



Office of the Inspector of the
Law Enforcement Conduct Commission

Report under Section 49(1) of the

Surveillance Devices Act 2007

For the period ending

31 December 2020

April 2021

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Chapter 1. Introduction

The *Surveillance Devices Act 2007* (NSW) (the Act) provides for the use of surveillance devices to investigate crime and to enable evidence to be obtained of the commission of such crime as well as the identity and/or the whereabouts of potential suspects. The Act covers the installation, use and maintenance of listening, optical, tracking, and data surveillance devices. It also places restrictions upon the communication and publication of private conversations, surveillance activities and other information obtained from the use of such devices.

Reporting and record keeping obligations are imposed on the law enforcement agencies authorised to use surveillance devices as are provisions for the safe keeping and destruction of information obtained from the use of such devices.

1.1 Legislative Changes

The following legislative changes were made during the reporting period.

The *Statute Law (Miscellaneous Provisions) Act 2020* amended section 28(1A)(e) of the *Surveillance Devices Act 2007* in order to provide reference to the correct section concerning the reporting on retrieval warrants.

The *Stronger Communities Legislation Amendment (Crimes) Act 2020* which made several amendments to the *Surveillance Devices Act 2007* commenced operation on 28 September 2020. The first such amendment was to extend the definition of “relevant proceeding” in section 4(1) of the Act to include the following subsections:

- (s) a proceeding before the State Parole Authority under Part 6 or 7 of the *Crimes (Administration of Sentences) Act 1999*,
- (t) an application under the *Crimes (Serious Crime Prevention Orders) Act 2016* to an appropriate court within the meaning of that Act, or an appeal under section 11 of that Act,
- (u) an application under Part 5 of the *Crimes (Forensic Procedures) Act 2000*,
- (v) a proceeding before the Civil and Administrative Tribunal in respect of an application for administrative review under section 75(1)(a) or (f) of the *Firearms Act 1996*.

A consequential amendment was also made to omit the words “or Division 3A of Part 6 of the *Crimes (Administration of Sentences) Act 1999*” from paragraph (q) of the definition of

“relevant proceeding”. The effect of the amendments to the definition is to expand the list of court, tribunal and other proceedings in which certain protected information (including information obtained from the use of a surveillance device) may be used, published or communicated.

Sections 18 and 26 were amended to remove references to applications being made by fax. They also permit remote applications for warrants to be made if the eligible Judge or Magistrate requests that they are made in that fashion. Sections 19 and 27 were consequentially amended to reflect those changes.

Section 33(1) of the Act provides that within 2 business days of the use of a surveillance device without a warrant in an emergency under section 31 of the Act, an application must be made to an eligible Judge for approval of the exercise of such powers. Section 33(1A) was inserted to provide for an exception to that requirement when the law enforcement officer uses an optical surveillance device to observe, but not record, the carrying on of an activity. Section 33(3B) was also inserted to clarify that applications may be made by the use of technology such as e-mail, if the eligible Judge so requests.

1.2 Reporting requirements

Since 1 July 2017 the responsibility for inspections has been conferred upon the Inspector of the Law Enforcement Conduct Commission (LECC). Amendments to the LECC Act which came into effect on 25 September 2017 enabled the Inspector to delegate functions to nominated members of staff. Appropriate delegations are now in existence.

The four law enforcement agencies which are the subject of inspections for the reporting period are:

- NSW Police Force
- NSW Crime Commission
- Independent Commission Against Corruption
- Law Enforcement Conduct Commission

The Inspector is required by section 49(1) of the Act to report to the Minister at six monthly intervals on the results of inspections. The Minister is required by section 49(2) to lay the report or cause the report to be laid before both Houses of Parliament within 15 days after receiving the report.

This report is submitted to the Minister in accordance with section 49 of the Act. The report details the results of inspections conducted of agency records covering the period from 1 July 2020 to 31 December 2020 (the reporting period).

1.3 Scope of the inspections

The aim of the Act is to enable law enforcement agencies to utilise surveillance devices to assist in the successful investigation and prosecution of certain offences. Such use is, of course, subject to meeting certain procedural and record keeping requirements. The inspection and monitoring by the Inspector aims to foster agency compliance with the Act and to provide public accountability through regular reporting to the Minister and Parliament. The approach taken in the inspections for this reporting period was to examine the records of each agency to determine if there had been compliance with those record and document keeping requirements. At the same time the focus was upon such other aspects of compliance as could be determined from those records as well as what could be gleaned from asking questions of relevant officers.

