

Chapter 3

Key issues and accountability

3.1 This chapter examines some issues of ongoing interest to the committee. These include the Australian Federal Police's (AFP) revised Ministerial Direction, its ongoing work to monitor complaint handling processes, as well as an overview of the findings of the Commonwealth Ombudsman (the Ombudsman), who has a statutory oversight role of the AFP.

3.2 Examination of the Ombudsman's findings with respect to the AFP is limited to oversight of complaints management and controlled operations, including the use of surveillance devices. These issues are examined below.

Revised Ministerial Direction

3.3 As indicated in Chapter 2, the committee noted that the Minister for Justice, the Hon Michael Keenan MP, issued a revised Ministerial Direction to the AFP pursuant to section 8 of the *Australian Federal Police Act 1979* (AFP Act).¹ The AFP explained that the new Ministerial Direction resulted in the addition of numerous instructions, including:

- protecting Commonwealth revenue;
- contributing to whole-of-government efforts to prevent Australia from being a safe haven for proceeds of crime, including from corruption, or used for money laundering purposes;
- leading Commonwealth's efforts to disrupt organised criminal groups by restraining and seizing their assets and unexplained wealth;
- maintaining focus on investigating Commonwealth offences, particularly those relating to firearms and foreign bribery; and
- taking a leadership role and collaborating with state and territory law enforcement to deliver national law enforcement initiatives to disrupt the operation of criminal gangs, reduce the proliferation of child exploitation material and reduce the harm caused by illicit drugs.²

3.4 The AFP noted that three instructions had been removed from the Ministerial Directions. These include redundant instructions to implement relevant recommendations of the Federal Audit of Police Capabilities and two other items:

1 AFP, *Annual Report 2013-14*, p. 3.

2 AFP, *Answers to Questions on Notice*, p. 15, (received 26 March 2015).

- taking account of the Government's long-standing opposition to the application of the death penalty (this is part of AFP's standard procedures); and
- building a relationship of trust with the indigenous community (this was a focus during Operation Pleach — the joint NT Police/AFP Child Abuse Taskforce in the Northern Territory).³

3.5 When asked about the AFP's policy on the sharing of intelligence with agency partners overseas in the broad context of the Bali Nine case, Commissioner Colvin responded:

The AFP operates under very strict guidelines as to what we will share, how we will share it and what considerations will be taken into account. Inherent in those guidelines is an actual prohibition without further approval on some information and that also depends on the stage of the investigation...

What I will say, though, is that we do work now, and we did then, to very strict guidelines that tell us when we can share information and what sort of information we should share. Obviously, we have an international remit and we work with our partner agencies in countries in our region, as well as more broadly in the world. We do so, knowing that they operate very different judicial systems and very different law enforcement systems to us. We probably know those systems and those countries better than anybody else, so we are best placed to make those judgements within the confines and parameters that we have been set.⁴

Complaints handling process

3.6 The matter of complaints handling has been considered by the committee in previous examinations of AFP annual reports. For example in its examination of the 2010-11 AFP annual report, the committee recommended that in future annual reports, the AFP 'include the average number of days taken to resolve cases for each category of complaint to enable the committee to better monitor the timeliness of complaint resolution'.⁵ The government responded to the recommendation in September 2012 noting that the 2011-12 report would provide information on the average number of

3 AFP, *Annual Report 2013-14*, p. 3.

4 Mr Andrew Colvin, Commissioner, AFP, *Committee Hansard*, 4 March 2015, pp 9–10.

5 See: Parliamentary Joint Committee on Law Enforcement, *Examination of the Australian Federal Police Annual Report 2012-13*, pp 19–20; Parliamentary Joint Committee on Law Enforcement, *Examination of the Australian Federal Police Annual Report 2011-12*, pp 21–22; Parliamentary Joint Committee on Law Enforcement, *Examination of the 2010-11 Annual Reports of the Australian Crime Commission and the Australian Federal Police*, pp 26–28.

days taken to resolve complaint matters in relation to Serious Misconduct/Category 3 investigations.⁶

Complaints management

3.7 In 2013-14, the AFP received a total of 263 category 3 complaints (compared to 398 received in 2012-13).⁷

3.8 In 2013-14, the AFP received a total of 564 category 1 and 2 complaints which is a reduction on 670 complaints in 2012-13.⁸ These figures do not include Category 3 complaints, nor corruption issues investigated in concert with Australian Commission for Law Enforcement Integrity (ACLEI).⁹

3.9 The 2013-14 annual report does not include detail on the number or the length of time of investigations of outstanding Category 3 complaints in 2013-14.

