

CHAPTER 2

REPORTS ON THE OPERATION OF ACTS AND PROGRAMS

2.1 Standing Order 25(20) does not provide for the consideration of reports on the implementation or operation of acts or programs. The committee is not, therefore, required to include them in its report on the examination of annual reports. However, as on previous occasions, the committee has chosen to examine such reports, specifically the:

- *Surveillance Devices Act 2004* report for the year ending 30 June 2012; and
- Annual report on the Commonwealth Ombudsman's activities under Part V of the *Australian Federal Police Act 1979* for the period 1 July 2011 to 30 June 2012 (published by the Commonwealth Ombudsman).

Report on the operation of the *Surveillance Devices Act 2004*

2.2 The report on the operation of the *Surveillance Devices Act 2004* (SD Act) was tabled in the House of Representatives on 29 November 2012 and in the Senate on 5 February 2013. The report was presented to the minister on 4 October 2012, just outside the SD Act's legislative provisions. Under section 50(3) of the SD Act:

The report must be submitted to the Minister as soon as practicable after the end of each financial year, and in any event within 3 months after the end of the financial year.

2.3 The report relates to the period from 1 July 2011 to 30 June 2012. During this reporting period, some important legislative and policy developments took place in relation to the SD Act. Following reforms to the *Extradition and Mutual Assistance in Criminal Matters Legislation Amendment Act 2012*, which is a formal assistance process between countries to assist one another in their investigation and prosecution of criminal offences, the SD Act provides authorisation for the use of a surveillance device to be used for foreign law enforcement purposes. A foreign government can request the use of a surveillance device in another country's jurisdiction and arrange for the information obtained to be sent to that foreign country. This is a reciprocal arrangement, which also enables the Australian government to request a foreign government to authorise the use of a surveillance device in that jurisdiction and arrange for the information to be sent to Australia.¹ Authorisation for the use of a device is granted following a foreign government's request for mutual assistance and approval by the Attorney-General.² The use of surveillance devices was previously restricted to domestic purposes, but these amendments mean surveillance devices can

1 Attorney-General's Department (AGD), *Surveillance Devices Act 2004 Report for the year ending 30 June 2012*, p. 8.

2 AGD, *Surveillance Devices Act 2004 Report for the year ending 30 June 2012*, p. 8.

be authorised for foreign law enforcement purposes, but only where their use could already be authorised for a domestic purpose.³

2.4 Other relevant developments in relation to the SD Act in 2011–12 included an increase (of 9.2%) in surveillance device warrants issued, with three more agencies using the investigative tool.⁴ While the Australian Federal Police (AFP) reported a 22.2% increase in obtaining surveillance device warrants from the preceding period (up from 406 in 2010–2011 to 496 in 2011–12), this contrasted with the Australian Crime Commission's (ACC) decrease of 26.8% in the same reporting period (131 warrants obtained in 2011–12 compared to 179 warrants obtained in 2010–11).⁵

2.5 Information in relation to the number of warrants obtained at the state and territory level was not available as state and territory law enforcement agencies generally rely on their own legislative regimes for the use of surveillance devices, although they are able to make use of the SD Act when dealing with a Commonwealth matter or during a joint operation.⁶

2.6 There were no significant judicial decisions under the SD Act during the reporting period.⁷

2.7 Pursuant to paragraph 50(1)(a) of the SD Act, the annual report must provide information on the number of applications for warrants made and the number of warrants issued for the reporting period. Under subsection 50(2), the SD Act also requires the report to provide a breakdown of these numbers in respect of each different kind of surveillance device.⁸

2.8 For 2011–12 there was an approximate 9.1% increase in the number of warrants issued (642 warrants issued) compared to the preceding period (588 warrants issued).⁹

2.9 The report notes that section 10 of the SD Act allows a surveillance device warrant to cover more than one surveillance device or more than one kind of surveillance device. It could also be issued for composite devices, meaning devices that may have more than one function. For example, a warrant could authorise the use of separate listening and tracking devices for a vehicle or a composite device containing both listening and tracking functions.¹⁰

2.10 Section 15 of the SD Act provides for remote application for a warrant. A remote warrant could be made by telephone, fax, email or other means of