Inspections focussed upon the extent of compliance with the following parts of the Act:

- Part 3 which deals with warrants and emergency authorisations
- Part 5 which covers compliance and monitoring, including dealing with records obtained by use of surveillance devices, the use, communication or publication of protected information, reporting and record keeping
- Part 6 which requires notification to the Attorney General about warrants sought, as well as notification to the subject of surveillance if so directed by the eligible Judge

Surveillance device warrants are issued by eligible Judges of the Supreme Court or eligible Magistrates in the case of a surveillance device warrant which authorises the use of a tracking device only, or for a retrieval warrant in respect of a tracking device. Applications must include certain information and must be accompanied by an affidavit setting out the grounds for seeking the warrant. While the inspections of records included an examination of the matters required to be specified, they did not examine the sufficiency or otherwise of the information provided in support of the application as that is the function of the relevant judicial officer.

All surveillance device warrant files at each agency were inspected. The inspections included examining the application, the warrant itself, the required notice to the Attorney General under section 17(5A) of the Act, as well as the subsequent report to the issuing

judicial officer and the Attorney General required under section 44 of the Act, and any other information which was contained on the file.

The inspections involve checking that:

- the application was made to an eligible Judge or, in appropriate cases, to an eligible Magistrate
- the application included the name of the applicant and the nature and duration of the warrant including the kind of device which was sought and that the application was supported by an affidavit
- the warrant contained the information required by section 20 of the Act
- any extension or variation to the warrant complied with section 22 of the Act
- the revocation of a warrant complied with section 23 of the Act
- the appropriate law enforcement officer had notified the chief officer immediately when they were satisfied that the use of the warrant was no longer necessary, and that the chief officer had taken steps to discontinue the use of the device or devices as soon as practicable
- where a warrant was revoked, that the use of the device was discontinued immediately
- the section 17(5A) notice contained the required information and had been provided to the Attorney General before the warrant was issued, and that the Attorney General had been given an opportunity to be heard on the application
- the subsequent report under section 44 of the Act had been provided to the eligible judge and the Attorney General within the time specified in the warrant
- the report complied with the requirements of section 41 of the Act
- the application for continued use of an authorised surveillance device in an emergency situation complied with sections 31 and 32 of the Act

- where a surveillance device was used without a warrant, that an application for approval had been made within two business days to an eligible judge and that such approval had complied with section 33 of the Act
- the register of warrants and emergency applications contained the information required by section 47 of the Act
- that any directions by an eligible Judge under section 52 of the Act had been complied with.

Records relating to the use of protected information obtained by the use of surveillance devices, and the security of those records, were also inspected.

Chapter 2. Overview of records inspected

Inspections were conducted during the reporting period over a period of time which in total amounted to 20 days. The following tables set out the details of those inspections.

2.1 Table 1: Surveillance device warrants issued

	No. of warrants issued
NSW Police Force	446
NSW Crime Commission	0
Independent Commission Against Corruption	2
Law Enforcement Conduct Commission	0
Total	448

2.2 Table 2: Surveillance device warrants revoked

	No. of warrants revoked
NSW Police Force	111
NSW Crime Commission	0
Independent Commission Against Corruption	1
Law Enforcement Conduct Commission	0
Total	112

2.3 Table 3: Emergency use of surveillance devices

	No. of emergency uses of surveillance devices
NSW Police Force	3
NSW Crime Commission	0
Independent Commission Against Corruption	0
Law Enforcement Conduct Commission	0
Total	3

2.4 Table 4: Retrieval warrants issued

	No. of retrieval warrants issued
NSW Police Force	0
NSW Crime Commission	0
Independent Commission Against Corruption	1
Law Enforcement Conduct Commission	0
Total	1

2.5 Table 5: Surveillance device warrant reports received

	No. of warrant reports received
NSW Police Force	461
NSW Crime Commission	0
Independent Commission Against Corruption	3
Law Enforcement Conduct Commission	0
Total	464

Chapter 3. NSW Police Force

As the majority of records are located at the Covert Applications Unit (CAU) all of the inspections during this reporting period were conducted at those premises.

