

CHAPTER 3

REPORTS ON THE OPERATION OF ACTS AND PROGRAMS

3.1 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 the following reports:

- Report to the Attorney-General on the results of inspection of surveillance device records for 2008 under section 55 of the *Surveillance Devices Act 2004*, March 2011 (published by the Commonwealth Ombudsman);
- Report pursuant to section 91Y of the Migration Act on protection visa processing taking more than 90 days for the period 1 November 2010 to 28 February 2011 (published by the Department of Immigration and Citizenship);
- Report pursuant to section 91Y of the Migration Act on protection visa processing taking more than 90 days for the period 1 March 2011 to 30 June 2011 (published by the Department of Immigration and Citizenship);
- Report pursuant to section 440A of the Migration Act on the conduct of Refugee Review Tribunal reviews not completed within 90 days for the period 1 November 2010 to 28 February 2011 (published by the Refugee Review Tribunal); and
- Report pursuant to section 440A of the Migration Act on the conduct of Refugee Review Tribunal reviews not completed within 90 days for the period 1 March 2011 to 30 June 2011 (published by the Refugee Review Tribunal).

Report under the *Surveillance Devices Act 2004*

3.2 The *Surveillance Devices Act 2004* (the Act) regulates the use of surveillance devices by law enforcement agencies.¹ Subsection 55(1) of the Act requires the Commonwealth Ombudsman to inspect the records of each law enforcement agency to determine the extent of compliance with the Act by the agency and its law

1 Under subsection 6(1), the term 'law enforcement agency' includes the Australian Crime Commission, the Australian Federal Police, the Australian Commission for Law Enforcement Integrity, and specified state and territory law enforcement agencies. If any of these agencies utilise the provisions of the Act, the Ombudsman is required to inspect records relating to that use. See further, Commonwealth Ombudsman, *Report to the Attorney-General on the results of inspection of records under s55 of the Surveillance Devices Act 2004*, March 2011, p. 1.

enforcement officers. Under section 61 of the Act, the Ombudsman is required to report to the Minister at six-monthly intervals on the results of each inspection.²

3.3 The inspections conducted by the Ombudsman were limited to those warrants and authorisations that had expired or been revoked during the inspection periods.³

3.4 This report relates to inspections of records for the following agencies for the time period indicated:

- Australian Crime Commission (ACC) (Records from 1 July 2009 to 31 December 2009); and
- Australian Federal Police (AFP) (Records from 1 July 2009 to 31 December 2009).

3.5 The committee was pleased to note that the Ombudsman did not identify any issues in relation to the ACC during the reporting period and assessed the agency as compliant with the Act.⁴

3.6 The Ombudsman found that the AFP was compliant with the Act during the reporting period; however, identified the following issues for attention:

- obtaining new warrants to continue use of surveillance devices for a person, premises or object, rather than extending the original warrant;
- eligibility requirements to apply for an extension to a warrant; and
- access to records which confirm lawful access to premises under 'person warrants'.⁵

3.7 The Ombudsman made recommendations in relation to the first and third issues listed above, which aim to improve AFP compliance with the Act.

3.8 The AFP responded to the Ombudsman's report during the Budget Estimates 2011-12 hearings when it appeared before the committee:

Senator HUMPHRIES:...The second issue I want to raise briefly was the report that came down earlier this week by the Commonwealth Ombudsman into possible shortcomings in compliance arrangements with covert surveillance. The Ombudsman makes the point that there is a number of improperly extended surveillance operations and installed surveillance

2 Report to the Attorney-General on the results of inspections of records under s55 of the *Surveillance Devices Act 2004*, March 2011, p. 1.

3 Commonwealth Ombudsman, *Report to the Attorney-General on the results of inspections of records under s 55 of the Surveillance Devices Act 2004*, March 2011, p. 1.

4 Commonwealth Ombudsman, *Report to the Attorney-General on the results of inspections of records under s 55 of the Surveillance Devices Act 2004*, March 2011, p. 4.

5 Commonwealth Ombudsman, *Report to the Attorney-General on the results of inspections of records under s 55 of the Surveillance Devices Act 2004*, March 2011, p. 2.

without adequate justification. He comments that there is a perception by operational police that keeping up with the paper trail was burdensome. Can you outline to the committee what approximately is the process used to begin, say, the use of a surveillance device and how you would describe that in terms of the burden that is placed on an officer or officers beginning such an investigation?

...

Mr Negus: The issues around compliance are necessarily complex because they are quite intrusive powers and there are a range of different checks and balances in place our officers must go through. Sometimes at the lower level of the organisation—and we do our best to explain these things—they might not understand necessarily the rationale for all of those complexities. ...Again, it is an ongoing education process with us, but I am pleased that at least we were assessed as being compliant with the act and the recommendations are more of an administrative nature to improve our performance rather than anything else.

Mr Gaughan: ...in relation to any activity where we use covert powers, we are required to complete an affidavit. In the first instance that affidavit is actually reviewed by senior officers within the AFP to ensure that it not only complies with the law but also that there is sufficient evidence to allow us to obtain the relevant warrant to undertake the activity. In most instances we will then appear before a member of the Administrative Appeals Tribunal, and a warrant will be provided and sent up to members of my team to be involved in the installation of the necessary device to undertake the surveillance in accordance with the conditions that are put in place by the AAT member.

