



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 2021**

Covert Search Warrants

July 2021

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Legislative Changes

There were no relevant legislative changes during the reporting period.

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 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 a ‘searchable offence’ that is a ‘serious offence’ as defined in the Act.

Section 46A (2) of the Act defines a ‘serious offence’ as meaning the following:

- (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 (sexual offences against adults and children) 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 who 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 must be the Commissioner or Assistant Commissioner, or a member of staff appropriately authorised by the Commissioner or Assistant Commissioner. Applicants from the LECC must be the Chief Commissioner or Commissioner of Integrity, or a member of staff appropriately authorised by the Chief Commissioner or Commissioner of Integrity.

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 Form 2 which is prescribed in Schedule 1 of the *Law Enforcement (Powers and Responsibilities) Regulation 2016* (the Regulation). 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 a covert search warrant (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 Inspector

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 staff of the Inspector were required to inspect the records of the eligible 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, only the NSW Police Force applied for covert search warrants and as such only those records were inspected for the purpose of this Act.

Pursuant to s 242(3) of the Act the Inspector is required to furnish a report to the Attorney General and the Minister for Police each year. The report details the results of inspections conducted of law enforcement agency records between 29 May 2020 and 28 May 2021 together with any other statutory compliance matters of note. The Attorney General 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 that it 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 (CAU). For the current reporting period they were inspected on 4, 5 June 2020 and 22, 23 March 2021 with a further follow-up on 31 May 2021. The NSW Police Force were cooperative in facilitating the inspections.

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

The Law Enforcement Conduct Commission also did not make any covert search warrant applications during the reporting period and consequently no inspections were conducted at that agency either.

Chapter 2. NSW Police Force

The files containing records relating to 43 proposed applications for covert search warrants prepared during the reporting period, being CSW20/025 to CSW21/012, were inspected. 7 proposed applications did not proceed. 36 applications did proceed and warrants were issued in relation to each of them.

Covert Search Warrants Granted - Five Year Comparison

2017	2018	2019	2020	2021
34	40	34	37	36

2.1 Warrants

In relation to the 36 warrants issued, 6 authorised the search and seizure of particular things specified in the warrant, and 23 authorised the seizure of ‘a thing of a kind connected with a searchable offence’. The remaining 7 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, robbery offences, kidnapping, participate in criminal group and proceeds of crime and sexual assault offences.

2.2 Occupier’s notice

In relation to all 36 of the warrants, the service of the occupier’s notice was postponed for 6 months. In relation to 3 of those warrants the service of the occupier’s notice was postponed for a second period of 6 months. In relation to 1 warrant which had been issued during the previous reporting period, the occupier’s notice was also postponed for a period of 6 months.

Information relevant to each warrant is held at the CAU 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 CAU 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 CAU to monitor the service of the occupier's notice at locations around the state.

Inspections of the register revealed that 7 occupier's notices were not served within the time specified in the notice.

Covert Search Warrant	Date to Serve	Date Served
19/011	04/10/2019	06/04/2020
19/031	25/02/2020	08/05/2020
20/012	18/08/2020	07/12/2020
20/013	20/08/2020	27/08/2020
20/014	20/08/2020	27/08/2020
20/018	09/10/2020	12/10/2020
20/019	01/11/2020	16/11/2020

This Office sought an explanation from the CAU as to why each of those notices was not served within the specified time. In relation to covert search warrant 20/018, CAU advised that the delay resulted from difficulties in initially locating the occupier to effect service of the notice. In respect of covert search warrants 20/013 and 20/014 (which are directly related) and 20/019, although the delays have not been explained, in each case they were not significant. However, in relation to covert search warrants 19/011, 19/013 and 20/012 this Office has recently requested a report from the CAU that provides it with a more detailed explanation as to what caused the significant delays in each of those instances.

Following correspondence, and in an endeavour to minimise the possibility of similar issues occurring in the future, the CAU implemented a new process at the beginning of 2021. It involved providing email notification to the responsible officers 3 weeks prior to the due date for service reminding those officers of their obligations. I am able to report

that since the implementation of the new practice, there have been no delays in the service of occupier's notices.

2.3 Reports

During the reporting period, of the 36 warrants that were granted to the NSW Police Force, 29 were executed and 7 were not executed. Inspections revealed that 5 reports were not provided to the eligible judge within the required 10 day period.

Covert Search Warrant	Date Report Due to Judge	Date Served on Judge
20/008	08/03/2020	11/03/2020
20/024	29/05/2020	15/06/2020
20/025	11/06/2020	18/11/2020
20/028	30/06/2020	24/07/2020
20/048	03/12/2020	9/12/2020

This Office sought an explanation from the CAU as to why each of those reports was not provided within the specified time. In relation to covert search warrants 20/008, 20/024, 20/028 and 20/048 those explanations included that the particular officers in charge of the reports had been on leave for extended periods of time when the reports were due, and that there were also elements of human error involved. In relation to covert search warrant 20/025, this Office has recently requested a report from the CAU that provides it with a more detailed explanation as to what caused the significant delay in that instance.

Following correspondence, and in an endeavour to minimise the possibility of similar issues occurring in the future, the CAU has made adjustments to the handover processes that apply when officers in charge of covert search warrants take leave. It has also undertaken measures which will shorten the periods between its own internal audits of record keeping for covert search warrant files.

2.4 Exceptions identified at inspection

These have already been identified.

2.5 Concluding comments

Apart from the matters referred to earlier, 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 steps to address the issues raised in relation to the exceptions 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. Law Enforcement Conduct Commission

The Law Enforcement Conduct Commission did not apply for any covert search warrants during the period covered by this report.