

**Report to the Attorney-General
on the results of inspections
of records under s 55 of the
*Surveillance Devices Act 2004***

**INSPECTIONS FINALISED BETWEEN
1 JULY – 31 DECEMBER 2013**

**AUSTRALIAN COMMISSION FOR LAW ENFORCEMENT
INTEGRITY**

Records from 1 July to 31 December 2012

AUSTRALIAN FEDERAL POLICE

Records from 1 July to 31 December 2012

AUSTRALIAN CRIME COMMISSION

Records from 1 July to 31 December 2012

CORRUPTION AND CRIME COMMISSION

Records from 1 July 2012 to 30 June 2013

CRIME AND MISCONDUCT COMMISSION

Records from 1 July 2011 to 30 June 2012

Report by the Commonwealth Ombudsman
under s 61 of the *Surveillance Devices Act 2004*

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INTRODUCTION

The *Surveillance Devices Act 2004* (the Act) restricts the use, communication and publication of information obtained through the use of surveillance devices.¹ The Act also establishes procedures for law enforcement agencies to obtain permission to use such devices in relation to criminal investigations and the recovery of children, and imposes requirements for the secure storage and destruction of records in connection with the use of surveillance devices.

Section 55(1) of the Act requires the Commonwealth Ombudsman (Ombudsman) to inspect the records of each law enforcement agency to determine the extent of their compliance with the Act. Under s 6(1) of the Act, the term 'law enforcement agency' includes the Australian Crime Commission (ACC), the Australian Federal Police (AFP), the Australian Commission for Law Enforcement Integrity (ACLEI), police forces of each state and territory, and other specified state and territory law enforcement agencies, such as the Corruption and Crime Commission (CCC) and the Crime and Misconduct Commission (CMC).

The Ombudsman is also required under s 61 of the Act to report to the relevant Minister (the Commonwealth Attorney-General) at six-monthly intervals on the results of each inspection. Reports to the Attorney-General alternately include the results of inspections that have been finalised in the periods January to June and July to December.

Inspection results are considered finalised once the Ombudsman's internal report to the agency is completed (having provided the agency with an opportunity to comment on the findings), so typically there will be some delay between the date of inspection and the report to the Attorney-General.

¹ Under the Act, a 'surveillance device' means a data surveillance device, a listening device, an optical surveillance device or a tracking device (or a device that is a combination of any two or more of these devices).

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The following table is a summary of the inspections covered by this report.

Table 1 – Inspections finalised between 1 July and 31 December 2013

Agency	Records covered by the inspection period	Dates of inspection	Finalised
			Report to the agency completed
ACLEI	1 July to 31 December 2012	5 and 27 February 2013 ²	17 July 2013
ACC	1 July to 31 December 2012	8 to 10 April 2013	23 July 2013
AFP	1 July to 31 December 2012	4 to 6 March 2013	27 August 2013
CCC	1 July 2012 to 30 June 2013	1 August 2013	28 November 2013
CMC	1 July 2011 to 30 June 2012	2 May 2013	17 July 2013

Detailed internal reports on the results of each inspection were provided to each agency. This report summarises the results of these inspections and discusses significant issues. We have not included sensitive information in this report.

INSPECTION OBJECTIVE AND SCOPE

The objective of the inspection is to determine the extent of compliance with the Act by agencies and their law enforcement officers. The following criteria were applied to assess compliance:

1. Were applications for warrants and authorisations properly made?
2. Were warrants and authorisations properly issued?
3. Were surveillance devices used lawfully?
4. Were revocations of warrants properly made?
5. Were records properly kept and used by the agency?
6. Were reports properly made by the agency?
7. Was protected information properly dealt with by the agency?

² Not all records were available on 5 February 2013.

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All records held by an agency relating to warrants and authorisations issued under the Act were potentially subject to inspection. However, the Ombudsman’s discretion under s 55(5) of the Act was exercised to limit inspections to those warrants and authorisations that had expired or were revoked during the relevant inspection period.

