

## COMMONWEALTH OMBUDSMAN: IMPROVING PUBLIC ADMINISTRATION THROUGH OVERSIGHT

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The recent expansion of the Commonwealth Ombudsman's responsibilities to include the oversight of new metadata laws highlights the increasing importance of oversight as a function for public accountability. The Commonwealth Ombudsman works to safeguard citizens from government actions which could adversely affect them. In doing so, it plays an increasing role in monitoring the use of intrusive and coercive powers by law enforcement and other agencies. As expected, the public will not (or at least, should not) be aware of the use of these powers. As you cannot complain about something you are not aware of, people affected by the use of these powers are unlikely to do so. Enforcement agencies must be accountable in their use of these powers. Proper oversight is therefore crucial.

This article provides an overview of the new metadata oversight function and how this ties in with the future vision for the office. The article will consider what level of assurance the Ombudsman can give the public that metadata is being used as the legislation intended; how early engagement with stakeholders has helped the office to 'hit the ground running' with the new metadata regime; how best-practice sharing contributes to the overall improvement of public administration; whether operating in a spirit of cooperation and collaboration with agencies will enhance procedural fairness as well as the agency's response to inspection results; and, as public expectations of government grow, how an oversight function can add value to an agency's system of checks and balances rather than just ensure compliance.

### **The Commonwealth Ombudsman's role and purpose**

I like to think of Ombudsmen as the arms and legs of the administrative law system. We sit at the interface between the law, good public administration and just plain old 'fairness'. It is a volume business — we deal with thousands upon thousands of matters. It is also essentially an intelligence business — we learn about what is going right and wrong with public administration by listening to complaints and directly inspecting the activities of agencies.

The focus of this article is on the Commonwealth Ombudsman's role in improving public administration through oversight, looking particularly at oversight of covert law enforcement.

The Commonwealth Ombudsman works hard to achieve its purpose, which is to:

- provide assurance that the organisations we oversight act with integrity; and
- influence systemic improvement in public administration in Australia and the region.

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We do this in a number of ways, the most obvious of which is our complaint-handling role. Our aim is to resolve complaints people have against Australian Government departments and agencies impartially, informally and quickly.

We do this through consultation and negotiation. If necessary, we can highlight administrative deficiencies by making formal recommendations in public reports and to the most senior levels of government.

Our complaint-handling role is generally reactive and is heavily reliant on members of the public complaining about issues as they arise. But, in public administration, as in the rest of society, change is the only constant. As a consequence, the way we achieve our purpose has evolved from pure complaint-handling and now embraces many different functions.

A number of factors drive this. First, the nature of complaints is changing. The immediacy of social media (Twitter, Facebook, You Tube, Instagram) and mobile devices means that complaining is easier now than ever before. People can complain on multiple platforms, to multiple audiences and in the heat of the moment. The complexity of complaints that come through our door is increasing and this leads us to spend much more time investigating systemic problems.

Secondly, there is greater recognition that the Ombudsmen and like bodies form part of the public sector integrity system. For example, the Commonwealth Ombudsman now performs a key role in overseeing the Public Interest Disclosure Scheme, which came into operation in January 2014. The scheme encourages public officials to disclose suspected wrongdoing in the Commonwealth public sector.

Thirdly, there is an increasing need for parliamentary and public assurance regarding the use of powers by public agencies — in particular, law enforcement agencies. Law enforcement is operating in an increasingly globalised society with constant new and emerging threats and technologies. Terrorism is one of those threats. The number of terrorism investigations doubled between 2014–15 and the previous year; the age of terrorism suspects is dropping; calls to the National Security Hotline peaked last year; and police themselves have recently become the target choice for extremist attacks.

As a response, we have seen a broadening of the coercive and intrusive powers of law enforcement agencies. This, of course, raises the question of proper oversight for the use of these powers. The Commonwealth Ombudsman plays a significant role in this area.

### **The nominal complainant**

In most cases, the public will not (or at least, should not) be aware of the use of these powers. And, of course, you cannot complain about something you are not aware of. The very premise of ‘policing by consent’ is therefore challenged when certain police operations are essentially hidden from public view. It is not sufficient to invite law enforcement bodies to demonstrate the legitimacy of their own operations. External oversight is a necessary precondition to providing assurance to the Parliament and the public of the lawful use of coercive and intrusive powers.

