



NEW SOUTH WALES

Inspector of the New South Wales Crime Commission

ANNUAL REPORT
of
the Inspector of the
New South Wales Crime Commission

For the year ended
30 June 2015



Inspector of the New South Wales Crime Commission

The Hon. Donald Harwin MLC
President
Legislative Council
Parliament House
Sydney NSW 2000

The Hon. Shelley Hancock MP
Speaker
Legislative Assembly
Parliament House
Sydney NSW 2000

Dear Mr President and Madam Speaker

In accordance with section 68 of the *Crime Commission Act 2012* I hereby furnish to each of you for presentation to the Parliament my Annual Report for the year ended 30 June 2015.

My report has been prepared in accordance with the requirements of the *Crime Commission Act 2012*. I recommend that it be made public forthwith.

Yours sincerely

A handwritten signature in black ink, appearing to read "Graham Barr".

The Hon Graham Barr QC
Inspector, New South Wales Crime Commission
29 October 2015

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PART 1

THE INSPECTOR'S ROLE AND FUNCTIONS

1.1 THE INSPECTOR

In accordance with section 61 (1) of the *Crime Commission Act 2012*, the Hon Graham Barr QC was appointed to the position of the Inspector of the Crime Commission on 22 April 2013. Mr Barr was appointed in a part-time capacity for a period of 5 years.

The Inspector derives authority from the *Crime Commission Act 2012* and is accountable through a reporting requirement to both Houses of Parliament. The Parliamentary Joint Committee on the Ombudsman, the Police Integrity Commission and the Crime Commission, is authorised to examine each annual and other report of the Inspector and to report to both Houses of Parliament with such comments as it thinks fit on any matter concerning the Inspector.

1.2 FUNCTIONS OF THE INSPECTOR

The principal functions of the Inspector are:

- to audit the operations of the Crime Commission for the purpose of monitoring compliance with the law of the State,
- to deal with (by reports and recommendations) complaints of abuse of power, impropriety and other forms of misconduct on the part of the Crime Commission or officers of the Crime Commission,
- to deal with (by reports and recommendations) conduct amounting to maladministration (including, without limitation, delay in the conduct of investigations and unreasonable invasions of privacy) by the Crime Commission or officers of the Crime Commission, and
- to assess the effectiveness and appropriateness of the procedures of the Crime Commission relating to the legality or propriety of its activities.

In order to carry out these functions, the Inspector may hold inquiries and has the powers, authorities, protections and immunities conferred on a commissioner under the *Royal Commissions Act 1923* for the purpose of such inquiries.

The functions of the Inspector may be exercised on the Inspector's own initiative, at the request of the Minister, in response to a complaint made to the Inspector or in response to a reference by the Parliamentary Joint Committee on the Ombudsman, the Police Integrity Commission and the Crime Commission.

1.3 THE POWERS OF THE INSPECTOR

The Inspector:

- may investigate any aspect of the Crime Commission's operations or any conduct of officers of the Crime Commission,
- is entitled to full access to the records of the Crime Commission and to take or have copies made of any of them,
- may require officers of the Crime Commission to supply information or produce documents or other things about any matter, or any class or kind of matters, relating to the Crime Commission's operations or any conduct of officers of the Crime Commission,
- may require officers of the Crime Commission to attend before the Inspector to answer questions or produce documents or other things relating to the Crime Commission's operations or any conduct of officers of the Crime Commission,
- may investigate and assess complaints about the Crime Commission or officers of the Crime Commission,
- may refer matters relating to the Crime Commission or officers of the Crime Commission to other public authorities or public officials for consideration or action, and
- may recommend disciplinary action or criminal prosecution against officers of the Crime Commission.

PART 2

THE OFFICE OF THE INSPECTOR OF THE CRIME COMMISSION

2.1 STAFF

At the end of the reporting period, the Inspectorate was constituted by the Inspector and two support staff. Support staff are supplied to the Inspectorate by the NSW Department of Justice.

The Executive Assistant to the Inspector works one day per week.

The other staff member of the Inspectorate is a Senior Policy Analyst, who is engaged for approximately one day per week. The Senior Policy Analyst undertakes legal and professional duties at the request of the Inspector and is the primary contact at the Inspectorate.

The Inspectorate is additionally supported by staff of the Department of Justice who provide technology and communications support, as required.

2.2 PREMISES

During the reporting period the premises of the Inspectorate were located in the Sydney central business district.

Postal address: GPO Box 3015, Sydney NSW 2001

Telephone: (02) 9258 0938

Facsimile: (02) 9258 0936

Email: inspector@oicc.nsw.gov.au

2.3 WEBSITE

www.oicc.nsw.gov.au

2.4 BUDGET AND FINANCE

In 2014-15, a grant of \$356, 000 was received from the Department of Justice for the Office of the Inspector of the Crime Commission.