SUMMARY OF INSPECTION RESULTS

Table 2 – Summary of inspection results

Criteria	ACLEI	ACC	AFP	CCC	CMC
1. Were applications for warrants and authorisations properly made?	Compliant.	Compliant.	Compliant with one exception.	N/A	Compliant.
2. Were warrants and authorisations properly issued?	Compliant.	Compliant.	Compliant with one exception.	N/A	Compliant.
3. Were surveillance devices used lawfully?	Compliant. ³	Compliant.	Compliant with one exception.	N/A	N/A
4. Were revocations of warrants properly made?	N/A	Compliant.	Compliant.	N/A	Compliant.
5. Were records properly kept and used by the agency?	Compliant.	Compliant.	Compliant.	N/A	Compliant.
6. Were reports properly made by the agency?	Compliant.	Compliant.	Compliant with one exception.	N/A	Compliant.
7. Was protected information properly dealt with by the agency?	Compliant.	Compliant.	Compliant.	Compliant.	N/A

No recommendations were made as a result of these inspections. All five agencies displayed a positive attitude towards compliance and are responsive to addressing the issues identified as a result of our inspections.

³ A finding of compliance under criteria 3 and 7 is equivalent to ‘nothing to indicate otherwise’.

AUSTRALIAN COMMISSION FOR LAW ENFORCEMENT INTEGRITY

Inspection results

An inspection of ACLEI's records was conducted on 5 and 27 February 2013. The inspection examined all six surveillance device warrants (and associated records) that expired or were revoked during 1 July to 31 December 2013. The report on the results of this inspection was provided to ACLEI on 17 July 2013.

No issues were identified and no recommendations were made as a result of the inspection.

Progress made since previous report

There were no issues identified in our last report to the Attorney-General which required follow-up at the February 2013 inspection.

AUSTRALIAN CRIME COMMISSION

Inspection results

An inspection of the ACC's records was conducted from 8 to 10 April 2013. The inspection examined all 45 surveillance device warrants and tracking device authorisations (and associated records) that expired or were revoked during 1 July to 31 December 2012, and also records relating to the retention of protected information obtained under one warrant. A report of the results of this inspection was provided to the ACC on 23 July 2013.

Two minor administrative issues were noted (one self-disclosed by the ACC). No recommendations were made as a result of the inspection.

Progress made since previous report

In our last report to the Attorney-General, we noted that at the September 2012 inspection, the ACC self-disclosed five non-compliances with s 46 of the Act, which relates to dealing with records obtained by the use of surveillance devices. We also noted the steps taken by the ACC to address these issues. These measures appear to have been effective, as these issues were not noted at the April 2013 inspection.

AUSTRALIAN FEDERAL POLICE

Inspection results

An inspection of the AFP's records was conducted from 4 to 6 March 2013. The inspection examined surveillance device warrants and tracking device authorisations (and associated records) that expired or were revoked during 1 July to 31 December 2012, and also records relating to the destruction and retention of protected information. A report of the results of this inspection was provided to the AFP on 27 August 2013.

We inspected records relating to 86 warrants and authorisations (a 31% sample) and the destruction of protected information obtained under 72 warrants and authorisations (a 67% sample).

We noted four exceptions to compliance:

- One instance where the AFP self-disclosed that it had applied for and was granted a tracking device authorisation (rather than a warrant) in relation to extraterritorial surveillance.
- Under the above warrant, the AFP did not notify the Attorney-General of extraterritorial surveillance in accordance with s 42(6).
- A written record of a tracking device authorisation did not fully comply with s 40(1).
- One s 49 report had not been provided to the Attorney-General as soon as practicable after the warrant ceased in accordance with s 49(1).

Although no recommendations were made as a result of the inspection, a number of suggestions were made regarding how the AFP could better comply with relevant provisions under the Act. Further details are provided under 'Issues arising from the March 2013 inspection'.

Progress made since previous report

In our last report to the Attorney-General, we noted at the September 2012 inspection that the AFP self-disclosed three instances where surveillance devices had been used or may have been used without lawful authority. As a result of these self-disclosed instances, we recommended that the AFP provide or strengthen guidance to those who are responsible for the use and retrieval of surveillance devices.

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The AFP accepted this recommendation and advised that it had implemented a decision matrix to provide clear guidance to AFP members regarding the legislative requirements, and that training would also be conducted. This issue was not noted at the March 2013 inspection.

In the last report, we also noted 30 non-compliances with s 46 of the Act, which (as stated on page 5) relates to dealing with records obtained by the use of surveillance devices. As the result of the AFP finalising a review of such records, these issues were not noted at this inspection.

