



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

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October 2021

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Contents

Chapter 1 Introduction	1
1.1 Inspector’s functions under the Act	1
1.2 The legislative framework which governs surveillance devices	3
1.2.1 Part 1 – Preliminary	3
1.2.2 Part 2 – Regulation of installation, use and maintenance of surveillance devices	10
1.2.3 Part 3 – Warrants	14
1.2.4 Part 4 – Recognition of corresponding warrants and authorisations.....	20
1.2.5 Part 5 – Compliance and monitoring	22
1.3 OILECC inspection methodology.....	26
Chapter 2 NSW Police Force	31
2.1 Warrants – general requirements	31
2.1.1 Section 17 Application for a surveillance device warrant	31
2.1.2 Section 17(5A) Notice to be served on the Surveillance Devices Commissioner (as the Attorney General’s delegate)	31
2.1.3 Section 18 Remote Application	31
2.1.4 Section 22 Extension and variation of surveillance device warrant	31
2.1.5 Section 23 Revocation of surveillance device warrant	31
2.1.6 Section 24 Discontinuance of use of surveillance device under warrant.....	32
2.1.7 Section 25 Application for retrieval warrant.....	32
2.1.8 Section 25(5A) Notice to be served on the Surveillance Devices Commissioner (as the Attorney General’s delegate)	32
2.1.9 Section 26 Remote application for retrieval warrant	32
2.1.10 Section 30 Revocation of retrieval warrant.....	32
2.1.11 Section 31 Emergency use of surveillance devices without a warrant	32
2.1.12 Section 32 Emergency authorisation of the use of a surveillance device in a participating jurisdiction.....	32
2.1.13 Section 33 Application for approval after use of surveillance device without warrant or under emergency authorisation	32
2.2 Compliance and monitoring	33
2.2.1 Section 40 Prohibition on use, communication, publication of protected information.....	33
2.2.2 Section 41 Dealing with records obtained by use of surveillance devices.....	33

2.2.3 Section 44 Reports to eligible Judge or eligible Magistrate and the Surveillance Devices Commissioner (as the Attorney General’s delegate).....	33
2.2.4 Section 47 Register of warrants and emergency authorisations.....	34
2.2.5 Section 50 Provision for the issue of evidentiary certificates	34
2.3 Miscellaneous	34
2.3.1 Section 52 Requirement to inform subject of surveillance	34
2.4 Concluding Comments.....	34
2.5 Recommendations.....	34
Chapter 3 NSW Crime Commission	35
3.1 Warrants – general requirements	35
3.1.1 Section 17 Application for a surveillance device warrant	35
3.1.2 Section 17(5A) Notice to be served on the Surveillance Devices Commissioner (as the Attorney General’s delegate)	35
3.1.3 Section 18 Remote Application	35
3.1.4 Section 22 Extension and variation of surveillance device warrant	35
3.1.5 Section 23 Revocation of surveillance device warrant	35
3.1.6 Section 24 Discontinuance of use of surveillance device under warrant.....	35
3.1.7 Section 25 Application for retrieval warrant.....	35
3.1.8 Section 25(5A) Notice to be served on the Surveillance Devices Commissioner (as the Attorney General’s delegate)	35
3.1.9 Section 26 Remote application for retrieval warrant	36
3.1.10 Section 30 Revocation of retrieval warrant.....	36
3.1.11 Section 31 Emergency use of a surveillance device without a warrant	36
3.1.12 Section 32 Emergency authorisation of the use of a surveillance device in a participating jurisdiction.....	36
3.1.13 Section 33 Application for approval after use of surveillance device without warrant or under emergency authorisation	36
3.2 Compliance and monitoring.....	36
3.2.1 Section 40 Prohibition on use, communication or publication of protected information	36
3.2.2 Section 41 Dealing with records obtained by use of surveillance devices.....	37
3.2.3 Section 44 Reports to eligible Judge or eligible Magistrate and the Surveillance Devices Commissioner (as the Attorney General’s delegate).....	37
3.2.4 Section 47 Register of warrants and emergency authorisations.....	37

