

Office of the Inspector of the Law Enforcement Conduct Commission

Report for the period ending 28 May 2023

Under Section 242(3) of the *Law Enforcement (Powers and Responsibilities) Act 2002*

Covert Search Warrants

September 2023

OFFICIAL



Acknowledgement of Country

Office of the Inspector of the Law Enforcement Conduct Commission acknowledges the Traditional Custodians of the lands where we work and live. We celebrate the diversity of Aboriginal peoples and their ongoing cultures and connections to the lands and waters of NSW.

We pay our respects to Elders past, present and emerging and acknowledge the Aboriginal and Torres Strait Islander people.

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Published by Office of the Inspector of the Law Enforcement Conduct Commission.

www.oilecc.nsw.gov.au

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2 Introduction

2.1 Role of the Inspector of the Law Enforcement Conduct Commission

Inspection function

Section 122(1) of the *Law Enforcement Conduct Commission Act 2016* (LECC Act) provides that:

(1) The Inspector has the functions conferred or imposed on the Inspector by or under this or any other Act.

Note—

Functions conferred on the Inspector under other Acts include the functions of an inspecting officer under the *Telecommunications (Interception and Access) (New South Wales) Act 1987* and of the Inspector under the *Surveillance Devices Act 2007* and the *Law Enforcement (Controlled Operations) Act 1997*.

In addition to those specific functions, section 242(1) of the *Law Enforcement (Powers and Responsibilities) Act 2002* (the Act) provides that:

The Inspector must inspect the records of the NSW Police Force, the New South Wales Crime Commission and the Law Enforcement Conduct Commission under Part 5 in relation to covert search warrants every 12 months after the substitution of this section by the amending Act for the purpose of ascertaining whether or not the requirements of that Part (in so far as it relates to covert search warrants) are being complied with.

In order to facilitate that function, section 242(2) of the Act provides that ‘the Inspector may require the Commissioner of Police, the Commissioner for the New South Wales Crime Commission and the Chief Commissioner of the Law Enforcement Conduct Commission to provide access to the relevant records.’

Reporting function

Section 242(3) of the Act provides that:

The Inspector must, as soon as practicable after 28 May of each subsequent year, prepare a report of the Inspector’s work and activities under subsection (1) and furnish a copy of the report to the Attorney General and the Minister for Police.

Section 242(7) of the Act requires the Attorney General to lay (or cause to be laid) a copy of the report before both Houses of Parliament as soon as practicable after the Attorney General receives the report.

This report details the results of inspections conducted during the period commencing 29 May 2022 and ending on 28 May 2023, together with any significant statutory compliance issues that were identified. During the reporting period, the NSW Police Force (NSWPF) was the only agency which applied for covert search warrants and as such only its records were inspected.

2.2 The legislative framework that governs covert search warrants

Section 3 of the Act defines a ‘covert search warrant’ as being ‘a search warrant issued under Division 2 of Part 5 that may be executed covertly.’ Part 5 of the Act regulates the use of search and seizure powers by the issuing of warrants.

An 'eligible applicant' may apply to an 'eligible issuing officer' for a covert search warrant if, as required by section 47(3) of the Act, the applicant:

- (a) suspects on reasonable grounds that there is, or within 10 days will be, in or on the premises a thing of a kind connected with a searchable offence in relation to the warrant, and
- (b) considers that it is necessary for the entry and search of those premises to be conducted without the knowledge of any occupier of the premises.

Section 47A(1) provides that if issued, a covert search warrant authorises any executing officer for the warrant to enter the subject premises (being the premises the subject of the warrant), and to search the premises for things connected with a particular searchable offence in relation to the warrant. Subsection (2) provides that the executing officer is also authorised to conduct the entry and search of the subject premises without the knowledge of any occupier of the subject premises, and if necessary to do so to enter and search the subject premises – to enter premises adjoining or providing access to the subject premises (adjacent premises) without the knowledge of the occupier of the adjacent premises, and to impersonate another person for the purposes of executing the warrant, and to do anything else that is reasonable for the purpose of concealing anything done in the execution of the warrant from the occupier of the premises.

An eligible applicant is described in section 46C of the Act in the following terms:

- (1) The following persons are authorised to apply for a covert search warrant –
 - (a) a police officer authorised to make the application by a police officer holding the rank of Superintendent or above,
 - (b) the Chief Commissioner or other Commissioner of the Law Enforcement Conduct Commission or a member of staff of that Commission authorised to make the application by the Chief Commissioner or the Commissioner for Integrity,
 - (c) the Commissioner or an Assistant Commissioner for the New South Wales Crime Commission or a member of staff of the New South Wales Crime Commission authorised to make the application by the Commissioner or an Assistant Commissioner.
- (2) An authorisation to apply for a covert search warrant in respect of a searchable offence may be given in accordance with this section if the person giving the authorisation –
 - (a) suspects on reasonable grounds that there is, or within 10 days will be, in or on the premises a thing of a kind connected with the searchable offence, and
 - (b) considers that it is necessary for the entry and search of those premises to be conducted without the knowledge of any occupier of the premises.

