

Chapter 3

Complaints handling and Ombudsman's findings

3.1 This chapter examines the ongoing management of complaints by the Australian Federal Police (AFP), as well as an overview of the findings of the Commonwealth Ombudsman (the Ombudsman), which 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.

Complaints management

3.3 During the reporting period, the AFP received 494 complaints, a 4 per cent increase on the previous reporting period (477 complaints).

3.4 The committee questioned the AFP about the increase in the number of complaints relating to alleged AFP corruption during the reporting period.¹ The committee was informed that, rather than there being an increase in the incidents of corruption, the reported increase was a result of administrative changes to the way corruption was referred to the Australian Commission for Law Enforcement Integrity (ACLEI), which oversees the integrity of officers of certain law enforcement agencies pursuant to the *Law Enforcement Integrity Commission Act 2006*.²

One of the things on which we agreed with the then ACLEI commissioner in around 2013 was to err on the side of caution and include referrals rather than make a judgement call ourselves on what may or may not fall under the definition of 'serious corruption' under the ACLEI act. So we started referring anything that they might interpret as serious corruption under the definition in their legislation and allowing them to make the decision on whether they wanted to be involved in the matters or not. I am not responsible for this part of the organisation at the moment, but I was at the time that occurred.

Basically, we had a formal request from ACLEI to make sure that we referred matters that could be interpreted as such or that could emerge to be through further investigation. Hence, we started changing the language a bit to include matters that, if established, would be serious corruption, rather than 'we already know they are serious corruption'. It was not a legislative change; it was more of an administrative arrangement where we reached an agreement with the ACLEI commissioner to say we would send them more, and they would then make a call on the matters within that broader group that they wanted to retain an interest in.

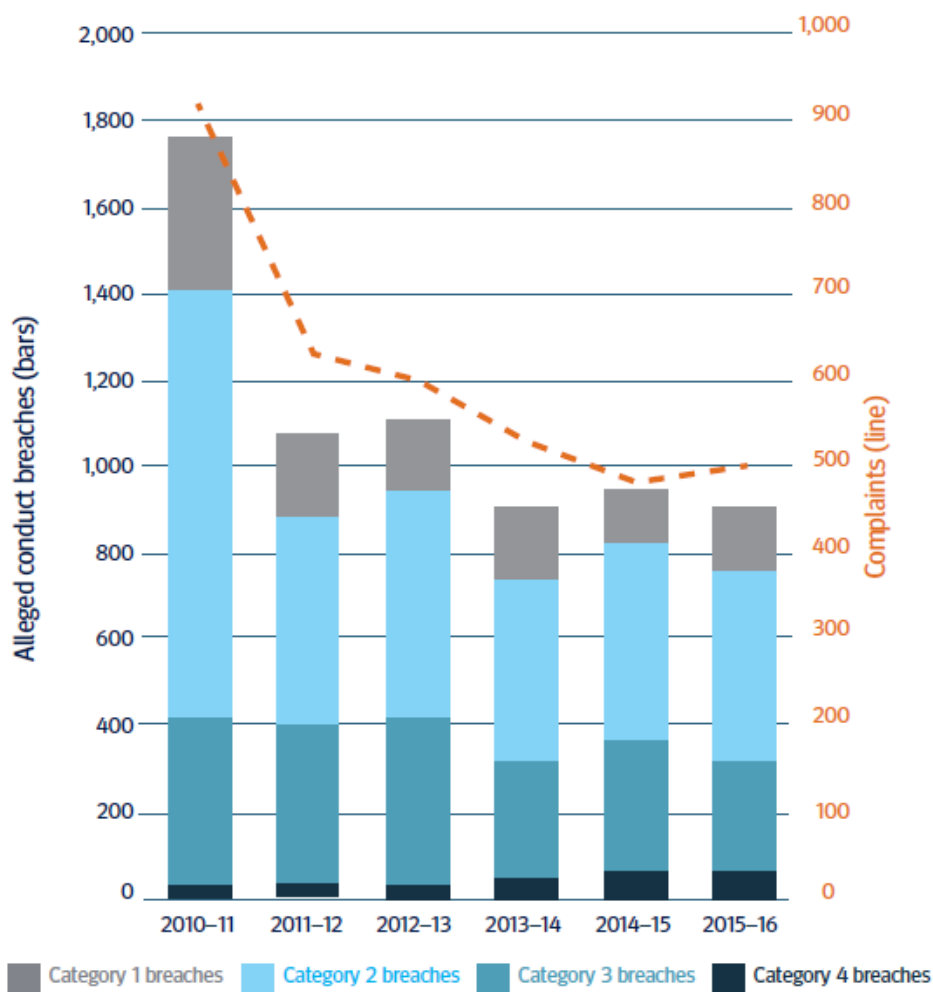
1 Australian Federal Police (AFP), *Annual Report 2015–16*, p. 84.