3.1 Warrants-general requirements**3.1.1 Section 17 Application for a surveillance device warrant**

451 applications for surveillance device warrants were made during the reporting period, of which 446 were issued and 5 refused. All such applications were made to eligible Judges. No applications were made to an eligible Magistrate for a warrant authorising the use of a tracking device only.

3.1.2 Section 17(5A) Particulars of warrants sought notified to Attorney General

Inspections revealed that the NSWPF was compliant with this requirement, a number of minor issues were addressed and resolved during the inspections.

3.1.3 Section 18 Remote Application

351 such applications were made during the reporting period. Changes in procedure as a result of COVID-19 allowed applications to be made remotely in circumstances which made it impractical for the application to be made in person. In these instances, the application and all supporting documentation was provided to the eligible Judge by electronic means at the time of the application. As indicated earlier, legislative amendments introduced in the *Stronger Communities Legislation Amendment (Crimes) Act 2020* permitted remote applications to be made at the request of the relevant Judge or Magistrate.

3.1.4 Section 22 Extension and variation of surveillance device warrant

26 extensions and 4 variations were issued during the reporting period.

3.1.5 Section 23 Revocation of surveillance device warrant

111 such warrants were revoked during the reporting period, all of which were revoked by an eligible Judge.

3.1.6 Section 24 Discontinuance of use of surveillance device under warrant

Section 24(2)(a) of the Act requires the use of a surveillance device to be discontinued as soon as practicable after the chief officer of the law enforcement agency is satisfied that the use of the device is no longer necessary. The NSWPF uses a Notification of Discontinuation form to record such action. All warrants which had been used were discontinued as soon as practicable.

Section 24(2)(b) requires that when an application for discontinuation is made, an application must also be made for the revocation of the warrant under section 23, although there is no time limit specified for making the latter application. Inspections revealed that in each instance where the use of the device had been discontinued, an application for revocation of the warrant had been made and also revealed that the warrant had been revoked.

3.1.7 Section 25 Application for retrieval warrant

No such applications were made during the reporting period.

3.1.8 Section 25(5A) Particulars of retrieval warrants sought notified to Attorney General

No retrieval warrants were sought during the reporting period.

3.1.9 Section 26 Remote application for retrieval warrant

No such applications were made during the reporting period.

3.1.10 Section 30 Revocation of retrieval warrant

No revocation of such a warrant was made during the reporting period.

3.2 Emergency authorisation requirements**3.2.1 Section 31 Emergency use of surveillance devices – threat of serious personal violence or substantial property damage**

3 surveillance devices were used in such circumstances during the reporting period.

3.2.2 Section 32 Emergency authorisation - continued use of surveillance devices in participating jurisdiction

No authorisation of a surveillance device warrant in such circumstances was made during the reporting period.

3.2.3 Section 33 Application for approval after use of surveillance device without warrant or under emergency authorisation

The applications for approval of the use of these 3 surveillance devices were granted.

3.3 Protected information

3.3.1 Section 40 Prohibition on use, communication, publication of protected information

The NSWPF has adopted a practice whereby a Protected Information Register (PIR) is provided to each law enforcement officer to whom a warrant is issued. The use and communication of protected information is recorded on that register. Also recorded are the details of the destruction of any protected information which is no longer required for the purposes set out in sub-sections (4) or (5).

As reported previously, the CAU has received funding to enable a state-wide surveillance device electronic database to be developed and implemented. Following a trial period, the new database register is now being used for surveillance device record keeping in place of PIRs. Nevertheless, the old system remains in place but only for warrants issued prior to the implementation of the database.

Due to COVID-19, inspections at police operational commands were not conducted during the reporting period which meant that the use of the PIRs were not inspected.

3.4 Record-Keeping and Reporting

3.4.1 Section 41 Dealing with records obtained by use of surveillance devices

Section 41 requires that the chief officer of the law enforcement agency ensure that every record or report obtained by the use of a surveillance device is kept, in accordance with guidelines established by the chief officer, in a secure place that is not accessible to people who are not entitled to deal with the record or report. That officer must also destroy or cause

to be destroyed any such record or report if satisfied that it is not likely to be required in connection with a purpose referred to in section 40(4) or (5).