3.2.5	Section 50 Provision for the issue of evidentiary certificates	37
3.3	Miscellaneous	37
3.3.1	Section 52 Requirement to inform subject of surveillance	37
3.4	Concluding Comments.....	37
3.5	Recommendations.....	37
	Chapter 4 Independent Commission Against Corruption.....	38
4.1	Warrants – general requirements	38
4.1.1	Section 17 Application for a surveillance device warrant	38
4.1.2	Section 17(5A) Notice to be served on the Surveillance Devices Commissioner (as the Attorney General’s delegate)	38
4.1.3	Section 18 Remote Application	38
4.1.4	Section 22 Extension and variation of surveillance device warrant	38
4.1.5	Section 23 Revocation of surveillance device warrant	38
4.1.6	Section 24 Discontinuance of use of surveillance device under warrant.....	38
4.1.7	Section 25 Application for retrieval warrant.....	38
4.1.8	Section 25(5A) Notice to be served on the Surveillance Devices Commissioner (as the Attorney General’s delegate)	38
4.1.9	Section 26 Remote application for retrieval warrant	38
4.1.10	Section 30 Revocation of retrieval warrant.....	39
4.1.11	Section 31 Emergency use of surveillance devices without a warrant	39
4.1.12	Section 32 Emergency authorisation of the use of a surveillance device in a participating jurisdiction.....	39
4.1.13	Section 33 Application for approval after use of surveillance device without warrant or under emergency authorisation	39
4.2	Compliance and monitoring.....	39
4.2.1	Section 40 Prohibition on use, communication or publication of protected information	39
4.2.2	Section 41 Dealing with records obtained by use of surveillance devices.....	39
4.2.3	Section 44 Reports to eligible Judge or eligible Magistrate and the Surveillance Devices Commissioner (as the Attorney General’s delegate).....	40
4.2.4	Section 47 Register of warrants and emergency authorisations.....	40
4.2.5	Section 50 Provision for the issue of evidentiary certificates	40
4.3	Miscellaneous	40
4.3.1	Section 52 Requirement to inform subject of surveillance	40

4.4	Concluding Comments.....	40
4.5	Recommendations.....	40
	Chapter 5 Law Enforcement Conduct Commission.....	41
5.1	Warrants – general requirements	41
5.1.1	Section 17 Application for a surveillance device warrant	41
5.1.2	Section 17(5A) Notice to be served on the Surveillance Devices Commissioner (as the Attorney General’s delegate)	41
5.1.3	Section 18 Remote Application	41
5.1.4	Section 22 Extension and variation of surveillance device warrant	41
5.1.5	Section 23 Revocation of surveillance device warrant	41
5.1.6	Section 24 Discontinuance of use of surveillance device under warrant.....	41
5.1.7	Section 25 Application for retrieval warrant.....	41
5.1.8	Section 25(5A) Notice to be served on the Surveillance Devices Commissioner (as the Attorney General’s delegate)	41
5.1.9	Section 26 Remote application for retrieval warrant	41
5.1.10	Section 30 Revocation of retrieval warrant.....	42
5.1.11	Section 31 Emergency use of surveillance devices without a warrant	42
5.1.12	Section 32 Emergency authorisation of the use of a surveillance device in a participating jurisdiction.....	42
5.1.13	Section 33 Application for approval after use of surveillance device without warrant or under emergency authorisation	42
5.2	Compliance and monitoring.....	42
5.2.1	Section 40 Prohibition on use, communication or publication of protected information	42
5.2.2	Section 41 Dealing with records obtained by use of surveillance devices.....	42
5.2.3	Section 44 Reports to eligible Judge or eligible Magistrate and the Surveillance Devices Commissioner (as the Attorney General’s delegate).....	43
5.2.4	Section 47 Register of warrants and emergency authorisations.....	43
5.2.5	Section 50 Provision for the issue of evidentiary certificates	43
5.3	Miscellaneous	43
5.3.1	Section 52 Requirement to inform subject of surveillance	43
5.4	Concluding Comments.....	43
5.5	Recommendations.....	43

Chapter 1. Introduction

In recognition of their importance as an investigative tool, the *Surveillance Devices Act 2007* (NSW) (the Act) establishes a legislative scheme for the use of surveillance devices. The Act also provides a framework of safeguards in order to regulate their use by duly authorised investigative agencies. Furthermore, regular reporting to the relevant Minister and to Parliament about the results of inspections conducted in respect of that use by those agencies provides a measure of public accountability.

1.1 Inspector's functions under the Act

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.

Inspection function

In relation to surveillance devices, section 48(1) of the Act provides that:

The Inspector must, from time to time, inspect the records of each law enforcement agency (other than the Australian Crime Commission) to determine the extent of compliance with this Act by the agency and law enforcement officers of the agency.

