REVIEW OF THE
LAW ENFORCEMENT (CONTROLLED OPERATIONS) ACT 1997

NSW GOVERNMENT
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## CONCLUSIONS

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Executive Summary

The Law Enforcement (Controlled Operations) Act 1997 provides a regime whereby the Chief Executive Officer and delegates can authorise law enforcement officers and other participants carrying out a criminal investigation to commit what would otherwise be unlawful acts.

The Act authorises specific investigative bodies to carry out controlled operations within NSW. Those agencies are: the NSW Police Force, the Independent Commission Against Corruption, the NSW Crime Commission, the Police Integrity Commission, Australian Federal Police, Australian Crime Commission, and (under mutual recognition agreements) interstate law enforcement agencies.

Key stakeholders have been consulted and have provided submissions on the operation of the Act, including recommendations for amendments.

The Ministry for Police and Emergency Services has reviewed all submissions and considered all proposed amendments in line with the objectives of the Act.

In general, this review has found that the Act is achieving its aims. Stakeholders have not raised significant concerns with the operation of the Act.

This Review’s recommendations are provided below.

**Recommendation 1:**

That the Act and Regulations be amended to provide for the nomination of a secondary law enforcement officer. The role of the secondary law enforcement officer would be to perform the duties of the primary law enforcement officer, where the primary law enforcement officer was unable to do so.

**Recommendation 2:**

That the Surveillance Devices Act 2007 be amended to permit civilian participants in controlled operations to wear surveillance devices when participating in authorised controlled operations, without the need to obtain a warrant under that Act.
1. Introduction and background

1.1 Why the legislation was introduced

The specific trigger for the introduction of the Act in NSW was the Final Report of the Wood Royal Commission into the NSW Police Service. The Final Report recommended that legislation be enacted to overcome the difficulties for law enforcement agencies arising from the High Court judgement in Ridgeway v R (1995) 184 CLR 19.

The Ridgeway judgement concerned a joint Australian Federal and Malaysian Police investigation into high level drug trafficking. In the course of their investigation, Police arranged a controlled importation and delivery of heroin to Australia, for the purpose of apprehending the defendant: Ridgeway.

Following the importation, Ridgeway was apprehended by the Australian Federal Police with 203 grams of pure heroin in his possession. He was later convicted in the South Australian District Court.

Following his conviction, Ridgeway obtained special leave to appeal to the High Court of Australia. The High Court’s majority decision was that the importation of the heroin by law enforcement officers was illegal and therefore the evidence of that importation of heroin should have been excluded on the grounds of public policy.

The Law Enforcement (Controlled Operations) Act 1997 (the Act) was proclaimed on 1 March 1998. The Law Enforcement (Controlled Operations) Regulation (the Regulation) also came into force at that time.

In essence, the Act provides a framework for the authorisation, conduct and monitoring of law enforcement operations that involve what might otherwise be unlawful activities.

Controlled operations are now a well-established and accepted part of law enforcement in Australia.

NSW is also in the process of enacting mutual recognition regimes with other jurisdictions. Mutual recognition permits the conduct of controlled operations by other state’s police within NSW under their own legislation, and by NSW Police Force officers in those other states under NSW legislation.

To date, Schedule 1 of the NSW Act recognises the controlled operations legislation of the Commonwealth, Queensland, Victoria, the Australian Capital Territory and Tasmania; and negotiations are underway with other jurisdictions.

States not currently included within Schedule 1 are still able to conduct controlled operations within NSW; however, these would be carried out under NSW legislation and in cooperation with a NSW law enforcement agency.
1.2 The 1999 Review
The then Inspector of the Police Integrity Commission, the Hon. Mervyn Finlay, QC, conducted the independent review of the Act. The report was tabled on 1 June 1999. The purpose of the Review was to determine if the policy objectives remain valid and if the terms of the Act remain appropriate for securing them.

Mr Finlay found that the policy objectives remained valid then, and for the foreseeable future. However, there was seen to be a need to improve the terms of the Act to maximise its use and effectiveness.

It had been detected that drug sweeps and investigations involving small time drug dealers had virtually ceased due to uncertainty by police about whether or not those operations should be ‘controlled operations’. The 1999 review put forward amendments to streamline the controlled operations process and ensure that general undercover operations (including intelligence probes) were not inhibited.

1.3 The 2003 Review
The then Minister for Police requested that the Director General of the Ministry for Police coordinate the review on his behalf. Submissions were called for via advertisements in major newspapers, and via letters to key stakeholders.

The 2003 review put forward a number of recommendations for amendment of the Act. These included the introduction of retrospective authorities, the mutual recognition of the controlled operations regimes of some other states and the ability to authorise cross-border controlled operations.

