

Government Response to the Parliamentary Joint Committee On the National Crime Authority Report "Street Legal: The Involvement of the National Crime Authority in Controlled Operations"

The Government welcomes the report of the Parliamentary Joint Committee on the National Crime Authority on the involvement of the National Crime Authority in controlled operations. Controlled operations are an essential tool for investigating and combating serious criminal activity. It is important that the provisions which provide for the conduct of controlled operations are framed both to enhance the effectiveness of controlled operations as an investigatory tool and ensure that private rights are protected and powers are exercised properly.

In recognition of the need for improved controlled operations provisions, the Government has formulated proposals to amend the controlled operations provisions in Part IAB of the *Crimes Act 1914*. The recommendations of the committee have been considered in this context.

Government Response to each of the Recommendations of the Parliamentary Joint Committee on the National Crime Authority

Recommendation 1: That the Government recommend to the Standing Committee of Attorneys-General that uniform controlled operations legislation be enacted by the Commonwealth, States and Territories in terms similar to the Law Enforcement (Controlled Operations) Act 1997 (NSW) subject to the foreshadowed amendments in the Finlay Review Report and the further recommendations in this report. (Paragraph 3.43)

Government Response to Recommendation 1: Agree

The Government has decided to adopt an approach to enhancing drug law enforcement strategies that seeks national consistency and draws together existing disparate State and Territory practices. While it is proposed to pursue uniform Commonwealth, State and Territory controlled operations legislation in the medium term, the Government sees merit in pursuing the enhancement of Commonwealth provisions in the first instance.

Recommendation 2: That, if uniform controlled operations legislation cannot be secured then:

- (a) the Government call for those States and Territories that do not have controlled operations legislation, to enact such legislation as is necessary for the NCA to authorise and conduct controlled operations in each jurisdiction;**
 - (b) the Government call for those States and Territories that allow officers of a State or Territory agency (eg police service) to authorise controlled operations to amend their legislation to allow NCA members to authorise their own controlled operations.**
- (Paragraph 3.43)**

Government Response to Recommendation 2: Agree

As discussed in relation to recommendation 1, the Government proposes to pursue uniformity. The precise manner in which uniformity or consistency will be sought has not yet been determined. The question of conferring powers on the NCA under State laws will be explored in that context.

Recommendation 3: That a two tiered approval process be established for the authorisation of controlled operations under Part 1AB of the Crimes Act 1914:

(i) Applications for minor controlled operations should be subject to an in-house approval regime. That is, a law enforcement officer in charge of a controlled operation may apply to the Commissioner, a Deputy Commissioner or an Assistant Commissioner of the AFP or to a member of the NCA for a certificate authorising a controlled operation. Minor controlled operations are to be defined as short-term investigations (not exceeding one month's duration) involving minimal contact between a covert operative and a suspect or suspects, where law enforcement officers are required to engage in activities involving unlawfulness of a technical nature. If a minor controlled operation exceeds one month's duration, it should be re-classified as a longer-term operation and subject to the external approval process set out in paragraph (ii).

(ii) Applications for longer-term controlled operations should be subject to an external approval process. The function of determining applications for longer-term controlled operations should be transferred to the office of the Inspector-General of the NCA as described in recommendation 19 of the Committee's 1998 report Third Evaluation of the National Crime Authority. Should the Government not accede to the establishment of an Inspector-General for the NCA, then the power to approve longer-term controlled operations should be conferred on such other independent authority as the Government sees fit, such as the AAT.