Note—

Under section 55 of the Surveillance Devices Act 2004 of the Commonwealth, the Commonwealth Ombudsman is required to inspect the records of the Australian Crime Commission to determine the extent of the Commission's compliance with this Act. Under section 61 of that Act, the Commonwealth Ombudsman is required to report the results of the inspection to the Commonwealth Minister, lay the report before the Commonwealth Parliament and send a copy of the report to the Minister administering this Act.

Sections 48(2) and (3), which are set out below, contain additional provisions that enable the Inspector to access the necessary records:

- (2) For the purpose of an inspection under this section, the Inspector—
 - (a) after notifying the chief officer of the agency, may enter at any reasonable time premises occupied by the agency, and
 - (b) is entitled to have full and free access at all reasonable times to all records of the agency that are relevant to the inspection, and
 - (c) may require a member of staff of the agency to give the Inspector any information that the Inspector considers necessary, being information that is in the member's possession, or to which the member has access, and that is relevant to the inspection.
- (3) The chief officer must ensure that members of staff of the agency give the Inspector any assistance that the Inspector reasonably requires to enable the Inspector to perform the Inspector's functions under this section.

Section 128A of the LECC Act provides that the Inspector may delegate his functions to members of his staff. Delegations are in place which enable inspecting officers to perform those functions in relation to the use of various covert powers, including surveillance devices.

Reporting function

The Inspector also has a reporting function. Section 49 of the Act relevantly provides that:

- (1) The Inspector must make a written report to the Minister at 6-monthly intervals on the results of an inspection under section 48.
- (2) The Minister must, within 15 days after the receipt of the report, lay the report (or cause it to be laid) before both Houses of Parliament.

This report is submitted to the Minister in accordance with section 49. The report details the results of inspections conducted of agency records covering the period from 1 January 2021 to 30 June 2021 (the reporting period).

It is to be noted that towards the end of the current reporting period, the metropolitan area of Sydney as well as other parts of the state were subjected to a second period of lockdown due to Covid-19. That inevitably disrupted the Office's capacity to complete all scheduled

inspections in a timely fashion, particularly those in respect of warrants issued to the NSW Police Force. Nevertheless, all necessary inspections were able to be completed but not until the middle of October.

1.2 The legislative framework which governs surveillance devices

1.2.1 Part 1 – Preliminary

Part 1 includes section 2A which sets out the objects of the Act as follows:

- (a) to provide law enforcement agencies with a comprehensive framework for the use of surveillance devices in criminal investigations, and
- (b) to enable law enforcement agencies to covertly gather evidence for the purposes of criminal prosecutions, and
- (c) to ensure that the privacy of individuals is not unnecessarily impinged upon by providing strict requirements around the installation, use and maintenance of surveillance devices.

Part 1 also includes section 4 which provides the following definitions:

(1) In this Act—

applicant for a warrant means the law enforcement officer who applies, or on whose behalf an application is made, for the warrant.

Australian Crime Commission means the Australian Crime Commission established by the *Australian Crime Commission Act 2002* of the Commonwealth.

body-worn video means equipment worn on the person of a police officer that is capable of recording visual images or sound or both.

building includes any structure.

business day means a day other than a Saturday, Sunday, public holiday or bank holiday in New South Wales.

chief officer means the following—

- (a) in relation to the NSW Police Force—the Commissioner of Police,
- (b) in relation to the Australian Crime Commission—the Chief Executive Officer of the Australian Crime Commission,
- (c) in relation to the New South Wales Crime Commission—the Commissioner for the New South Wales Crime Commission,

- (d) in relation to the Independent Commission Against Corruption—the Chief Commissioner of the Independent Commission Against Corruption,
- (e) in relation to the Law Enforcement Conduct Commission—the Chief Commissioner of that Commission, or
- (f) any other person prescribed by the regulations as the chief officer in relation to a law enforcement agency.

computer means any electronic device for storing, processing or transferring information.

correctional centre and **inmate** of a correctional centre have the same meanings as in the *Crimes (Administration of Sentences) Act 1999*.

corresponding emergency authorisation means an authorisation in the nature of an emergency authorisation given under the provisions of a corresponding law, being an authorisation in relation to a relevant offence within the meaning of the corresponding law.

corresponding law means a law of another jurisdiction that—

- (a) provides for the authorisation of the use of surveillance devices, and
- (b) is declared by the regulations to be a corresponding law.