3 AGD, *Surveillance Devices Act 2004 Report for the year ending 30 June 2012*, p. 8.

4 AGD, *Surveillance Devices Act 2004 Report for the year ending 30 June 2012*, p. 8.

5 AGD, *Surveillance Devices Act 2004 Report for the year ending 30 June 2012*, p. 8.

6 AGD, *Surveillance Devices Act 2004 Report for the year ending 30 June 2012*, p. 8.

7 AGD, *Surveillance Devices Act 2004 Report for the year ending 30 June 2012*, p. 8.

8 AGD, *Surveillance Devices Act 2004 Report for the year ending 30 June 2012*, pp 9–11.

9 AGD, *Surveillance Devices Act 2004 Report for the year ending 30 June 2012*, p. 10.

10 AGD, *Surveillance Devices Act 2004 Report for the year ending 30 June 2012*, p. 10.

communication if it is impracticable for the law enforcement to apply in person. There were no remote applications during the reporting period.¹¹

2.11 Section 50 requires the inclusion of information which is, for the committee's purpose, indicative of the SD Act's effective use, such as: the number of arrests; prosecutions and convictions; as well as 'the number of locations and safe recoveries of children', based on information obtained using surveillance devices.¹²

2.12 The table below shows the number of arrests, prosecutions and convictions for 2011–12. The figures in brackets refer to the preceding reporting period 2010–11. During the reporting period there was an increase in arrests, prosecutions and convictions.¹³

AGENCY	Arrests	Safe Recovery	Prosecutions	Convictions
ACC	(30) 25	-	(4)	(4)
AFP	(47) 112	-	(50) 125	(10) 25
Victoria Police	(5) 2	-	-	-
CCC	-	-	-	(1 ¹⁴)
Total	(82 ¹⁵) 139	-	(54) 125	(15) 25

2.13 The report notes that information regarding arrests, prosecutions (inclusive of committal proceedings) and convictions should be interpreted with caution, especially in presuming a relationship between them. An arrest in one reporting period might not lead to a prosecution in a later reporting period (if at all), likewise a conviction in one reporting period could be recorded in another period. Further, there is no correlation between the number of charges and arrests as an arrest could lead to conviction for multiple offences. Also, in situations where the weight of evidence obtained from surveillance devices is sufficient for defendants to enter guilty pleas, it may not be necessary for surveillance information to be introduced as evidence.¹⁶

11 AGD, *Surveillance Devices Act 2004 Report for the year ending 30 June 2012*, p. 12.

12 AGD, *Surveillance Devices Act 2004 Report for the year ending 30 June 2012*, p. 14.

13 Adapted from: AGD, *Surveillance Devices Act 2004 Report for the year ending 30 June 2012*, p. 15.

14 This conviction is the result of a warrant and extensions granted during 2008–09.

15 AGD, *Surveillance Devices Act 2004 Report for the year ending 30 June 2011*, p. 15. The total figure in the report was 77; however, adding the figures in the table equals 82.

16 AGD, *Surveillance Devices Act 2004 Report for the year ending 30 June 2012*, p. 15.

Annual report on the Commonwealth Ombudsman's activities under Part V of the Australian Federal Police Act 1979

2.14 The *Annual report on the Commonwealth Ombudsman's activities under Part V of the Australian Federal Police Act 1979 for the period 1 Jul 2011 to 30 June 2012* was tabled in the House of Representatives on 28 November 2012 and in the Senate on the 29 November 2012.

2.15 Part V of the *Australian Federal Police Act 1979* (AFP Act) confers to the Ombudsman oversight responsibilities in respect of the way that the AFP handles complaints about it and its members.¹⁷

2.16 Pursuant to subsections 40XA and 40XD of the AFP Act, the Ombudsman conducts annual reports and reviews of AFP complaint-handling procedures and processes by undertaking an inspection of records. For the 2011–12 financial year, the Ombudsman conducted a two-part review inspection at the offices of both the AFP and the Ombudsman (using the AFP terminal AFPNet¹⁸). The review covered all AFP complaint issues closed in the review period, 1 September 2010 to 31 December 2011.¹⁹

2.17 Part one of the review conducted by the Ombudsman covered complaints closed during the period 1 September 2010 to 31 August 2011 and part two covered complaints closed during 1 September 2011 to 31 December 2011. The rationale behind conducting a two-part review was to enable the Ombudsman to examine whether reforms to AFP Professional Standards (PRS) processes have improved its complaint handling, with the expectation that part two would exhibit an improvement in timeliness.²⁰ The review examined 1275 complaints closed within the review period covering 2797 complaint issues²¹ (857 cases in part one covering 1927 complaint issues and in part two, 418 complaints covering 870 complaint issues).²² The review examined 132 complaints in detail (92 complaints from part one and 40 complaints

17 *Annual report on the Commonwealth Ombudsman's activities under Part V of the Australian Federal Police Act 1979 for the period 1 July 2011 to 30 June 2012*, p. 1.

