

Office of the Inspector of the Law Enforcement Conduct Commission

**Report for the period from 7 August 2021 to 6 August 2023**

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Under Section 242(6) of the *Law Enforcement (Powers and Responsibilities) Act 2002* – Criminal Organisation Search Warrants

October 2023

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## 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.

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# 1 Introduction

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## 1.1 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 inspection functions, section 242(4) of the *Law Enforcement (Powers and Responsibilities) Act 2002* (the Act) provides that:

- *The Inspector must inspect the records of the NSW Police Force under Part 5 in relation to criminal organisation search warrants every 2 years 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 they relate to criminal organisation search warrants) are being complied with.*

In order to facilitate that function, section 242(5) of the Act provides that ‘the Inspector may require the Commissioner of Police to provide access to the relevant records.’

### Reporting function

Section 242(6) of the Act provides that:

- The Inspector must, as soon as practicable after 7 August each year and as soon as practicable after the expiration of each subsequent 2-year period, prepare a report of the Inspector’s work and activities under subsection (4) 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.

The NSW Police Force (NSWPF) is the only law enforcement agency that is authorised to use criminal organisation search warrant powers. Accordingly, this report details the results of inspections of the NSWPF conducted during the period commencing on 7 August 2021 and ending on 15 May 2023, together with any significant statutory compliance issues that were identified.

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## 1.2 The legislative framework that governs criminal organisation search warrants

Section 3 of the Act defines a ‘criminal organisation search warrant’ as being ‘a search warrant issued under Division 2 of Part 5 in relation to an organised crime offence.’ 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 criminal organisation search warrant if, as required by section 47(3A) of the Act, the applicant 'has reasonable grounds to suspect that there is, or within 7 days there will be, in or on the premises a thing connected with a searchable offence in relation to the warrant.'

Section 47A(1) of the Act provides that if issued, a criminal organisation search warrant authorises any executing officer for the warrant to enter the subject premises, and to search the premises for things connected with a particular searchable offence in relation to the warrant.

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

(1) An application for a criminal organisation search warrant may be made by a police officer authorised to make the application by a police officer holding the rank of Superintendent or above.

(2) An authorisation to apply for a criminal organisation search warrant in respect of a searchable offence may be given in accordance with this section if the person giving the authorisation suspects on reasonable grounds that there is, or within 7 days there will be, in or on the premises a thing of a kind connected with the searchable offence.

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 criminal organisation search warrant is defined in section 46 of the Act as being 'any police officer'.

A **searchable offence** in relation to a criminal organisation search warrant is defined in section 46A(1)(c) as being an 'organised crime offence' which section 46A(2) describes as being 'any serious indictable offence arising from, or occurring as a result of, organised criminal activity.'

Section 46AA of the Act defines 'organised criminal activity' in the following terms:

(1) In this Part —

**organised criminal activity** means any activity that —

- (a) is carried out on an organised basis, and
- (b) is carried out to advance any one or more of the following objectives —
  - (i) obtaining material benefits from conduct constituting a serious indictable offence,
  - (ii) obtaining material benefits from conduct engaged in outside New South Wales (including outside Australia) that, if it occurred in New South Wales, would constitute a serious indictable offence,
  - (iii) committing serious violence offences,
  - (iv) engaging in conduct outside New South Wales (including outside Australia) that, if it occurred in New South Wales, would constitute a serious violence offence.

**serious violence** offence means an offence punishable by imprisonment for life or for a term of 10 years or more, where the conduct constituting the offence involves —

- (a) loss of a person's life or serious risk of loss of a person's life, or
- (b) serious injury to a person or serious risk of serious injury to a person, or
- (c) serious damage to property in circumstances endangering the safety of any person, or

- (d) perverting the course of justice (within the meaning of Part 7 of the *Crimes Act 1900*) in relation to any conduct that, if proved, would constitute a serious violence offence as referred to in paragraph (a), (b) or (c).

(2) For the purposes of this section, an activity is carried out on an **organised basis** if it is planned, organised, structured or otherwise carried out in such a manner as to indicate that the activity is carried out on more than one occasion and involves more than one participant.

A 'serious indictable offence' is defined in section 4 of the *Crimes Act 1900* as being an indictable offence that is punishable by imprisonment for life or for a term of 5 years or more.

Section 60 of the Act provides that an application for a criminal organisation search warrant is to be in writing in the form prescribed by the regulations and that it must be made in person. 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'). 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.' Section 61(3) provides that 'an application must be made by facsimile if the facilities to do so are readily available for that purpose.'

When determining an application for a criminal organisation search warrant the eligible Judge must consider the matters specified in section 62 of the Act, the relevant parts of which are set out below:

(1) An eligible issuing officer must not issue a warrant unless the application for the warrant includes the following information —

- (a) the name of the applicant and details of the authority of the applicant to make the application for the warrant,
- (b) particulars of the grounds on which the application is based, including (without limitation) the nature of the searchable offence or other offence involved,
- (c) the address or other description of the subject premises,
- (d) if the warrant is required to search for a particular thing — a full description of that thing and, if known, its location,
- (e) if the warrant is required to search for a kind of thing — a description of the kind of thing,
- (f) if a previous application for the same warrant was refused — details of the refusal and any additional information required by section 64,
- (g) any other information required by the regulations.