The grant was used to pay rent for the leased premises of the Inspectorate, salaries and sundries.

2.5 THE INSPECTOR'S CONFERENCES AND MEETINGS

During the reporting period the Inspector held many conferences with the Commissioner of the Crime Commission and staff of the Commission. The Inspector attends the quarterly meetings of the Internal Audit and Risk Committee of the Crime Commission.

Other consultations took place during the period to discuss operational and policy matters, including conferences with the Deputy Secretary, Police and Emergency Services, Department of Justice and the Executive Director, Policy, Partnerships and Finances, Department of Justice and the Commissioner of the Police Integrity Commission.

The Inspector also met the former Minister for Police and Emergency Services, and the current Deputy Premier and Minister for Justice and Police, the Hon Troy Grant MP, during the reporting period.

On 9 November 2014 the Inspector's Special Report to the Minister, made under s67 of the *Crime Commission Act*, was tabled in Parliament. The substance of the report was a recommendation to remove the power of the Police Integrity Commission to oversee the Crime Commission. No action had been taken on the Special Report by the time the Hon. Troy Grant MP, Deputy Premier, became the responsible Minister.

The questions raised by the Special Report were included as a term of reference in the review of police oversight in New South Wales by Mr Andrew Tink AM. The Inspector provided a submission to the review. At the time of writing this report, Mr Tink's report has not been released.

PART 3

THE WORK OF THE INSPECTORATE DURING THE REPORTING PERIOD

3.1 COMPLAINTS DEALT WITH DURING THE REPORTING PERIOD

Two of the principal functions of the Inspector are stated thus in subs 62(1) of the Act:

- (b) to deal with (by reports and recommendations) complaints of abuse of power, impropriety and other forms of misconduct on the part of the Commission or officers of the Commission, and*
- (c) to deal with (by reports and recommendations) conduct amounting to maladministration (including, without limitation, delay in the conduct of investigations and unreasonable invasions of privacy) by the Commission or officers of the Commission, and*

Subsection 62(4) provides:

- (4) For the purposes of this section, conduct is of a kind that amounts to maladministration if it involves action or inaction of a serious nature that is:
 - (a) contrary to law, or*
 - (b) unreasonable, unjust, oppressive or improperly discriminatory, or*
 - (c) based wholly or partly on improper motives.**

There are four complaints relevant to the current reporting period.

Two were initiated in the 2013/14 reporting period. One was withdrawn. Consideration of the other was deferred pending publication of the report of another agency.

Two complaints were made in the current period. One was withdrawn. One complaint remains unresolved.

PART 4

4.1 AUDITS CONDUCTED DURING THE REPORTING PERIOD

One of the principal functions of the Inspector under s62(1)(a) of the *Crime Commission Act 2012* is to audit the Crime Commission's operations to monitor its compliance with NSW law.

The Inspectorate conducts a number of audits each year as part of its routine auditing function. Specifically, the Inspectorate audits the Crime Commission's powers it exercises in accordance the following legislation:

- *Crime Commission Act 2012*
- *Surveillance Devices Act 2007*
- *Criminal Assets Recovery Act 1990*
- *Law Enforcement (Controlled Operations) Act 1997*
- *Law Enforcement (Controlled Operations) Regulation 2012*

The Crime Commissioner was provided the results of each audit undertaken by the Inspectorate. A summary of the results of these audits is provided below.

In addition, the Inspector commenced an audit of the Crime Commission's use of human sources. The audit was incomplete at the end of the year under report.

Summary of audits undertaken

4.2 *Surveillance Devices Act 2007*

In assessing the Commission's compliance with the *Surveillance Devices Act*, the Inspectorate audited the Commission's use of powers under the Act by inspecting the relevant files for three investigations undertaken by the Crime Commission.

Section 17 of the Act outlines the requirements for an application for a surveillance devices warrant. It includes the following:

- (1) *A law enforcement officer (or another person on his or her behalf) may apply for the issue of a surveillance device warrant if the law enforcement officer on reasonable grounds suspects or believes that:*
 - (a) *a relevant offence has been, is being, is about to be or is likely to be committed, and*
 - (b) *an investigation into that offence is being, will be or is likely to be conducted in this jurisdiction or in this jurisdiction and in one or more participating jurisdictions, and*
 - (c) *the use of a surveillance device is necessary for the purpose of an investigation into that offence to enable evidence to be obtained of the commission of that offence or the identity or location of the offender.*
- (2) *The application may be made to:*
 - (a) *an eligible Judge in any case, or*
 - (b) *an eligible Magistrate in the case of an application for a surveillance device warrant authorising the use of a tracking device only.*
- (3) *An application:*
 - (a) *must specify:*

- (i) the name of the applicant, and*
- (ii) the nature and duration of the warrant sought, including the kind of surveillance device sought to be authorised, and*
- (b) subject to this section, must be supported by an affidavit setting out the grounds on which the warrant is sought.*

In each file inspected the Inspector was satisfied that affidavits were made and filed in court in accordance with s17 (3)(b) of the *Surveillance Devices Act 2007*. The warrants were issued by the Court in accordance with s16 of the Act.

