

# Oversight of the use of covert, intrusive and coercive powers

## Commonwealth Ombudsman

The purpose of the Office of the Commonwealth Ombudsman is to:

- provide assurance that the organisations we oversee act with integrity and treat people fairly
- influence systemic improvement in public administration in Australia and the region.

We achieve our purpose through:

- correcting administrative deficiencies through independent review of complaints about Australian Government administrative action
- fostering good public administration that is accountable, lawful, fair, transparent and responsive
- assisting people to resolve complaints about government administrative action
- providing assurance that Commonwealth, State and Territory law enforcement, integrity and regulatory agencies are complying with statutory requirements and have sound administrative practices in relation to certain covert, intrusive and coercive powers.

## Oversight of the use of covert, intrusive and coercive powers

One of the Ombudsman's functions is to perform compliance audits of certain Commonwealth, State and Territory law enforcement, integrity and regulatory agencies' use of covert, intrusive and coercive powers.

This is achieved through:

- the inspection of paper and electronic files
- the inspection of systems
- interviews with staff
- observing practices
- obtaining and maintaining a working knowledge of each agency's systems, policies and procedures.

Due to their covert nature, a person is typically unaware they are the subject of these powers and as a result, cannot make a complaint about or question an agency's actions. In the absence of this visibility our role is to assess and report on an agency's legislative compliance and to provide assurance that agencies are applying these powers as Parliament intended.

The following table sets out the regimes and agencies that we inspect.

| Power   | Legislation  | Agencies subject to inspection  |
|---|--|---|
| Controlled operations authorities   | <i>Crimes Act 1914</i> – Part IAB  | <ul style="list-style-type: none"> <li>• Australian Federal Police (AFP)</li> <li>• Australian Commission for Law Enforcement Integrity (ACLEI)</li> <li>• Australian Criminal Intelligence Commission (ACIC)</li> </ul>  |
| Delayed notification search warrants  | <i>Crimes Act 1914</i> – Part IAAA                                       | <ul style="list-style-type: none"> <li>• AFP</li> </ul>   |
| Monitoring of compliance with supervisory orders under Part 5.3 of the <i>Criminal Code</i> (including control orders)  | <i>Crimes Act 1914</i> – Part IAAB                                       | <ul style="list-style-type: none"> <li>• AFP</li> </ul>   |
| Account takeover warrants   | <i>Crimes Act 1914</i> – Part IAAC                                       | <ul style="list-style-type: none"> <li>• AFP</li> <li>• ACIC</li> </ul>   |
| Industry assistance requests and notices  | <i>Telecommunications Act 1997</i> – Part 15                             | <ul style="list-style-type: none"> <li>• All State/Territory police</li> <li>• AFP</li> <li>• ACIC</li> </ul>   |
| Surveillance device warrants and warrantless surveillance, tracking device authorisations, and computer access warrants | <i>Surveillance Devices Act 2004</i>                                     | <ul style="list-style-type: none"> <li>• All State/Territory police</li> <li>• ACIC</li> <li>• ACLEI</li> <li>• AFP</li> <li>• Corruption &amp; Crime Commission (WA)</li> <li>• Crime &amp; Corruption Commission (QLD)</li> <li>• Law Enforcement Conduct Commission (NSW)</li> <li>• NSW Crime Commission</li> <li>• Independent Commission Against Corruption (ICAC) (NSW)</li> <li>• Independent Commission Against Corruption (ICAC) (SA)</li> <li>• Independent Broad-based Anti-corruption Commission (IBAC)</li> </ul> |
| Data disruption warrants  | <i>Surveillance Devices Act 2004</i>                                     | <ul style="list-style-type: none"> <li>• AFP</li> <li>• ACIC</li> </ul>   |
| Telecommunications interceptions  | <i>Telecommunications (Interception and Access) Act 1979</i> – Chapter 2 | <ul style="list-style-type: none"> <li>• AFP</li> <li>• ACLEI</li> <li>• ACIC</li> </ul>  |