A number of the 2003 review’s recommendations were ultimately adopted in the Law Enforcement (Controlled Operations) Amendment Act 2006.

1.4 The process for this review
Section 32 of the Act requires the Minister for Police to undertake a further review of the Act five years after the commencement of the Law Enforcement (Controlled Operations) Amendment Act 2006 (being 11 April 2011), and table a report of the review in Parliament within three months of that date.

The Chief Executive Officer of the Ministry for Police and Emergency Services has coordinated the review on behalf of the Minister for Police and Emergency Services.

Submissions were sought from key stakeholders. Responses received indicate that respondents are mostly happy with the Act in its current form. Three submissions have included suggestions for minor amendments to the Act; these will be discussed later in this report. A list of submissions received is included at Appendix 1.

Statistical information presented in this review report is taken from the NSW Ombudsman’s Annual Reports on the Act.
2. The Controlled Operations Framework

2.1 Conducting controlled operations

What is a controlled operation?

Section 3 of the Act defines a controlled operation in the following terms:

controlled operation means an operation conducted for the purpose of:

(a) obtaining evidence of criminal activity or corrupt conduct, or
(b) arresting any person involved in criminal activity or corrupt conduct, or
(c) frustrating criminal activity or corrupt conduct, or
(d) carrying out an activity that is reasonably necessary to facilitate the achievement of any purpose referred to in paragraph (a), (b) or (c),

being an operation that involves, or may involve, a controlled activity.

A controlled activity is any activity that would, in the absence of an authorisation under the Act, be unlawful. This may include, for example, purchasing illicit drugs or firearms.

Controlled operations are typically conducted by undercover operatives, that is, police or other law enforcement officials acting under an assumed identity. However, in some circumstances civilians may participate in a controlled operation as agents of the authorising law enforcement agency.

How the Act aims to regulate controlled operations

The main aims of the Act are to:

1. Provide law enforcement agencies with the investigative tools they need to effectively investigate serious crime, particularly organised crime and drug trafficking. To this end, the Act permits the Chief Executive Officer (or a senior delegate) of each prescribed agency to authorise suitably trained officers to undertake, as part of an approved controlled operation, what would otherwise be illegal activities (controlled activities).

2. Provide a strict system of accountability for the approval of controlled operations and the conduct of controlled activities by ensuring that authorisations are granted only in accordance with statutory guidelines (sections 6 & 7) and by providing external monitoring of compliance with these requirements by the NSW Ombudsman.

3. Safeguard officers by providing an indemnity against departmental, criminal or civil prosecution for all controlled activities they undertake.

4. Remove any doubt as to the status of evidence obtained in the course of a controlled operation by ensuring that all such evidence is classified as legal and prima facie admissible.
The Act does not affect any legal or administrative discretion that is lawfully taken in relation to the commencement, conduct or conclusion of legal or internal disciplinary proceedings such as the Attorney General’s or Director of Public Prosecution’s ability to grant indemnity from prosecution in certain circumstances.

**Conducting a controlled operation**

**Who can conduct controlled operations**

Law enforcement agencies are empowered to authorise and conduct controlled operations. Section 3 of the Act states defines a law enforcement agency as:

(a) the NSW Police Force,
(b) the Independent Commission Against Corruption,
(c) the New South Wales Crime Commission,
(d) the Police Integrity Commission,
(e) such of the following agencies as may be prescribed by the regulations as law enforcement agencies for the purposes of this Act:
   (i) the Australian Federal Police,
   (ii) the Australian Crime Commission,
   (iii) the Australian Customs Service.

**Applications to conduct controlled operations**

Section 5 of the Act states that a law enforcement officer of a law enforcement agency can apply to the Chief Executive Officer (CEO) of the agency for authority to conduct a controlled operation. The Act and Regulations set the procedures that must be adhered to in order to receive approval to conduct a controlled operation. The Act also provides procedures for reporting on the conduct of a controlled operation.

**Chief Executive Officer and delegates**

The CEO of a law enforcement agency may authorise controlled operations. The Act and the Regulations permit the CEO to delegate his or her functions under the Act, but only in a limited manner.

In the case of the NSW Police Force, section 29 of the Act permits the Commissioner can delegate his functions to officers of the rank of Deputy Commissioner, Assistant Commissioner and to two named Superintendents (in practice these have been Chief Superintendents).