An 'eligible issuing officer' is defined in section 46 of the Act as being an eligible Judge within the meaning of section 46B of the Act, namely a Judge of the Supreme Court who has been declared to be eligible by the Attorney General.

An 'executing officer' in relation to a covert search warrant is defined in section 46 of the Act as being:

- (i) any police officer, or
- (ii) any member of staff of the Law Enforcement Conduct Commission if the applicant for the warrant was authorised to make the application under section 46C(1)(b), or

(iii) any member of staff of the New South Wales Crime Commission if the applicant for the warrant was authorised to make the application under section 46C(1)(c).

It is not intended that covert search warrants are to be used as a routine investigative tool because covertly entering and searching premises is a significant departure from standard entry and search powers. Accordingly, section 47(3) of the Act provides that an eligible applicant may only apply for such a warrant if it is in the investigation of a 'searchable offence'. A 'searchable offence' in relation to a covert search warrant is defined in section 46A(1)(b) of the Act as being a 'serious offence'. A 'serious offence' is defined in section 46A(2) of the Act in the following terms:

(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 rebirthing 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,

- (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 involving 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).

Section 60 of the Act provides that an application for a covert search warrant is to be in writing in the form prescribed by the regulations and that it must be made in person, unless it is a telephone warrant. Section 60A, which came into effect in December 2021, enables applications to be made by email.

Section 60(2) of the Act provides that:

An eligible issuing officer must not issue a warrant unless the information given by the applicant in or in connection with the application is verified before the eligible issuing officer on oath or affirmation or by affidavit.

Section 61 of the Act provides that the warrant may be applied for by telephone (a 'telephone warrant') and sets out procedural requirements in respect of the issuing of such warrants. However, section 61(2) provides that an eligible issuing officer must not issue such a warrant 'unless the eligible issuing officer is satisfied that the warrant is required urgently and that it is not practicable for the application to be made in person.'

An application for a covert search warrant must contain the information specified in sections 62(1) and 62(2) of the Act. When determining an application for a covert search warrant, the eligible Judge must consider the matters specified in sections 62(3) and 62(4) of the Act. Applications are made using Form 2 which is prescribed in the *Law Enforcement (Powers and Responsibilities) Regulation 2016* (the Regulation). That form contains all the relevant information which is required by section 62 of the Act.

While the initial searching may be done covertly, eventually the occupier must be given formal notice that it has occurred. Section 67(8) of the Act provides that a person executing the warrant

must serve the notice as soon as practicable after the warrant is executed, unless the service of the notice is postponed under section 67A. Any postponement to service is determined by the eligible Judge who issued the warrant. Service may be delayed 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.

Section 67B(1) of the Act provides that if the execution of the warrant ‘will involve entering premises adjoining or providing access to the subject premises (adjoining premises) without the knowledge of the occupier of the adjoining premises,’ an adjoining occupier’s notice must be prepared by the person to whom a covert search warrant is issued. Under section 67B(2) of the Act, before execution of the covert search warrant, that notice is to be provided to the eligible Judge who issued the warrant for their approval. Section 67B(3) provides that the notice is to specify the name of the person who applied for the covert search warrant, the date when the warrant was issued, the address or other description of the subject premises, and any other matters required by the regulations. Section 67B(4) of the Act provides that:

The adjoining occupier’s notice must be served on the person who was the occupier of the adjoining premises at the time the covert search warrant was executed, on (or as soon as practicable after) service of the occupier’s notice on the occupier of the subject premises under section 67 unless the eligible issuing officer directs that service of the notice may be dispensed with.

Section 49 of the Act authorises the seizure of things pursuant to a search warrant, and in the case of a ‘covert search warrant that authorises the placing of a kind of thing in substitution for a seized thing – a power to place a thing of that kind on the subject premises in substitution for a thing seized.’ Section 49A of the Act provides that a ‘covert search warrant may authorise the return of a thing seized under section 49(1)(a), or the retrieval of a thing placed under section 49(2)(c), if the warrant expressly authorises such a return or retrieval.’ That section imposes time limits for the return or retrieval of things seized.

Section 73 of the Act provides that covert search warrants expire 10 days after the date on which they are issued unless the warrant specifies an earlier expiry date. There is no provision in the Act for the extension of a covert search warrant.

Section 74A of the Act provides that within 10 days of executing a covert search warrant, or of the warrant expiry date if the warrant is not executed, the executing officer is required to provide a report in writing to the eligible Judge who issued the warrant. That section also provides that, if premises are entered for the purposes of returning or retrieving a thing under section 49A, then a report is to be provided in writing to the Judge within 10 days after the entry to the premises for the purpose of retrieving or returning the thing.