3.10 Further discussion on these matters is included below in the committee view, from paragraph 3.16.

Commonwealth Ombudsman's findings

3.11 In February 2015, the annual report of the Commonwealth Ombudsman (Ombudsman) in relation to activities under Part V of the *Australian Federal Police Act 1979* (AFP Act) was published.¹⁰

3.12 The Ombudsman was provided with a list of all complaints closed between 1 July 2013 and 30 June 2014 (the review period) which comprised 564 closed complaints. The Ombudsman conducted a review over two periods: part one covering the period 1 March and 31 August 2013, and part two from 1 September 2013 to 28 February 2014. The Ombudsman found that there were:

- 305 complaints closed in the first period; and
- 225 complaints closed in the second period.¹¹

6 Government Response to Parliamentary Joint Committee on Law Enforcement, *Examination of the 2010-11 Annual Reports of the Australian Crime Commission and the Australian Federal Police*, September 2012,

www.aph.gov.au/Parliamentary_Business/Committees/Joint/Law_Enforcement/Annual_Report_s/2012/AFP/~media/Committees/Senate/committee/le_ctte/annual/2012/gov_response/gov_response.ashx, (accessed 31 August 2015).

7 AFP, *Annual Report 2013-14*, p. 99.

8 AFP, *Annual Report 2013-14*, p. 194.

9 AFP, *Annual Report 2013-14*, p. 194.

10 Commonwealth Ombudsman and Law Enforcement Ombudsman, *Annual Report on the Ombudsman's activities under Part V of the Australian Federal Police Act 1979*, February 2015, www.ombudsman.gov.au/files/activities_under_part_v_08.pdf, (accessed 31 August 2015). Part V of the AFP Act governs professional standards and AFP conduct and practice issues.

11 Commonwealth Ombudsman and Law Enforcement Ombudsman, *Annual Report on the Ombudsman's activities under Part V of the Australian Federal Police Act 1979*, February 2015, p. 4.

3.13 The Ombudsman examined a sample of 226 complaints of which 124 complaints were reviewed in the first period and 102 complaints were reviewed in the second period.¹²

3.14 In its 2013-14 report, the Ombudsman found that the AFP's administration of Part V of the AFP Act was 'comprehensive and adequate'.¹³ The report noted ongoing issues within the complaint management process but found that those issues 'did not necessarily impact the outcomes of those complaints'.¹⁴

3.15 The Ombudsman noted that the AFP had not notified his office of approximately 20 per cent of Category 3 complaints:

Based on the data provided there were 188 category 3 conduct issues for which the AFP should have notified the Ombudsman under s 40TM(1) of the Act. We did not locate notifications for 39 of these issues.¹⁵

3.16 The Ombudsman reported that the AFP had advised that classifications of complaints to particular categories may have been reassigned to a different category prior to the investigation being accepted. The report notes:

During this period, the use of categories is no more than an administrative process until a [Professional Standards] Coordinator endorses a particular category. The AFP advised that it will notify our office of all category 3 conduct issues once they have been appropriately endorsed by a [Professional Standards] Coordinator. We will consider this in our future reviews.¹⁶

3.17 The Ombudsman's report notes that the AFP has subsequently reviewed and amended its processes to ensure better compliance with subsection 40TM(1) of the AFP Act, requiring notifications being made to the Ombudsman's office.¹⁷

12 Commonwealth Ombudsman and Law Enforcement Ombudsman, *Annual Report on the Ombudsman's activities under Part V of the Australian Federal Police Act 1979*, February 2015, p. 4.