Nothing in this recommendation should affect the ability of law enforcement agencies to make urgent applications for a certificate authorising a controlled operation in accordance with section 15L of Part 1AB of the Crimes Act 1914. Urgent applications should be able to be made in-house either in person, by telephone or by any other means of communication in respect of both minor and longer-term controlled operations. In particular, the requirements in sections 15L(5) and (6) for the follow-up provision of a written application and certificate in relation to urgent applications should be retained. These written records will be subject to the stringent accountability processes outlined in Recommendation 10. (Paragraph 4.74)

Government Response to Recommendation 3: Disagree

The Government does not favour a two-tiered approach. Such an approach would unduly fetter law enforcement agencies, and add unnecessary complexity to the legislative scheme. Maintaining the same approval process for all operations will ensure consistency and accountability and promote efficiency whilst providing operational flexibility. Both Commonwealth and NSW provisions currently employ a single approval process. The review of the NSW provisions found no reason to alter the existing regime in this respect.

The Government agrees that urgent application procedures should be retained.

Recommendation 4: That law enforcement agencies devise appropriate training and education courses in relation to the operations of the controlled operations legislative regime. (Paragraph 4.74)

Government Response to Recommendation 4: Agree in principle

The Australian Federal Police has established national guidelines in relation to the conduct of controlled operations. The guidelines are enforceable through disciplinary procedures available under an employment management regime and the *Australian Federal Police (Discipline) Regulations 1979*. Appropriate training and education will continue to be a focus for all agencies.

Recommendation 5: That those States and Territories that have enacted specific controlled operations legislation should make appropriate amendments to allow the NCA Chairperson and Members to authorise controlled operations certificates. (Paragraph 4.77)

Government Response to Recommendation 5: No comment

As previously noted, the Government has decided to adopt an approach to enhancing drug law enforcement strategies that seeks national consistency and draws together existing disparate State and Territory practices. The recommendation will be addressed in that context, and will ultimately be a matter for the States and Territories.

Recommendation 6: That the standard of satisfaction required by the authorising officer in relation to the preconditions in section 15M of Part 1AB of the Crimes Act 1914 should be expressed in such terms as 'reasonably satisfied' or 'satisfied on reasonable grounds'. (Paragraph 4.83)

Government Response to Recommendation 6: Agree

The Government is developing a proposal along these lines.

Recommendation 7: That the 'no entrapment' test in section 15M(b) of Part 1AB of the Crimes Act 1914 be enunciated with greater clarity. (Paragraph 4.86)

Government Response to Recommendation 7: Agree

The Government is developing a proposal to require an authorising officer to be reasonably satisfied that a criminal offence will be committed by the person or group targeted by the operation, whether or not the operation takes place (the 'no entrapment test'). The precise formulation of the test will be reviewed in the drafting process, taking into account the Committee's comments.

Recommendation 8: That in relation to the precondition in section 15M(d) of Part 1AB of the Crimes Act 1914 the paragraph be reworded to better reflect the need for operational flexibility by relevant law enforcement agencies. (Paragraph 4.88)

Government Response to Recommendation 8: Agree

The Government is developing a proposal to modify the existing requirement in paragraph 15M(d) that the authorising officer be satisfied that any narcotic goods that are the subject of the operation will be under the control of an Australian law enforcement officer at the end of the operation. It is instead proposed that the authorising officer be required to be reasonably satisfied that the operation will be conducted so as to minimise the risk that any illicit goods involved in the operation will be outside law enforcement control at the end of the operation. The proposed formulation will promote improved operational planning but does not require certainty as to operational outcomes.

Recommendation 9: That section 15M of Part 1AB of the Crimes Act 1914 be amended to adopt similar conditions to those contained in paragraphs 6(3)(b) and (c) of the Law Enforcement (Controlled Operations) Act 1997 (NSW) that the nature and extent of the suspected criminal activity or corrupt conduct are such as to justify the conduct of a controlled operation and the proposed controlled activities. (Paragraph 4.91)

Government Response to Recommendation 9: Agree

The Government is developing a proposal to amend to section 15M to require an authorising officer to be reasonably satisfied that the nature and extent of the suspected criminal activity is such as to justify the conduct of a controlled operation within the parameters that the authorising officer proposes to authorise. This proposal is consistent with paragraph 6(3)(b) of the of the *Law Enforcement (Controlled Operations) Act 1997 (NSW)*.