2 *Law Enforcement Integrity Commission Act 2006*, s. 19. For a definition of 'law enforcement agency' see section 5 of the Act.

Whether or not actual matters have increased, I think the evidence one way or the other for that is to look at the results of investigations by ACLEI and, hence, whether or not they are establishing an increase or a decrease or the same level of matters. Whilst I do not have that specific data in front of me, the impression I certainly have is that, no, the number of matters that have been established by ACLEI as meeting the definition of 'corruption' for incidents occurring within the AFP is not increasing.³

3.5 Figure 1 illustrates the trend in the number of complaints and alleged breaches from 2010–11 to 2015–16.

Figure 1: Trend in the number of complaints and alleged breaches, 2010–11 to 2015–16⁴



3.6 This figure classifies complaints according to the four categories of conduct for AFP appointees under Part V of the *Australian Federal Police Act 1979* (AFP Act), defined as follows:

3 Mr Andrew Wood, Acting Chief Operating Officer, AFP, *Committee Hansard*, 14 June 2017, p. 3.

4 AFP, *Annual Report 2015–16*, p. 84.

Category 1 is the least serious category and relates mainly to customer service breaches. Category 2 is minor misconduct and category 3 is serious misconduct. Category 4 complaints relate to corruption as defined by the Law Enforcement Integrity Act 2006. These matters are deemed to be either significant or non-significant corruption and are referred to [ACLEI].⁵

Committee view

3.7 The committee welcomes the opportunity to engage with the AFP about its complaint management process, and considers that the information in the Annual Report 2015–16 (annual report) is useful by providing a longitudinal analysis of complaints management. The committee encourages the AFP to continue with this approach.

3.8 However, the committee considers that it may also be useful to provide in the annual report examples of complaints that correspond with each category under Part V of the AFP Act for the relevant financial year.

3.9 The committee will observe with interest whether complaints increase or decrease in the next reporting period, given that the AFP's administrative arrangements for reporting corruption matters to ACLEI will have been in place for some time.

Recommendation 1

3.10 The committee recommends that the Australian Federal Police considers including in future annual reports examples of the complaints corresponding to the categories of breaches outlined in Part V of the *Australian Federal Police Act 1979*.

Commonwealth Ombudsman's report—Part V of the AFP Act

3.11 In May 2017, the annual report of the Ombudsman in relation to activities under Part V of the AFP Act was published.⁶

3.12 The Ombudsman's report outlines the results of one review conducted between 1 March 2015 and 29 February 2016. The Ombudsman found that '[o]verall, the records indicated that the AFP is investigating matters appropriately' and that the AFP's administration of Part V of the Act in respect of addressing conduct and practice issues 'is comprehensive and adequate'.⁷

3.13 However, the Ombudsman also identified 'deficiencies in records detailing the consideration of potential conflicts of interest by complaint managers, investigators

5 AFP, *Annual Report 2015–16*, Appendix A, p. 130.

6 Commonwealth Ombudsman, *Annual Report on the Ombudsman's activities under Part V of the Australian Federal Police Act 1979*, May 2017. Part V of the AFP Act prescribes the process for recording and dealing with AFP conduct and practices issues (that is, conduct which may be corrupt conduct or contravenes AFP professional standards).