NSWPF has established guidelines for dealing with protected information and its destruction. In relation to records maintained by the CAU, those records are kept in a secure location which can only be accessed by staff of the CAU. Inspections conducted at the CAU revealed that the statutory requirements had been complied with.

3.4.2 Section 44 Reports to eligible Judge or eligible Magistrate and Attorney General

Inspections revealed that 461 reports were completed during the reporting period and that each report contained all of the required information. All reports were provided within the timeframe specified in the warrant. The following table reveals delayed reports over the past 5 reporting periods.

Table 6: Surveillance device warrant reports delayed

Reporting period ending	Delayed Reports
December 2018	0
June 2019	1
December 2019	1
June 2020	0
December 2020	0

A particular issue was identified during the reporting period concerning a warrant identified as SD20/0609. It was issued by an eligible Judge on 31 July 2020 but with a condition. An inspection of the section 44 effectiveness report provided to the eligible Judge and Attorney-General on 19 November 2020 however revealed that the condition imposed had not been complied with when the warrant was executed.

This issue was raised with the NSWPF on 10 March 2021. In its response dated 12 March 2021, the NSWPF accepted that the use of the devices breached the condition upon which the warrant had been issued. The NSWPF has subsequently agreed to provide a supplementary report to the eligible Judge and to the Attorney-General which acknowledges that the condition of the warrant was breached.

At the suggestion of this Office, the NSWPF is also engaging with the Surveillance Devices Commissioner in order to discuss remedial action which will endeavour to mitigate any future breaches and to also address the issue of the use of any protected information obtained under the warrant. The NSWPF will report to my inspecting officers about the results of such discussions.

3.4.3 Section 47 Register of warrants and emergency authorisations

The Act requires the chief officer of the law enforcement agency to keep a register of warrants and emergency authorisations. That register is maintained at CAU. The register is also required to contain certain specified information.

Inspections revealed that the register recorded all of the required information.

3.5 Evidentiary Certificates

3.5.1 Section 50 Provision for the issue of evidentiary certificates

During the course of inspections for the current reporting period, this Office became aware that evidentiary certificates had been being issued by the NSWPF for some time. That discovery was at odds with previous advice received from the NSWPF that evidentiary certificates were not being issued by it. Inspections conducted in late March 2021 revealed that such certificates had in fact been issued ever since April 2019. An explanation has been sought from the NSWPF as to how this situation had occurred.

As a result of inspecting those evidentiary certificates, the following information was revealed:

Reporting period ending	Evidentiary Certificates issued
30 June 2019	7
31 December 2019	8
30 June 2020	17
31 December 2020	9

Inspections also revealed that in relation to 12 of those evidentiary certificates, there were inconsistencies between the information provided in the certificates and what appeared in the reports furnished under section 44 of the Act. An explanation for those inconsistencies is also being sought from the NSWPF.

3.5.2 Section 52 Requirement to inform subject of surveillance

No such orders were made during the reporting period.

3.6 Concluding Comments

Apart from the issues that were identified earlier, the NSWPF has been generally compliant with its obligations under the Act during the reporting period.

3.7 Recommendations

No specific recommendations are made.

Chapter 4**NSW Crime Commission****4.1 Warrants general requirements****4.1.1 Section 17 Application for a surveillance device warrant**

No applications for surveillance device warrants were made during the reporting period.

4.1.2 Section 17(5A) Particulars of warrants sought notified to Attorney General

No notices containing information from subsections (3) and (3A) were served on the Attorney General

4.1.3 Section 18 Remote Application

No such applications were made during the reporting period.

4.1.4 Section 22 Extension and variation of surveillance device warrant

No extensions were issued during the reporting period. No variations were issued during the reporting period.

4.1.5 Section 23 Revocation of surveillance device warrant

No warrants were revoked during the reporting period.

4.1.6 Section 24 Discontinuance of use of surveillance device under warrant

No surveillance devices were used during the period and hence no devices were discontinued.

4.1.7 Section 25 Application for retrieval warrant

No such applications were made during the reporting period.

4.1.8 Section 26 Remote application for retrieval warrant

No such applications were made during the reporting period.

4.1.9 Section 30 Revocation of retrieval warrant

No revocations of such warrants were made during the reporting period.

