

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:

- *Surveillance Devices Act 2004* Report for the year ending 30 June 2011; and
- Annual report on the Commonwealth Ombudsman's activities under Part V of the *Australian Federal Police Act 1979* for the period 1 July 2010 to 30 June 2011 (published by the Commonwealth Ombudsman).

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

2.2 The report for the operation of the *Surveillance Devices Act 2004* (SD Act) was tabled by the Minister in both Houses of Parliament on 1 November 2011. The report's presentation date to the Minister was 4 October 2011, just outside the SD Act's legislative provisions.

2.3 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.

2.4 Among the significant developments relevant to the SD Act during 2010-11 is the Australian Federal Police's (AFP) reported increase in obtaining surveillance device warrants. The AFP obtained 406 warrants in 2010-11 compared to 311 in 2009-10, representing an increase of 29 per cent. This is in contrast to the Australian Crime Commission (ACC), which reported 179 warrants being obtained for 2010-11, a 10 per cent drop from the preceding reporting period of 199 warrants.¹

2.5 There was no information in relation to the number of warrants obtained at the state/territory level as state and territory law enforcement agencies generally rely on their own legislative regimes for their 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.²

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

1 Attorney-General's Department, *Surveillance Devices Act 2004 Report for the year ending 30 June 2011*, p. 8.

2 Attorney-General's Department, *Surveillance Devices Act 2004 Report for the year ending 30 June 2011*, p. 8.

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.³

2.8 For 2010-11 there was an approximate 12 per cent increase with 588 warrants issued, compared to 522 warrants issued during the preceding period. The law enforcement agencies, to which these warrants were issued, were: ACC; AFP; NSW Police; and Victoria Police.⁴

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.⁵

2.10 Section 15 of the SD Act provides for remote application for a warrant. There were no remote applications during the reporting period.

2.11 Section 50 requires the inclusion of additional 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; and the number of locations and safe recoveries of children, based on information obtained using surveillance devices.⁶

2.12 The table below shows the number of arrests, prosecutions and convictions for 2010-11. There was no information for the NSW Police as they had nil data for the reporting period.

3 Attorney-General's Department, *Surveillance Devices Act 2004 Report for the year ending 30 June 2011*, p. 10.

4 Attorney-General's Department, *Surveillance Devices Act 2004 Report for the year ending 30 June 2011*, p. 10.

5 Attorney-General's Department, *Surveillance Devices Act 2004 Report for the year ending 30 June 2011*, p. 10.

6 Attorney-General's Department, *Surveillance Devices Act 2004 Report for the year ending 30 June 2011*, p. 14.

AGENCY	Arrests	Safe Recovery	Prosecutions	Convictions
ACC	30	-	4	4
AFP	47	-	50	10
Victoria Police	5	-	-	-
CCC	-	-	-	1 ⁷
Total	82 ⁸	-	54	15

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 lead to a prosecution (if at all) in a later reporting period, 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 of 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.⁹

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

2.14 The Commonwealth Ombudsman's (Ombudsman) annual report into the Australian Federal Police's (AFP) activities under Part V of the *Australian Federal Police Act 1979* (AFP Act) was tabled in both Houses of Parliament on 22 November 2011.

2.15 Part V of the AFP Act confers to the Ombudsman oversight responsibilities in respect of the way that the AFP handles complaints about it and its members.¹⁰

2.16 The Ombudsman conducts annual and ad hoc reviews of AFP complaint-handling procedures and processes by undertaking an inspection of records. For the

7 This conviction is the result of a warrant and extensions granted during 2008-09.

8 Attorney-General's Department, *Surveillance Devices Act 2004 Report for the year ending 30 June 2011*, p. 15. The total figure in the report was 77. This figure does not appear to match the sum calculation of figures provided, which is 82.

9 Attorney-General's Department, *Surveillance Devices Act 2004 Report for the year ending 30 June 2011*, p. 15.

10 *Annual report on the Commonwealth Ombudsman's activities under Part V of the Australian Federal Police Act 1979* for the period 1 July 2010 to 30 June 2011, p. 1.