The issues that were raised in the Ombudsman's report were primarily around the renewal of those particular surveillance device warrants, and the issue primarily raised was: where members, inadvertently, instead of seeking a renewal of a surveillance device had actually made an additional application for what appeared to be a new device. Obviously the member of the AAT that then issues the new warrant is not necessarily of the view or the knowledge that this is an extension of an application. Obviously, and rightly so, the Ombudsman has some concerns that full and frank information is not being disclosed to the AAT member...[I]t is an issue of education, and various members of the AFP are involved in the education process of members. We have had a significant influx of new members into the organisation in the last few years, as you would be well aware. But, as the Ombudsman also pointed out, it is not an issue of intentional noncompliance; it is an issue of people failing, to some extent, to understand what they are actually supposed to do. And we work very hard to ensure we comply with the act.⁶

3.9 The committee will continue to monitor this issue in future reports.

Protection visa processing taking more than 90 days

3.10 Section 65A of the Migration Act imposes a requirement for the Minister to make a decision on a protection visa application within 90 days of the lodgement of the application. If this target is exceeded, under section 91Y of the Act, the Secretary of the Department of Immigration and Citizenship is required to report on protection visa applications for which decision-making has taken over 90 days. The department is required to report every four months. The reports reviewed by the committee cover the period 1 November 2010 to 30 June 2011.

3.11 The table below compares protection visa processing by the department taking more than 90 days for the three previous reporting periods:

	1 July 2010 to 31 October 2010	1 November 2010 to 28 February 2011	1 March 2011 to 30 June 2011
Total number <i>undecided</i> outside of 90 day period	1561	1760	1734
Total number <i>decided</i> outside of 90 day period	1091	1270	1151
Total number processed outside of 90 day period	2652	3030	2885
Percentage of total applications processed outside of 90 day period	43%	52%	29%

3.12 The committee notes the improvement in the percentage of total applications processed outside of the 90 day period for the most recent period, down from 52% to 29%. However, as noted in Chapter 1 of this report, the overall result for the percentage of onshore protection applications decided within 90 days for 2010-11, was lower than the previous two years.

3.13 The department's report covering the most recent period, 1 March 2011 to 30 June 2011, indicates that the number of delays attributable to the department has risen from 2,072 applications in this category across both decided and undecided groups, to 2,204.⁷

⁷ Protection visa processing taking more than 90 days for the reporting period 1 March 2011 to 30 June 2011, Letter of transmittal, p. 2.

Refugee Review Tribunal reviews not completed within 90 days

3.14 Section 440A of the Migration Act requires the Refugee Review Tribunal (RRT) to report on reviews not completed within 90 days. The RRT is required to report every four months. The reports reviewed by the committee cover the period 1 November 2010 to 30 June 2011.

3.15 The table below outlines the number of RRT reviews not completed within 90 days for the previous three reporting periods:

	1 July 2010 to 31 October 2010	1 November 2010 to 28 February 2011	1 March 2011 to 30 June 2011
Reviews completed <i>outside</i> of 90 days	190 (23%)	274 (30%)	272 (32%)
Reviews completed <i>within</i> 90 days	636 (77%)	654 (70%)	578 (68%)
Total	826	928	850

3.16 The Migration Review Tribunal-Refugee Review Tribunal (MRT-RRT) has a KPI target of 70% of RRT cases decided within 90 calendar days.

3.17 The committee notes that the percentage of reviews completed within 90 days declined throughout 2010-11. The Tribunals' Principal Member advised in the 2010-11 annual report that this was:

due to member capacity issues arising from the combined impact of the increase in RRT cases and the appointment of experienced members as Independent Protection Assessors. Meeting the target of finalising 70% of RRT cases within 90 days will be a significant challenge in 2011-12.⁸

3.18 The MRT-RRT annual report advised that over the 2010-11 period, 71% of RRT cases were decided within 90 days and the average time to decision was 99 days.⁹ The report further noted:

Increasingly, cases cannot be decided within the relevant time standards due to the growing volume of cases on hand. In 2010-11 the tribunals' active caseload increased by 53% compared to 2009-10. While the tribunals have

⁸ *Migration Review Tribunal-Refugee Review Tribunal Annual Report 2010-11*, pp 10-11.

⁹ *Migration Review Tribunal-Refugee Review Tribunal Annual Report 2010-11*, p. 41.

responded by developing strategies to improve processing efficiencies, the active caseload has continued to increase.¹⁰

3.19 The Principal Member of the MRT-RRT advised the committee during the Additional Estimates 2011-12 hearings that Professor Michael Lavarch has been appointed by the Minister for Immigration and Citizenship 'to particularly consider strategies for reducing our backlog and also to look at the question of how the transition to us of the irregular maritime arrival caseload might best happen'.¹¹

Senator Trish Crossin
Chair

10 *Migration Review Tribunal-Refugee Review Tribunal Annual Report 2010-11*, p. 41.

11 *Committee Hansard*, 13 February 2012, p. 10.