|   |   |  |
|---|---|--|
| Stored communications                           | <i>Telecommunications (Interception and Access) Act 1979</i><br>– Chapter 3           | <ul style="list-style-type: none"> <li>• All State/Territory police</li> <li>• ACIC</li> <li>• Australian Competition and Consumer Commission (ACCC)</li> <li>• ACLEI</li> <li>• AFP</li> <li>• Australian Securities and Investment Commission (ASIC)</li> </ul>  |
| Telecommunications data (metadata)              | <i>Telecommunications (Interception and Access) Act 1979</i><br>– Chapter 4           | <ul style="list-style-type: none"> <li>• Corruption &amp; Crime Commission (WA)</li> <li>• Crime &amp; Corruption Commission (QLD)</li> <li>• Department of Home Affairs</li> <li>• IBAC</li> <li>• Law Enforcement Conduct Commission (NSW)</li> <li>• NSW Crime Commission</li> <li>• ICAC (NSW)</li> <li>• ICAC (SA)</li> </ul>   |
| International Production Orders                 | <i>Telecommunications (Interception and Access) Act 1979</i><br>– Schedule 1          | <ul style="list-style-type: none"> <li>• Australian Designated Authority (Attorney-General’s Department)</li> <li>• All State/Territory police</li> <li>• ACIC</li> <li>• Australian Competition and Consumer Commission (ACCC)</li> <li>• ACLEI</li> <li>• AFP</li> <li>• Australian Securities and Investment Commission (ASIC)</li> <li>• Corruption &amp; Crime Commission (WA)</li> <li>• Crime &amp; Corruption Commission (QLD)</li> <li>• Department of Home Affairs</li> <li>• IBAC</li> <li>• Law Enforcement Conduct Commission (NSW)</li> <li>• NSW Crime Commission</li> <li>• ICAC (NSW)</li> <li>• ICAC (SA)</li> </ul> |
| Fair Work Ombudsman                             | <i>Fair Work Act 2009</i> – s 712F(6)   | <ul style="list-style-type: none"> <li>• Fair Work Ombudsman</li> </ul>  |
| Australian Building and Construction Commission | <i>Building and Construction Industry (Improving Productivity) Act 2016</i> – s 65(6) | <ul style="list-style-type: none"> <li>• Australian Building and Construction Commission</li> </ul>  |

## Overview of powers subject to Ombudsman inspection

### Controlled operations – Part IAB of the Crimes Act 1914

Controlled operations cover conduct that would otherwise constitute an offence involving a law enforcement officer or other person for the purpose of obtaining evidence that may lead to the prosecution of a person for a serious Commonwealth offence or a serious State offence that has a federal aspect.

The Ombudsman must inspect the controlled operations records of authorising agencies to determine the extent of their compliance with Part IAB of the *Crimes Act 1914* (Crimes Act). The Commonwealth Ombudsman must report annually to the Minister for Home Affairs, who must then table the report in Parliament.

The Ombudsman, at least once in a calendar year, must brief the Parliamentary Joint Committee on Law Enforcement (the Committee) on the Australian Criminal Intelligence Commission (ACIC) and the Australian Federal Police's (AFP) use of controlled operations under Part IAB of the Crimes Act.

At least once in a calendar year the Ombudsman briefs the Parliamentary Joint Committee on the Australian Commission for Law Enforcement Integrity (ACLEI). The briefing relates to ACLEI's use of controlled operations under Part IAB of the Crimes Act and although not required to, extends to the results of our inspections of ACLEI's use of other covert powers.

### Part 5.3 supervisory orders, preventative detention orders and delayed notification search warrants

The Ombudsman must: inspect records to determine the extent of the AFP's legislative compliance with Delayed Notification Search Warrants<sup>1</sup> under Part IAAA of the Crimes Act; and receive notifications from the AFP regarding preventative detention orders<sup>2</sup> and prohibited contact orders<sup>3</sup> under Division 105 of the *Criminal Code Act 1995*. Under Part IAAB of the Crimes Act, the Ombudsman may inspect records to assess the AFP's monitoring of Part 5.3 supervisory orders.<sup>4</sup>

The Ombudsman is required to report to the Minister 6 monthly on the results of inspections of the AFP's use of Part IAAA conducted during the period, and annually on the results of inspections of the AFP's use of Part IAAB. The Minister is required to table the Part IAAA report in Parliament.

### Account takeover warrants – Part IAAC of the Crimes Act

Account takeover warrants provide the AFP and the ACIC with the ability to take control of one or more online accounts and deprive the account holder of access to that account for the purpose of enabling evidence to be obtained.

The Ombudsman must inspect the records of the AFP and ACIC at least once every 12 months to determine the extent of their compliance with Part IAAC of the Crimes Act. Under s 3ZZVX of the Crimes Act, the Ombudsman must report at 12 monthly intervals to the Minister for Home Affairs, who must then table the report in Parliament.