Section 51 of the Act requires that the Attorney General be informed of the Crime Commission's intention to bring any application for a surveillance device.

In accordance with s51(1) of the Act the Attorney General was informed of the Crime Commission's intention to bring each application. In each application, the Attorney General by his delegate informed the Crime Commission that he did not wish to be heard.

Subsection 44(1) of the Act provides:

- (1) A person to whom a surveillance device warrant is issued must, within the time specified in the warrant, furnish a report, in writing, to an eligible Judge (if the warrant was issued by an eligible Judge)...*
- (a) stating whether or not a surveillance device was used pursuant to the warrant, and*
- (b) specifying the type of surveillance device (if any) used, and*
- (c) specifying the name, if known, of any person whose private conversation was recorded or listened to, or whose activity was recorded, by the use of the device, and*
- (d) specifying the period during which the device was used, and*
- (e) containing particulars of any premises or vehicle on or in which the device was installed or any place at which the device was used, and*
- (f) containing particulars of the general use made or to be made of any evidence or information obtained by the use of the device, and*
- (g) containing particulars of any previous use of a surveillance device in connection with the relevant offence in respect of which the warrant was issued, and*
- (h) in the case of a surveillance device warrant issued in this jurisdiction and executed in a participating jurisdiction:*
 - (i) giving details of the benefit to the investigation of the use of the relevant surveillance device and of the general use made or to be made of any evidence or information obtained by the use of the device, and*
 - (ii) giving details of the compliance with the conditions (if any) to which the warrant was subject.*

Where appropriate the Crime Commission filed within the prescribed time a return under s44(1) stating any use it had made of each warrant.

Section 41(1)(a) of the *Surveillance Devices Act* requires that records obtained from the use of surveillance devices must be kept in accordance with guidelines established by the Chief Officer of an agency, not be accessible to those not entitled and destroyed if satisfied that the record is unlikely to be required. The Inspectorate was satisfied that the files inspected are kept in accordance with guidelines established by the Crime Commission.

Similarly, the surveillance device warrants were appropriately recorded in the Commission's register of warrants and emergency authorisations as required by s47(1) of the *Surveillance Devices Act*. The appropriate details were also recorded in the register for emergency authorisations in accordance with s47(3).

In accordance with s47(2) the register appropriately detailed the date the warrant was issued, the law enforcement officer named in the warrant, the relevant offence for which the warrant was issued and the period for which the warrant was in force.

However, in one investigation there were instances where the reports to the Court and the Attorney General on the use of surveillance devices (in accordance with s44 of the *Act*) were incorrect. The initial reports incorrectly described the use to which surveillance device warrants had been put. This error was later identified by the Crime Commission and reports were provided to the Court and the Attorney General, correctly describing the use made of the warrants. The Inspector was satisfied that the reporting requirements of the Act had been met.

It was concluded that all applications inspected for surveillance device warrants complied with the requirements of the *Surveillance Devices Act 2007*.

4.3 Sections 24, 28 & 29 of the *Crime Commission Act 2012*

These sections confer power on the Commission to acquire information and require the production to it of documents and things in much the same way as parties to Court proceedings can interrogate and serve Notices to Produce on each other and have the Court issue subpoenas to others. S28 concerns itself with the acquisition of information from government agencies and s29 with production by others.

The sections specify, among other things, who may give such notices and what they shall contain. S29 specifies how documents and things produced in response must be kept.

On each occasion the Inspector was satisfied that the notices issued complied with the requirements of the *Crime Commission Act*.

Section 29 notices were issued in two of the three investigations reviewed and in each case the Inspector was satisfied that each notice was approved by an Executive Officer with legal qualifications in accordance with s29(1) of the Act and that the documents produced to the Crime Commission were fastened in a file in accordance with section 29(4) of the Act.

Section 28 notices were issued in two investigations. In each case the notices were appropriately issued by an Executive Officer (s28(1)), appropriately specified or described the information concerned and fixed a time, date and manner for compliance with the notice (s28(2)) of the *Crime Commission Act*.

Summons were issued in two investigations in accordance with section 24 of the Act. In each case a summons was issued by an Executive Officer with appropriate legal qualifications (s24(1)) and the Executive Officer believed on reasonable grounds that a delay in attendance to appear before the Commission would result in adverse circumstances as outlined in s24(2).

Each summons was accompanied by a notice to which the hearing relates (s24(3)) and the general nature of the matter in which the Commission intends to question the person.