13 Commonwealth Ombudsman and Law Enforcement Ombudsman, *Annual Report on the Ombudsman's activities under Part V of the Australian Federal Police Act 1979*, February 2015, p. 5.

14 Commonwealth Ombudsman and Law Enforcement Ombudsman, *Annual Report on the Ombudsman's activities under Part V of the Australian Federal Police Act 1979*, February 2015, p. 5.

15 Commonwealth Ombudsman and Law Enforcement Ombudsman, *Annual Report on the Ombudsman's activities under Part V of the Australian Federal Police Act 1979*, February 2015, p. 10.

16 Commonwealth Ombudsman and Law Enforcement Ombudsman, *Annual Report on the Ombudsman's activities under Part V of the Australian Federal Police Act 1979*, February 2015, p. 10.

17 Commonwealth Ombudsman and Law Enforcement Ombudsman, *Annual Report on the Ombudsman's activities under Part V of the Australian Federal Police Act 1979*, February 2015, p. 10.

Committee view

3.18 The committee notes that previous AFP annual reports have included detail of category 1, 2 and 3 complaints. This information is particularly useful for determining the AFP's performance in completing investigations in a timely manner.

3.19 The committee has previously commented at length on the AFP's internal complaints handling processes,¹⁸ and has found that detail extremely helpful.

3.20 The committee is of the view that the AFP should include more detail on its complaints handling outcomes. In this regard, the committee draws the AFP's attention to its previous annual reports as well as the *Annual Report of the Integrity Commissioner 2013-14*, and the inclusion of detail of investigations carried over across financial years.¹⁹

3.21 The committee believes ACLEI's table is a clear example of how that data could be conveyed in future AFP annual reports. Further, the same detail as previously provided, with reference to how many complaints are received in the reporting period, how long they take to investigate and resolve, how many are 'carried over' financial years and the proportion substantiated, is necessary for the committee to fulfil its statutory role to examine the annual reports of the AFP.

Recommendation 1

3.22 The committee recommends the Australian Federal Police include greater detail in the Annual Report with reference to all category 1, 2 and 3 complaints, including the period in which they are received, how long they take to investigate and resolve, how many are 'carried over' financial years and what proportion are substantiated.

Surveillance devices

3.23 The *Surveillance Devices Act 2004* (Surveillance Act) restricts the use, communication and publication of information obtained through the use of surveillance devices. The Surveillance Act also establishes procedures for law enforcement agencies 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

18 See: Parliamentary Joint Committee on Law Enforcement, *Examination of the Australian Federal Police Annual Report 2012-13*, pp 19–20; Parliamentary Joint Committee on Law Enforcement, *Examination of the Australian Federal Police Annual Report 2011-12*, pp 21–22; Parliamentary Joint Committee on Law Enforcement, *Examination of the 2010-11 Annual Reports of the Australian Crime Commission and the Australian Federal Police*, pp 26–28.

19 Australian Commission for Law Enforcement Integrity (ACLEI), *Annual Report of the Integrity Commissioner 2013-14*, p. 195.

devices'.²⁰ Under subsection 6(1) of the Surveillance Act, the term 'law enforcement agency' includes the AFP, the ACC, ACLEI, and state and territory police forces.

3.24 The Ombudsman's report into inspections under the Surveillance Act notes that while it makes no formal recommendations, there were numerous instances of non-compliance and instances in which the Ombudsman could not determine whether the AFP had acted in compliance with the Surveillance Act.²¹

3.25 The Ombudsman's report also notes:

Additionally, [the Ombudsman] requested documents relevant to the inspection which were not provided by the AFP. As the documents fell within the scope of s 55(3) of the Act, which entitles the Ombudsman to full and free access to all records relevant to an inspection, the Ombudsman issued to the AFP a Notice to Produce under s 56(2) of the Act on 21 October 2014.