7 Commonwealth Ombudsman, *Annual Report on the Ombudsman's activities under Part V of the Australian Federal Police Act 1979*, May 2017, p. 1.

and adjudicators'.⁸ This finding was consistent with previous findings,⁹ and the Ombudsman therefore made the following recommendation:

That the Australian Federal Police demonstrate the consideration of conflict of interest in accordance with the instructions set out in sections 13(c) and 14 of the *AFP National Guideline on Complaint Management*.¹⁰

3.14 The Ombudsman also made specific recommendations in respect of updating relevant guidelines about recording and storing conflicts of interest and the consideration of conflicts of interest, to which the AFP responded that it would review its guidelines and administrative practices.¹¹

3.15 Another issue addressed by the Ombudsman was the identification of 10 complaint notification letters for category 3 conduct issues which provided little or no reasons for a decision.¹² The Ombudsman suggested that AFP Professional Standards (PRS) includes guidance in its PRS Toolkit about 'the appropriate level and type of detail that should be provided in outcome letters'.¹³

3.16 The AFP responded to this suggestion noting that it would seek legal advice about the extent of the information that could be provided, and would liaise with the Ombudsman in the process of updating and implementing PRS support tools.¹⁴

3.17 The Ombudsman also noted that, with respect to issues about the practices or procedures of the AFP (a 'practices issue'),¹⁵ the AFP Practices and Procedures Register did not reflect what action, if any, had been taken when a practices issue was recorded.¹⁶ The AFP agreed with the Ombudsman's suggestion that 'PRS investigate mechanisms for receiving feedback from AFP business areas on practice issues', and

8 Commonwealth Ombudsman, *Annual Report on the Ombudsman's activities under Part V of the Australian Federal Police Act 1979*, May 2017, p. 1.

9 Commonwealth Ombudsman, *Annual Report on the Ombudsman's activities under Part V of the Australian Federal Police Act 1979*, May 2017, p. 8.

10 Commonwealth Ombudsman, *Annual Report on the Ombudsman's activities under Part V of the Australian Federal Police Act 1979*, May 2017, p. 10.

11 Commonwealth Ombudsman, *Annual Report on the Ombudsman's activities under Part V of the Australian Federal Police Act 1979*, May 2017, p. 11.

12 Commonwealth Ombudsman, *Annual Report on the Ombudsman's activities under Part V of the Australian Federal Police Act 1979*, May 2017, p. 11.

13 Commonwealth Ombudsman, *Annual Report on the Ombudsman's activities under Part V of the Australian Federal Police Act 1979*, May 2017, pp 11–12.

14 Commonwealth Ombudsman, *Annual Report on the Ombudsman's activities under Part V of the Australian Federal Police Act 1979*, May 2017, p. 12.

15 *Australian Federal Police Act 1979*, ss 40RI(1).

16 Commonwealth Ombudsman, *Annual Report on the Ombudsman's activities under Part V of the Australian Federal Police Act 1979*, May 2017, p. 12.

advised that PRS continues to seek system enhancements to capture appropriate records.¹⁷

Committee view

3.18 The committee is concerned that the AFP has not fully addressed the Ombudsman's previous findings about deficiencies in records detailing the consideration of potential conflicts of interest. The committee urges the AFP to address the Ombudsman's concerns and in particular, the Ombudsman's recommendations that it demonstrates consideration of conflict of interests in accordance with the instructions set out in sections 13(c) and 14 of the *AFP National Guideline on Complaint Management*, as well as update relevant guidelines in relation to recording, storing and considering conflicts of interest.

3.19 The committee is pleased that the AFP has agreed to consider how it will respond to the Ombudsman's recommendations in relation to PRS outcome letters and records for AFP practices issues. The committee expects these issues to have been addressed by the time it next considers the Ombudsman's report under Part V of the AFP Act.

Ombudsman's report—controlled operations

3.20 Subsection 15HS(1) of the *Crimes Act 1914* (Crimes Act) provides that:

The Ombudsman must, from time to time and at least once every 12 months, inspect the records of each authorising agency to determine the extent of compliance with this Part [Part IAB—Controlled operations] by the agency and by law enforcement officers.