4.2 Emergency authorisation requirements

4.2.1 Section 31 Emergency use of surveillance devices – threat of serious personal violence or substantial property damage

No use of a surveillance device in such circumstances was made during the reporting period.

4.2.2 Section 32 Emergency authorisation - continued use of surveillance devices in participating jurisdiction

No authorisation of a surveillance device in such circumstances was made during the reporting period.

4.2.3 Section 33 Application for approval after use of surveillance device without warrant or under emergency authorisation

No such applications were made during the reporting period.

4.3 Protected Information

4.3.1 Section 40 Prohibition on use, communication or publication of protected information

The law enforcement officers responsible for each warrant at the NSW Crime Commission (NSWCC) are also NSW police officers and accordingly they follow the NSWPF practice. They use the NSWPF Protected Information Register on which is recorded the use and communication of protected information. Also recorded are the details of the destruction of protected information which is no longer required for the purposes set out in sub-sections (4) or (5).

4.4 Record-Keeping and Reporting

4.4.1 Section 41 Dealing with records obtained by use of surveillance devices

The NSWCC has adopted the NSWPF practice for dealing with protected information and its destruction. Protected information is securely stored at the NSWCC premises with access restricted to authorised officers.

The NSWCC informed inspecting officers that they had not yet destroyed any protected information.

4.4.2 Section 44 Reports to eligible Judge or eligible Magistrate and Attorney General

No such reports were required during the reporting period.

4.4.3 Section 47 Register of warrants and emergency authorisations

The Act requires the chief officer of the law enforcement agency to keep a register of warrants and emergency authorisations. That register is also required to contain certain specified information.

As there were no warrants issued during this reporting period, it was unnecessary to inspect the register.

4.5 Evidentiary Certificates

4.5.1 Section 50 Provision for the issue of evidentiary certificates

Inspections revealed that there were no evidentiary certificates issued during the reporting period.

4.5.2 Section 52 Requirement to inform subject of surveillance

No such orders were made during the reporting period.

4.6 Concluding Comments

As indicated in previous reports, NSWPF officers attached to the Organised Crime Squad at the Crime Commission make surveillance device applications through the Covert Applications Unit of NSWPF.

The NSWCC complied with its obligations under the Act during the reporting period.

4.7 Recommendations

No specific recommendations are made.

Chapter 5**Independent Commission Against Corruption****5.1 Warrants general requirements****5.1.1 Section 17 Application for a surveillance device warrant**

2 surveillance device warrants were issued during the reporting period each of which was made to an eligible Judge. No applications were made to an eligible Magistrate for a warrant authorising the use of a tracking device only.

5.1.2 Section 17(5A) Particulars of warrants sought notified to Attorney General

Inspections revealed that the ICAC was compliant with this requirement.

5.1.3 Section 18 Remote Application

No such applications were made during the reporting period.

5.1.4 Section 22 Extension and variation of surveillance device warrant

No extensions were sought during the reporting period. No variations were sought during the reporting period.

5.1.5 Section 23 Revocation of surveillance device warrant

1 warrant was revoked by an eligible judge during the reporting period.

5.1.6 Section 24 Discontinuance of use of surveillance device under warrant

No surveillance devices were used under the warrants issued during the period and hence no devices were discontinued.

5.1.7 Section 25 Application for retrieval warrant

1 application for a retrieval warrant was made during the reporting period.

5.1.8 Section 26 Remote application for retrieval warrant

No such applications were made during the reporting period.

5.1.9 Section 30 Revocation of retrieval warrant

No revocations of such warrants were made during the reporting period.

5.2 Emergency authorisation requirements

5.2.1 Section 31 Emergency use of surveillance devices – threat of serious personal violence or substantial property damage

No use of a surveillance device in such circumstances was made during the reporting period.

5.2.2 Section 32 Emergency authorisation - continued use of surveillance devices in participating jurisdiction

No authorisation of a surveillance device in such circumstances was made during the reporting period.

5.2.3 Section 33 Application for approval after use of surveillance device without warrant or under emergency authorisation

No such applications were made during the reporting period.

5.3 Protected Information

5.3.1 Section 40 Prohibition on use, communication or publication of protected information

The use of protected information is simply recorded on the warrant file. Inspections revealed that no protected information had been used during the reporting period.

