



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 2017

October 2017

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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

1.1.1. Transfer of responsibility to the Inspector of the Law Enforcement Conduct Commission

Prior to 1 July 2017, the Act required the NSW Ombudsman to conduct inspections of the surveillance device records of law enforcement agencies to determine the extent of compliance by those agencies and their officers with the Act. Following the introduction by the Government of legislative changes to civilian oversight of law enforcement agencies in NSW, the Office of the Inspector of the Law Enforcement Conduct Commission was created. The functions previously carried out by the NSW Ombudsman were transferred to the Inspector of the Law Enforcement Conduct Commission (the Inspector) in transitional provisions. Those legislative changes came into effect on 1 July 2017. As from that date, the Inspector has taken possession of all relevant information, documents and records previously held by the Ombudsman in relation to this function and has also taken over the Ombudsman's work in progress.

The legislative changes referred to above also created a new agency, the Law Enforcement Conduct Commission (LECC), which from 1 July 2017 replaced the Police Integrity Commission (PIC). LECC now exercises the surveillance device warrant powers which, prior to 30 June 2017, were conferred on the PIC. There are therefore references throughout the Report to the PIC as this Report relates to the period ending 30 June 2017 when PIC was still in existence.

1.2 Reporting requirements

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.

For the purposes of this report, inspections conducted prior to 1 July 2017 were performed by the NSW Ombudsman. From 1 July 2017, the responsibility for inspections was conferred upon the Inspector. Amendments to the LECC Act which came into effect on 25 September 2017 enabled the Inspector to delegate those 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
- The Police Integrity Commission
- The Independent Commission Against Corruption.

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 2017 to 30 June 2017 (the reporting period). The Inspector is authorised by the transitional provisions in Schedule 3 to the *Law Enforcement Conduct Commission Act, 2016* (the LECC Act) to assume responsibility for the preparation of this report.

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 inspection 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 inspection involved 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 31-32 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 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 in respect of all 4 NSW law enforcement agencies over a period which totalled 18 days. The following tables set out the details of those inspections.

Table 1: Surveillance device warrants issued

| | No. of warrants issued |
|---|------------------------|
| NSW Police Force | 371 |
| NSW Crime Commission | 74 |
| Independent Commission Against Corruption | 0 |
| Police Integrity Commission | 0 |
| Total | 445 |

Table 2: Surveillance device warrant reports received

| | No. of warrant reports received |
|---|---------------------------------|
| NSW Police Force | 234 |
| NSW Crime Commission | 30 |
| Independent Commission Against Corruption | 0 |
| Police Integrity Commission | 0 |
| Total | 264 |

Table 3: Surveillance device warrants revoked

| | No. of warrants revoked |
|---|-------------------------|
| NSW Police Force | 54 |
| NSW Crime Commission | 3 |
| Independent Commission Against Corruption | 0 |
| Police Integrity Commission | 0 |
| Total | 57 |

Table 4: 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 |
| Police Integrity Commission | 0 |
| Total | 0 |

Table 5: Retrieval warrants issued

| | No. of retrieval warrants issued |
|---|----------------------------------|
| NSW Police Force | 1 |
| NSW Crime Commission | 1 |
| Independent Commission Against Corruption | 0 |
| Police Integrity Commission | 0 |
| Total | 2 |

Chapter 3. NSW Police Force

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

There is also a requirement that the protected information received as a result of surveillance device warrants must be kept with the law enforcement officer responsible for the warrants at the relevant specialist command or local area command. That officer is also responsible for recording information pertaining to the use, communication or publication, and destruction of protected information obtained under the warrant. In order to test compliance with that requirement, inspections are conducted at selected commands. During this reporting period inspections were conducted at Blacktown LAC, Mt Druitt LAC and the Metropolitan Robbery Unit (MRU).

3.1. Warrants-general requirements

3.1.1. Section 17 Application for a surveillance device warrant

371 surveillance device warrants were issued during the reporting period. All such applications were made to eligible Judges during the reporting period. 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

11 such applications were made during the reporting period.

All such applications were notified to the Attorney General. 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

25 warrants issued during the reporting period were extended. 1 of those warrants was also varied. Another 1 of those warrants was extended on more than one occasion.

3.1.4. Section 23 Revocation of surveillance device warrant

54 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 NSW Police Force 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.

3.1.6. Section 25 Application for retrieval warrant

There was one application for a retrieval warrant, which was granted.

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

There was no use of a surveillance device in such circumstances during the reporting period.

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

There was no authorisation of a surveillance device warrant in such circumstances 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 NSW Police Force has created a '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). Inspections conducted at the 3 identified commands revealed that each of the registers recorded the required information.

3.4. Record-Keeping and Reporting

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

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. Records maintained at the three selected commands referred to earlier were also kept in a secure location. They were accessed only by authorised officers.

Most commands have now created a Surveillance Device register which records details of each warrant, the law enforcement officer responsible for that warrant and where that officer is located. Also recorded are the details of the destruction of protected information which is no longer required for the purposes set out in section 40(4), (4A) or (5).

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

Inspections revealed that there were a large number of instances (160 in total) during the reporting period in which the reports required under section 44 had not been provided to the eligible Judge and the Attorney General. Of those where a report was provided, 54 were provided outside the specified 60-day period.

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. Miscellaneous Matters

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

Inspections revealed that the NSW Police Force was generally compliant with this requirement. However, there were a small number of instances in which either the file did not have a hardcopy version of the section 51 notice or the notice did not contain all the relevant particulars or it contained minor typographical errors. When these instances were drawn to the attention of the relevant staff at CAU, these deficiencies were rectified.

3.6.2. Section 52 Requirement to inform subject of surveillance

No such orders were made during the reporting period.

3.7. Concluding Comments

As indicated above, the NSW Police Force has not been compliant with all aspects of its obligations under the Act during the reporting period. The exceptions identified as a result of the inspection process will be raised in correspondence with the NSW Police Commissioner. Any response that the Commissioner may choose to make will be included in the next report.

3.8. Recommendations

It is recommended that the NSW Police Force address those areas which have been identified in which there has been a lack of compliance with the requirements of the Act.

Chapter 4. NSW Crime Commission

4.1. Warrants- general requirements

4.1.1. Section 17 Application for a surveillance device warrant

74 surveillance device warrants were issued during the reporting period. 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

41 warrants issued during the reporting period were extended. 33 of these warrants were extended on more than one occasion. There were also a further 19 warrants which were issued during the previous reporting period that were extended during this reporting period. There were 7 warrants in total that were varied during the reporting period.

4.1.4. Section 23 Revocation of surveillance device warrant

3 surveillance device 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

There was one application for a retrieval warrant, which was granted.

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

There was no use of a surveillance device in such circumstances during the reporting period.

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

There was no authorisation of a surveillance device in such circumstances 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. They use the NSW Police Force '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). There were no inspections conducted of the registers 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 established guidelines for dealing with protected information. Protected information is securely stored at the NSWCC premises with access restricted to authorised officers.

The NSWCC has not thus far provided any information to inspecting officers in relation to the destruction of 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 time 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. Miscellaneous Matters

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

Inspections revealed that each of the section 51 notices contained all of the required information.

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 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

The Independent Commission Against Corruption did not apply for any surveillance device warrants during the reporting period.

None of the warrants issued during the previous reporting period were extended during this reporting period.

Chapter 6. Police Integrity Commission

The Police Integrity Commission did not apply for any surveillance device warrants during the reporting period.

None of the warrants issued during the previous reporting period were extended during this reporting period.