In the case of other agencies clause 14 of the Regulations permits the respective CEO to delegate to:

- Independent Commission Against Corruption: Assistant Commissioner
- Police Integrity Commission: Assistant Commissioner
- NSW Crime Commission: Director
- Australian Federal Police: the member responsible for the AFP in NSW
- Australian Crime Commission: Director, National Operations; General Manager, National Operations; an SES employee of the ACC
- Australian Customs Service: Regional Director (NSW)
Form of authorities
Section 8 of the Act sets out the information that must be provided to the authorising officer in an application to conduct a controlled operation. Schedule 1 of the regulations contains application forms. When a controlled operation is approved, these completed forms must be provided to the NSW Ombudsman. Further information is also provided to the Ombudsman at the completion of an operation.

Formal applications
The Act refers to all non-urgent applications as ‘formal applications’. A law enforcement officer can make a formal application to conduct a controlled operation within NSW or interstate (known as a cross-border operation – discussed further below).

A formal application will involve the submission of a written application to the CEO or delegate.

Urgent applications
An urgent application can be made orally in person, over the phone or via 2-way radio. Urgent applications can be made where the urgency of circumstances makes a formal application impractical.

Written notes of an urgent application must be kept, being: the date and time the application was made, the identity of the applicant and the information given to the CEO in support of the application.

Cross-border controlled operations
The Act defines a cross-border controlled operation as:

“...a controlled operation that is, will be, or is likely to be, conducted in this jurisdiction and in one or more participating jurisdictions.”

Schedule 1 of the Act recognises the controlled operations legislation of a number of other Australian jurisdictions (specifically, the Commonwealth, Queensland, Victoria, the ACT and Tasmania). This means that those jurisdictions can conduct controlled operations within NSW in accordance with their own controlled operations regimes. NSW will recognise an authorisation under those interstate Acts as having the same effect as one issued under NSW legislation.

In addition, other jurisdictions also recognise NSW controlled operations legislation; meaning that NSW law enforcement officers can conduct controlled operations in those other states, in accordance with NSW legislation.

Also of note is that the Australia New Zealand Policing Advisory Agency (ANZPAA) has developed and is currently seeking adoption (on a national level) of a protocol for the conduct of inter-jurisdictional controlled operations. At the time of writing of this report, the draft protocol is to be presented to the Standing Council of Police and Emergency Management.
Part 3A of the Act provides the process by which cross-border controlled operations can be authorised.

Cross-border controlled operations differ in a number of respects from intra-state controlled operations.

In respect of the NSW Police Force, only Police of or above the rank of Assistant Commissioner can approve a cross-border controlled operation.

Cross border controlled operations cannot be authorised retrospectively.

In addition, urgent applications for cross-border controlled operations are only available if the application has not been the subject of a previous application, and the applicant has reason to believe that the delay in making a formal application may affect the success of the operation.

In addition to the factors that must be considered relating to other controlled operations applications, an authorising officer must take into account additional factors when considering whether to approve a cross-border controlled operation. For example, that:

- there is a likelihood that the operation will be conducted in one or more participating jurisdictions;
- the nature and extent of the criminal activity justify the conduct of the controlled operation in one or more participating jurisdictions; and,
- the operation will be conducted in a way that will minimise the risk of more illicit goods being under the control of persons (other than law enforcement officers) at the end of the operation than are reasonably necessary to enable the officers to achieve the purpose of the controlled operation.

Geographical operations
Geographical operations are not defined within the Act. However, a geographical operation relates to an application whereby a map is appended to an application to describe the area in which the operation will take place. A geographical operation often involves a large number of participating law enforcement officers who operate within the defined geographic area to detect crime such as drug supply or prostitution offences.

Conduct that cannot be authorised
Section 7 of the Act prohibits the authorisation of certain controlled activities. It states:

(1) An authority to conduct a controlled operation must not be granted in relation to a proposed operation that involves any participant in the operation:

(a) inducing or encouraging another person to engage in criminal activity or corrupt conduct of a kind that the other person could not
reasonably be expected to engage in unless so induced or encouraged, or

(b) engaging in conduct that is likely to seriously endanger the health or safety of that or any other participant, or any other person, or to result in serious loss or damage to property, or

(c) engaging in conduct that involves the commission of a sexual offence against any person.

(2) A person must not be authorised to participate in a controlled operation unless the chief executive officer is satisfied that the person has the appropriate skills to participate in the operation.

(3) A civilian participant:

(a) must not be authorised to participate in any aspect of a controlled operation unless the chief executive officer is satisfied that it is wholly impracticable for a law enforcement participant to participate in that aspect of the operation, and

(b) must not be authorised to engage in a controlled activity unless it is wholly impracticable for the civilian participant to participate in the aspect of the controlled operation referred to in paragraph (a) without engaging in that activity.

One submission to this review suggested that the Act, as it is currently constructed, does not prevent the decision of a CEO (or delegate) being set aside if a judge forms a different opinion as to whether the authority should have been granted, and that this ‘second guessing’ is not the best public policy. Furthermore, it has been stated that the CEO is better placed to make the decision than a judge, as the matter is outside the judge’s expertise.

