



Office of the Inspector of the
Law Enforcement Conduct Commission

**Report under section 242(3) of the
*Law Enforcement (Powers and
Responsibilities) Act 2002*
for the period ending 28 May 2017**

Covert Search Warrants

AUGUST 2017

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Legislative Changes

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

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 (Inspector of LECC) was created. The functions previously carried out by the NSW Ombudsman under the Law Enforcement (Powers and Responsibilities) Act 2002 were transferred to the Inspector of the Law Enforcement Conduct Commission 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 covert search 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 28 May 2017 when PIC was still in existence.

This report is submitted to the Attorney General and the Minister for Police in accordance with section 242(3) of the Law Enforcement (Powers and Responsibilities) Act 2002. The report details the results of inspections conducted of agency records between 29 May 2016 and 28 May 2017 together with any other statutory compliance matters of note.

Chapter 1. Introduction

Sections 46C and 47 of the *Law Enforcement (Powers and Responsibilities) Act 2002* (the Act) authorise specified persons within the NSW Police Force, the NSW Crime Commission and, since 1 July 2017, the Law Enforcement Conduct Commission (previously the PIC) to apply to eligible judicial officers of the Supreme Court for “a covert search warrant”. They are known as covert search warrants because the occupier of the property does not need to be told about the search until the time specified in the warrant by the issuing Judge. This will usually be several months after the search.

1.1 Purpose of covert search warrants

It is not intended that covert search warrants are to be used as a routine investigative tool. Covertly entering and searching premises is a significant departure from standard entry and search powers. However, an application may be made to the Supreme Court for a covert search warrant in the investigation of ‘serious offences’ as defined in the Act.

Section 46A of the Act defines a serious offence as:

- (a) any indictable offence punishable by imprisonment for a period of 7 or more years and that involves the following:
 - (i) the supply, manufacture or cultivation of drugs or prohibited plants
 - (ii) the possession, manufacture or sale of firearms within the meaning of the Firearms Act 1996,
 - (iii) money laundering,
 - Note: For example, section 193B of the Crimes Act 1900.
 - (iv) car and boat re-birthing activities,
 - Note: For example, section 154G of the Crimes Act 1900.
 - (v) the unauthorised access to, or modification or impairment of, computer data or electronic communications,
 - (vi) an activity involving theft carried out on an organised basis,
 - (vii) violence causing grievous bodily harm or wounding,
 - (viii) the possession, manufacture or supply of false instruments,
 - (ix) corruption,
 - (x) destruction of property,
 - (xi) homicide,

- (xii) kidnapping,
- (b) any offence under Division 10 (offences in the nature of rape, offences relating to other acts of sexual assault etc) of Part 3 of the *Crimes Act 1900* punishable by imprisonment for a period of 7 or more years,
- (c) an offence under section 80D (causing sexual servitude) or 80E (Conduct of business using sexual servitude) of the *Crimes Act 1900*,
- (d) an offence under section 93FA (Possession, supply or making of explosives) of the *Crimes Act 1900*,
- (e) an offence under Division 15 (Child prostitution) or 15A (Child pornography) of Part 3 of the *Crimes Act 1900*,
- (f) an offence under section 308F (Possession of data with intent to commit serious computer offence) or 308G (Producing, supplying or obtaining data with intent to commit serious computer offence) of the *Crimes Act 1900*,
- (g) an offence of attempting to commit, or of conspiracy or incitement to commit, or of aiding or abetting, an offence referred to in paragraphs (a) – (f).

Before granting a covert search warrant, the issuing Judge must also be satisfied that it is necessary for the entry and search to be conducted without the occupier's knowledge.

While the initial searching may be done covertly, eventually the occupier must be given formal notice that it has occurred. The length of time before the occupier's notice must be served is determined by the issuing Judge and they may authorise delaying service of the notice for up to six months at a time. In exceptional circumstances the service of the notice may be delayed beyond 18 months, but it must not be delayed beyond three years in any circumstances. Covert search warrants expire 10 days after the date on which they are issued, unless the warrant specifies an earlier expiry date. Warrants may be granted to allow a search for a particular thing or things, or a kind of thing or things.