The AFP complied with the Notice, and the documents were considered in finalising our inspection findings.²²

Review period, sample and focus

3.26 The Ombudsman's inspection of the AFP's surveillance device records was conducted from 17 to 21 March 2014.²³ It focused on surveillance device warrants and authorisations (and associated records) that expired or were revoked during the period 1 July to 31 December 2013 as well as records relating to the use of tracking device authorisations.²⁴

3.27 A report of the results of the inspection was provided to the AFP on 18 December 2014.²⁵ While all the records held by the respective agencies under the Surveillance Act are potentially subject to inspection:²⁶

20 Commonwealth Ombudsman, *Report to the Attorney-General on the results of inspections of records under s 55 of the Surveillance Devices Act 2004*, March 2015, p. 1, www.ombudsman.gov.au/files/Surveillance_devices_six_monthly_report_-_1_July_to_31_December_2014_-_March_2015_-_WEB_VERSION.pdf, (accessed 31 August 2015).

21 Commonwealth Ombudsman, *Report to the Attorney-General on the results of inspections of records under s 55 of the Surveillance Devices Act 2004*, March 2015, p. 7.

22 Commonwealth Ombudsman, *Report to the Attorney-General on the results of inspections of records under s 55 of the Surveillance Devices Act 2004*, March 2015, p. 7.

23 Commonwealth Ombudsman, *Report to the Attorney-General on the results of inspections of records under s 55 of the Surveillance Devices Act 2004*, March 2015, p. 2.

24 Commonwealth Ombudsman, *Report to the Attorney-General on the results of inspections of records under s 55 of the Surveillance Devices Act 2004*, March 2015, p. 2.

25 Commonwealth Ombudsman, *Report to the Attorney-General on the results of inspections of records under s 55 of the Surveillance Devices Act 2004*, March 2015, p. 2.

26 *Surveillance Devices Act 2004*, ss. 55(5).

...the Ombudsman's discretion under s 55(5) of the Act was exercised to limit inspections to those warrants and authorisations that had expired or were revoked during the relevant inspection period.²⁷

3.28 The Ombudsman inspected results relating to 100 warrants and authorisations (a 32 per cent sample) and 18 records relating to tracking device authorisations (a 52 per cent sample).²⁸

Ombudsman's findings

3.29 While the Ombudsman's report made no recommendations as a result of the inspection carried out in March 2014, it did make several observations of instances where it was unable to determine compliance. These are set out below.

Use of devices without the authority of a warrant or authorisation

3.30 The report notes the AFP self-disclosed three instances where surveillance devices had 'been used without lawful authority.'²⁹ The first instance related to an incident where a tracking device was used despite not having been authorised by a warrant. This was because the relevant officer was unaware that the device installed under the warrant was a tracking device. In this instance, the AFP advised that it sought a variation to the warrant to include the device in question so that it could be lawfully retrieved.³⁰

3.31 The second instance was a further example of when a tracking device was installed without a warrant. In this case, the AFP advised the Ombudsman that '[the AFP] relied upon the information contained within the application, which listed a tracking device, rather than the information listed on the warrant'.³¹

3.32 The third incident was when surveillance devices installed on a premises continued to be used 'after it was identified the person listed on the warrant was no longer at the premises'.³² The AFP told the Ombudsman that once identified, the devices were discontinued and the unlawfully obtained material was quarantined.³³

27 Commonwealth Ombudsman, *Report to the Attorney-General on the results of inspections of records under s 55 of the Surveillance Devices Act 2004*, March 2015, p. 3.

28 Commonwealth Ombudsman, *Report to the Attorney-General on the results of inspections of records under s 55 of the Surveillance Devices Act 2004*, March 2015, p. 2.

29 Commonwealth Ombudsman, *Report to the Attorney-General on the results of inspections of records under s 55 of the Surveillance Devices Act 2004*, March 2015, p. 7.

30 Commonwealth Ombudsman, *Report to the Attorney-General on the results of inspections of records under s 55 of the Surveillance Devices Act 2004*, March 2015, p. 8.

31 Commonwealth Ombudsman, *Report to the Attorney-General on the results of inspections of records under s 55 of the Surveillance Devices Act 2004*, March 2015, p. 8.

