

**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 2011**

AUSTRALIAN CRIME COMMISSION

Records from 1 July to 31 December 2010

AUSTRALIAN FEDERAL POLICE

Records from 1 July to 31 December 2010

VICTORIA POLICE SPECIAL PROJECTS UNIT

Records from 1 July 2010 to 30 June 2011

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. The Act also establishes procedures 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 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, police forces of each State and Territory, such as the Victoria Police and other specified State and Territory law enforcement agencies.

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), so typically there will be some delay between the date of inspection and the report to the Attorney-General.

Below is a summary of the inspections to which this report relates.

Table 1. Inspections finalised between 1 July and 31 December 2011

Agency	Records covered by the inspection period	Dates of inspection	Report to the agency completed
ACC	1 July to 31 December 2010	31 January to 2 February 2011	22 August 2011
AFP	1 July to 31 December 2010	4 April to 8 April 2011	5 September 2011
Victoria Police Special Projects Unit	1 July 2010 to 30 June 2011	9 August 2011	14 November 2011

Detailed internal reports on the results of each inspection were provided to the relevant agency. This report summarises the results of these inspections, outlining any significant compliance and administrative issues.

INSPECTIONS OF SURVEILLANCE DEVICE RECORDS

All records held by an agency that relate 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 the inspections to those warrants and authorisations that had expired or were revoked during the inspection period.

We appreciate the continued cooperation we receive from agencies during inspections and their constructive responses to address the issues we identify. The importance agencies place on compliance with the Act is also recognised.

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?

SUMMARY OF AGENCY COMPLIANCE AND IMPROVEMENTS

The inspections found the ACC, the AFP and the Victoria Police Special Projects Unit compliant with the Act. The agencies displayed a strong culture of compliance and a high standard of record keeping. The issues identified were relatively minor and generally able to be remedied through improved record keeping processes and providing guidance to agency staff.

We noted a significant improvement in the ACC's and AFP's record keeping to demonstrate compliance with warrants. This was an issue raised in the previous report to the Attorney-General and is further discussed below.

Section 18(1)(c) of the Act states that a surveillance device warrant may authorise the use of a surveillance device in respect of the conversations,

activities or location of a specified person or a person whose identity is unknown. A warrant of this type is colloquially known as a 'person' warrant.

Section 18(2)(c)(i) of the Act states that a 'person warrant' authorises the installation, use and maintenance of devices on premises where the person is reasonably believed to be or likely to be. To allow operational flexibility, there is no requirement in the Act for a 'person warrant' to detail such premises. However, this does not provide agencies with the authority to install surveillance devices under a 'person warrant' on any premises – the premises, as s 18(2)(c)(i) requires, must be where the person is reasonably believed to be or likely to be. Therefore, where surveillance devices have been installed on premises under a 'person warrant', we would expect to see information relating to the use of these devices that connect the premises to the person named in the warrant.

It was noted in the previous report to the Attorney-General that both the ACC and the AFP updated their procedures to require sufficient information to be recorded in relation to person warrants to establish a link between the person named on the warrant and the premises where the device or devices were installed. The effectiveness of these measures was assessed during this reporting period and the results are provided for each agency.

AUSTRALIAN CRIME COMMISSION

Inspection results

The inspection of ACC surveillance device records was conducted from 31 January to 2 February 2011. The inspection examined surveillance device warrants and authorisations (and associated records) that expired during the period 1 July to 31 December 2010. A report of this inspection was provided to the ACC on 22 August 2011.

Based on the examination of 25 warrants and authorisations (a 45% sample), the ACC was assessed as compliant with the Act.

We identified a minor issue relating to tracking device authorisation record keeping, which the ACC advised has been remedied by updating its template for tracking device authorisations. We will report on the effectiveness of this measure in our next report.

No recommendations were made as a result of the inspection.

Improvements

In the previous report to the Attorney-General, we could not provide a compliance assessment against s 18(2)(c)(i) for 26% of the ACC's 'person warrants' that were inspected due to insufficient records. During this reporting period, the ACC provided sufficient information to demonstrate compliance with s 18(2)(c)(i) for 100% of the 'person warrants' that were inspected.

The 'Summary of Agency Compliance and Improvements' on page 2 of this report provides details on the nature of 'person warrants' and the information which was required.

We commend the ACC's continued commitment towards implementing procedures and 'best practices' to ensure compliance with the Act.

AUSTRALIAN FEDERAL POLICE

Inspection results

The inspection of AFP surveillance device records was conducted from 4 to 8 April 2011. The inspection examined surveillance device warrants and authorisations (and associated records) that expired during the period 1 July to 31 December 2010. A report of this inspection was provided to the AFP on 5 September 2011.

Based on the examination of 58 warrants and authorisations (a 26% sample), the AFP was assessed as compliant with the Act.

The AFP self-disclosed some issues relating to its use and retrieval of tracking devices outside the period of authorisation. This matter is discussed further under 'Issues arising from the inspection'.

No recommendations were made as a result of the inspection.

Improvements

In the previous report to the Attorney-General, we could not provide a compliance assessment against s 18(2)(c)(i) for 44% of the AFP's 'person warrants' that were inspected due to insufficient records. During this reporting period, the AFP provided sufficient information to demonstrate compliance with s 18(2)(c)(i) for 95% of the 'person warrants' that were inspected.

The 'Summary of Agency Compliance and Improvements' on page 2 of this report provides details on the nature of 'person warrants' and the information which was required.

Issues arising from the inspection

Use and retrieval of tracking device outside the period of authorisation

Under s 39 of the Act, a law enforcement officer may, with the written permission of an appropriate authorising officer, use a tracking device without a warrant in the investigation of a relevant offence. A law enforcement officer may also, with the written permission of an appropriate authorising officer, retrieve a tracking device to which the tracking device authorisation relates. Such written permission, known as a tracking device authorisation, may remain in force for a period not exceeding 90 days.

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For one tracking device authorisation, the AFP self-disclosed that the device was used two and half hours prior to the issuing of the authorisation and was retrieved after 90 days, when the authorisation had expired. For another two tracking device authorisations, the AFP self-disclosed that the tracking devices were retrieved after 90 days, when their respective authorisations had expired.

The use and retrieval of the above tracking devices were not compliant with s 39, as these actions took place outside of the 90 day authorisation period. In regards to the retrieval of tracking devices, under s 39, a law enforcement officer may apply for an authorisation to retrieve a tracking device. These provisions should have been applied to ensure the lawful retrieval of the devices.

The AFP advised that since the inspection, it had revised its guidelines to provide AFP members with clear guidance on the use and retrieval of surveillance devices and reporting requirements under the Act. We commend the AFP for promptly identifying these issues and taking steps to prevent them from recurring.

VICTORIA POLICE SPECIAL PROJECTS UNIT

Inspection results

The inspection of the Victoria Police Special Projects Unit's surveillance device records was conducted on 9 August 2011. The inspection examined one surveillance device warrant (and associated records) that expired during the period 1 July 2010 to 30 June 2011. A report of this inspection was provided to the Victoria Police on 14 November 2011.

This was the first time the Ombudsman had inspected the surveillance device records of the Special Projects Unit of the Victoria Police (the Ombudsman has previously inspected the surveillance device records of the Ethical Standards Department of the Victoria Police).

The Victoria Police was assessed as compliant with the Act. No issues were identified and no recommendations were made as a result of the inspection.

We commend the Victoria Police Special Project Unit's positive attitude towards compliance.

Alison Larkins
A/g Commonwealth Ombudsman