



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 2018**

March 2019

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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 *Surveillance Devices Amendment (Statutory Review) Act 2018 No 90*, which will effect a number of changes to the substantive Act, was assented to on 28 November 2018. At the time of writing that Act has yet to be proclaimed.

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 2018 to 31 December 2018 (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 (inspections revealed that no applications for such warrants were made by LECC). The inspections included examining the application, the warrant itself, the required notice to the Attorney General under section 51 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 51 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 28 days. The following tables set out the details of those inspections.

Table 1: Surveillance device warrants issued

	No. of warrants issued
NSW Police Force	401
NSW Crime Commission	6
Independent Commission Against Corruption	1
Law Enforcement Conduct Commission	0
Total	408

Table 2: Surveillance device warrants revoked

	No. of warrants revoked
NSW Police Force	83
NSW Crime Commission	5
Independent Commission Against Corruption	0
Law Enforcement Conduct Commission	0
Total	88

Table 3: Emergency use of surveillance devices

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

Table 4: Retrieval warrants issued

	No. of retrieval warrants issued
NSW Police Force	5
NSW Crime Commission	0
Independent Commission Against Corruption	0
Law Enforcement Conduct Commission	0
Total	5

Table 5: Surveillance device warrant reports received

	No. of warrant reports received
NSW Police Force	434
NSW Crime Commission	67
Independent Commission Against Corruption	1
Law Enforcement Conduct Commission	0
Total	502

Chapter 3. NSW Police Force

As the majority of records are located at the Covert Applications Unit (CAU) most of the inspections were conducted at those premises.

In addition to the regular inspections at CAU, inspections were also conducted over a 3 day period in November 2018 at the following commands:

Nepean Police Area Command (Penrith, Blue Mountains, Mt Druitt, Quakers Hill)

Orana Mid-Western Police District (Dubbo)

Central West Police District (Orange)

Chifley Police District (Bathurst)

3.1. Warrants-general requirements

3.1.1. Section 17 Application for a surveillance device warrant

409 applications for surveillance device warrants were made during the reporting period, of which 401 were issued and 8 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 18 Remote Application

9 such applications were made during the reporting period. All supporting affidavits were provided to the issuing judicial officer within the time frame required by the legislation.

3.1.3. Section 22 Extension and variation of surveillance device warrant

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

3.1.4. Section 23 Revocation of surveillance device warrant

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

3.1.5. 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 Discontinuance

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.

3.1.6. Section 25 Application for retrieval warrant

5 such applications were made during the reporting period all of which were issued.

3.1.7. Section 26 Remote application for retrieval warrant

No such applications were made during the reporting period.

3.1.8. Section 30 Revocation of retrieval warrant

No revocation of such warrants 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

No use of a surveillance device in such circumstances was made 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

No such applications were made during the reporting period.

3.3. Protected information

3.3.1. Section 40 Prohibition on use, communication or 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), (4A) or (5).

PIRs were examined at the following locations:

Nepean Police Area Command (Penrith, Blue Mountains, Mt Druitt, Quakers Hill)

Orana Mid-Western Police District (Dubbo)

Central West Police District (Orange)

Chifley Police District (Bathurst)

Inspections revealed that the PIR was not used consistently across those Commands. CAU is exploring means of ensuring that the PIR which they have designed is used uniformly across the state.

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.

Inspections conducted at the other NSWPF locations referred to earlier, also revealed that the statutory requirements had been complied with, in that all records were kept in a secure location with access being restricted to authorised officers.

The inspections also revealed that destructions of protected information were not carried out consistently across the various commands.

Inspections also revealed that there remains an apparent widespread lack of awareness in relation to the legislative requirements concerning the destruction of protected information. It also appears that there are currently no NSWPF policy and procedures in place in respect of those requirements.

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

Inspections revealed that all such reports were provided within the timeframe specified in the warrant and that each report also contained all of the required information.