32 Commonwealth Ombudsman, *Report to the Attorney-General on the results of inspections of records under s 55 of the Surveillance Devices Act 2004*, March 2015, p. 8.

33 Commonwealth Ombudsman, *Report to the Attorney-General on the results of inspections of records under s 55 of the Surveillance Devices Act 2004*, March 2015, p. 8.

AFP response

3.33 The AFP advised the Ombudsman that it has 'introduced a range of new administrative practices and processes to prevent similar occurrences in future.'³⁴

Records to confirm actions taken under warrants

3.34 The Ombudsman's report raises instances where the AFP had not kept accurate records on the use, and maintenance, of listening devices on premises. Specifically:

For a number of warrants authorising the installation, use and maintenance of devices on premises where the person named on the warrant is reasonably believed to be or likely to be, there was insufficient information to establish whether this was the case.³⁵

3.35 The report notes that the Ombudsman has raised this issue with the AFP in the previous report to the Attorney-General and suggested to the AFP that its existing compliance measures were no longer effective.³⁶

AFP response

3.36 The Ombudsman report notes that the AFP has advised it has subsequently implemented additional procedures to ensure sufficient records are kept.³⁷

Keeping protected information for longer than five years

3.37 Under paragraph 46(1)(b) of the Surveillance Act, the chief officer (officer in charge of an investigation) must ensure that a record or report comprising protected information is destroyed if they are satisfied that it is no longer required by the law enforcement agency.³⁸

3.38 The chief officer may also certify that the information be retained if it is still likely to be required by the law enforcement agency. This decision must be made within 5 years after the record or report's creation. This decision must be re-made every 5 years until the information is destroyed. The Ombudsman's report notes:

We identified that protected information obtained under three warrants had been kept for a period longer than five years, however there were no records on file to indicate the chief officer had certified that it could be

34 Commonwealth Ombudsman, *Report to the Attorney-General on the results of inspections of records under s 55 of the Surveillance Devices Act 2004*, March 2015, p. 8.

35 Commonwealth Ombudsman, *Report to the Attorney-General on the results of inspections of records under s 55 of the Surveillance Devices Act 2004*, March 2015, p. 8.

36 Commonwealth Ombudsman, *Report to the Attorney-General on the results of inspections of records under s 55 of the Surveillance Devices Act 2004*, March 2015, p. 8.

37 Commonwealth Ombudsman, *Report to the Attorney-General on the results of inspections of records under s 55 of the Surveillance Devices Act 2004*, March 2015, p. 8.

38 Commonwealth Ombudsman, *Report to the Attorney-General on the results of inspections of records under s 55 of the Surveillance Devices Act 2004*, March 2015, pp 8–9.

retained or that the protected information had been entered into legal proceedings.³⁹

AFP response

3.39 In response the AFP stated that the instances referred to by the Ombudsman occurred due to an internal destruction freeze.⁴⁰

Ombudsman's report

3.40 The committee received a report from the Commonwealth Ombudsman regarding the AFP's involvement in controlled operations under Part 1AB of the *Crimes Act 1914* during the preceding 12 months. The report was provided in accordance with section 10 of the *Parliamentary Joint Committee on Law Enforcement Act 2010*. The committee noted the report and has received it as confidential correspondence.⁴¹

Committee view

3.41 The committee is generally satisfied as to how the AFP has discharged its obligations with respect to controlled operations and listening devices. Nevertheless, the committee is concerned with some ongoing administrative issues that appear to have been overlooked or repeated across inspection periods. Inadequacies in record keeping arrangements are a particularly relevant concern to the committee.

3.42 The committee will monitor these ongoing administrative issues in future reporting periods.

39 Commonwealth Ombudsman, *Report to the Attorney-General on the results of inspections of records under s 55 of the Surveillance Devices Act 2004*, March 2015, pp 8–9.

40 Commonwealth Ombudsman, *Report to the Attorney-General on the results of inspections of records under s 55 of the Surveillance Devices Act 2004*, March 2015, pp 8–9.

41 *Parliamentary Joint Committee on Law Enforcement Act*, s. 10.