1.2 Application process

A Judge of the Supreme Court may consent to being nominated by the Attorney General as an 'eligible Judge' under the Act. The Attorney General may then declare those Judges who have consented, to be 'eligible Judges' under the Act. Both the consent and declaration must be made in writing.

An application for a covert search warrant must be made in person to an eligible Judge. The applicant must be a police officer, who is duly authorised by a police officer of the rank of Superintendent or above to make such applications. Applicants from the NSW Crime Commission and the LECC (previously the PIC) must be a member of staff appropriately authorised by the Commissioner or Assistant Commissioner of the relevant Commission.

The application may be made by telephone if the issuing Judge is satisfied that a warrant is required urgently and the application cannot be made in person.

Applications are made using the Form 2 which is prescribed in the Law Enforcement (Powers and Responsibilities) Regulation 2016. The form contains all the relevant information that s 62 of the Act requires to be considered for a covert search warrant application.

The form of the warrants (Form 12) is also prescribed in the Regulation as well as the occupier's notice (Form 22), and adjoining occupier's notice (Form 23). The criteria set out in ss 66, 67 and 67B of the Act in relation to these documents are covered in these forms.

1.3 Reporting requirements

Within 10 days of executing the warrant, or of the warrant expiry date if the warrant is not executed, the executing officer is required under s 74A to provide a report in writing to the issuing Judge. Depending on the type of report, it must comply with either Form 28 or Form 29, both of which are contained in the Regulation.

1.4 Role of the Ombudsman (to 30 June 2017)

Covert searching of premises is a significant departure from usual expectations of the privacy and sanctity of private premises. Covert search warrants give eligible law enforcement agencies, and their officers, authority to enter and search premises without the knowledge of the occupiers, in relation to the investigation of serious offences.

During the reporting period, the NSW Ombudsman was required to inspect the records of law enforcement agencies to check on their compliance, and the compliance of their officers, with Part 5 of the Act. This provides rigorous external oversight of the use of these powers. Inspections must take place at least every 12 months.

During the reporting period, there were three law enforcement agencies inspected for the purpose of this Act:

- NSW Police Force
- NSW Crime Commission
- Police Integrity Commission

Section 242(1) of the Act commenced on 29 May 2009. Prior to 1 July 2017, pursuant to this section, the Ombudsman was required to furnish a report to the Attorney General and the Minister for Police each year. As noted earlier, the Inspector of the LECC has taken over those particular functions and the section now specifies that the Inspector of LECC is required to furnish the Report. The Attorney is required by s 242(7) of the Act to lay the report, or cause the report to be laid, before both Houses of Parliament as soon as practicable after receiving the report.

1.5 Scope of an inspection

Every covert search warrant file at each agency is inspected. This involves an examination of the application, warrant, occupier's notice, and report to the issuing Judge, and any other information contained on the file. Each inspection involves checking that:

- the applicant is authorised to apply for the covert search warrant (s 46C)
- the application is in the form prescribed by the Regulation and is made in person by the applicant (s 60)
- the application contains the information required by s 62
- the warrant is in the form prescribed by the Regulation (Form 12)
- the warrant fulfils the requirements of s 66, which includes detailed information about the premises, the occupant and their likely involvement in the searchable offence
- the occupier's notice is in the form prescribed by the Regulation (Form 22)
- the occupier's notice contains the particulars specified in s 67(2) to provide the occupier with sufficient information about the warrant
- any occasion of the postponement of service of the occupier's notice does not exceed 6 months, and that postponement is not delayed for more than 3 years in total (s 67A(1) and (2))