4.4 Settlement Guidelines for orders made by consent under the *Criminal Assets Recovery Act 1990*

Section 57 of *Crime Commission Act 2012* requires the Crime Commission's Management Committee to furnish guidelines (the Guidelines) regarding negotiation by the Commission of the terms of agreements of orders made by consent under the *Criminal Assets Recovery Act 1990* (the CAR Act). Relevantly, the section is as follows:

- 57(1) The Management Committee may give directions and furnish guidelines to the Commission with respect to the exercise of its functions.*
- (2) The Commission must comply with any such directions or guidelines.*
- (3) Without limiting subsection (1), the Management Committee:*
 - (a) must furnish guidelines with respect to the negotiation by the Commission of the terms of agreements regarding orders made by consent under the Criminal Assets Recovery Act 1990 ...*

The Guidelines are attached at Appendix A and came into effect on 5 February 2013. The Guidelines require that where a settlement is contemplated by the making of confiscation orders by consent, a Delegated Negotiator represents the Commission in these negotiations.

In recommending the terms of settlement to the Decision Maker (the Commissioner or Assistant Commissioner with special legal qualifications), the Delegated Negotiator must be of the opinion that the terms of the settlement represent the most appropriate for the Crown.

The Negotiator must also confirm that the financial investigation of the defendant has been thorough, any interest the defendant has in any property has been identified, relevant factors to making the confiscation order have been considered and the investigation was undertaken by an appropriately qualified person. The Decision Maker must then certify that he or she is satisfied that the Delegated Negotiator's certification has been made on a reasonable basis.

In addition, section 62(4) of the CAR Act requires that a confiscation or order may only be made by consent if the Crime Commissioner certifies that any guidelines concerning the negotiations of the terms of agreement with respect to the making of the consent orders given, have been made in accordance with the Guidelines referred to above have been fully complied with.

The Inspectorate audited all the orders that were made by consent in 2014/15 and in all the matters inspected the necessary certifications and confirmations were made in accordance with the Guidelines, which include confirmation by the Delegated Negotiator that the terms of the settlement represent the most appropriate outcome for the Crown and certification by the Decision Maker that the Delegated Negotiator's certification was made on a reasonable basis.

In addition, in all the matters a certification by the Commissioner of the Crime Commission that the Guidelines were fully complied with was made in accordance with s62(4) of the CAR Act.

4.5 Controlled operations pursuant to the *Law Enforcement (Controlled Operations) Act 1997*

The Inspector audited the use of the Crime Commission's power to undertake controlled operations in accordance with the *Law Enforcement (Controlled Operations) Act 1997* and *Law Enforcement (Controlled Operations) Regulation 2012*. During the year the Crime Commission conducted two controlled operations.

The Statutory Requirements

The *Law Enforcement (Controlled Operations) Act 1997* (the Act) authorises the commission of acts which would be otherwise unlawful. The Act and the *Law Enforcement (Controlled Operations) Regulation 2012* (the Regulation) set out what must be done for an intended act to have statutory protection. These provisions are relevant for present purposes.

The Act sections:

5 Applications for authorities

(1) *A law enforcement officer for a law enforcement agency may apply to the chief executive officer of the agency for authority to conduct a controlled operation on behalf of the agency.*

(2) *An application for an authority may be made:*

(a) *by means of a written document, signed by the applicant, or by means of a facsimile transmission of a document so signed (a "**formal application**"), or*

(b) *by such other means as are available, including (but not limited to) orally in person, by telephone or by 2-way radio (an "**urgent application**").*

(2A) *In any application, whether formal or urgent, the applicant must provide the following particulars:*

(a) *a plan of the proposed operation,*

(b) *the nature of the criminal activity or corrupt conduct in respect of which the proposed operation is to be conducted,*

(c) *the nature of the controlled activity in respect of which an authority is sought,*

(d) *a statement of whether or not the proposed operation, or any other controlled operation with respect to the same criminal activity or corrupt conduct, has been the subject of an earlier application for an authority or variation of an authority and, if so, whether or not the authority was given or variation granted,*

(e) *the names and ranks of the law enforcement officers nominated to be the principal law enforcement officer and the secondary law enforcement officer for the proposed operation.*

(2B) *The regulations may make provision for or with respect to the following matters:*

(a) *the circumstances in which an urgent application may be made,*

(b) *the procedure for making an urgent application,*

- (c) the extent to which a chief executive officer is to be satisfied as to the validity of the circumstances in which an urgent application is made,*
- (d) the keeping of records in relation to an urgent application,*
- (e) the form in which a formal application may be made.*
- (3) The chief executive officer may require the applicant to furnish such additional information concerning the proposed controlled operation as is necessary for the chief executive officer's proper consideration of the application.*

