



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

30 June 2020

September 2020

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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

There were no legislative changes made during the reporting period.

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 January 2020 to 30 June 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 22 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	466
NSW Crime Commission	0
Independent Commission Against Corruption	2
Law Enforcement Conduct Commission	0
Total	468

2.2 Table 2: Surveillance device warrants revoked

	No. of warrants revoked
NSW Police Force	141
NSW Crime Commission	0
Independent Commission Against Corruption	0
Law Enforcement Conduct Commission	0
Total	141

2.3 Table 3: Emergency use of surveillance devices

	No. of emergency uses of surveillance devices
NSW Police Force	1
NSW Crime Commission	0
Independent Commission Against Corruption	0
Law Enforcement Conduct Commission	0
Total	1

2.4 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

2.5 Table 5: Surveillance device warrant reports received

	No. of warrant reports received
NSW Police Force	386
NSW Crime Commission	0
Independent Commission Against Corruption	0
Law Enforcement Conduct Commission	2
Total	388

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**

476 applications for surveillance device warrants were made during the reporting period, of which 466 were issued and 10 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, with the following exceptions.

SD 20/0261 and SD 20/0266

The affidavits accompanying these warrants failed to include any information known to the applicant that may be adverse to the warrant application or, if no adverse information is known, a statement to that effect. s.17(3A) (c)

SD 20/0292

The affidavit accompanying this warrant failed to as far as reasonably practicable identify persons who may be incidentally recorded by the surveillance device.17(3A) (b)

SD 20/0411

The affidavit and application accompanying these warrants failed to as far as reasonably practicable identify persons who may be incidentally recorded by the surveillance device s.17(3)(b) and 17(3) (c)

These issues were raised by inspecting officers with the CAU who provided explanations in relation to each of them. The Commissioner of Police was also provided with the correspondence between the inspecting officers and the CAU.

3.1.3 Section 18 Remote Application

220 such applications were made during the reporting period. 9 of these applications were made by telephone. In each instance the requirement to provide a sworn affidavit within 72 hours pursuant to s17(5)(b) was complied with. As to the remaining 211 applications, they were made electronically due to changes in procedure as a result of Covid 19 in circumstances in which it was 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.

3.1.4 Section 22 Extension and variation of surveillance device warrant

37 extensions and 5 variations were issued during the reporting period.

3.1.5 Section 23 Revocation of surveillance device warrant

141 such warrants were revoked during the reporting period, all of which were revoked by an eligible Judge. 1 retrieval device warrant was also revoked. (See 3.1.10)

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

4 such applications were made during the reporting period. .

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

General

Inspections revealed that the NSWPF was compliant with this requirement.

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

1 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

1 application for the use of a surveillance device in such circumstances was made during the reporting period. (See 3.2.3)

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 application for approval of the use of the surveillance device was granted (see 3.2.1).

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), (4A) or (5).

In previous reports it had been indicated that the PIR had not been used consistently across various Commands. However due to Covid 19, inspections at police operational commands were cancelled during the reporting period which meant that the use of the PIRs were not inspected.

As reported previously, the CAU received funding to enable a statewide surveillance device electronic database to be developed and implemented. The new database register has been used on a trial basis in several commands and will be required to be used in all commands as from 28 September 2020. Prior to applying for a surveillance device warrant all applicants and law enforcement officers responsible for the warrant will be required to complete the “iLearn’ module on the use of the register and the record keeping requirements. It is anticipated that the new database will address concerns in relation to the recording and destruction of protected information.

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 391 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 the improvements that have been achieved in this area during the past 5 reporting periods.

3.3 Table 6: Surveillance device warrant reports delayed

Reporting period ending	Delayed Reports
June 2018	49
December 2018	0
June 2019	1
December 2019	1
June 2020	0

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.

3.5.2 Section 52 Requirement to inform subject of surveillance

No such orders were made during the reporting period.

3.6 Concluding Comments

The NSWPF has been generally compliant with its obligations under the Act during the reporting period.

An issue that arose in the most recent inspections (discussed at 3.1.2) concerned the form of affidavit used by the NSWPF in support of an application for a warrant. The Surveillance Devices Commissioner (SDC) Mr Donald McKenzie has worked in conjunction with the CAU and inspecting officers and has developed a form that is clear

and concise. It is understood that it will be in use as from 15 September 2020. It is expected that the use of the amended form will avoid the issues which occurred during the reporting period. It is hoped that in due course all other agencies will adjust their forms in order to ensure that there is consistency in their use.

3.7 Recommendations

No specific recommendations are made.

Chapter 4 NSW Crime Commission**4.2 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, all of which were revoked by an eligible Judge.

4.1.6 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. 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.

4.1.7 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), (4A) 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. 1 variation was sought during the reporting period.

5.1.5 Section 23 Revocation of surveillance device warrant

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

5.1.6 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 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.

5.1.7 Section 25 Application for retrieval warrant

No such applications were 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 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

No such reports were required during the reporting period.

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

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

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

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.

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 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

2 reports were provided to the Attorney-General and eligible Judge during the reporting period. These reports related to warrants issued during the previous reporting period. Both reports were provided within the timeframe specified in the warrants and each contained all of the required information.

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.