

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



The below information sets out how the Commonwealth Ombudsman oversees Commonwealth, State and Territory law enforcement and integrity agencies' use of covert, intrusive and coercive powers.

## Role of the Ombudsman

The role 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 covert, intrusive and coercive powers

## Overview of the legislation

The Ombudsman oversees Commonwealth, State and Territory law enforcement and integrity agencies' use of the following covert, intrusive and coercive powers:

<p><i>Crimes Act 1914</i> – controlled operations, delayed notification search warrants, monitoring of compliance with control or supervision orders, account takeover warrants</p>	<p><i>Telecommunications (Interception and Access) Act 1979</i> – telecommunications interception, stored communications, telecommunications data, international production orders</p>	
<p>Part 15 <i>Telecommunications Act 1997</i> – Industry technical assistance to agencies</p>	<p>Compulsory examination powers of the Fair Work Ombudsman</p>	<p><i>Surveillance Devices Act 2004</i> – surveillance device powers, access to computers, data disruption warrants</p>

We carry out our oversight through:

- inspecting agency records, systems, training and governance material
- interviewing staff
- observing and assessing processes and practices
- providing reports to agencies, including making recommendations, suggestions and comments
- preparing statutory reports on our inspection findings which are tabled in Parliament and made public

A person is often unaware they are subject to the use of these powers and cannot make a complaint about or question an agency's actions. Due to the nature of the intrusive or coercive powers we oversee, a person subject to these powers has limited rights in relation to their use. In assessing and reporting on an agency's compliance in using these powers, our Office aims to provide assurance to the public that agencies are using these powers in accordance with legislation.

**Attachment A** sets out further detail on the powers we oversee and the agencies we inspect. **Attachment B** provides further information on our processes for inspections and reporting.

## Attachment A – The powers we oversee and agencies we inspect

Power	Legislation	Agency subject to the inspection
<p><b>Controlled operations</b></p> <p>A controlled operation is a covert operation carried out by law enforcement officers under Part IAB of the <i>Crimes Act 1914</i> (the Crimes Act). This is carried out to obtain evidence that may lead to the prosecution of a person for a relevant offence or be used in an integrity investigation. A controlled operation provides legal protection for authorised law enforcement and civilian participants who engage in certain conduct in the course of the operation that would otherwise be unlawful or lead to civil liability.</p> <p>Our Office must inspect the records of the AFP, ACIC, and NACC to determine the agencies' compliance with Part IAB of the Crimes Act. Our Office also inspects the ACIC's use of corresponding State controlled operations laws unless the corresponding State law provides for inspections.</p> <p>Our Office must produce an annual report on the results of controlled operations inspections in the preceding 12 months. The annual report must also include comments on the comprehensiveness and adequacy of the statutory reports prepared by the agencies subject to our oversight.</p> <p>The Ombudsman briefs the Parliamentary Joint Committee on Law Enforcement as part of that committee's annual reviews of the use of controlled operations by the AFP and ACIC. The Ombudsman also briefs the Parliamentary Joint Committees on the National Anti-Corruption Commission in relation to the NACC, as required.</p>	<p><i>Crimes Act 1914</i> – Part IAB</p>	<p>Australian Federal Police (AFP)</p> <p>Australian Criminal Intelligence Commission (ACIC)</p> <p>National Anti-Corruption Commission (NACC)</p>

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<p><b>Delayed notification search warrants</b></p> <p>Delayed notification search warrants are available to the AFP for the purpose of investigating a terrorism offence punishable by imprisonment for 7 years or more. These warrants allow the AFP to conduct a search of a premises covertly and notify the occupier of the premises at a later date.</p> <p>Our Office inspects the AFP’s records at least once every 6 months to determine compliance in using delayed notification search warrants. We prepare statutory reports on these inspections every 6 months. These reports are provided to the Attorney-General to be tabled in Parliament and made public.</p>	<p><i>Crimes Act 1914 – Part IAAB</i></p>	<p>AFP</p>
<p><b>Monitoring of compliance with control and supervision orders</b></p> <p>The Ombudsman is responsible for oversight of monitoring powers under Part IAAB of the Crimes Act.</p> <p>Monitoring powers are search and seizure powers available to the AFP in relation to persons who are subject to Part 5.3 Supervisory Orders (i.e., control orders or supervision orders found under Part 5.3 of the <i>Criminal Code Act 1995</i>).</p> <p>Our Office may inspect the AFP’s records to determine compliance in using monitoring powers. We prepare an annual report which summarises our inspection findings. This report is provided to the Attorney-General and forms part of the Attorney-General’s report under s 104.29 of the <i>Criminal Code Act 1995</i>, which is tabled in Parliament and made public.</p>	<p><i>Crimes Act 1914 – Part IAAB</i></p>	<p>AFP</p>
<p><b>Account takeover warrants</b></p>	<p><i>Crimes Act 1914 – Part IAAC</i></p>	<p>AFP ACIC</p>