<sup>1</sup> Under a Delayed Notification Search Warrant, searches are conducted covertly and notification of the execution of a search warrant does not need to be provided until a later date, as stipulated in the warrant.

<sup>2</sup> A preventative detention order enables the AFP to take a person into custody where there is a threat of imminent terrorist attack where custody may assist in preventing it, or immediately after a terrorist act if it is likely vital evidence will be lost.

<sup>3</sup> A prohibited contact order restricts a person detained under a preventative detention order from contacting a named person or class of people during the duration of detention.

<sup>4</sup> A Part 5.3 supervisory order is any of the following made under Part 5.3 of the Criminal Code; an interim control order, a confirmed control order, an interim supervision order, or an extended supervision order. Control orders and supervision orders can prohibit a person from doing certain things, impose conditions, or require a person to do things for the purpose of preventing a terrorist attack. The AFP has monitoring powers in relation to a person the subject of a Part 5.3 supervisory order.

### Surveillance devices – *Surveillance Devices Act 2004*

A surveillance device is a data surveillance device, a listening device, an optical surveillance device, a tracking device or a device that is a combination of such devices.

The Ombudsman must inspect the records of law enforcement agencies to determine the extent of their compliance with the *Surveillance Devices Act 2004* (SD Act). The Commonwealth Ombudsman must report to the Minister for Home Affairs at 6 monthly intervals, on the results of each inspection under the SD Act, who must then table the report in Parliament.

### Computer access warrants and data disruption warrants – *SD Act*

Computer access warrants enable law enforcement agencies to covertly access and search devices such as laptops, tablets, mobile phones and USBs.

Under the SD Act data disruption warrants are available only to the AFP and the ACIC to disrupt online data by modifying, adding, copying or deleting data in order to frustrate the commission of relevant offences.

The SD Act provides for law enforcement agencies to make an application to an eligible Judge or nominated AAT member for computer access and data disruption warrants, a similar process to obtaining a surveillance device warrant. Agencies are required to notify the Ombudsman about particular actions taken in respect of computer access warrants and data disruption warrants.

The Ombudsman must inspect the records of agencies to determine the extent of their compliance with legislative requirements for computer access and data disruption warrants. The Commonwealth Ombudsman must report to the Minister for Home Affairs at 6 monthly intervals, on the results of each inspection under the SD Act, who must then table the report in Parliament.

### Telecommunications data – *Chapter 4 of the Telecommunications (Interception and Access) Act 1979*

Telecommunications data (commonly referred to as ‘metadata’) is information about an electronic communication that does not include the contents or substance of that communication, for example the date, time and duration of a communication.

Chapter 4 of the *Telecommunications (Interception and Access) Act 1979* (TIA Act) provides the legislative framework for access to telecommunications data. The Ombudsman must inspect enforcement agencies’ compliance with Chapter 4 of the TIA Act and report annually to the Minister for Home Affairs, who must table the report in Parliament.

If the Ombudsman’s report relates to the AFP’s authorisations for access to telecommunications data, including authorisations issued under a Journalist Information Warrant, the Ombudsman must also provide a copy of the report to the Parliamentary Joint Committee on Intelligence and Security (PJCIS).

### Stored communications – *Chapter 3 of the TIA Act*

Stored communications are communications that have already occurred and are stored in the systems of a carrier or carriage service provider — they contain the content of the communication. Examples of stored communications include Short Message Service (SMS), Multimedia Messaging Service (MMS), emails and voicemails.

Chapter 3 of the TIA Act provides the legislative framework under which criminal law enforcement agencies may covertly access stored communications. Agencies may issue a preservation notice requiring a carrier or carriage service provider to preserve stored communications on their systems for a period of 90 days, to give agencies time to obtain a warrant to access those communications. The Ombudsman must inspect criminal enforcement agencies’ compliance with Chapter 3 of the TIA Act and report annually to the Minister for Home Affairs, who must table the report in Parliament.

### Telecommunications interception – Chapter 2 of the TIA Act

Telecommunications interception is listening or recording information passing over telecommunications systems, in real time without the knowledge of the person making the communication.

Chapter 2 of the TIA Act provides the legislative framework under which interception agencies may covertly intercept telecommunications. The Ombudsman is required to inspect records, twice per year of each Commonwealth law enforcement agency that obtains a warrant under this part of the TIA Act to ascertain compliance with certain legislative provisions. The Ombudsman must annually report to the Minister for Home Affairs, who is then required to include a summary of the report in his annual report.