18 The AFPNet is a system that was installed in 2012 which allows the Ombudsman's office direct access to AFP complaint information.

19 *Annual report on the Commonwealth Ombudsman's activities under Part V of the Australian Federal Police Act 1979 for the period 1 July 2011 to 30 June 2012*, p. 8

20 *Annual report on the Commonwealth Ombudsman's activities under Part V of the Australian Federal Police Act 1979 for the period 1 July 2011 to 30 June 2012*, p. 1.

21 A complaint may have multiple issues that need to be investigated, such as a complaint about multiple AFP officers involved in one incident. One incident may also involve a complaint about multiple issues, for example, excessive use of force, discourtesy and warrant administration.

22 *Annual report on the Commonwealth Ombudsman's activities under Part V of the Australian Federal Police Act 1979 for the period 1 July 2011 to 30 June 2012*, pp 1–2 and 9.

from part two) and selected 16 complaints as case studies. Of the sampled complaints, 92% were external, mostly from members of the public.²³

2.18 Key findings in the Ombudsman's review included: establishment rates for external complaints (publicly-generated complaints) being significantly lower than for internally-generated complaints; the AFP's initiatives to improve timeliness of dispute resolution have had an impact but there remains a backlog of old complaints which need to be cleared so resources can be redirected to new complaints;²⁴ the negligible establishment rate of external complaints about excessive use of force against a person; better management of conflicts of interests that may arise in the course of complaint investigations; and regular communication with complainants.²⁵ The review noted that it was not surprising that ACT policing (30.2%) and aviation security (22.6%) were the two most functional streams for complaints as these areas have most frequent contact with members of the public.²⁶

2.19 The establishment rate for internal complaints was 43% (679 of 1546 complaint issues established) compared to 11% (140 of 1251 complaint issues established) for external complaints.²⁷ In contrast, the figures reported in the previous review was higher for the establishment rate for internal complaints (at 60% or 139 of 232 complaint issues established) and lower for the external complaints (at 7% or 30 of 415 complaint issues established).²⁸

2.20 The top five complaint issues established, and which accounted for 70% of all issues established, were: 'diligence failure'; 'serious breach of the AFP Code of Conduct'; 'supervision failure'; 'failure to comply with direction or procedure'; and 'breach of the AFP Code of Conduct'.²⁹

23 *Annual report on the Commonwealth Ombudsman's activities under Part V of the Australian Federal Police Act 1979 for the period 1 July 2011 to 30 June 2012*, pp 9–10.

24 *Annual report on the Commonwealth Ombudsman's activities under Part V of the Australian Federal Police Act 1979 for the period 1 July 2011 to 30 June 2012*, pp 3, 11 and 43–44. Although the review noted timeliness in resolving complaints has improved during the reporting period, it remains a concern.

25 *Annual report on the Commonwealth Ombudsman's activities under Part V of the Australian Federal Police Act 1979 for the period 1 July 2011 to 30 June 2012*, p. 11.

26 *Annual report on the Commonwealth Ombudsman's activities under Part V of the Australian Federal Police Act 1979 for the period 1 July 2011 to 30 June 2012*, p. 11.

27 *Annual report on the Commonwealth Ombudsman's activities under Part V of the Australian Federal Police Act 1979 for the period 1 July 2011 to 30 June 2012*, pp 3–4 and 16. Figures in Table 4 provide a comparison of the internal and external establishment rates for the past four reviews. Note the figures presented in Table 4 slightly differ from those on pages 3 and without an explanation.

28 *Annual report on the Commonwealth Ombudsman's activities under Part V of the Australian Federal Police Act 1979 for the period 1 July 2011 to 30 June 2012*, pp 3–4.

29 *Annual report on the Commonwealth Ombudsman's activities under Part V of the Australian Federal Police Act 1979 for the period 1 July 2011 to 30 June 2012*, pp 17–18.