6 Determination of applications

- (1) After considering an application for authority to conduct a controlled operation, and any additional information furnished under section 5 (3), the chief executive officer:*
 - (a) may authorise a law enforcement officer for the law enforcement agency concerned to conduct the operation, either unconditionally or subject to conditions, or*
 - (b) may refuse the application.*
- (2) An authority to conduct a controlled operation on behalf of a law enforcement agency may not be granted unless a code of conduct is prescribed by the regulations in relation to that agency.*
- (3) An authority to conduct a controlled operation may not be granted unless the chief executive officer is satisfied as to the following matters:*
 - (a) that there are reasonable grounds to suspect that criminal activity or corrupt conduct has been, is being or is about to be conducted in relation to matters within the administrative responsibility of the agency,*
 - (b) that the nature and extent of the suspected criminal activity or corrupt conduct are such as to justify the conduct of a controlled operation,*
 - (c) that the nature and extent of the proposed controlled activities are appropriate to the suspected criminal activity or corrupt conduct,*
 - (d) that the proposed controlled activities will be capable of being accounted for in sufficient detail to enable the reporting requirements of this Act to be fully complied with.*
- (4) In considering the matters referred to in subsection (3), the chief executive officer must have regard to the following:*
 - (a) the reliability of any information as to the nature and extent of the suspected criminal activity or corrupt conduct,*
 - (b) the likelihood of success of the proposed controlled operation compared with the likelihood of success of any other law enforcement operation that it would be reasonably practicable to conduct for the same purposes,*
 - (c) the duration of the proposed controlled operation.*
- (5) (Repealed)*

8 Form of authority

- (1) An authority to conduct a controlled operation may be granted:*

(a) by means of a written document, signed by the chief executive officer, or by means of a facsimile transmission of a document so signed (a "**formal authority**"), or

(b) by such other means as are available, including (but not limited to) orally in person, by telephone or by 2-way radio (an "**urgent authority**").

(2) An authority, whether formal or urgent:

(a) must identify the operation by reference to the plan referred to in section 5 (2A) (a), and

(b) must identify the principal law enforcement officer who is the person who is to conduct, and to have responsibility for, the operation, and

(b1) must identify the secondary law enforcement officer who is the person who is to conduct, and to have responsibility for, the operation whenever the principal law enforcement officer is unavailable to do so, and

(c) must identify each person who may engage in controlled activities for the purposes of the operation, and

(d) must state whether or not any such person may operate under an assumed name, and

(e) must identify:

(i) with respect to the law enforcement participants, the nature of the controlled activities that those participants may engage in, and

(ii) with respect to the civilian participants, the particular controlled activities (if any) that each such participant may engage in, and

(f) in respect of an urgent authority, must specify the period (not exceeding 72 hours) for which the authority is to remain in force, and

(g) in respect of a formal authority, must specify the period (not exceeding 6 months) for which the authority is to remain in force, and

(h) must specify any conditions to which the conduct of the operation is subject under section 6 (1) (a).

(3) A person is sufficiently identified for the purposes of subsection (2) (b), (b1) or (c) if the person is identified:

(a) by an assumed name under which the person is operating, or

(b) by a code name or code number,

so long as the assumed name, code name or code number can be matched to the person's identity by reference to documentation kept by the chief executive officer.

(4) Unless it sooner ceases to have effect, an urgent authority ceases to have effect 72 hours after it is granted.

(5) A chief executive officer who grants an urgent authority must ensure that written notes are kept of the following matters:

(a) the date and time when the authority was granted,

(b) the identity of the law enforcement officer to whom the authority was granted,

(c) the particulars referred to in subsection (2).

(6) The regulations may make provision for or with respect to the following matters:

(a) the procedure for granting an urgent authority,

(b) the keeping of records in relation to an urgent authority,

(c) the form in which a formal authority may be granted.

13A Defect in authority

An application for an authority or variation of authority, and any authority or variation of authority granted on the basis of such an application, is not invalidated by any procedural defect, other than a defect that affects the substance of the application, authority or variation in a material particular.

15 Reports on controlled operations

(1) Within 2 months after completing an authorised operation, the principal law enforcement officer for the operation must cause a report on the operation to be given to the chief executive officer.

(2) The regulations may make provision for or with respect to the matters to be included in such a report.

16 Lawfulness of controlled activities

Despite any other Act or law, an activity that is engaged in by a participant in an authorised operation in the course of, and for the purposes of, the operation is not unlawful, and does not constitute an offence or corrupt conduct, so long as it is authorised by, and is engaged in in accordance with, the authority for the operation.

20 Codes of conduct

(1) The regulations may prescribe codes of conduct for authorised operations conducted on behalf of law enforcement agencies.

(2) Different codes of conduct may be prescribed for different law enforcement agencies.

(3) A code of conduct may make provision for or with respect to any aspect of the conduct of an authorised

21 Ombudsman to be notified of certain matters

(1) Within 21 days after:

(a) granting an authority (other than a retrospective authority) or variation of authority, or

(b) receiving a report on the conduct of an authorised operation to which an

authority relates,

a chief executive officer must cause written notice of that fact to be given to the Ombudsman.