### International Production Orders – Schedule 1 of the TIA Act

The *Telecommunications Legislation Amendment (International Production Orders) Act 2021* introduced Schedule 1 to the TIA Act (the IPO Schedule) to give Commonwealth, State and Territory law enforcement and national security agencies the ability to obtain international production orders. International production orders allow agencies to access telecommunication interceptions, telecommunications data and stored communications from prescribed communications providers in foreign countries with which Australia has a designated international agreement.

The Ombudsman may inspect the records of law enforcement agencies to determine the extent of compliance with the IPO schedule. The Ombudsman may also inspect the records of the Australian Designated Authority's (ADA) to determine compliance with the IPO Schedule. The ADA reviews international production orders for compliance with the relevant international agreement. The Ombudsman must give the Minister an annual report about the results of those inspections.

### Industry Assistance – Part 15 of the Telecommunications Act 1997

The industry assistance powers are to request, and in limited circumstances, compel telecommunications and internet service providers to provide technical assistance.

Under Part 15 of the *Telecommunications Act 1997* (Telecommunications Act), interception agencies must notify the Ombudsman if they issue voluntary and mandatory industry assistance requests and notices. The Ombudsman *may* inspect the records of an interception agency to determine the extent of their compliance with Part 15 of the Telecommunications Act. The Ombudsman *may* report to the Minister for Home Affairs on inspection results, who must then table the report in Parliament.

### Australian Building and Construction Commission - *Building & Construction Industry (Improving Productivity) Act 2016*

Under the *Building and Construction Industry (Improving Productivity) Act 2016* (the BCIP Act), the Australian Building and Construction Commissioner (the Commissioner) may apply to a nominated Administrative Appeals Tribunal (AAT) presidential member for an examination notice under s 61B of the BCIP Act, requiring a person to provide information or documents or attend to answer questions relevant to an investigation of a suspected contravention of the BCIP Act or a designated building law by a building industry participant.

Under s 64 of the BCIP Act, the Commissioner is required to notify the Ombudsman as soon as practicable after an examination notice is issued and provide copies of relevant documents.

Under s 65(3) of the BCIP Act, the Ombudsman must review how the Commissioner and any person assisting the Commissioner exercised examination notice powers under the BCIP Act.

Under s 65(6) of the BCIP Act, the Ombudsman must report to Parliament as soon as practicable after the end of each quarter of each financial year about examinations conducted by the Commissioner and reviews conducted by the Ombudsman during that quarter.

### Fair Work Ombudsman - s 712F(3) of the Fair Work Act 2009

Under s 712AA(1) of the *Fair Work Act 2009* (the Fair Work Act), the Fair Work Ombudsman (FWO) can apply to the Administrative Appeals Tribunal for an FWO notice if they reasonably believe a person or business has information or documents that will assist an investigation. A FWO notice may require persons to give information or produce documents, or attend and answer questions relevant to an investigation.

Under s 712F(3) of the Fair Work Act, the Ombudsman must review the exercise of FWO notice powers by the FWO and any member of the staff of the Office of the FWO.

Under s 712F(6) of the Fair Work Act, as soon as practicable after the end of each quarter of the financial year, the Ombudsman must prepare and present to the Parliament a report about examinations conducted during that quarter. The report must include the results of reviews conducted during that quarter.

## Overview of inspection process

Our inspections assess the extent of an agency's compliance with the legislative requirements when using these powers. We do this by assessing the extent to which agencies can demonstrate they have met the relevant legislative requirements.

In addition to agencies' practical compliance we also consider their organisational culture regarding compliance. We often find that a good compliance culture results in greater levels of practical compliance.

### Ombudsman's powers

For each regime the Ombudsman has coercive information gathering powers under the relevant legislation. This includes the power to require an officer to give relevant information and attend before a specified inspecting officer to answer questions relevant to the inspection.

The Ombudsman must also be given information and access to information despite any other law – penalty provisions apply to a breach of such a request, for example, imprisonment for 6 months.

The Office relies on strong stakeholder relationships in conducting inspections and rarely has cause to engage its coercive powers.

### How we conduct inspections

Our inspections and reviews are conducted retrospectively to avoid any risk of jeopardising an ongoing investigation or operation.

Prior to an inspection we obtain a list of all relevant records for a particular period and inspect a sample of those records, focusing on areas of highest risk. We identify risks based on our previous experience of agencies, as well as themes that may arise across agencies. There is often a higher risk when new powers are introduced and new or existing agencies apply powers for the first time.