(2A) In addition, an eligible issuing officer must not issue a criminal organisation search warrant unless the application for the warrant includes the following information —

- (a) the name of the following persons —
  - (i) the occupier (if known) of those premises,
  - (ii) any person believed to have committed, or to be intending to commit, the searchable offence in respect of which the application is made,

(b) whether the occupier is believed to be knowingly concerned with the commission of the searchable offence.

(3) An eligible issuing officer, when determining whether there are reasonable grounds to issue a warrant, is to consider (but is not limited to considering) the following matters —

(a) the reliability of the information on which the application is based, including the nature of the source of the information,

(b) if the warrant is required to search for a thing in relation to an alleged offence — whether there is sufficient connection between the thing sought and the offence.

(5) The applicant must provide (either orally or in writing) such further information as the eligible issuing officer requires concerning the grounds on which the warrant is being sought.

(6) Nothing in this section requires an applicant for a warrant to disclose the identity of a person from whom information was obtained if the applicant is satisfied that to do so might jeopardise the safety of any person.

Applications are made using form 3 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.

Section 67(1) of the Act requires the eligible Judge to prepare and give an occupier's notice to the person to whom the eligible Judge issues a warrant. Section 67(2) of the Act requires that the notice:

(a) is to be in the form prescribed by the regulations, and

(b) must specify the following —

(i) the name of the person who applied for the warrant,

(ii) (Repealed)

(iii) the date and the time when the warrant was issued,

(iv) the address or other description of the premises the subject of the warrant, and

(c) must contain a summary of the nature of the warrant and the powers conferred by the warrant.

Section 67(4) provides that the notice is to be served by a person executing the warrant on entry into or onto the premises or as soon as practicable after entry. Should that not be possible, the section specifies other steps which are to be taken in order to facilitate service of the notice.

Section 73 of the Act provides that criminal organisation search warrants expire 7 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 criminal organisation search warrant.

The reporting requirements for a criminal organisation search warrants are the same as those for standard search warrants. They are set out in section 74(1) of the Act which is in the following terms:

(1) The person to whom a warrant other than a covert search warrant is issued must furnish a report in writing to the eligible issuing officer who issued the warrant —

(a) stating whether or not the warrant was executed, and

(b) if the warrant was executed — setting out briefly the result of the execution of the warrant (including a brief description of anything seized), and

- (c) if the warrant was not executed — setting out briefly the reasons why the warrant was not executed, and
- (d) in the case of a search warrant — stating whether or not an occupier’s notice has been served in connection with the execution of the warrant, and
- (e) in the case of a telephone warrant — containing a copy of the form of warrant and, in the case of a search warrant, the form of occupier’s notice if those documents were not furnished to the person, and
- (f) containing such other particulars as may be prescribed by the regulations.

The report must be furnished to the eligible Judge who issued the warrant within 10 days after the execution of the warrant or the expiry of the warrant, whichever occurs first.

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 regulations for the warrant administration process. In Schedule 1 of the Regulation there are forms provided which are to be used for the purpose of making an application (form 3), issuing a warrant (form 13), preparing an occupier’s notice (form 24) and submitting a report to the eligible Judge who issued the warrant about the execution of the warrant (form 27).

### 1.3 Scope of an Inspection

During the reporting period, inspections were conducted in August 2021, March and July 2022, and in May 2023. OILECC officers inspected each individual criminal organisation search warrant file at the NSWPF Covert Applications Unit (CAU), which is a designated unit responsible for record keeping and compliance. The inspections included an examination of the application, the warrant, the occupier’s notice, and the report to the eligible Judge who issued the warrant 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 criminal organisation search warrant (section 46D)
- the application is in the form prescribed by the Regulation (Form 3) and was made in person by the applicant (section 60)
- the application contains the information required by section 62 and in particular section 62(2A)
- the warrant meets the requirements of section 66(1) that the warrant is in the form prescribed by the Regulation (Form 13)
- the occupier’s notice is in the form prescribed by the Regulation (Form 24)
- the occupier’s notice contains the particulars specified in section 67(2) in order to provide the occupier with sufficient information about the warrant
- the report about the execution of the criminal organisation search warrant is in the form prescribed by the Regulation (Form 27) and contains the particulars specified in section 74
- the report about the execution of the criminal organisation 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 74(2)).

After conducting inspections, the Inspector’s delegated inspection officers hold an exit interview with the manager responsible for warrant administration at CAU. 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.

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## 2 Chapter 2 Inspection Results

79 criminal organisation search warrant files were inspected during the reporting period.

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### 2.1 Applications

Although the NSWPF prepared 79 applications for such warrants during the reporting period, 9 of those applications were not proceeded with. Among the 70 applications that were processed, 66 were approved by an eligible Judge, and 4 were refused.

There were no telephone applications made during the reporting period.

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### 2.2 Section 74(1)- Reports to the eligible issuing officer

Inspections revealed the NSWPF were compliant with this requirement.

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### 2.3 Exceptions or issues identified

No exception or issue were identified during inspections.

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### 2.4 Concluding comments

Inspections revealed that, the NSWPF complied with the requirements of Part 5 of the Act in relation to criminal organisation search warrants.

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