corresponding warrant means a warrant in the nature of a surveillance device warrant or retrieval warrant issued under the provisions of a corresponding law, being a warrant in relation to a relevant offence within the meaning of that corresponding law.

data surveillance device means any device or program capable of being used to record or monitor the input of information into or output of information from a computer, but does not include an optical surveillance device.

device includes instrument, apparatus and equipment.

disciplinary proceeding means a proceeding of a disciplinary nature under a law of any jurisdiction or of the Commonwealth.

eligible Judge is defined in section 5.

eligible Magistrate is defined in section 5.

emergency authorisation means an emergency authorisation given under Division 4 of Part 3.

enhancement equipment, in relation to a surveillance device, means equipment capable of enhancing a signal, image or other information obtained by use of the surveillance device.

exercise a function includes perform a duty.

function includes a power, authority or duty.

Inspector means the Inspector of the Law Enforcement Conduct Commission.

install includes attach.

jurisdiction means a State or Territory of the Commonwealth.

law enforcement agency means the following agencies—

- (a) the NSW Police Force,
- (b) the New South Wales Crime Commission,
- (c) the Independent Commission Against Corruption,
- (d) the Law Enforcement Conduct Commission,
- (e) any other agency prescribed by the regulations for the purposes of this definition.

law enforcement officer means the following—

- (a) in relation to the NSW Police Force—a member of the NSW Police Force,
- (b) in relation to the New South Wales Crime Commission—an officer of the Commission within the meaning of the *Crime Commission Act 2012*,
- (c) in relation to the Independent Commission Against Corruption—an officer of the Commission within the meaning of the *Independent Commission Against Corruption Act 1988*,
- (d) in relation to the Law Enforcement Conduct Commission—an officer of the Commission within the meaning of the *Law Enforcement Conduct Commission Act 2016*,
- (e) in relation to an agency prescribed for the purposes of paragraph (e) of the definition of **law enforcement agency**—any person prescribed by the regulations as a law enforcement officer in respect of that agency for the purposes of this definition,

and includes a person who is seconded to a law enforcement agency, including (but not limited to) a member of the police force or police service or a police officer (however described) of another jurisdiction.

listening device means any device capable of being used to overhear, record, monitor or listen to a conversation or words spoken to or by any person in conversation, but does not include a hearing aid or similar device used by a person with impaired hearing to overcome the impairment and permit that person to hear only sounds ordinarily audible to the human ear.

maintain, in relation to a surveillance device, includes—

- (a) adjust, relocate, repair or service the device, and
- (b) replace a faulty device.

optical surveillance device means any device capable of being used to record visually or observe an activity, but does not include spectacles, contact lenses or a similar device used by a person with impaired sight to overcome that impairment.

participating jurisdiction means a jurisdiction in which a corresponding law is in force.

party—

- (a) to an activity—means a person who takes part in the activity, and
- (b) to a private conversation—means a person by or to whom words are spoken in the due course of the conversation or a person who, with the consent, express or implied, of any of the persons by or to whom words are spoken in the course of the conversation, records, monitors or listens to those words.

premises includes the following—

- (a) land,
 - (b) a building,
 - (c) a part of a building,
 - (d) any place, whether built on or not,
- whether in or outside this jurisdiction.

principal party, in relation to a private conversation, means a person by or to whom words are spoken in the course of the conversation.

private conversation means any words spoken by one person to another person or to other persons in circumstances that may reasonably be taken to indicate that any of those persons desires the words to be listened to only—

- (a) by themselves, or
 - (b) by themselves and by some other person who has the consent, express or implied, of all of those persons to do so,
- but does not include a conversation made in any circumstances in which the parties to it ought reasonably to expect that it might be overheard by someone else.

protected information has the meaning given to it by section 39.

public officer means a person employed by, or holding an office established by or under a law of, this jurisdiction or a person employed by a public authority of this jurisdiction, and includes a law enforcement officer.

record includes the following—

- (a) an audio, visual or audio visual record,
- (b) a record in digital form,
- (c) a documentary record prepared from a record referred to in paragraph (a) or (b).

relevant offence means—

- (a) an offence against a law of this jurisdiction or of the Commonwealth or another State or Territory that may be prosecuted on indictment, or
- (b) an offence against the law of this jurisdiction that is prescribed by the regulations for the purposes of this definition.