On this basis, a recommendation has been made to this review that the Act be amended to state that each of the prohibitions contained within section 7(1) should be dependent upon the CEO’s satisfaction.

However, this review considers that it is in the public interest, and therefore good public policy, that administrative decision making of this kind should be subject to judicial review; the authorisation of criminal acts via a controlled operations authority are a case in point.

Decision makers should not fear that decisions made in good faith and in accordance with the law may place them in legal peril, or result in them being subjected to unnecessary or onerous cross examination at a later date. By the same notion, the public is also entitled to reasonably expect that where a decision has been made in error (particularly one which could reasonably be said to result in harm to a member or members of the community) then
recourse should exist to set aside such a decision, and where necessary, put in place mechanisms to see that the error is (where possible) corrected, and not repeated. This review therefore does not intend to adopt the proposed recommendations regarding CEO decision making.

**Variation of authorisations**
Section 10 of the Act provides for the variation of authorities once they have been granted. The purposes (pursuant to section 10) for which an authority may be varied, are:

(a) *to extend the period for which the authority has effect,*

(b) *to provide for an alternative principal law enforcement officer for the operation,*

(c) *to authorise additional or alternative persons to engage in controlled activities for the purposes of the operation,*

(d) *to authorise participants in the operation to engage in additional or alternative controlled activities.*

Section 20G provides for the variation of cross-border authorities. The below table shows how often controlled operations are varied.

**Controlled operations varied**

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</thead>
<tbody>
<tr>
<td>NSW Police Force</td>
<td>112</td>
<td>99</td>
<td>112</td>
<td>104</td>
<td>112</td>
</tr>
<tr>
<td>NSW Crime Commission</td>
<td>1</td>
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<td>4</td>
<td>0</td>
<td>1</td>
</tr>
<tr>
<td>Police Integrity Commission</td>
<td>5</td>
<td>0</td>
<td>0</td>
<td>0</td>
<td>2</td>
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<tr>
<td>Independent Commission Against Corruption</td>
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<td>1</td>
<td>1</td>
<td>2</td>
<td>0</td>
</tr>
<tr>
<td>Total varied</td>
<td>118</td>
<td>100</td>
<td>117</td>
<td>106</td>
<td>115</td>
</tr>
<tr>
<td>Total operations authorised</td>
<td>408</td>
<td>364</td>
<td>384</td>
<td>334</td>
<td>324</td>
</tr>
</tbody>
</table>

**The Primary Law Enforcement Officer (PLEO)**
Section 8(2)(b) requires that the investigating agency nominate a law enforcement officer who is to conduct the operation. This officer is known as the Primary Law Enforcement Officer (PLEO). The PLEO has overall responsibility for the coordination of the controlled operation. It has been submitted to this review that there have been numerous situations, particularly during protracted targeted or geographical operations, where variations to an authority have been required due to a PLEO being unavailable at the time an operation was to be carried out.

The reasons for an absence could be varied: other pressing operational commitments, leave, or court commitments. It has been suggested that consideration be given to allowing the nomination of a secondary law enforcement officer, who, in the absence of the PLEO, could assume the PLEO’s duties.

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It could be assumed that, where an agency is required to seek a variation on an authority due to the absence of a PLEO, that whoever would then be nominated as the new PLEO, could have been nominated as a secondary law enforcement officer on the original application – thereby saving the time and resources taken to vary the authority, and ensure that the investigating agency can carry out the operation at the preferred time, and without delay.

With approximately a third of authorisations requiring variation, this change should reduce variations and consequently, the administrative burden on law enforcement agencies.

**Recommendation 1:** That the Act and Regulations be amended to provide for the nomination of a secondary law enforcement officer. The role of the secondary law enforcement officer would be to perform the duties of the primary law enforcement officer, where the primary law enforcement officer was unable to do so.

**Retrospective authorities**
The Act was amended in 2006 to permit retrospective authorities to be granted where participants had engaged in unlawful conduct during a properly authorised controlled operation which was not included within the original authorisation. Prior to the amendment, retrospective authorities could only be granted where the participant engaged in unlawful conduct to protect themselves or another person from death or serious injury.

Prior to the amendments, only one retrospective authority had been granted. Police have advised us that since the amendments were enacted, they have made no retrospective authority applications.

A submission to this review has suggested that the 24 hour time period in which an application for a retrospective authority must be submitted may be insufficient and should be extended to 72 hours. The rationale behind this proposal is that there is less likelihood an operation would be being delayed while a written submission is prepared.