5.4 Record-Keeping and Reporting

5.4.1 Section 41 Dealing with records obtained by use of surveillance devices

ICAC has established guidelines for dealing with protected information and its destruction. Protected information is securely stored at the ICAC premises with access restricted to authorised officers.

ICAC informed inspecting officers that they had not yet destroyed any protected information.

5.4.2 Section 44 Reports to eligible Judge or eligible Magistrate and Attorney General

Inspections revealed that 3 reports were completed during the reporting period and that each report contained all the required information. All 3 reports were provided within the time frame specified in the warrant.

5.4.3 Section 47 Register of warrants and emergency authorisations

The Act requires the chief officer of the law enforcement agency to keep a register of warrants and emergency authorisations. That register is also required to contain certain specified information.

Inspections revealed that the register recorded all of the required information.

5.5 Evidentiary Certificates

5.5.1 Section 50 Provision for the issue of evidentiary certificates

Inspections revealed that there were no evidentiary certificates issued during the reporting period.

5.5.2 Section 52 Requirement to inform subject of surveillance

No such orders were made during the reporting period.

5.6 Concluding Comments

ICAC generally complied with its obligations under the Act during the reporting period.

5.7 Recommendations

No specific recommendations are made.

Chapter 6 Law Enforcement Conduct Commission

6.1 Warrants general requirements

6.1.1 Section 17 Application for a surveillance device warrant

2 applications for surveillance device warrants were made during the reporting period, both of which were refused.

6.1.2 Section 17(5A) Particulars of warrants sought notified to Attorney General

No notices containing information from subsections (3) and (3A) were served on the Attorney General.

6.1.3 Section 18 Remote Application

No such applications were made during the reporting period.

6.1.4 Section 22 Extension and variation of surveillance device warrant

No extension was issued during the reporting period.

6.1.5 Section 23 Revocation of surveillance device warrant

There were no revocations of warrants during the reporting period.

6.1.6 Section 24 Discontinuance of use of surveillance device under warrant

No surveillance devices were used during the period and hence no devices were discontinued.

6.1.7 Section 25 Application for retrieval warrant

No such applications were made during the reporting period.

6.1.8 Section 26 Remote application for retrieval warrant

No such applications were made during the reporting period.

6.1.9 Section 30 Revocation of retrieval warrant

No revocations of such warrants were made during the reporting period.

6.2 Emergency authorisation requirements

6.2.1 Section 31 Emergency use of surveillance devices – threat of serious personal violence or substantial property damage

No use of a surveillance device in such circumstances was made during the reporting period.

6.2.2 Section 32 Emergency authorisation - continued use of surveillance devices in participating jurisdiction

No authorisation of a surveillance device in such circumstances was made during the reporting period.

6.2.3 Section 33 Application for approval after use of surveillance device without warrant or under emergency authorisation

No such applications were made during the reporting period.

6.3 Protected Information

6.3.1 Section 40 Prohibition on use, communication or publication of protected information

The use of protected information is simply recorded on the warrant file. Inspections revealed that no protected information had been used during the reporting period.

6.4 Record-Keeping and Reporting

6.4.1 Section 41 Dealing with records obtained by use of surveillance devices

LECC has established guidelines for dealing with protected information and its destruction. Protected information is securely stored at the LECC premises with access restricted to authorised officers.

LECC informed inspecting officers that they had not yet destroyed any protected information.

6.4.2 Section 44 Reports to eligible Judge or eligible Magistrate and Attorney General

No such reports were required during the reporting period.

6.4.3 Section 47 Register of warrants and emergency authorisations

The Act requires the chief officer of the law enforcement agency to keep a register of warrants and emergency authorisations. That register is also required to contain certain specified information.

As there were no warrants issued during this reporting period, it was unnecessary to inspect the register.

6.5 Evidentiary Certificates

6.5.1 Section 50 Provision for the issue of evidentiary certificates

Inspections revealed that there were no evidentiary certificates issued during the reporting period.

6.5.2 Section 52 Requirement to inform subject of surveillance

No such orders were made during the reporting period.

6.6 Concluding Comments

LECC complied with its obligations under the Act during the reporting period.

6.7 Recommendations

No specific recommendations are made.