Issues arising from the March 2013 inspection

Applications for extraterritorial surveillance

Section 42 of the Act allows a warrant to be issued in relation to the investigation of a relevant offence where it becomes apparent that there will be a need for extraterritorial surveillance.

The AFP self-disclosed that in one instance, an authorisation, rather than a warrant, was applied for and granted in relation to extraterritorial surveillance.

The AFP initiated an internal review of this file and concluded that although the Act does not explicitly preclude the extraterritorial use of tracking devices under an authorisation, where it seeks to use surveillance devices offshore it should obtain a warrant, along with the permission of an appropriate consenting official of the relevant foreign country in accordance with s 42. The AFP further advised that the conclusion of its internal review reaffirmed its existing policy position and, as a result, AFP guidance regarding extraterritorial surveillance had been reviewed and updated.

Notifying Minister of consent for extraterritorial surveillance

Section 42(6) of the Act requires that as soon as practicable after the commencement of surveillance under the authority of a warrant in a foreign country, the Commissioner must give the Attorney-General evidence in writing that the surveillance has been agreed to by an appropriate consenting official of that foreign country.

At the inspection, we identified one instance where notification of extraterritorial surveillance had not been provided to the Attorney-General in accordance with s 42(6). This issue was identified in relation to the same file discussed above where the AFP applied for and granted an authorisation (rather than a warrant) for extraterritorial surveillance.

In response to this issue, and as a result of the AFP's internal review of this file, the AFP agreed that the notification requirement under s 42(6) should have been complied with in this instance.

Following the inspection, we confirmed that the AFP notified the Attorney-General of the extraterritorial surveillance; however, as this was done more than five months after the commencement of surveillance, the AFP did not comply with s 42(6) as it did not notify the Attorney-General as soon as practicable after the commencement of extraterritorial surveillance.

The AFP advised that it has reviewed and updated its guidance to ensure compliance with s 42(6).

Authorisation in relation to a recovery order

Section 40(1)(d) requires the written record of an authorisation for the use of a tracking device in relation to a recovery order⁴ to state the date the order was made and the name of the child to whom the order relates.

For one authorisation in relation to a recovery order, the written record did not state the date on which the recovery order was made. In response to this finding the AFP noted that, during the application process, full details relating to the date of the recovery order were provided to the authorising officer.

The AFP also advised that specific guidance was disseminated to its staff, informing them of the information required for both authorisations and warrants relating to child recovery orders. It further noted that these requirements would be highlighted to staff during the delivery of ongoing, targeted training.

⁴ A recovery order is defined under the Act as an order under s 67U of the *Family Law Act 1975* or an order for a warrant for the apprehension or detention of a child under subregulation 15(1) or 25(4) of the *Family Law (Child Abduction Convention) Regulations 1986*.

CRIME AND CORRUPTION COMMISSION

Inspection results

An inspection of the CCC's records was conducted on 1 August 2013. The inspection examined records relating to the destruction of protected information obtained under one surveillance device warrant during the period 1 July 2012 to 30 June 2013. The CCC advised that no warrants or tracking device authorisations expired or were revoked during this period. A report of the results of this inspection was provided to the CCC on 28 November 2013.

No issues were identified and no recommendations were made as a result of the inspection. One suggestion to improve practices was made.

Progress made since previous report

In our report to the Attorney-General dated November 2010, we discussed the results of our inspection of the CCC's first use of provisions under the Act. In that report, it was noted that one recommendation had been made to the CCC in relation to its reports to the Minister under s 49 of the Act.

As the CCC advised at the August 2013 inspection that no warrants or tracking devices had expired or been revoked since November 2009, there has not been an opportunity to monitor the progress made in relation to this recommendation.

CRIME AND MISCONDUCT COMMISSION

Inspection results

An inspection of the CMC's records was conducted on 2 May 2013. The inspection examined the one surveillance device warrant (and associated records) that was revoked during 1 July 2011 to 30 June 2012. A report of the results of this inspection was provided to the CMC on 17 July 2013.

This was the first time we had inspected the surveillance device records of the CMC.

No issues were identified and no recommendations were made as a result of the inspection.

Colin Neave
Commonwealth Ombudsman