That is where the Commonwealth Ombudsman comes in. When looking at our work in the law enforcement area, we asked ourselves how we could adapt our traditional, reactive, extremely transparent process in this very different domain. The answer was that, for a body like the Ombudsman to make a difference in this area, we need to stand in the shoes of the nominal complainant — that is, we need to ask the questions a complainant might ask. We need to make ourselves familiar with the sorts of issues a complainant might raise. But we

also need to go further — we need to engage in detail with the operation of the agencies so that we can reflect on more than mere compliance and drive best practice.

Before I describe how we do that, I will first outline the types of law enforcement activity we look at and the scale of the task.

### **Law enforcement powers**

The Commonwealth Ombudsman is responsible for overseeing 20 law enforcement agencies and their use of certain covert and intrusive powers. In 2014–15, we performed more than 50 inspections on the use of these powers and produced more than 40 reports to inspected agencies as well as statutory reports to ministers and the Parliament. The function is rapidly expanding — both because use of the powers is increasing and because new powers are being introduced.

Below are some examples of the regimes we currently oversee.

#### ***Controlled operations***

Part IAB of the *Crimes Act 1914* (Cth) permits certain law enforcement agencies to conduct controlled operations. Controlled operations can be broadly described as covert operations carried out for the purpose of obtaining evidence that may lead to the prosecution of a person for a serious Commonwealth offence. It is part of our role to provide assurance that agencies are approving and conducting controlled operations as Parliament intended and, if they are not, hold the agencies accountable to the Minister and the public.

For one of the major law enforcement agencies we oversee, there was a 160 per cent rise in the number of authorisations granted to perform controlled operations in the three-year period between 2012–13 and 2014–15. For another, there was a 60 per cent rise over the same period.

#### ***Surveillance devices***

We also perform the independent oversight mechanism provided for in the *Surveillance Devices Act 2004* (Cth). The use of surveillance devices — including listening, optical and tracking devices — is one of the most intrusive covert powers afforded to law enforcement agencies.

The Surveillance Devices Act establishes procedures for law enforcement officers to obtain warrants and authorisations for the use and installation of surveillance devices that may be used in relation to criminal investigations and the location and safe recovery of children.

For one of the major law enforcement agencies we oversee, there was a 60 per cent rise in the number of surveillance device warrants issued in the three years between 2012–13 and 2014–15.

#### ***Telecommunications interception***

The Commonwealth Ombudsman also performs the oversight function in relation to telecommunications interceptions. Interception warrants can only be obtained for serious offences, such as murder, kidnapping and serious drug offences.

For two major law enforcement agencies, warrants that were granted for telecommunications interceptions rose by 34 per cent and 48 per cent between 2012–13 and 2014–15, so we are seeing a significant rise in the use of existing powers. We are also seeing a broadening of powers and our oversight responsibilities.

### ***Data retention***

On 13 October 2015, new Commonwealth laws came into effect requiring telecommunication carriers and service providers to retain certain data — known as ‘metadata’ — for a mandatory two-year period. That data is accessible by law enforcement agencies in certain circumstances.

The Commonwealth Government’s data retention reforms further expanded our role to include the oversight of law enforcement agencies’ access to metadata.

### **International experience**

These are issues that are being addressed around the world. The balancing of the rights of the individual with the need for law enforcement to respond to new technologies and threats is an almost universal policy and political challenge.

In the United Kingdom, for example, the Law Reform Commission has been asked to review legal issues surrounding the state’s right to access communications data and an individual’s right to privacy and freedom of expression. There, telecommunications data can be accessed by seven national agencies, 52 police forces, 12 other law enforcement agencies, 474 local authorities and 110 other public authorities. Under current arrangements, the UK’s Interception of Communications Commissioner’s Office is solely responsible for keeping under review the interception of communications and the acquisition and disclosure of communications data by intelligence agencies, police forces and other public authorities. The office reports to the Prime Minister on a half-yearly basis.

### **Our approach**

In Australia, as far as law enforcement agencies are concerned, the task falls to the Commonwealth Ombudsman.

What does our office do to provide assurance about the proper use of law enforcement powers? How do we stand in the shoes of the nominal complainant? The answer falls into two parts. The first part goes to the technical understanding and skill of our excellent law enforcement inspections staff. They know their stuff and can ask the questions that a complainant might ask if they had the chance. They can be aggrieved on behalf of society that intrusive powers have been exercised and demand to be shown how their exercise was lawful.

The second part goes to approach — understanding the drivers of law enforcement activity, encouraging strong relationships that facilitate self-reporting of problems, and engaging the leadership of law enforcement bodies so that the agencies’ commitment to providing assurance to the Parliament and the public starts at the top. We conduct inspections, engage with agencies, audit relevant records, and test agencies’ processes and systems. To do this, we need a certain level of expertise in each area to provide the assurance that a reasonable person would expect.