(1A) A chief executive officer who grants a retrospective authority must provide the Ombudsman with written details of the retrospective authority and the circumstances justifying that authority.

(1B) The details are to be provided as soon as practicable after the retrospective authority is granted but, in any case, no later than 7 days after it is granted.

(2) The Ombudsman may require the chief executive officer to furnish such information concerning the authority, variation or report as is necessary for the Ombudsman's proper consideration of it.

The Regulation:

6 Grant of authority: section 8

For the purposes of section 8 (6) (c) of the Act, the form in which a formal authority is to be granted is:

(a) Form 1, in respect of a controlled operation other than a cross-border controlled operation, or

(b) Form 2, in respect of a cross-border controlled operation.

9 Matters to be included in report: section 15

A report referred to in section 15 of the Act with respect to an authorised operation must include the following matters:

(a) the date and time when the operation began and its duration,

(b) the nature of the controlled conduct engaged in for the purposes of the operation,

(c) details of the outcome of the operation,

(d) if the operation involved any illicit goods (within the meaning of Part 3A of the Act), a statement (to the extent known) of:

(i) the nature and quantity of the illicit goods, and

(ii) the route through which the illicit goods passed in the course of the operation,

(e) details of any loss of, or serious damage to, property or any personal injuries occurring in the course of, or as a direct result of, the operation.

10 Code of conduct: section 20

The code of conduct set out in Schedule 2 is prescribed as the code of conduct for authorised operations and it applies to all law enforcement agencies.

11 Written notice to Ombudsman of granting of authority: section 21

Without limiting section 21 of the Act, a written notice given to the Ombudsman with respect to the granting of an authority (other than a retrospective authority granted under section 14 of the Act) for a controlled operation must include the following details:

- (a) the date on which the authority was granted,*
- (b) the serial number or other identifying code for the authority,*
- (c) the nature of the suspected criminal activity or corrupt conduct in respect of which the authority was granted,*
- (d) the period for which the authority is to remain in force,*
- (e) the nature of the controlled activities authorised by the authority,*
- (f) the number of participants in the operation, specifying:*
 - (i) how many of them are law enforcement participants, and*
 - (ii) how many of them are civilian participants.*

13 Written notice to Ombudsman of receipt of report of authorised operation: section 21

Without limiting section 21 of the Act, a written notice given to the Ombudsman with respect to the receipt of a report on the conduct of an authorised operation must include the following details:

- (a) the date on which the report was received,*
- (b) the serial number or other identifying code for the authority for the operation,*
- (c) the serial numbers or other identifying codes for any variations that have been granted with respect to the authority for the operation,*
- (d) the serial numbers or other identifying codes for any authorities, and any variations of authority, that have been granted for previous controlled operations with respect to the same criminal activity or corrupt conduct,*
- (e) the nature of the controlled activities engaged in for the purposes of the operation,*
- (f) the number of participants who engaged in controlled activities, specifying:*
 - (i) how many of them were law enforcement participants, and*
 - (ii) how many of them were civilian participants,*
- (g) a statement as to whether the operation was conducted in accordance with the authority for the operation and, in particular, as to:*
 - (i) whether any unlawful conduct was engaged in by any participant in the operation, and*
 - (ii) if so, whether that unlawful conduct was the subject of an application for*

retrospective authority under section 14 of the Act, and

(iii) if so, whether retrospective authority under section 14 of the Act was granted,

(h) the date on which the operation was completed.

14 Delegations: section 29

Each of the following positions is prescribed for the purposes of section 29 of the Act as a position to which functions under the Act (including functions under Part 3A) may be delegated:

(a) in respect of the Independent Commission Against Corruption--the position of Assistant Commissioner,

(b) in respect of the Police Integrity Commission--the position of Assistant Commissioner,

(c) in respect of the New South Wales Crime Commission--the position of Assistant Commissioner,

(d) in respect of the Australian Federal Police--the position of the member of the Australian Federal Police responsible for the day to day operations of the Australian Federal Police in New South Wales,

(e) in respect of the Australian Crime Commission--the position of an SES employee or acting SES employee (within the meaning of the Australian Crime Commission Act 2002 of the Commonwealth) of the Commission,

(f) in respect of the Australian Customs and Border Protection Service:

(i) the position of National Director, Compliance and Enforcement,

(ii) the position of National Manager, Enforcement Operations,

(iii) the position of National Manager, Investigations.