We encourage agencies to proactively identify and disclose compliance issues to our Office. We clarify issues with an agency as they are identified throughout an inspection, speak with relevant agency officers to understand agency policies and processes and provide our preliminary inspection findings at the close of an inspection, to enable immediate remedial action where necessary.

We have developed a set of inspection methodologies that are applied consistently across all agencies within a regime. These methodologies are based on legislative requirements and best-practice standards in auditing.

The legislation is very clear about the scope of the Ombudsman's role, therefore we do not assess or comment on:

- any operational decisions
- the effectiveness of the use of such powers
- a Judge's or Administrative Appeals Tribunal Member's decision to issue a warrant.

## Administrative and logistical management of inspections

A summary of some of the administrative and logistical aspects of our inspections is set out in the table below.

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| <b>Notification process</b>                           | The Office's inspection powers are subject to the Ombudsman giving reasonable notice to the chief officer of an agency about when the inspection will occur. The Ombudsman cannot conduct unannounced inspections.   |
| <b>May/June each year</b>                             | The Ombudsman sends a notification letter to the chief officer of each agency to be inspected: <ul style="list-style-type: none"> <li>- drawing on powers to enter premises, inspect records, request information</li> <li>- providing broad inspection criteria to ensure the efficiency of the inspection.</li> </ul>  |
| <b>Approximately 4 weeks prior to each inspection</b> | The Office requests statistics from agencies, regarding the number of warrants/authorisations/authorities/orders, for sampling processes. There is no requirement for agencies to advise our Office of such statistics outside of this process.  |
| <b>Inspection</b>                                     | <p>At the beginning of each inspection we hold an opening meeting to:</p> <ul style="list-style-type: none"> <li>- explain objective and scope of inspection</li> <li>- follow up on previous issues</li> <li>- discuss changes to legislation and internal policies and procedures</li> <li>- allow agencies the opportunity to voluntarily disclose any issues.</li> </ul> <p>In the course of the inspection, we:</p> <ul style="list-style-type: none"> <li>- inspect records and systems</li> <li>- hold interviews with relevant staff and observe relevant systems and processes as necessary.</li> </ul> <p>At the conclusion of each inspection we hold an exit meeting to discuss preliminary inspection findings and enable agencies to take immediate remedial action.</p> |
| <b>Post-inspection at the Office</b>                  | <p>Issues that could not be resolved at the inspection due to time constraints are followed up post-inspection and the agency can provide additional information (where appropriate).</p> <p>Feedback and assessment is provided on an agency's guidance documents and policies, as necessary.</p>   |

## Inspection Reports

After an inspection the Office prepares a report of our inspection findings and provides it to the agency for comment. Agency comments are considered and, if appropriate, incorporated into the report.

All internal inspection reports inform the Ombudsman's statutory reports, that are either prepared on a quarterly, bi-annual or annual basis.

As set out in the overview of the powers subject to Ombudsman inspection, some statutory reports are tabled in Parliament and some are summarised to be included in the Minister's own annual report.

## Additional law enforcement oversight

### Reviewing the AFP's administration of complaint handling

Part V of the *Australian Federal Police Act 1979* prescribes the process for recording and handling conduct and practices issues relating to the AFP. The Ombudsman must inspect the records of the AFP at least once per year, for the purpose of reviewing the AFP's administration of Part V.

The Ombudsman must prepare an annual report on any reviews conducted during the period and provide the report to the Speaker of the House and the President of the Senate for tabling in each House.

### Oversight as the ACT Ombudsman

In the Office's capacity as the ACT Ombudsman, we also provide oversight of agencies' compliance with the *Crimes (Controlled Operations) Act 2008* (ACT), the *Crimes (Surveillance Devices) Act 2010* (ACT), the *Crimes (Assumed Identities) Act 2009* (ACT), and Part 3.11 and Chapter 4 of the *Crimes (Child Sex Offenders) Act 2005* (ACT). The results of our inspections are included in the ACT Ombudsman Annual Report.<sup>5</sup>

Please note: This document is intended as a guide only. For this reason, the information should not be relied on as legal advice or regarded as a substitute for legal advice in individual cases. To the maximum extent permitted by the law, the Commonwealth Ombudsman is not liable to you for any loss or damage suffered as a result of reliance on this document. For the most up-to-date versions of cited Acts, please refer to the Federal Register of Legislation.

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<sup>5</sup> [Annual reports - ACT Ombudsman.](#)  
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