Recommendation 10: That there be an appropriate system of accountability provided within the legislative regime of controlled operations involving oversight by the Commonwealth Ombudsman. The oversight should be in identical terms to that required of the NSW Ombudsman under the Law Enforcement (Controlled Operations) Act 1997 (NSW). (Paragraph 5.53)

Government Response to Recommendation 10: Disagree

In the course of developing proposals for reforming controlled operations provisions, significant consideration was given to providing appropriate systems of accountability. Creating an oversight role for the Commonwealth Ombudsman was one option considered. However, oversight by the Commonwealth Ombudsman was considered to be unlikely to yield further accountability beyond that which is already achieved by the requirement to report to the Minister. It was also considered that the oversight function in respect of controlled operations would not coexist well with the Ombudsman's current role in respect of Australian Federal Police complaints, as there would be a possibility the Ombudsman's office may be called upon to investigate and report on controlled operations procedures it had previously reviewed and approved.

Recommendation 11: In order that the Parliament be appropriately involved in discharging its responsibility for scrutiny under the legislation there should be a requirement placed on the Ombudsman to annually brief the Parliamentary Joint Committee on the National Crime Authority on a confidential basis in relation to the Authority's involvement in controlled operations. (Paragraph 5.53)

Government Response to Recommendation 11: Disagree

The existing controlled operations provisions require the NCA Chairperson and AFP Commissioner to report to the Minister and the Minister to table an annual report in Parliament. It is proposed to amend the *National Crime Authority Act 1984* to require the National Crime Authority to comply with a request by the Committee for information relating to an investigation or concerning the general conduct of the operations of the authority, unless disclosure would be prejudicial to the safety of persons or the operations of law enforcement agencies. It is considered that these existing and proposed reporting requirements are sufficient and that an annual briefing by the Ombudsman is not necessary. Furthermore, as discussed in relation to recommendation 10, it is not considered appropriate for the Ombudsman to perform an oversight role in respect of controlled operations.

Recommendation 12: That the scope of the definition of 'controlled operations' in Part IAB of the Crimes Act 1914 should be widened to refer to operations carried out for the purpose of obtaining evidence that may lead to the prosecution of a person for theft, fraud, tax evasion, currency violations, illegal drug dealings, illegal gambling, obtaining a financial benefit by vice engaged in by others, extortion, violence, bribery or corruption of, or by, an officer of the Commonwealth, an officer of a State or an officer of a Territory, bankruptcy and company violations, dealings or illegal importation or exportation of fauna into or out of Australia, money laundering and people trafficking. (Paragraph 6.50)

Government Response to Recommendation 12: Agree in part

The Government agrees that controlled operations are an essential tool for infiltrating and investigating a wide range of criminal activity. However, rather than specifying each type of criminal activity, it is proposed to amend the controlled operations provisions to provide that a controlled operation may be conducted in respect of any criminal offence, the investigation of which falls within the functions of the agency in relation to Commonwealth law. Such an approach is consistent with the NSW Act, which does not limit the range of criminal activity for which approval to conduct a controlled operation may be sought.

Recommendation 13(i): That the immunity conferred on covert operatives should be widened commensurately with the scope of controlled operations to confer immunity from criminal liability on any person authorised to participate in a controlled operation in terms of sections 16 of the Law Enforcement (Controlled Operations) Act 1997

(NSW). As prescribed in section 16 of that Act, immunity should only be available where the unlawful activity engaged in has been authorised by and is engaged in in accordance with the Authority for the operation. (Paragraph 6.50)

Government Response to Recommendation 13(i): Agree

The Government is developing a proposal under which a law enforcement officer will not be liable for any offence in relation to conduct that is undertaken for the purposes of an authorised controlled operation and is within the terms of the authorisation. The proposal imposes an additional limitation that the conduct must not involve the commission of a sexual offence, or involve causing death or serious injury to a person.