2.21 In relation to 'use of force complaints', the report noted that of the 246 complaint issues coded as 'use of force', 218 related to excessive use of force on an individual.³⁰ Of these, only two were established, with one an internal complaint and the other an external complaint. The Ombudsman's office considered the investigation of the external complaint was 'thorough and of a high standard'³¹. In many of the cases examined, the report noted there was insufficient evidence available for the complaint to be established.³²

2.22 Another area of review by the Ombudsman was the management of conflicts of interests. In five of the cases examined by the Ombudsman, a conflict of interest or potential conflict of interest was identified in the course of a complaint investigation. The case studies in the annual report highlighted: the importance of an investigation officer recognising a conflict of interest and taking appropriate steps to resolve the matter³³; and the importance of appointing an independent investigator who is impartial, particularly when dealing with difficult complainants.³⁴

2.23 The report noted regular contact with complainants was not consistent nor was there any indication of how often complainants were contacted. The report also commented that regularly updating a complainant is good practice.³⁵ Of the 132 cases examined, in only 20% of cases were complainants regularly contacted by an investigating officer, and the regularity of contact varied between once every month to every two months.³⁶ The report recommended introducing minimum standards for frequency of contact with complainants during the investigation process.³⁷

2.24 With regard to 'obtaining a complainant's version of events' and 'witnesses and evidence', the Ombudsman continued to express concerns that decision-makers

30 In the AFP's response to the Ombudsman's report, the AFP noted that where use of force by an AFP member results in criminal charges, the complaint against the AFP member is coded as criminal conduct rather excessive use of force: refer *Annual report on the Commonwealth Ombudsman's activities under Part V of the Australian Federal Police Act 1979 for the period 1 July 2011 to 30 June 2012*, p. 19.

31 *Annual report on the Commonwealth Ombudsman's activities under Part V of the Australian Federal Police Act 1979 for the period 1 July 2011 to 30 June 2012*, p. 19. See Case study 3, *Established use of force*, pp 19 and 21–22.

32 *Annual report on the Commonwealth Ombudsman's activities under Part V of the Australian Federal Police Act 1979 for the period 1 July 2011 to 30 June 2012*, p. 19.

33 *Annual report on the Commonwealth Ombudsman's activities under Part V of the Australian Federal Police Act 1979 for the period 1 July 2011 to 30 June 2012*, p. 29.

34 *Annual report on the Commonwealth Ombudsman's activities under Part V of the Australian Federal Police Act 1979 for the period 1 July 2011 to 30 June 2012*, pp 30–31.

35 *Annual report on the Commonwealth Ombudsman's activities under Part V of the Australian Federal Police Act 1979 for the period 1 July 2011 to 30 June 2012*, p. 28.

36 *Annual report on the Commonwealth Ombudsman's activities under Part V of the Australian Federal Police Act 1979 for the period 1 July 2011 to 30 June 2012*, p. 28.

37 *Annual report on the Commonwealth Ombudsman's activities under Part V of the Australian Federal Police Act 1979 for the period 1 July 2011 to 30 June 2012*, p. 28.

exhibited a tendency to accept the evidence of an AFP officer without sufficient attempts to interview other possible third party witnesses. The Ombudsman's review of AFP records found that in only 37% of cases (34 of 92 cases) in part one and 57% of cases (23 of 40 cases) in part two, did the investigator speak to the complainant prior to speaking with the AFP officer under investigation.³⁸ The report commented that the lack of independent sources of evidence undermines the veracity of an investigation outcome.³⁹

2.25 The AFP's response to the Ombudsman's six recommendations were summarised in the report: the AFP accepted and / or advised that it had processes to address five of the six recommendations.⁴⁰ The AFP did not agree with recommendation four which stated that all potential witnesses and sources of evidence should be identified and subsequently interviewed or obtained.⁴¹

**Senator the Hon. Ian Macdonald
Chair**

38 *Annual report on the Commonwealth Ombudsman's activities under Part V of the Australian Federal Police Act 1979 for the period 1 July 2011 to 30 June 2012*, pp 32–33.

39 *Annual report on the Commonwealth Ombudsman's activities under Part V of the Australian Federal Police Act 1979 for the period 1 July 2011 to 30 June 2012*, pp 32–34.

40 *Annual report on the Commonwealth Ombudsman's activities under Part V of the Australian Federal Police Act 1979 for the period 1 July 2011 to 30 June 2012*, pp 5–7.

41 *Annual report on the Commonwealth Ombudsman's activities under Part V of the Australian Federal Police Act 1979 for the period 1 July 2011 to 30 June 2012*, p. 6.