However, given that there have been no applications for retrospective authorities since the 2006 provisions commenced, further legislative amendment to extend the 24 hour window seems unwarranted at this time.

**How often is the Act used?**

**Controlled operations authorised**

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<tr>
<td>NSW Police Force</td>
<td>384</td>
<td>342</td>
<td>346</td>
<td>310</td>
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<tr>
<td>NSW Crime Commission</td>
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<td>7</td>
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<td>6</td>
<td>2</td>
</tr>
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<td>3</td>
<td>1</td>
<td>2</td>
<td>9</td>
<td>5</td>
</tr>
<tr>
<td><strong>Total</strong></td>
<td>408</td>
<td>364</td>
<td>384</td>
<td>334</td>
<td>324</td>
</tr>
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2 The two tables in this section have been taken from: Ibid p.13
**Controlled operations completed**

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<td>367</td>
<td>340</td>
<td>300</td>
<td>305</td>
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</tr>
<tr>
<td>NSW Crime Commission</td>
<td>14</td>
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<td>9</td>
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<td>2</td>
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<td>7</td>
</tr>
<tr>
<td><strong>Total</strong></td>
<td><strong>394</strong></td>
<td><strong>362</strong></td>
<td><strong>332</strong></td>
<td><strong>330</strong></td>
<td><strong>299</strong></td>
</tr>
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</table>

The Australian Federal Police and Australian Customs Service have not conducted any controlled operations under the NSW legislation in the past five reporting years.

**What types of crimes are most commonly targeted in controlled operations?**

Drug offences are overwhelmingly the most common types of offences targeted by controlled operations. In the 2009-10 reporting year, 83% of all controlled operations conducted by the NSW Police Force targeted drug offences; in 2008-09, it was 76% of operations. For those same reporting years, controlled operations conducted by the NSW Crime Commission involved drug crime in 63% (2009-10) and 75% (2008-09) of operations.3

Other crime types targeted by controlled operations conducted by the NSW Police Force include robbery, firearms, murder, fraud and rebirthing of stolen motor vehicles. Other crime types targeted by the NSW Crime Commission in controlled operations include fraud, money laundering and murder.

**What types of controlled activities are most commonly undertaken in controlled operations?**

Given that controlled operations see most of their use in policing of drug crime, it is no surprise that the most common controlled activities undertaken by law enforcement officers participating in controlled operations involve:

- possession of prohibited drugs;
- conversations and negotiations regarding the purchase of prohibited drugs; and,
- purchase of prohibited drugs.4

Controlled activities can also include:

- conversations and negotiations regarding the purchase of stolen goods;
- purchase of stolen goods;
- conversations and negotiations regarding the purchase of firearms and ammunition;
- purchase of prohibited firearms and ammunition;
- enter enclosed lands;
- conspiracy to murder; and,
- operation of a surveillance device.5

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How effective are controlled operations?

Results of controlled operations by NSW Police Force

<table>
<thead>
<tr>
<th></th>
<th>2007-08(^5)</th>
<th>2008-09(^6)</th>
<th>2009-10(^7)</th>
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<tbody>
<tr>
<td>Controlled activities conducted, with arrests and charges resulting</td>
<td>45%</td>
<td>57%</td>
<td>60%</td>
</tr>
<tr>
<td>Controlled activities conducted, no arrests and charges resulting</td>
<td>29%</td>
<td>25%</td>
<td>40%</td>
</tr>
</tbody>
</table>

The above table shows the results (in terms of arrests and charges) for those operations where controlled activities were authorised and conducted. There are also a percentage of operations each year where controlled activities are authorised, but no controlled activity is conducted. In addition, when using arrests and charges as a measure of the ‘effectiveness’ of controlled operations, it is important to note that not all controlled operations are necessarily intended to immediately result in arrests and charges. One example of such a controlled operation is the controlled purchase of illicit drugs. Law enforcement officers may conduct a number of controlled ‘buys’, with the intent of building trust with the dealer and establishing that the dealer has engaged in a pattern of drug supply, not just a single instance of the crime. Given these provisos, it is apparent that a greater proportion of controlled operations are resulting in arrests and charges.

2.2 Compliance with the Act and its safeguards

Application approval process

Controlled operations can only be approved by the Chief Executive Officer (CEO) or nominated delegates.

In order to approve a controlled operation, the CEO or delegate must be furnished with specific information. Section 5 of the Act sets out the information that must be contained within an application, and Schedule 1 of the Regulation provides forms for each type of application. Section 5.(2A) states that:

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,

\(^5\) Ibid pp. 23-42
\(^7\) NSW Ombudsman, Law Enforcement (Controlled Operations) Act 1997, Annual Report 2008-09 p. 14
\(^8\) NSW Ombudsman, Law Enforcement (Controlled Operations) Act 1997, Annual Report 2009-10 p. 14, 15
(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.