Schedule 2:

3 Participants to be properly briefed

Before conducting an authorised operation, the principal law enforcement officer for the operation:

(a) must ensure that each law enforcement participant and each civilian participant:

(i) has a thorough understanding of the nature and extent of any controlled activities in which the participant may be directed to engage in for the purposes of the operation, and

(ii) is made aware of the terms of the authority to the extent to which it authorises the participant to engage in those activities, and

(b) must ensure that each civilian participant undertakes not to engage in any

*controlled activities other than those referred to in paragraph (a), and
(c) must make a written record of each undertaking given by a civilian participant as referred to in paragraph (b).*

The First Controlled Operation

Two law enforcement officers and one civilian took part in this operation. An urgent need had arisen for certain acts to be performed so as to maintain the safety of the community. That could not lawfully be done without authority under the Act.

One of the law enforcement officers prepared a written application for the consideration of the Commissioner. Two officers were named in the application as being intended to participate in controlled activities. One was designated senior law enforcement officer.

Annexed to the application was a plan, which specified the intended conduct. The plan stated that both officers and the civilian would participate. It stated what each should do.

Para 6 (a) of the authority was as follows:

[Name] a law enforcement officer within the meaning of the Act (the principal law enforcement officer), may conduct the controlled operation in accordance with the plan of the proposed operation accompanying the Application.

The Authority did not specify the authorised conduct except by reference to the plan.

The Commissioner signed the Authority.

The second officer, who had applied for the authority, briefed the other officer, who was designated senior law enforcement officer, about the details of the operation. A briefing note was prepared and filed accordingly.

The second officer also briefed the civilian participant about the details of the operation, limited to what the civilian participant was required to do. Except by implication, the civil participant was not instructed not to do any other act. No undertaking was sought from the civilian participant not to do any other act.

No written record was made of the briefing of the civilian participant.

The operation was carried out according to the plan. The acts referred to were performed as intended.

Reports

The Ombudsman was notified within the time limited by s21 of the Act of the Commission's receipt of the report on the operation.

The Commission received a report on the operation within the time limited by s15 of the Act.

The Ombudsman was notified within the time limited by s21 of the Act of the Commissioner's

receipt of the report on the operation.

Compliance with particular requirements of the Act and the Regulation

The application

Subsections 5(1), 2(a) and (2A) were complied with.

The form of the authority

As to subs 8(2) –

- (a) The authority identified the operation by reference to the plan annexed to the application.
- (b) The authority identified the principal law enforcement officer.
- (b1) The authority did not in terms identify the other law enforcement officer.
- (c) The authority did not in terms identify each person who might engage in controlled activities for the purposes of the operation.
- (d) The authority did not state whether any such person might operate under an assumed name.
- (e) The authority did not, except by reference to the plan, identify the controlled activities of the law enforcement participants or the particular controlled activities of the civilian participant.

Paragraphs (g) and (h) were complied with.

The briefing of participants and records thereof

Schedule 2 Para 3: code of conduct: Participants to be properly briefed.

The principal law enforcement officer did not brief the second law enforcement officer or the civilian as required by para (3) (a) (i) and (ii).

Instead the second law enforcement officer briefed the principal law enforcement officer as to the part he would play. A briefing note to that effect was filed.

The second law enforcement officer also briefed the civilian about what to do, but no briefing note was made.

Neither law enforcement officer obtained any undertaking from the civilian in accordance with para 3(b).

The consequences

The plan was carried out according to the intention recorded in the plan annexed to the application and referred to in the authority. The three persons taking part knew the parts they had to play. None of those persons failed to do any act in accordance with the plan or did any act outside the plan. The object of the plan was achieved and the public thereby protected.

The requirements of subs 8(2) (b1) (c) and (e) were not met, but each could have been met by

repetition of matter already referred to in the plan.

The requirement of subs 8(2)(d) was not met. Assumed names were not part of the plan, were not authorised and were not used. The omission was to state that there was no authority to do so. All participants were aware of that.

The briefing requirements of Schedule 2 para (3) were not met by the principal law enforcement officer, but the second law enforcement officer performed that function save for a failure to exact the necessary undertaking from the civilian participant or to make a record of briefing the civilian participant: para (3)(b) and (c).

Conclusion and Comment

The matter was dealt with urgently and without reference to the Commission's solicitor. A result was a failure fully to comply with the detailed requirements of the legislation. Since the operation the Commission has established a system of dealing with such applications which will ensure that documents used are appropriate and complete and that proper consideration is given to the requirements of the Act and the Regulation. The authority authorised the commission of the acts detailed in the plan. They were the only acts carried out. No harm was done. The safety of the community was maintained. No further action is warranted.

The Second Controlled Operation

Authority to conduct the operation was signed by a law enforcement officer in accordance with s5(1) & (2)(a) of the Act and the application outlined the details (plan) of the operation as required by s5(2A) of the Act.

The authority was granted by the Commissioner's delegate, an Assistant Commissioner, in accordance with s29 of the Act and clause 14(c) of the Regulation.

The Assistant Commissioner was satisfied that the authorities to grant the controlled operation met the requirements of s8(2)(a)-(e) of the Act.

The Ombudsman was notified of the authority that was granted in accordance with subs 21(1) of the Act and clause 11 of Regulation.