3.21 The AFP is one such authorising agency.¹⁸

3.22 Section 10 of the *Parliamentary Joint Committee on Law Enforcement Act 2010* requires the Ombudsman, at least once per calendar year, to brief the committee about the involvement of the AFP and the Australian Crime Commission (ACC) in controlled operations under Part 1AB of the Crimes Act during the preceding 12 months.

3.23 On 21 June 2017, the committee met with representatives from the Ombudsman who briefed the committee in private about controlled operations, including in respect of the Ombudsman's public report on the controlled operations activities of ACLEI, the AFP and the ACC for the period 1 July 2015 to 30 June 2016.¹⁹

17 Commonwealth Ombudsman, *Annual Report on the Ombudsman's activities under Part V of the Australian Federal Police Act 1979*, May 2017, p. 12.

18 *Crimes Act 1914*, s. 15GC.

19 See Commonwealth Ombudsman, *A report on the Commonwealth Ombudsman's activities in monitoring controlled operations*, April 2017.

3.24 In respect of the AFP's disclosure obligations, the Ombudsman noted 'the AFP's cooperation during the inspection and its ongoing frank and open engagement with [its] office'.²⁰

3.25 The Ombudsman made two findings in relation to the AFP's use of controlled operations. The first finding was the failure by the AFP, in two instances, to comply with section 15HC of the Crimes Act, which provides:

...protection from criminal responsibility for conduct during a controlled operation and indemnification of participants against civil liability do not apply to a person's conduct that is, or could have been, authorised under Commonwealth law or a law of a State or Territory relating to electronic surveillance devices or telecommunications interception.²¹

3.26 The Ombudsman identified that:

...two internally granted authorities included activities that could have been authorised under the *Surveillance Devices Act 2004* and the *Telecommunications (Interception and Access) Act 1979*. Warrants authorising these activities are issued externally by a Judge or an Administrative Appeals Tribunal Member under these Acts, once the agency has demonstrated that certain thresholds and conditions have been met.²²

3.27 The Ombudsman therefore suggested that additional legal consultation be undertaken prior to the authorisation of a controlled operation 'so as to determine whether other Commonwealth laws should be relied' upon. The AFP agreed to do so 'on a case-by-case basis'.²³

3.28 The second finding concerned issues previously raised by the Ombudsman about the AFP's compliance with sections 15HA and 15HB of the Crimes Act. The Ombudsman noted that '[t]wo significant issues that were raised in our last report to the Minister were again identified'²⁴ in several instances during the reporting period, namely:

20 Commonwealth Ombudsman, *A report on the Commonwealth Ombudsman's activities in monitoring controlled operations*, April 2017, p. 8.

21 Commonwealth Ombudsman, *A report on the Commonwealth Ombudsman's activities in monitoring controlled operations*, April 2017, p. 8.

22 Commonwealth Ombudsman, *A report on the Commonwealth Ombudsman's activities in monitoring controlled operations*, April 2017, pp 8–9.

23 Commonwealth Ombudsman, *A report on the Commonwealth Ombudsman's activities in monitoring controlled operations*, April 2017, p. 9.

24 Commonwealth Ombudsman, *A report on the Commonwealth Ombudsman's activities in monitoring controlled operations*, April 2017, p. 8.

- where the participants and activities of controlled operations are not covered by an authority, contrary to sections 15HA and 15HB of the Crimes Act,²⁵ and
- instances where the Ombudsman was unable to determine whether a civilian participant in a controlled operation was acting under the direction of law enforcement officers, contrary to 15HA(2) of the Crimes Act.²⁶

3.29 In October 2015, AFP self-disclosed three instances where activities were undertaken without being covered by an authority. The Ombudsman identified a further two instances, and was unable to determine compliance in another two instances.²⁷ In April 2016, the AFP self-disclosed seven instances and the Ombudsman identified a further instance.²⁸

3.30 The Ombudsman suggested that additional targeted training be provided to relevant staff, with which the AFP agreed;²⁹ the Ombudsman also noted that the AFP's self-reporting on this issue allayed possible concerns over 'the AFP's transparency and accountability'.³⁰

Committee view

3.31 The committee thanks the Ombudsman for the private briefing it received about the AFP's exercise of its controlled operations powers during the reporting period.