It has been submitted that the need to provide a full copy of the operational plan in the application and authority creates an unnecessary administrative burden and adds to the risk of administrative error, while adding little to advance the object of the Act.

Schedule 1 of the Regulation contains the form for the authority. The Act requires that the operational plan be provided with the application (s.5 (2A) (a)) and be referenced in the authority (s.8 (2) (a)).

However, it is important that the authorising officer is able to assess the full operational plan when considering whether or not to approve an operation; only making reference to an operation’s ‘essential elements’ would not be sufficient.

Discussions at a national level have also resulted in jurisdictions agreeing that operational plans are necessary to provide clarity in respect of cross-border controlled operations.

It is therefore recommended that no changes be made to provisions relating to operational plans.

**Code of Conduct**

Schedule 2 of the Regulation contains a code of conduct for controlled operations that applies to all law enforcement agencies that conduct controlled operations. The code of conduct sets the expectations of law enforcement applicants for controlled operations including:

- act in good faith when carrying out and reporting on the operation
- disclose changes in circumstances
- properly brief all participants
- comply with any lawful directions given by the primary law enforcement officer
- not induce others to engage in unauthorised conduct
- report breaches of the code of conduct

Contravention of the code of conduct is taken to be misconduct for the purposes of any disciplinary proceedings taken against that person with respect to the contravention.

**Reporting and review process**

It was suggested in one submission that the Federal controlled operations legislation may be more streamlined than NSW and a comparison of the two could result in administrative savings for NSW.
This review has considered the Federal legislation and has found that it is substantially similar to the NSW Act in many respects. This review has considered each recommendation received in each submission received and this report contains recommendations that aim to streamline the controlled operations process in NSW. As noted in recent NSW Ombudsman’s office reports on controlled operations, compliance with the Act’s record keeping and safeguard requirements continues to improve. The review has not received any submissions indicating that the reporting and record keeping requirements of the Act are onerous.

**Determining the danger likely to arise from a controlled operation**

It is the responsibility of the Chief Executive Officer, or delegate, to determine whether or not it is likely that a proposed controlled operation will seriously endanger the health or safety of anyone or result in serious loss or damage to property.

Certain cases have drawn particular attention to this aspect of controlled operations, notably *Gedeon V NSW Crime Commission*. The ‘Gedeon’ case involved the controlled supply of illegal drugs to a drug dealer without the likelihood of those drugs being recovered. The High Court of Australia ultimately found that the controlled operation authority was invalid due to the likelihood that the drugs would be purchased and used by drug users, thus seriously endangering the health of those drug users.

It could be argued that this ‘harm’ was not a ‘direct’ result of the controlled supply of drugs, but rather a consequential harm, removed from the act authorised by the controlled operation.

It has been proposed in one submission that the Act be amended to provide clarity regarding the ‘remoteness of harm’ likely to arise from a controlled operation.

It has been recommended that the Act be amended to clarify that an authority to conduct a controlled operation should not be granted if it is likely to involve any participant engaging in conduct that is likely to “of itself” or “directly” seriously endanger a person or result in serious loss or damage of property.

To support this argument, the example has been given of a common controlled operation involving the purchase of drugs by undercover operatives. Such purchases result in money being given to a drug dealer who, it could be said, is likely to use the money to buy and deal more drugs, some of which will no doubt be consumed – endangering the health of the persons ingesting them.

The supply of illicit drugs – which have no value other than as a commodity to ultimately be consumed, is inherently different from providing money to a drug dealer to purchase drugs. The uses that money can be put to are diverse, whereas drugs are made to be consumed.

It has been argued that the proposed amendment would not open the door to controlled operations involving assaults or the dangerous use of firearms, as the need to take into account indirect harm arising from a controlled operation would remain because of sections 6(3)(b) and (c).
However, these sections are broad and do not deal specifically with the possibility of harm arising from a controlled operation. Those sections may not provide a sufficient safeguard (should limitations be placed on section 7) to ensure that foreseeable, but indirect harm, did not arise from a controlled operation.

It is noted that section 7 of the Act is entitled: ‘Certain matters not to be authorised.’

Furthermore, the second reading speech for the Act was unequivocal in stating that:

‘Clause 7 expressly prohibits the approval of a controlled operation if there is likely to be any undue risk to the operatives involved or to any other person. Clause 7 also prevents approval of operations in which there is a risk of serious damage to the property of others.’

It is not in the public interest to permit the commission of crimes for law enforcement purposes that are likely to result, either directly or indirectly, in serious endangerment to persons or property. The current construction of the Act remains appropriate and should not be amended. The crucial factor for an authorising CEO’s consideration should be the likelihood and seriousness of harm, not whether this harm may be caused directly or indirectly.