The Ombudsman received a report on the conduct of the authorised operation to which the authority related (s21(1)(b)) and the report included the details required by clause 13 of the Regulation.

In accordance with subsection 15(1) of the Act and cl 9 of the Regulation the Crime Commissioner received a report which was prepared by the principal law enforcement officer, within two months after the completion of the authorised operation.

The principal law enforcement officer for the operation ensured all participants in the operation were properly briefed in accordance with Schedule 2(3) of the Regulation.

As required by schedule 2(3)(a)(i) the principal law enforcement officer ensured that each Law Enforcement Officer and civilian participant had a thorough understanding of the nature and

extent of the controlled operation and were made aware of the extent of the authority (schedule 2(3)(a)(ii)). The officer also ensured that each civilian participant undertook not to engage on any controlled activities other than those approved in the authority (schedule 2(3)(b)).

The principal law enforcement officer made a written record of each undertaking given by a civilian participant (schedule 2(3)(c)).

All other relevant requirements of the Act and Regulation were met.

A handwritten signature in black ink, appearing to read 'G Barr', with a small flourish above the 'B'.

The Hon Graham Barr, QC
Inspector, New South Wales Crime Commission
29 October 2015

APPENDIX A: *Crime Commission Act 2012* section 57(3)(a) Guidelines

CRIME COMMISSION ACT 2012

PARAGRAPH 57 (3) (a)

GUIDELINES

By resolution passed on 5 February 2013, pursuant to paragraph 57 (3) (a) of the *Crime Commission Act 2012*, the Management Committee of the New South Wales Crime Commission furnishes to the Crime Commission the following guidelines with respect to the negotiation by the Commission of the terms of agreements regarding orders made by consent to resolve finally proceedings under the *Criminal Assets Recovery Act 1990*:

1. Settlement negotiations may only be conducted by a person delegated by the Commissioner to do so ('the Delegated Negotiator'). Standing delegations may only be made to the Assistant Commissioners, lawyers or members of the Financial Investigation Division. Other staff members may only receive delegations specific to particular cases.
2. The terms of settlement may only be approved by the Commissioner or an Assistant Commissioner with special legal qualifications ('the Decision Maker').
3. When recommending terms of settlement to the Decision Maker the Delegated Negotiator must be of the opinion that the terms of settlement represent the most appropriate outcome for the Crown (measured not only by the absolute value of any confiscation order involved but also having regard to other factors such as an assessment of the commerciality of, and risks associated with, continued litigation). In formulating this opinion the Delegated Negotiator is to have regard to factors including:

- (a) the sufficiency of the evidence available to prove a relevant serious crime related activity;
- (b) the sufficiency of the evidence available to quantify the defendant's derivation of, or acquisition of property derived from, proceeds of illegal activities;
- (c) the particulars of any previous confiscation proceedings taken by the Commission against the defendant;
- (d) the likelihood that the defendant would be able to discharge his or her onus to prove that he or she has not derived proceeds of illegal activities;
- (e) the estimated value of the defendant's interests in property and the degree of futility in seeking to secure a larger order;
- (f) the likelihood of other person(s) successfully claiming an interest in property that may be subject to an assets forfeiture order or may become security for an proceeds assessment order or unexplained wealth order;
- (g) the likelihood of a successful application for hardship being made from an interest in property potentially subject to an assets forfeiture order;
- (h) the likelihood of the defendant successfully applying for an order for the release of reasonable legal expenses and the estimated quantum of such an order; and
- (i) the cost to the Commission of continuing to litigate the matter rather than settling the matter (such costs including not only the Commission's internal costs but also the estimated costs of briefing external counsel and the opportunity cost of continued litigation of the matter rather than devoting the Commission's resources to potentially more productive other matters) and the risks of a costs order being made against the Commission.

4. The Negotiator must also confirm to the Decision Maker that:

- (a) the financial investigation of the defendant has been appropriately thorough and extensive (having regard to the likely return to the Crown) and has been sufficient to provide a reasonable level assurance that all of the defendant's interests in property have been identified (in so far as it is feasible to do so) and that all factors relevant to the making of the confiscation order have been considered; and
- (b) the financial investigation has been conducted by an appropriately qualified and skilled person.

5. Should the Decision Maker approve the Delegated Negotiator's recommended terms of settlement:

- (a) the Delegated Negotiator must certify that, having regard to factors that include those listed above, the Delegated Negotiator is of the opinion that the terms of settlement represent the most appropriate outcome for the Crown (measured not only by the absolute value of any confiscation order involved but also having regard to other factors such as an assessment of the commerciality of, and risks associated with, continued litigation) ('the Delegated Negotiator's Certification'); and
- (b) the Decision Maker must certify that he or she is satisfied that the Delegated Negotiator's certification has been made on a reasonable basis.