3.32 The committee supports the Ombudsman's recommendations and urges the AFP to implement its responses to these. It is of particular concern to the committee that there continue to be instances where controlled operations are not covered by an authority. The committee will continue to pay particular attention to the AFP's performance in this regard.

Ombudsman's report—surveillance devices

3.33 Pursuant to section 55 of the *Surveillance Devices Act 2004* (Surveillance Act):

25 Commonwealth Ombudsman, *A report on the Commonwealth Ombudsman's activities in monitoring controlled operations*, April 2017, p. 9.

26 Commonwealth Ombudsman, *A report on the Commonwealth Ombudsman's activities in monitoring controlled operations*, April 2017, p. 9.

27 Commonwealth Ombudsman, *A report on the Commonwealth Ombudsman's activities in monitoring controlled operations*, April 2017, pp 9–10.

28 Commonwealth Ombudsman, *A report on the Commonwealth Ombudsman's activities in monitoring controlled operations*, April 2017, pp 10–11.

29 Commonwealth Ombudsman, *A report on the Commonwealth Ombudsman's activities in monitoring controlled operations*, April 2017, p. 11.

30 Commonwealth Ombudsman, *A report on the Commonwealth Ombudsman's activities in monitoring controlled operations*, April 2017, p. 11.

The Ombudsman must inspect the records of a law enforcement agency to determine the extent of compliance with this Act by the agency and law enforcement officers of the agency.³¹

3.34 The AFP is one such law enforcement agency.³²

3.35 In September 2016, the Ombudsman published a report which set out the results of its inspections finalised between 1 January 2016 and 30 June 2016.³³ It did not finalise any results from inspections conducted during 1 July 2016 to 31 December 2016.³⁴

3.36 The Surveillance Act:

...regulates the use of surveillance devices by law enforcement agencies. Broadly speaking, the Act allows certain surveillance activities to be conducted under a warrant (issued by an eligible Judge or nominated Administrative Appeals Tribunal (AAT) member), an internally issued authorisation or without formal authority. The Act imposes requirements for the secure storage and destruction of records, and restricts the use, communication and publication of information obtained through the use of surveillance devices. It also imposes reporting obligations on law enforcement agencies to ensure an appropriate level of transparency.³⁵

3.37 No recommendations were made in the September 2016 report as a result of the Ombudsman's inspection of the AFP (which took place during 29 September 2015 to 2 October 2015), but the Ombudsman did note that the AFP had 'taken appropriate remedial action' in response to suggestions in previous reports, and had cooperated with the inspection the subject of this report.³⁶

Committee view

3.38 The committee is satisfied by the Ombudsman's conclusion in the September 2016 report that the AFP has taken appropriate remedial action to address the issues identified as a result of the two previous inspections.

Ombudsman's report—stored communications and telecommunications data

3.39 Pursuant to section 186B of the *Telecommunications (Interception and Access) Act 1979* (TIA Act), the Ombudsman is empowered to conduct inspections of

31 *Surveillance Devices Act 2004*, ss. 55(1).

32 *Surveillance Devices Act 2004*, ss. 6A(6).

33 Commonwealth Ombudsman, *Report to the Attorney-General on agencies' compliance with the Surveillance Devices Act 2004*, September 2016.

34 Commonwealth Ombudsman, *Report to the Attorney-General on agencies' compliance with the Surveillance Devices Act 2004*, March 2017, p. 1.

35 Commonwealth Ombudsman, *Report to the Attorney-General on agencies' compliance with the Surveillance Devices Act 2004*, September 2016, p. 1 (citations omitted).

36 Commonwealth Ombudsman, *Report to the Attorney-General on agencies' compliance with the Surveillance Devices Act 2004*, September 2016, p. 9.

specified law enforcement agencies that can access an individual's stored communications and/or telecommunications data when investigating certain offences.³⁷

3.40 The AFP is one such agency.

3.41 The Ombudsman conducted its stored communications inspection of the AFP from 23 to 25 November 2016. It found the AFP compliant with all inspection criteria,³⁸ with some exceptions (relating to lawfully accessed stored communications, proper management of accessed information, and proper applications for preservation notices).