Compliance with safeguards
One submission contended that the current safeguards are insufficient to identify whether safeguards are always being complied with, and recommended that a case by case review of compliance with the safeguards should be undertaken. It stated that in the absence of such a review, it is impossible to say whether the Act is achieving its objectives.

However, the Ombudsman is already empowered under the Act to conduct just such a review. The Ombudsman’s powers to review and report on controlled operations are detailed below.

Ombudsman oversight, reporting and findings
The Act provides broad powers to the Ombudsman to review controlled operations. The Act does not limit the records that the Ombudsman can inspect to satisfy itself about the conduct of a controlled operation, and the Ombudsman is thus able to decide the best manner in which to exercise its oversight.

Section 22(1)(b) states that the Ombudsman may inspect the records of the agency at any time. Section 22(2) states that 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.

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The CEO of a law enforcement agency must notify the Ombudsman whenever an authority is granted or varied and when a report on the conduct of an operation is received. The time limit for providing such notifications to the Ombudsman is 21 days for both authorisations and reports on conduct.

Written notice of a retrospective authority must be provided to the Ombudsman as soon as practicable, and no later than 7 days after the authority is granted.

The Act requires the Ombudsman to inspect the records of each law enforcement agency at least once every 12 months.

The Ombudsman may also inspect the records of any law enforcement agency at any time to determine whether the requirements of the Act are being met.

The Ombudsman may report to Parliament at any time via a special report. The Ombudsman is also required to provide an annual report to Parliament on the Ombudsman’s work and activities under the Act.

These broad powers along with the expertise and experience of the staff of the Ombudsman’s office make the Ombudsman the appropriate body to oversee controlled operations.

**What has the Ombudsman found? Are investigating bodies complying?**

The majority of non-compliance issues raised by the NSW Ombudsman’s office regarding the conduct of controlled operations have related to minor administrative errors or oversights involving incomplete forms, or (prior to the last two reporting years) the late submission of reports from Principal Law Enforcement Officers on the outcome of their operations, and the provision of information relating to civilian participants.

The Ombudsman noted in his 2008-09 Controlled Operations Annual Report, that during that reporting year, the NSW Police Force appointed a permanent officer tasked with ensuring compliance with reporting timeframes and reporting on the undertakings of civilian participants; as a result, NSW Police Force compliance with these requirements markedly increased. The number of delayed reports dropped from 160, to 50.\(^\text{10}\)

It is clear from the NSW Ombudsman’s reports that compliance with the Act’s safeguards is good and is continuing to improve.

**Is more oversight required?**

In a submission to this review, it was suggested that there is currently no way to ensure compliance with the Act’s safeguards, and that the Act should be amended to (in respect of prosecutions involving evidence obtained through a controlled operation) require additional documents to be served on the Director of Public Prosecutions (DPP) and the accused, including:

- a copy of the application for authority to conduct the controlled operation

- a copy of the records made in respect of an urgent application (where an application is not in writing)
- a statement setting out any additional information provided to the chief executive officer pursuant to subsection (3) of section 5
- a statement setting out the chief executive officer’s conclusions as to the matters set out in subsection (4) of section 6
- similar documents to those set out above in respect of any variation of the authority

The Act currently contains some provisions relating to the conduct of legal proceedings. Section 26 provides that the DPP be notified of evidence obtained in the course of an authorised operation. Section 27 allows evidentiary certificates regarding a controlled operation issued by the CEO of a law enforcement agency, to be admissible in any legal proceedings and to be taken as conclusive evidence that the CEO was satisfied as to the matters that the certificate contains. Section 28 protects the identity of certain participants in operations, so that they are not disclosed in legal proceedings.

A Court is able to consider the controlled operation authority. The Court will properly concern itself with whether an authority exists, and with any evidence gathered from the operation conducted on the basis of that authority. It does not need as a matter of course to look behind that authority.

Furthermore, the documents that support that authority are of necessity highly frank and would disclose intimate details of an investigation and the background that led to the application for an authority. This frankness is a necessity, as the CEO or delegate should be able to consider the full facts of any given situation, prior to providing approval for a controlled operation.

The release of the suggested documents to the accused, even in an edited form (for example, with names blacked out) would still retain the very real potential of exposing confidential criminal intelligence, identities of informants, and law enforcement methodologies.

This would potentially jeopardise current and future police investigations, and place law enforcement officers, informants and other witnesses in perhaps mortal danger.

