

**Submission by the
Commonwealth Ombudsman**

**Parliamentary Joint Committee on
Intelligence and Security**

Review of Australian Federal Police Powers

Submission by the Commonwealth Ombudsman, Michael Manthorpe PSM

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Introduction and summary

On 17 June 2020, the Parliamentary Joint Committee on Intelligence and Security commenced a review of the operation, effectiveness and implications of Division 3A of the Part IAA of the *Crimes Act 1914* (Crimes Act) and Divisions 104 and 105 of the *Criminal Code 1995* (Criminal Code).

On 18 August 2020 the Committee expanded the scope of its inquiry to include the operation, effectiveness and implications of Division 105A of the Criminal Code and any other provision of that Code as far as it relates to that Division.

This submission addresses the following elements of the Committee's Terms of Reference:¹

- the control order regime provided under Division 104 of the Criminal Code
- the preventative detention order regime provided under Division 105 of the Criminal Code
- the operation, effectiveness and implications of Division 105A of the Criminal Code, and
- the stop, search, and seizure powers under Division 3A of the Crimes Act.

Background

The purpose of the Office is to:

- Provide assurance that the organisations we oversight act with integrity and treat people fairly.
- Influence systemic improvement in public administration in Australia and the region.

We seek to achieve our purpose through:

- correcting administrative deficiencies through independent review of complaints about Australian Government administrative action
- fostering good public administration that is accountable, lawful, fair, transparent and responsive
- assisting people to resolve complaints about government administrative action, and
- providing assurance that Commonwealth, State and Territory law enforcement, integrity and regulatory agencies are complying with statutory requirements and have sound administrative practices in relation to certain covert, intrusive and coercive powers.

Relevant to this inquiry, the last element is performed via regular compliance audits and reviews of 22 law enforcement, integrity and regulatory agencies. We engage with agencies, inspect relevant records and review agencies' policies and processes to assess their compliance with certain statutory requirements.

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https://www.aph.gov.au/Parliamentary_Business/Committees/Joint/Intelligence_and_Security/ReviewofAFPowers

The covert nature of many of these powers means we are unlikely to receive complaints about their use, so our role in monitoring their use and reporting our findings provides an important community safeguarding and assurance mechanism.

Currently, the Office monitors and reports publicly on the following activities under Commonwealth legislation:

- telecommunications interceptions under Chapter 2 of the *Telecommunications Interception and Access Act 1979* (the TIA Act)
- preservation of and access to stored communications under Chapter 3 of the TIA Act
- access to telecommunications data under Chapter 4 of the TIA Act
- use of surveillance devices under the *Surveillance Devices Act 2004*
- conduct of controlled operations under Part IAB of the *Crimes Act 1914*, and
- coercive examinations under the *Fair Work Act 2009* and the *Building and Construction Industry (Improving Productivity) Act 2016*.

Our Office regularly inspects the AFP's use of telecommunications interceptions, preservation and access to stored communications, access to telecommunications data, use of surveillance devices and conduct of controlled operations. The result of these inspections (with the exception of inspections of telecommunications interceptions²) are reported to the relevant Minister who then tables the report in Parliament.

The Ombudsman also has oversight of the AFP's use of delayed notification search warrants and the monitoring of compliance with control orders under the Crimes Act. In addition, the AFP has an obligation to notify the Ombudsman when it uses preventative detention order powers.

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

- properly applied for, and received the authority to engage in monitoring³
- only engaged in authorised monitoring activities
- has appropriate processes for handling and disclosing obtained information, and
- met its reporting obligations and was transparent with our Office and the relevant Minister.

² The Office is required to report annually to the Minister for Home Affairs on its activities in monitoring use of telecommunications interception powers. This content is then incorporated into the Minister's own report on the use of telecommunications interception and tabled in Parliament.

³ This does not include considering the merits of the decision of a Magistrate, eligible Judge or nominated AAT member to issue a warrant.

Response to Terms of Reference

The control order regime provided under Division 104 of the Criminal Code

The Office does not have a direct oversight function under Division 104 of the Criminal Code. However, the Office does provide peripheral oversight in relation to the Control Order regime, in respect of the powers introduced by the *Counter-Terrorism Legislation Amendment Act (No. 1) 2016* (the Amendment Act). This legislation inserted provisions across several pieces of legislation to enable the AFP to use surveillance devices, telecommunications interception, and search and seizure powers to monitor individuals' compliance with control orders. As a result, from late 2016 the Office became responsible, under Part IAAB of the Crimes Act, for oversight of the AFP's monitoring of compliance with control orders.

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

During the 2019–20 period, the Office did not receive or review any complaints about the AFP's use of powers under Division 104 of the Criminal Code.

The preventative detention order regime provided under Division 105 of the Criminal Code

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

The Office does not have an express oversight function beyond receiving notifications from the AFP and, since this function commenced, the Office has not received any notifications.

However, a detained person is able to make a complaint directly to the Office about his or her treatment while in detention. The Office would rely on powers under the *Ombudsman Act 1976* to investigate any complaint made in those circumstances.

During the 2019–20 period, the Office did not receive or review any complaints from a person detained under the preventative detention order regime.

The operation, effectiveness and implications of Division 105A of the Criminal Code

The Ombudsman does not perform a statutory oversight function for activities under Division 105A of the Criminal Code.

AFP Powers under Division 3A of Part IAA of the Crimes Act

The Ombudsman does not perform a direct statutory oversight function of the stop, search and seizure powers under Division 3A of Part IAA of the Crimes Act.

However, a person subject to these powers is able to make a complaint to the Ombudsman about his or her treatment and the actions taken by police. The Ombudsman would rely on powers under the *Ombudsman Act 1976* to investigate any complaint made in those circumstances.

During the 2019–20 period, the Office did not receive or review any complaints about the AFP's use of powers under Division 3A of Part IAA of the Crimes Act.