3.42 For example, the Ombudsman identified two instances where a stored communications warrant had been applied for and issued for multiple persons. This is not provided for under the Act. There were six instances identified where warrants were exercised (served on a carrier) by an unauthorised person.³⁹

3.43 In three instances, the Ombudsman could not determine whether stored communications had been sent by or to the person named on the warrant, meaning the AFP may have dealt with unlawfully accessed stored communications in contravention of the Act.⁴⁰

3.44 There were 25 instances (three foreign and 22 domestic preservation notices) in which the Ombudsman was unable to determine whether they should have been revoked.⁴¹ As a result, the Ombudsman suggested that:

...the AFP may wish to provide additional training for investigators on their legislative obligations under Chapter 3, and in particular, the requirement to revoke preservation notices in certain circumstances.⁴²

37 Commonwealth Ombudsman, *A report on the Commonwealth Ombudsman's monitoring of agency access to stored communications and telecommunications data under Chapters 3 and 4 of the Telecommunications (Interception and Access) Act 1979*, March 2017, p. 1.

38 Namely, whether the AFP is dealing with lawfully accessed stored communications; whether the AFP had properly managed accessed information; whether the AFP had properly applied the preservation notice provisions; whether the AFP satisfied certain record keeping and reporting obligations; and whether the AFP was cooperative and frank.

39 Commonwealth Ombudsman, *A report on the Commonwealth Ombudsman's monitoring of agency access to stored communications and telecommunications data under Chapters 3 and 4 of the Telecommunications (Interception and Access) Act 1979*, March 2017, p. 20.

40 Commonwealth Ombudsman, *A report on the Commonwealth Ombudsman's monitoring of agency access to stored communications and telecommunications data under Chapters 3 and 4 of the Telecommunications (Interception and Access) Act 1979*, March 2017, p. 20.

41 Commonwealth Ombudsman, *A report on the Commonwealth Ombudsman's monitoring of agency access to stored communications and telecommunications data under Chapters 3 and 4 of the Telecommunications (Interception and Access) Act 1979*, March 2017, p. 21.

42 Commonwealth Ombudsman, *A report on the Commonwealth Ombudsman's monitoring of agency access to stored communications and telecommunications data under Chapters 3 and 4 of the Telecommunications (Interception and Access) Act 1979*, March 2017, p. 21.

3.45 Further, the Ombudsman found that '[t]he AFP has demonstrated that it has clear organisational roles and responsibilities in place to achieve compliance with Chapter 4 of the [TIA] Act',⁴³ that is, compliance with provisions relating to access to telecommunications data.

3.46 However, in respect of support for authorised officers, the Ombudsman observed that the AFP had no record of which authorised officers had reviewed an electronic training package on the new privacy and use and disclosure requirements under chapter 4 of the TIA Act.⁴⁴ The Ombudsman suggested that 'training material for authorised officers could more specifically address compliance requirements for authorisations relating to foreign law enforcement agencies'.⁴⁵

Committee view

3.47 The committee welcomes the Ombudsman's report on the exercise of the AFP's powers under the TIA Act, and encourages the AFP to consider implementing those suggestions for further training made by the Ombudsman, in order to increase compliance with the TIA Act.

Mr Craig Kelly MP
Chair

43 Commonwealth Ombudsman, *A report on the Commonwealth Ombudsman's monitoring of agency access to stored communications and telecommunications data under Chapters 3 and 4 of the Telecommunications (Interception and Access) Act 1979*, March 2017, p. 22.

44 Commonwealth Ombudsman, *A report on the Commonwealth Ombudsman's monitoring of agency access to stored communications and telecommunications data under Chapters 3 and 4 of the Telecommunications (Interception and Access) Act 1979*, March 2017, p. 22.

45 Commonwealth Ombudsman, *A report on the Commonwealth Ombudsman's monitoring of agency access to stored communications and telecommunications data under Chapters 3 and 4 of the Telecommunications (Interception and Access) Act 1979*, March 2017, p. 22.