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

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

3.6. Notifications to the Attorney General

3.6.1. Section 51 Particulars of warrants sought under Part 3 to be notified to the Attorney General

Inspections revealed that the NSWPF was compliant with this requirement.

3.6.2. Section 52 Requirement to inform subject of surveillance

No such orders were made during the reporting period.

3.7. Concluding Comments

The NSWPF generally complied with its obligations under the Act during the reporting period. It is also addressing the issues raised earlier in this Report. In addition to

considering various policy and procedural changes, my Office has been informed that the NSWPF is proposing to upgrade its centralised surveillance device database.

3.8. 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**

6 applications for surveillance device warrants were made during the reporting period, all of which were issued. 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.

4.1.2. Section 18 Remote Application

No such applications were made during the reporting period.

4.1.3. Section 22 Extension and variation of surveillance device warrant

25 extensions were issued during the reporting period. One variation was issued during the reporting period.

4.1.4. Section 23 Revocation of surveillance device warrant

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

4.1.5. 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. 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.

4.1.6. Section 25 Application for retrieval warrant

No such applications were made during the reporting period.

4.1.7. Section 26 Remote application for retrieval warrant

No such applications were made during the reporting period.

4.1.8. 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 PIR 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), (4A) or (5).

Given competing priorities it was not possible to conduct any such inspections during the reporting period.

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

Inspections revealed that all such reports were provided within the timeframe specified in the warrant and that each report also contained all of the required information.

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.

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

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.

4.6. Notifications to the Attorney General

4.6.1. Section 51 Particulars of warrants sought under Part 3 to be notified to the Attorney General

Inspections revealed that NSWCC complied with this requirement in each instance.

4.6.2. Section 52 Requirement to inform subject of surveillance

No such orders were made during the reporting period.

4.7. Concluding Comments

The number of NSWCC SD warrant applications for the current reporting period is well down on the number made during previous years. For example, during the previous reporting period 50 applications for warrants were made. This Office was advised that this was due to an administrative decision that was taken within the NSWCC. That decision was that henceforth NSWPF officers attached to the Organised Crime Squad at the Crime Commission would make such applications through the CAU of NSWPF.

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

4.8. 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**

1 surveillance device warrant was issued during the reporting period. This application was made to an eligible Judge and the warrant was issued. No applications were made to an eligible Magistrate for a warrant authorising the use of a tracking device only.

5.1.2. Section 18 Remote Application

No such applications were made during the reporting period.

5.1.3. Section 22 Extension and variation of surveillance device warrant

No extensions or variations were sought during the reporting period.

5.1.4. Section 23 Revocation of surveillance device warrant

1 such warrant was revoked during the reporting period. It was revoked by an eligible Judge.

5.1.5. 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 warrant which had been used was 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 the one 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.

5.1.6. Section 25 Application for retrieval warrant

No such applications were made during the reporting period.

5.1.7. Section 26 Remote application for retrieval warrant

No such applications were made during the reporting period.

5.1.8. 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 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 all such reports were provided within the timeframe specified in the warrant and that each report also contained all of the required information.

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.

5.6. Notifications to the Attorney General

5.6.1. Section 51 Particulars of warrants sought under Part 3 to be notified to the Attorney General

Inspections revealed that ICAC was compliant with this requirement in relation to the sole warrant that was sought.

5.6.2. Section 52 Requirement to inform subject of surveillance

No such orders were made during the reporting period.

5.7. Concluding Comments

ICAC complied with its obligations under the Act during the reporting period. The 1 warrant which was issued during the reporting period was inadvertently issued for a period in excess of 90 days. Inspecting officers were informed that when Commission staff became aware of the situation an application was made to have the warrant revoked. Information obtained pursuant to that warrant has reportedly been quarantined and advice is being sought as to what should be done with the information that had been obtained.

5.8. Recommendations

No specific recommendations are made.

Chapter 6. Law Enforcement Conduct Commission

The Law Enforcement Conduct Commission did not apply for any surveillance device warrants during the reporting period.