We have developed a set of inspection methodologies based on legislative requirements and best-practice standards in auditing. We form our compliance assessments based on the records made available by law enforcement agencies at inspections, through discussions with relevant teams, through processes we observe and information staff provide in response to any identified issues.

The increased use of these powers in recent years means the sheer number of records to examine is greater now than ever before. In 2014–15, the Australian Federal Police alone had more than 27 000 approved historic authorisations for metadata. Clearly, the sheer capacity of metadata records means we cannot inspect everything.

This has led to a shift in the way we conduct our inspections by placing more emphasis on gaining a thorough understanding of agencies' policies and processes. We invest heavily in building strong and productive working relationships with the agencies we oversee so that we can encourage compliance throughout the process, not just in our inspection reports.

The recent expansion of our responsibilities to include the oversight of new metadata laws is a useful example of this. In performing this function, our role is to provide fair, accurate and independent assurance to Parliament and the public about access to metadata by government agencies under the law.

But what level of assurance can the Ombudsman give the public that metadata is being used as the legislation intended? In our first year of metadata inspections, we spent our time getting to know each agency's policies and processes. Following these initial metadata inspections, each agency will be provided with a 'health check' report outlining the strength of their policies and processes. These reports will detail key areas within an agency's compliance framework — for example, the leadership and planning the agency has demonstrated to achieve compliance; the support that the agency has put in place to achieve compliance with the Act; and operating procedures that have been considered to meet compliance obligations. These reports will be consolidated and provided to the Commonwealth Attorney-General for tabling in Parliament.

Our future reports and inspections will use these 'health checks' as a baseline for assessing the future compliance of agencies and should give a clear indication of how well agencies are complying with the Act.

Another key component has been early engagement with agencies. In all of our inspection regimes we aim to communicate with an agency early and often. For example, even before the new metadata retention laws took effect, we conducted a series of forums and invited all the agencies we would oversee to come and discuss any challenges regarding compliance with the Act and explain how our oversight function would work. These forums had a very high attendance rate of nearly 100 per cent, indicating the willingness of agencies to comply. Not only did agencies attend these forums; they were also engaged, responsive and appreciative. Agencies wanted to comply from the start. By engaging early, they knew we were fundamental to that process.

Another key feature of our oversight process is the sharing of learning and best practice. We believe that sharing of best practices is critical to continuous improvement in public administration. As an oversight body we have a unique opportunity to identify the best methods of doing something, share that across agencies and bring all agencies up to the highest level of performance.

We also make sure we have the insight needed to determine when best practice may not be applicable due to the differences in the operating environments of agencies, and we balance

these with the best practices it can employ. We do not prescribe a 'one size fits all' approach to achieving compliance; rather, we adopt a principles-based approach to our oversight. This means we provide consistent inspection criteria for each agency, but we appreciate the different contexts and environments in which the agencies we oversee operate.

While we must ensure a minimal compliance standard is met, we also seek to understand any mitigating factors when compliance is not met. We encourage and provide recognition when agencies self-disclose issues.

The principle here is to acknowledge that mistakes do happen; however, the way that an agency responds is crucial to providing public assurance. We would be much more concerned about a system involving humans that does not reflect the existence of human error — there can be such a thing as appearing 'too perfect'.

Also, of course, we aim to provide procedural fairness. Agencies are given the opportunity to comment on our reports before they are finalised and are given prior notice of our inspection criteria. We report on our inspections objectively. We reflect dispassionately on the facts provided and report positive results and actions as well as any adverse findings.

### **Measuring success**

The effectiveness of this approach is evident in the receptive and positive responses we receive from agencies when we have raised issues or made suggestions in our inspection reports. However, developing other metrics to demonstrate success is more challenging. Is finding a breach of the law an example of successful oversight or is it better not to find any breaches because oversight has driven a culture of meaningful compliance? I will leave the detail of those evaluation questions to another day.

What I can say with confidence is that our approach to oversight provides assurance to the Parliament and the public because:

- we are on the ground looking at activities that are 'behind the veil' for the rest of the community;
- our approach encourages a culture of meaningful compliance by agencies;
- our analysis suggests that mistakes are just that — mistakes — and agencies are keen to remedy them; and
- our reports introduce an element of transparency into what is necessarily a secretive area.

That is how the Commonwealth Ombudsman makes a difference through oversight.