These risks would almost inevitably lead to law enforcement officers in many cases simply not making applications for controlled operations for fear of the abovementioned situations occurring, or alternatively, result in the CEO or delegate rejecting applications for the same reasons. This would obviously defeat the objectives of the Act.

It is also important to reiterate that the Ombudsman’s powers of review are broad. The Ombudsman’s Office possesses significant experience and expertise in overseeing law enforcement bodies, making the office an appropriate one to oversee controlled operations. There is no need for the DPP to also assume a review role.

The provision of information in the manner suggested cannot therefore be supported.
Minister responsible for administering controlled operations legislation

The Minister for Police and Emergency Services is the Minister responsible for administering the Act. In some other states and territories, the Attorney General administers legislation containing controlled operations powers. In the Commonwealth, it is the Minister for Home Affairs, and in Tasmania, the Minister for Justice.

It has been suggested that given the nature of the powers in the controlled operations act being ‘law enforcement powers’ that, for reasons of probity, the legislation may be better situated within the Law Enforcement (Powers and Responsibilities) Act 1997, which is not administered by the Minister for Police and Emergency Services, but by the Attorney General.

The determination of which Ministers will administer which Acts of Parliament is ultimately a decision for the Government of the day. It is noted however, that the Minister for Police and Emergency Services is not a member of the police force, nor are controlled operations exclusively conducted by police officers.

A Minister for Police and Emergency Services is a member of and accountable to Cabinet. It is an appropriate position to oversee important law enforcement legislation. As already stated, however, administration of acts is ultimately a question for the Government of the day.

Issues affecting other Acts

Surveillance devices worn by civilian participants

Currently, section 7(4) of the Surveillance Devices Act 2007 permits law enforcement officers who are participating in an approved controlled operation, and operating under an assumed name or identity (that is ‘undercover’), to wear surveillance devices to record a conversation they are party to, without seeking a further warrant under that Act.

There is however no similar exemption provided for civilian participants in a controlled operation.

Section 7(3)(a) states that a civilian participant:

“must not be authorised to participate in any aspect of a controlled operation unless the chief executive officer is satisfied that it is wholly impracticable for a law enforcement participant to participate in that aspect of the operation...”

It is clear from reading section 7(3) that a civilian participant is only permitted to be involved in a controlled operation in the place of a law enforcement officer.

It is noted that the exemption provided for in the Surveillance Devices Act only applies to undercover law enforcement officers. However, a comparison can be drawn between an undercover operative and a civilian participant who, although not operating under an assumed identity – are both acting covertly on behalf of a law enforcement agency.
Providing such an exemption would save police and court time in preparing and giving consideration to surveillance device warrants and would also not be out of step with the policy objectives of the Act. The use of surveillance devices by civilian participants would also still be subject to the safeguards provided for within the Law Enforcement (Controlled Operations) Act 1997. The intended use of the device would obviously be included in the operational plan and be a matter the CEO would have to consider when deciding whether or not to authorise that operation.

**Recommendation 2: That the Surveillance Devices Act 2007 be amended to permit civilian participants in controlled operations to wear surveillance devices when participating in authorised controlled operations, without the need to obtain a surveillance device warrant.**

**Conclusions**

On the basis of submissions received, it is clear that law enforcement agencies consider the Act to be an effective law enforcement tool. Results of controlled operations also indicate that more frequently than not, they result in offenders being arrested and charged.

The NSW Ombudsman’s Annual Reports on controlled operations show that agencies are achieving increasing levels of compliance with the Act, and this can perhaps be attributed to the thoroughness of the Ombudsman’s oversight and also, to an increasing familiarity with the Act’s requirements on the part of law enforcement officers.

Submissions to this review that have recommended amendment of the Act have on more than one occasion referenced the Gedeon matter; as an example to call for increased oversight or review of law enforcement agencies operations and decisions under the Act, and conversely, to call for less.

The Gedeon matter was ultimately not settled in favour of the NSW Crime Commission. Nevertheless, it is important to note that, but with the exception of the High Court, the decision to grant the controlled operation authorisation in the Gedeon matter was deemed appropriate; this includes by the NSW Ombudsman and the NSW Court of Appeal.

This review has taken that into account, however, for the reasons outlined in this report has determined that there is no need to amend the Act from its current state as a result of the Gedeon matter.

It is clear that the Act is meeting its objectives and that law enforcement agencies are using the powers it provides in an appropriate and responsible manner. The two recommendations made in this review seek only to streamline the Act without altering the overall framework, or reducing accountability. These recommendations have been made in the interest of reducing the administrative burden on law enforcement agencies.
Appendix 1 – List of submissions received

NSW Police Force
NSW Crime Commission
Independent Commission Against Corruption
NSW Police Association
Department of Attorney General and Justice
Law Society of NSW