



**Submission by the  
Commonwealth Ombudsman**

**PARLIAMENTARY JOINT COMMITTEE  
ON INTELLIGENCE AND SECURITY**

**REVIEW OF POLICE STOP, SEARCH AND SEIZURE  
POWERS, CONTROL ORDER REGIME AND  
PREVENTIVE DETENTION ORDER REGIME**

Submission by the Commonwealth Ombudsman, Michael Manthorpe PSM

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## Introduction and summary

On 9 August 2017 the Parliamentary Joint Committee on Intelligence and Security (the committee) commenced a review of the operation, effectiveness and implications of provisions under Division 3A of Part IAA of the *Crimes Act 1914* (the Crimes Act), and Divisions 104 and 105 of the *Criminal Code Act 1995* (the Criminal Code). This submission addresses the following points from the committee's Terms of Reference<sup>1</sup>:

- the control order regime provided under Division 104; and
- the preventative detention order regime provided for under Division 105.

## Background

The Ombudsman safeguards the community in its dealings with Australian Government agencies by:

- correcting administrative deficiencies through the independent review of complaints about Australian Government administrative action;
- fostering good public administration that is accountable, lawful, fair, transparent and responsive;
- providing assurance that Commonwealth, State and Territory law enforcement, integrity and regulatory agencies are exercising certain covert, intrusive and coercive powers as Parliament intended.

The last point is carried out through statutory compliance audits and reviews of 21 law enforcement, integrity and regulatory agencies. Our audits and reviews involve engaging with agencies, inspecting relevant records and reviewing agencies' policies and processes to assess compliance with certain legislative and statutory requirements.

The results of these audits and reviews are reported to the Parliament and the public, which serves as an important community safeguard. Detailed reports are provided to the agencies exercising the powers which assists them to apply sound administrative practices and identify areas for improvement. Currently, the Ombudsman conducts audits and reviews in relation to the following activities under Commonwealth legislation:

- telecommunications interceptions;
- preservation of and access to stored communications;
- access to telecommunications data;
- use of surveillance devices;
- conduct of controlled operations; and
- coercive examinations.<sup>2</sup>

The Ombudsman also has oversight of the Australian Federal Police's (AFP) use of the following counter terrorism powers: delayed notification search warrants and the monitoring of compliance with control orders. In addition, the AFP has an obligation to notify the Ombudsman upon its use of preventative detention order powers.

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<sup>1</sup> [http://www.aph.gov.au/Parliamentary\\_Business/Committees/Joint/Intelligence\\_and\\_Security/AFPpowersreview/Terms\\_of\\_Reference](http://www.aph.gov.au/Parliamentary_Business/Committees/Joint/Intelligence_and_Security/AFPpowersreview/Terms_of_Reference)

<sup>2</sup> Performed by the Australian Building and Construction Commissioner.

## Response to Terms of Reference

### ***The control order regime provided under Division 104***

The Ombudsman does not have oversight of Division 104 of the Criminal Code. However, with the passing of the *Counter-Terrorism Legislation Amendment Bill (No. 1) 2016* (the Amendment Act) in late 2016, the Ombudsman performs the independent oversight mechanism under Part IAAB of the Crimes Act, regarding the AFP's monitoring of compliance with control orders.

The Amendment Act also expanded the Ombudsman's existing oversight functions under the *Telecommunications (Interception and Access) Act 1979* and the *Surveillance Devices Act 2004*. The expansion requires the Ombudsman to assess law enforcement agencies' compliance with the covert monitoring (use of telecommunications interceptions or surveillance devices) of persons subject to a control order.

As the Ombudsman was consulted prior to the commencement of this oversight function, we were able to ensure that our oversight model was sufficient to ensure adequate transparency and accountability of the AFP's exercise of these powers. This ensures a model that is consistent with functions already performed by the Office in relation to other covert and coercive powers. The model is characterised by three main elements:

- a clearly defined scope;
- clearly defined powers for the Ombudsman; and
- a public reporting mechanism.

Oversight models with these characteristics are important as it has been the Office's experience that the absence of any one of them can negatively impact our ability to assess agencies' compliance with legislation and provide assurance to the Parliament and the public.

### ***Monitoring of compliance with control orders***

The Ombudsman has developed an audit methodology based on areas of highest risk, legislative requirements, best practice standards in auditing, and includes considerations as to whether the AFP has:

- properly applied for, and received, the authority to engage in monitoring<sup>3</sup>;
- only engaged in authorised monitoring activities;
- appropriate processes for handling and disclosing obtained information; and
- met its reporting obligations and was transparent with our Office and the relevant Minister.

Agencies that are subject to the Ombudsman's oversight of their use of covert, intrusive and coercive powers can expect the principles of transparency, accountability and procedural fairness to be applied. Collectively with a good oversight model, these principles

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<sup>3</sup> This does not include comment on the decision of a magistrate, eligible Judge or nominated AAT member to issue a warrant.

allow the Ombudsman to provide a high level of assurance to the Parliament and the public regarding agencies' use of covert, intrusive and coercive powers.

The AFP currently is subject to regular inspections by the Ombudsman's Office in relation to its use of telecommunications interceptions, preservation and access to stored communications (emails, text messages), access to telecommunications data (metadata), use of surveillance devices and conduct of controlled operations. The result of these inspections are reported to the relevant Minister who then tables the report in Parliament (with the exception of telecommunications interception, which is incorporated into the Minister's own report on the use of telecommunications interception powers, which itself is tabled in Parliament).

No inspections have been conducted in relation to monitoring of control orders, as the AFP has not advised that it has exercised these powers. Similarly, no inspections have been conducted in relation to the use of delayed notification search warrants for the same reason.

### ***The preventative detention order regime provided under Division 105***

The Ombudsman's visibility of the AFP's use of preventative detention order powers under Division 105 of the Criminal Code is much more limited compared to the oversight model provided under Part IAAB. Under Division 105, the AFP must notify the Ombudsman when it has exercised preventative detention order powers.

The Ombudsman does not have an express oversight function beyond receiving notifications from the AFP, since the commencement of this role there have been no notifications received by our office. However, a detained person is able to make a complaint to the Ombudsman about his or her treatment while in detention. The Ombudsman would rely on powers under the *Ombudsman Act 1976* to investigate any complaint made in those circumstances. To date, the Ombudsman has not received any complaints from a person detained under the preventative detention order regime.