2010-11 financial year, the Ombudsman conducted one review inspection pursuant to subsections 40XA and 40XD of the AFP Act.¹¹

2.17 The review's findings regarding establishment rates for publicly generated complaints remain lower than for internally generated complaints. These findings are similar to those found in the two preceding reviews on the matter.¹²

2.18 The Ombudsman reported that timeliness in complaint resolution for 2010-11 deteriorated across all categories compared to those of the two preceding reviews. At the time of the Ombudsman's 2010-11 review, the AFP had implemented new complaint processes which had yet to operate effectively when the Ombudsman was conducting its review for the report. For the 2010-11 review, the Ombudsman examined 76 complaints in detail and found only six (eight per cent) of these complaints were finalised within the AFP's own standards. Twenty-seven complaints took in excess of a year to finalise, with two of those taking in excess of 1000 days to finalise.¹³ The Ombudsman found the AFP's performance in this area to be well short of its own benchmarks.¹⁴

2.19 To address this issue, the AFP has established an Adjudication Panel and engaged a former senior officer to assist in the finalisation of a backlog of complaints. The AFP has also included a performance measure in the Human Resource Business Plan to improve the timeliness of complaint resolution by 25 per cent.¹⁵ As a result of these measures, the AFP reported that it was able to finalise a large number of complaints in backlog¹⁶ and has more recently advised the Ombudsman that it is achieving the benchmark for a majority of new complaints; however a significant backlog still remains.¹⁷

2.20 Another area of review by the Ombudsman was the frequency of contact with complainants. The Ombudsman reported an improvement in this area since its last review. In 2010-11, the review indicated investigators were contacting complainants and capturing their concerns in 45 per cent of cases. This compares well to 30 per cent and below of cases reported in previous reviews. In another 40 per cent of complaint

11 *Annual report on the Commonwealth Ombudsman's activities under Part V of the Australian Federal Police Act 1979* for the period 1 July 2010 to 30 June 2011, p. 2.

12 *Annual report on the Commonwealth Ombudsman's activities under Part V of the Australian Federal Police Act 1979* for the period 1 July 2010 to 30 June 2011, p. 1.

13 *Annual report on the Commonwealth Ombudsman's activities under Part V of the Australian Federal Police Act 1979* for the period 1 July 2010 to 30 June 2011, p. 14.

14 *Annual report on the Commonwealth Ombudsman's activities under Part V of the Australian Federal Police Act 1979* for the period 1 July 2010 to 30 June 2011, pp 14-15.

15 *Annual report on the Commonwealth Ombudsman's activities under Part V of the Australian Federal Police Act 1979* for the period 1 July 2010 to 30 June 2011, p. 15.

16 *Annual report on the Commonwealth Ombudsman's activities under Part V of the Australian Federal Police Act 1979* for the period 1 July 2010 to 30 June 2011, p. 15.

17 *Annual report on the Commonwealth Ombudsman's activities under Part V of the Australian Federal Police Act 1979* for the period 1 July 2010 to 30 June 2011, p. 15.

cases, contact with the complainant was not necessary due to the nature of the complaint.¹⁸ The complaint record did not clarify in the remaining cases whether a complainant was contacted or whether contact was simply not recorded.¹⁹

2.21 Reflecting similar findings in earlier reviews, the Ombudsman remain concerned that decision-makers showed a tendency to accept the evidence of an AFP member over a non-AFP member without sufficient justification or without demonstrating that 'sufficient effort was made to gather and test corroborating evidence from other members present or other witnesses.'²⁰

2.22 The Ombudsman reported that in a large number of instances (88 per cent), there was little evidence to indicate that advice was provided about the complaint process to complainants.²¹

2.23 Complainants were advised of the outcome of investigations in more than 60 per cent of complaints. Thirty per cent of complaints did not require an outcome due to the nature of complaints, and seven per cent did not receive an outcome.²²

2.24 The Ombudsman made no recommendation but continued to express its concerns in regards to timeliness of managing and finalising complaints, and frequency of contact with complainants.²³ It has indicated that these areas will be of interest in follow-up reviews in future reports.

Senator Trish Crossin Chair

18 They were either a self-report or an internal complaint.

19 *Annual report on the Commonwealth Ombudsman's activities under Part V of the Australian Federal Police Act 1979* for the period 1 July 2010 to 30 June 2011, p. 17.

20 *Annual report on the Commonwealth Ombudsman's activities under Part V of the Australian Federal Police Act 1979* for the period 1 July 2010 to 30 June 2011, p. 18.

21 *Annual report on the Commonwealth Ombudsman's activities under Part V of the Australian Federal Police Act 1979* for the period 1 July 2010 to 30 June 2011, p. 17.

22 *Annual report on the Commonwealth Ombudsman's activities under Part V of the Australian Federal Police Act 1979* for the period 1 July 2010 to 30 June 2011, p. 17.

23 *Annual report on the Commonwealth Ombudsman's activities under Part V of the Australian Federal Police Act 1979* for the period 1 July 2010 to 30 June 2011, pp 1 and 18.