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Power	Legislation	Agency subject to the inspection
<p>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.</p> <p>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 Attorney-General, who must then table the report in Parliament.</p>		
<p><b>Industry technical assistance to agencies</b></p> <p>The industry assistance powers enable interception agencies to request and, in limited circumstances, compel designated communications providers to provide technical assistance.</p> <p>Under Part 15 of the <i>Telecommunications Act 1997</i> (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 also provide a report on inspections in the relevant period to the Attorney-General, who must then table the report in Parliament.</p>	<p><i>Telecommunications Act 1997 – Part 15</i></p>	<p>All State/Northern Territory police AFP ACIC NACC</p>
<p><b>Surveillance powers</b></p> <p>A surveillance device is a data surveillance device, a listening device, an optical surveillance device, a tracking device or a</p>	<p><i>Surveillance Devices Act 2004</i></p>	<p>All State/Territory police ACIC AFP Corruption &amp;</p>

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<p>device that is a combination of such devices.</p> <p>The Ombudsman must inspect the records of law enforcement agencies to determine the extent of their compliance with the <i>Surveillance Devices Act 2004</i> (SD Act). This includes surveillance device warrants, warrantless surveillance, tracking device authorisations and computer access warrants. Computer access warrants enable law enforcement agencies to covertly access and search devices such as laptops, tablets, mobile phones and USBs. Agencies are required to notify the Ombudsman about particular actions taken in respect of computer access warrants.</p> <p>The Ombudsman must report to the Attorney-General at 6 monthly intervals on the results of each inspection under the SD Act, who must then table the report in Parliament.</p>		<p>Crime Commission (WACCC) (WA)            Crime &amp; Corruption Commission (QCCC) (QLD)            Law Enforcement Conduct Commission (LECC) (NSW)            NSW Crime Commission            Independent Commission Against Corruption (ICAC) (NSW)            Independent Commission Against Corruption (ICAC) (SA)            Independent Broad-based Anti-corruption Commission (IBAC)            NACC</p>
<p><b>Data disruption warrants</b></p> <p>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 a relevant offence.</p> <p>The SD Act provides for law enforcement agencies to make an application to an eligible Judge or nominated AAT member for data disruption warrants, a similar process to obtaining a surveillance device warrant.</p>	<p><i>Surveillance Devices Act 2004</i></p>	<p>AFP            ACIC</p>

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<p>Agencies are required to notify the Ombudsman about particular actions taken in respect of data disruption warrants.</p> <p>The Ombudsman must inspect the records of agencies to determine the extent of their compliance with legislative requirements for data disruption warrants. The Ombudsman must report to the Attorney-General at 6 monthly intervals on the results of each inspection under the SD Act, who must then table the report in Parliament.</p>		
<p><b>Telecommunications interception</b></p> <p>Telecommunications interception is listening or recording information passing over telecommunications systems, in real time without the knowledge of the person making the communication.</p> <p>Chapter 2 of the <i>Telecommunications (Interception and Access) Act 1979</i> (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 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 Attorney-General, who is then required to include a summary of the report in their annual report.</p>	<p><i>Telecommunications (Interception and Access) Act 1979</i> – Chapter 2</p>	<p>AFP ACIC NACC</p>

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<p><b>Stored communications</b></p> <p>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.</p> <p>Chapter 3 of the TIA Act provides the legislative framework under which criminal law enforcement agencies may 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 inspects law enforcement agencies' compliance with Chapter 3 of the TIA Act and reports annually to the Attorney-General, who tables the report in Parliament.</p>	<p><i>Telecommunications (Interception and Access) Act 1979</i> – Chapter 3</p>	<p>All State/Northern Territory police ACIC Australian Competition and Consumer Commission (ACCC) AFP Australian Securities and Investment Commission (ASIC) WACCC (WA) QCCC (QLD) Department of Home Affairs IBAC LECC (NSW) NSW Crime Commission ICAC (NSW) ICAC (SA) NACC NSW Corrective Service</p>
<p><b>Telecommunications data</b></p> <p>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.</p> <p>Chapter 4 of the TIA Act provides the legislative framework for access to telecommunications data. Under Chapter 4A of the TIA Act, the Ombudsman must inspect enforcement agencies' compliance with Chapter 4 of the TIA Act and report annually to the Attorney-General, who must table the report in</p>	<p><i>Telecommunications (Interception and Access) Act 1979</i> – Chapter 4</p>	

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Power	Legislation	Agency subject to the inspection
<p>Parliament.</p> <p>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 Attorney-General must also provide a copy of the report to the Parliamentary Joint Committee on Intelligence and Security.</p>		
<p><b>International production orders</b></p> <p>Schedule 1 to the TIA Act provides the international production order frameworks, allowing 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.</p> <p>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 (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 Attorney-General an annual report about the results of those inspections.</p>	<p><i>Telecommunications (Interception and Access) Act 1979</i> – Schedule 1</p>	<p>Australian Designated Authority (AGD) All State/Northern Territory police ACIC ACCC NACC AFP ASIC WACC (WA) Crime &amp; Corruption Commission (QLD) Department of Home Affairs IBAC LECC (NSW) NSW Crime Commission ICAC (NSW) ICAC (SA)</p>
<p><b>Fair Work Ombudsman examinations</b></p> <p>Under the <i>Fair Work Act 2009</i> (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</p>	<p><i>Fair Work Act 2009</i> – s 712F(6)</p>	<p>Fair Work Ombudsman</p>