- where an occupier's notice is postponed for more than 18 months there are exceptional circumstances provided to the issuing Judge (s 67A(3))
- if adjoining premises are entered in execution of the covert search warrant, that the adjoining occupier's notice is in the form prescribed by the Regulation (Form 23) and contains the information specified, and was served on the adjoining occupier at the time the covert search warrant was executed – unless the issuing Judge directs that service of the adjoining occupier's notice may be dispensed with (s 67B)
- the report on execution of the covert search warrant is in the form prescribed by the Regulation (Form 28) and contains the particulars specified in s 74A
- where a covert search warrant authorises the return or retrieval of a thing seized or placed, the report is in the form prescribed by the Regulation (Form 29) and contains the particulars specified in s 74A
- the report was provided within 10 days after the execution of the warrant or the expiry – whichever occurs first – or within 10 days after the entry to the premises for the purpose of retrieving or returning a thing (s 74A)
- copies of any reports provided to the issuing Judge under s 74A are given to the Attorney General.

Records about the execution of covert search warrants and those relating to entry and seizures to ascertain the accuracy of the reports to the issuing Judge are also examined. This also involves follow up on later inspections to confirm that occupier's notices have been served as soon as any period of postponement has expired.

1.6 Inspection detail

The NSW Police Force records are located at its Covert Applications Unit, and were inspected on 14 November 2016 and 30 May 2017. The NSW Police were cooperative in facilitating our inspections.

The NSW Crime Commission did not make any covert search warrant applications during the reporting year and consequently no inspections were conducted at that agency.

The Police Integrity Commission also did not make any covert search warrant applications during the reporting year so no inspections were conducted at that agency.

Chapter 2. NSW Police Force

The files containing records relating to 46 proposed applications for covert search warrants prepared during the reporting period, being CSW16/010 to CSW17/009, were inspected. Of these, 35 applications were made to the court and resulted in 34 warrants being issued and one application being refused. Eleven proposed applications did not proceed.

2.1 Warrants

In relation to the 34 warrants granted, 4 authorised the search and seizure of particular things specified in the warrant, and 26 authorised the seizure of ‘a thing of a kind connected with a searchable offence’ (s 47(3)(a)). The remaining 4 warrants authorised the search and seizure of both particular things and kinds of things. The types of offences investigated in relation to the warrants granted were murder, drug offences, firearms offences, arson offences and proceeds of crime.

2.2 Occupier’s notice

The service of the occupier’s notice was postponed for six months in relation to 32 warrants, one was postponed for 4 months and one was not postponed. None of these warrants had the occupier’s notice postponed for a further six months.

Information relevant to each warrant is held at the Covert Applications Unit but the responsibility for the service of the occupier’s notice lies with the officer responsible for executing each warrant. These officers may be located anywhere across the state. The Covert Applications Unit has developed a register which assists with the preparation of its annual report on the results of these warrants. This register now specifies the time for the service of the occupier’s notice and the date on which the notice was actually served. This register also assists the Covert Applications Unit to monitor the service of the occupier’s notice at locations around the state.

2.3 Reports

During this year, of the 34 warrants that were granted to the NSW Police Force, 30 were executed and 4 were not executed. Of the 30 warrants issued and reported on, one report was not provided to the eligible judge within the required 10 day period.

In relation to warrant CSW16/046 the report was due to be provided to the issuing Judge by 18/2/2017 but was not provided until almost 3 months later on 16/5/17.

2.4 Exceptions identified at inspection

There is still a general issue in relation to the completion of the standard report Form 28 following the execution of the warrant. This was raised with NSWPF following each of our inspections. The Covert Applications Unit will continue to provide assistance to officers completing these reports, and offer more training for officers conducting these operations.

2.5 Concluding comments

Apart from the exceptions outlined above, the NSW Police Force was otherwise compliant with Part 5 of the *Law Enforcement (Powers and Responsibilities) Act 2002* in so far as it related to covert search warrants.

2.6 Recommendations

As the NSW Police Force has taken action to address the issues raised in relation to the exceptions that were identified, no recommendations are made.

Chapter 3. NSW Crime Commission

The NSW Crime Commission did not apply for any covert search warrants during the period covered by this report.

Chapter 4. Police Integrity Commission

The Police Integrity Commission did not apply for any covert search warrants during the period covered by this report.