Recommendation 13(ii): The Commonwealth Act should be amended to include a provision in terms of section 19 of the NSW Act to immune covert operatives from civil liability. As prescribed in section 19 of that Act, immunity from civil liability should only be available where the conduct engaged in was in good faith and for the purpose of executing the provisions of the Act regulating controlled operations. (Paragraph 6.50)

Government Response to Recommendation 13(ii): Agree

The Government is developing a proposal with respect to immunity from civil liability that would protect the rights of innocent third parties.

Recommendation 13(iii): The Commonwealth Act should also be amended to include a provision expressly acknowledging that where an individual suffers loss or injury as a result of a controlled operation an action can be maintained against the State for compensation in respect of that loss or injury. (Paragraph 6.50)

Government Response to Recommendation 13(iii): Disagree

It is not considered necessary to make statutory provision for a right of recovery where an individual suffers loss or damage as a result of a controlled operation. The Government is considering a proposal that would preserve applicable civil remedies.

Recommendation 14: That the timeframe for which an authority to conduct a controlled operation may remain in force be extended to three months. If an investigation exceeds that timeframe, law enforcement agencies must apply for a new certificate in respect of the same investigation. (Paragraph 6.63)

Government Response to Recommendation 14: Agree in part

The Government agrees that the current 30 day timeframe provides insufficient time for law enforcement agencies to properly infiltrate and investigate organised and serious crime. However, it is considered that 3 months is also inadequate. The Government proposes that the period within which an authorisation may remain in force be extended from 30 days to 6 months, with provision for review of the authorisation after 3 months. In reviewing an authorisation the authorising officer would have to be satisfied that it is appropriate for the operation to continue having regard to the same considerations relevant to the initial

authorisation. Where the authorisation is not reviewed to assess the continuing need for the operation, the authorisation lapses and a new authorisation must be sought.

The 6 month authorisation period recognises that effective infiltration of criminal organisation may take many months or even years. The proposed extension takes into account the exigencies of deep infiltration of multi-faceted crime syndicates, while the provision for 3 monthly review ensures that the conduct of the operation receives frequent, high level attention.

Recommendation 15: That Part 1AB of the Crimes Act 1914 be amended to include a provision to allow for the retrospective authorisation of controlled operations only where the life or safety of a covert operative is at risk, in terms of section 14 of the Law Enforcement (Controlled Operations) Act 1997. In particular, the amendment should include the conditions that the relevant unlawful conduct was engaged in only for the purpose of protecting an operative or other person from death or serious injury and that the application must be made within 24 hours of the unlawful conduct having been engaged in. (Paragraph 6.85)

Government Response to Recommendation 15: Disagree

The Government considers that retrospective authorisation is not consistent with the integral role of planning in Commonwealth controlled operations. Common law defences and prosecution discretion will apply in emergency circumstances.

Recommendation 16: That Part 1AB of the Crimes Act 1914 be amended to include a provision to authorise the participation of civilians in controlled operations. The term 'civilians' should be defined so as to exclude those persons who are police informants or who become involved in a controlled operation by reason of their having knowledge, position or influence as a consequence of their own involvement in criminal activities. The position of that class of civilians should remain subject to the current system of retrospective indemnities and assistance at the time of sentencing that operates according to the discretion of the Director of Public Prosecutions. (Paragraph 6.140)

Government Response to Recommendation 16: Agree in part

The Government proposes to provide for the participation of persons who are not law enforcement officers in controlled operations. It is not proposed to exclude persons from this possibility by reason that they are an informant or that they become involved by reason of their own criminal activities. The participation of an informant may be vital to the success of a controlled operation, and it may be difficult to secure their cooperation where prospective immunity cannot be offered. In this respect it is important to note that all non-law enforcement participants in a controlled operation, whether informant or otherwise, are subject to the requirement that the conduct for which immunity may be given must be in accordance with the operation, and in accordance with any and all directions given by a supervising officer.