Power	Legislation	Agency subject to the inspection
<p>business has information or documents that will assist an investigation. A FWO notice may require a person to give information or produce documents or attend and answer questions relevant to an investigation.</p> <p>Under the Fair Work Act, the Ombudsman must review the exercise of FWO notice powers by the FWO and any FWO staff member. As soon as practicable after the end of each <u>quarter</u> of the financial year, the <u>Ombudsman</u> must prepare and present to the Parliament a report about examinations <u>conducted</u> during that <u>quarter</u>. The report must include the results of reviews <u>conducted</u> during that <u>quarter</u>.</p>		

## Additional law enforcement oversight

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

Part V of the *Australian Federal Police Act 1979* (Part V) 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.

# Attachment B – Overview of inspection process

The aim of our inspections is to determine the extent of an agency's compliance with the legislative requirements when using powers subject to our oversight. We do this by assessing an agency's records, systems, policies, and procedures that demonstrate whether relevant legislative requirements have been met.

Additionally, we also consider an agency's organisational culture and whether this supports compliant use of powers. We often find that a good compliance culture results in greater levels of practical compliance.

We apply a risk-based approach to our oversight activities to provide more efficient and meaningful assurance. This approach assists us to ensure agencies:

- lawfully use the powers they need to complete their work.
- provide assurance to our Office and Parliament that these powers are being used appropriately.
- have increased opportunity to provide operational context and information to inform our oversight.

## Ombudsman's powers

For each of the above oversight regimes, the Ombudsman has coercive information gathering powers. These include 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.

Notwithstanding the powers available to our Office, we typically rely on strong stakeholder relationships in conducting inspections and rarely have cause to engage our coercive powers.

## How we conduct inspections

Our inspections and reviews of operational activity are generally conducted retrospectively to minimise risks to ongoing investigations or operations, though this is not necessarily always the case.

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Prior to an inspection, we obtain key information about use of powers in a particular period to inform our approach to the inspection. Where there is a high volume of power usage, we inspect a targeted selection of records, focusing on areas of highest risk. We identify risks based on our knowledge of specific agency practices, as well as broader themes that may arise across agencies.

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 staff to understand agency policies and processes, and discuss our preliminary findings at the close of an inspection – called an ‘exit meeting’ – to enable immediate remedial action where necessary.

We have developed inspection methodologies that are applied across all agencies within a regime. These methodologies are based on legislative requirements and our Office’s cumulative experience in exercising oversight.

We do not assess or comment on the merits of an external issuing authority’s decision to issue or refuse a warrant, order, or authority, although we may comment on whether the agency’s decision to apply for the warrant was reasonable, proportionate, and necessary.

# Administrative and logistical management of inspections

<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 is not entitled to conduct unannounced inspections.
<b>Mid-year</b>	<p>The Ombudsman sends a notification letter to the chief officer of each agency to be inspected:</p> <ul style="list-style-type: none"> <li>• citing our Office's powers to enter premises, inspect records, request information, and</li> <li>• providing formal criteria as terms of reference for the assessments undertaken during the inspection.</li> </ul>
<b>Pre-Inspection</b>	The Office requests information from agencies regarding use of powers in the relevant period (known as the 'records period'). This information enables our Office to conduct preliminary analysis and informs our approach to the inspection.
<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 the objective and scope of the 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>During the inspection, we:</p> <ul style="list-style-type: none"> <li>• inspect records and systems.</li> <li>• review policy, procedural and guidance documents.</li> <li>• hold interviews with relevant staff and observe</li> </ul>

	<p>relevant systems and processes, as necessary.</p> <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 if required.</p>
<b>Post-inspection</b>	<p>Occasionally, an issue that cannot be resolved during the inspection, despite good faith effort from our Office and the agency, can be taken on notice and is followed up in a limited and predetermined ‘post-inspection’ period. Within this period, the agency can provide additional information to assist in clarifying or resolving the issue.</p>
<b>Ad hoc engagement</b>	<p>In addition to our statutory inspections, our Office encourages out-of-cycle engagement on compliance-related matters concerning the powers we oversight.</p> <p>We regularly provide feedback on policy, systems, and training development. Proactive engagement with our Office on relevant compliance matters is an indication of an agency’s compliance culture and can assist in mitigating compliance risks with new systems and practices.</p>

## Inspection Reports

After an inspection, our Office prepares a report on our inspection findings and provides it to the agency for comment. Agency comments are considered and, if appropriate, incorporated into our relevant statutory reports. Agencies are asked whether they accept or do not accept any recommendations or suggestions made by our Office.

Some statutory reports are tabled in Parliament, and some are summarised to be included in the relevant Minister’s own annual report.