Division 4 of Part 5 of the Act contains a number of general provisions relating to warrants that include references to forms prescribed by the regulation. In Schedule 1 of the Regulation there are forms provided which are to be used for the purpose of making an application (Form 2), issuing a warrant (Form 12), preparing an occupier’s notice (Form 22), preparing an adjoining occupier’s notice (Form 23), submitting a report to the eligible Judge who issued the warrant about the execution of the warrant (Form 28), and submitting a report to eligible Judge who issued the warrant about the return or retrieval of a thing (Form 29).

2.3 Scope of an Inspection

Inspecting officers aim to inspect every covert search warrant file at each agency that applied for such warrants. The inspections included an examination of the application, warrant, occupier’s notice, any reports to the issuing Judge together with any other information contained on the file.

Each inspection involved checking the following details recorded on those files (with reference to the relevant section of the Act and/or the form prescribed in the Regulation) to ensure that:

- the applicant is authorised to apply for the covert search warrant (section 46C)
- the application is in the form prescribed by the Regulation (Form 2) and is made in person by the applicant (section 60), or in the case of an application made by email the application is made in accordance with section 60A, or in the case of an application for a telephone warrant is made in accordance with section 61
- the application contains the information required by section 62
- the warrant is in the form prescribed by the Regulation (Form 12)
- the warrant meets the requirements of section 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 section 67(2) in order 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 (section 67A(1) and (2))
- if an occupier's notice is postponed for more than 18 months that there are exceptional circumstances provided to the eligible Judge who issued the warrant (section 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 it contains the information specified, and that it was served on the adjoining occupier at the time the covert search warrant was executed, unless the eligible Judge who issued the warrant directed that service of the adjoining occupier's notice may be dispensed with (section 67B)
- the report about the execution of the covert search warrant is in the form prescribed by the Regulation (Form 28) and contains the particulars specified in (section 74A)
- if a digital evidence access order was issued in connection with the warrant – setting out a brief description of the use of the order, and (section 74A(c1))
- the report about the execution of the covert search warrant to the eligible Judge who issued the warrant is provided within 10 days after the execution of the warrant or its expiry, whichever occurred first (section 74A(2))
- if 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 section 74A
- the report about the return or retrieval of a thing seized or placed 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 under section 49A (section 74A)
- the report about the return or retrieval of a thing seized or placed is provided within 10 days after the entry to the premises for the purpose of retrieving or returning the thing under section 49A (section 74A(4))
- copies of any reports provided to the issuing Judge under section 74A are given to the Attorney General (section 74A(5)).

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

After conducting inspections, the Inspector's delegated inspection officers hold an exit interview with the manager responsible for warrant administration at the relevant agency. Subsequently, these officers correspond with the manager to address and resolve any issues discovered during the inspection. Following this, the Inspector sends formal post-inspection correspondence to the relevant chief officer, reporting on the inspection's outcomes and highlighting any matters of concern that may have arisen during the process.

OILECC has been able to develop good working relationships with each of the agencies that may apply for covert search warrants. Those cooperative working arrangements have greatly assisted in facilitating the development of best practice models and have also contributed to ensuring that there is a high level of compliance with the legislative requirements.

3 NSW Police Force

The files containing records relating to 26 proposed applications for covert search warrants were inspected during the reporting period. Of the proposed applications, 20 proceeded and warrants were issued in relation to each of them.

The NSWPF's Covert Applications Unit (CAU) centrally manages its applications for covert search warrants. Its purpose is to support the NSWPF to operate in compliance with the legislation that governs its use of covert powers, including covert search warrants.

Covert Search Warrants Inspected - Five Year Comparison

| 2019 | 2020 | 2021 | 2022 | 2023 |
|------|------|------|------|------|
| 34 | 37 | 36 | 33 | 20 |

3.1 Warrants

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.

3.2 Section 67 Notice to the Occupier of Premises

The service of the occupier's notice was postponed for 6 months in relation to all 20 of the warrants.

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.

An examination of the register revealed that those occupier's notices that were served during the reporting period were served within the required timeframe.

3.3 Section 74(A) Report to eligible issuing officer

During this year, of the 20 warrants that were granted to the NSW Police Force, 18 were executed and 2 were not executed. 19 of the reports were delivered within 10 days. There was one instance of a delayed report.

3.4 Exceptions identified at inspection

There was one exception self-declared by NSWPF Compliance Staff. An application for a covert search warrant was sought and obtained without the assistance of the CAU and was issued in error by a local court registrar rather than a Judge of the Supreme Court who has been declared to be eligible by the Attorney General.

This resulted in an invalid warrant being executed by the NSWPF. Additionally, the required report to the issuing officer was not completed in within the required 10 days.

The NSWPF provided a report into the breach, explaining that it occurred due to an outdated link on the NSWPF Intranet. This outdated link has since been removed and the intranet page emphasises that all applications for covert search warrants must be completed through the CAU.

3.5 Concluding comments

The NSW Police Force were mostly compliant with Part 5 of the *Law Enforcement (Powers and Responsibilities) Act 2002* in so far as it related to covert search warrants.

3.6 Recommendations

No recommendations are made.

4 NSW Crime Commission

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

5 Law Enforcement Conduct Commission

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

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