relevant proceeding means the following—

- (a) the prosecution of a relevant offence,

- (b) a proceeding for the confiscation, forfeiture or restraint of property or for the imposition of a pecuniary penalty in connection with a relevant offence,
- (c) a proceeding for the protection of a child or intellectually impaired person,
- (d) a proceeding concerning the validity of a warrant, emergency authorisation, corresponding warrant or corresponding emergency authorisation,
- (e) a disciplinary proceeding against a public officer,
- (f) a coronial inquest or inquiry if, in the opinion of the coroner, the event that is the subject of the inquest or inquiry may have resulted from the commission of a relevant offence,
- (g) a proceeding under section 13 of the *Mutual Assistance in Criminal Matters Act 1987* of the Commonwealth in relation to a criminal matter that concerns an offence against the laws of the foreign country that made the request resulting in the proceeding, being an offence that may be prosecuted on indictment,
- (h) a proceeding for the taking of evidence under section 43 of the *Extradition Act 1988* of the Commonwealth, in so far as the proceeding relates to a relevant offence,
- (i) a proceeding for the extradition of a person from another jurisdiction to this jurisdiction, in so far as the proceeding relates to a relevant offence,
- (j) a proceeding under Division 1 of Part 4 of the *International War Crimes Tribunals Act 1995* of the Commonwealth,
- (k) a proceeding of the International Criminal Court,
- (l) a compulsory examination or public inquiry before the Independent Commission Against Corruption or an inquiry before the Inspector of the Independent Commission Against Corruption,
- (m) a public or private examination before an examining Commissioner (within the meaning of the *Law Enforcement Conduct Commission Act 2016*) or an inquiry before the Inspector of the Law Enforcement Conduct Commission,
- (n) a hearing before the New South Wales Crime Commission,
- (o) an examination before the Australian Crime Commission,
- (p) any proceeding in respect of a declaration under Part 2, or a control order under Division 1 or 2 of Part 3, of the *Crimes (Criminal Organisations Control) Act 2012*,
- (q) a proceeding for the parole of a person to whom Division 5 of Part 4C of the *Children (Detention Centres) Act 1987* applies,
- (r) a proceeding under the *Terrorism (High Risk Offenders) Act 2017*,
- (s) a proceeding before the State Parole Authority under Part 6 or 7 of the *Crimes (Administration of Sentences) Act 1999*,

(t) an application under the *Crimes (Serious Crime Prevention Orders) Act 2016* to an appropriate court within the meaning of that Act, or an appeal under section 11 of that Act,

(u) an application under Part 5 of the *Crimes (Forensic Procedures) Act 2000*,

(v) a proceeding before the Civil and Administrative Tribunal in respect of an application for administrative review under section 75(1)(a) or (f) of the *Firearms Act 1996*.

remote application for a warrant means an application referred to in section 18 or 26.

report of a conversation or activity includes a report of the substance, meaning or purport of the conversation or activity.

retrieval warrant means a warrant issued under Division 3 of Part 3.

senior officer means the following—

(a) in relation to the NSW Police Force—

- (i) the Commissioner of Police, or
- (ii) any Deputy Commissioner of Police, or
- (iii) any Assistant Commissioner of Police, or
- (iv) any Superintendent of Police,

(b) in relation to the New South Wales Crime Commission—the Commissioner for the New South Wales Crime Commission,

(c) in relation to the Independent Commission Against Corruption—the Chief Commissioner or any other Commissioner of the Independent Commission Against Corruption,

(d) in relation to the Law Enforcement Conduct Commission—the Chief Commissioner of the Law Enforcement Conduct Commission,

(e) in relation to any other agency prescribed by the regulations for the purposes of the definition of **law enforcement agency**—any officer prescribed by the regulations for the purposes of this definition for that agency.

serious narcotics offence means an offence under Division 2 of Part 2 of the *Drug Misuse and Trafficking Act 1985* but does not include an offence that is declared by the regulations not to be a serious narcotics offence for the purposes of this Act.

supervision or detention order under the *Terrorism (High Risk Offenders) Act 2017* means any of the following orders under that Act—

- (a) an extended supervision order,
- (b) an interim supervision order,
- (c) a continuing detention order,
- (d) an interim detention order,
- (e) an emergency detention order.

surveillance device means—

- (a) a data surveillance device, a listening device, an optical surveillance device or a tracking device, or
- (b) a device that is a combination of any 2 or more of the devices referred to in paragraph (a), or
- (c) a device of a kind prescribed by the regulations.

surveillance device warrant means a warrant issued under Division 2 of Part 3 or under section 35(3).

Surveillance Devices Commissioner means the Surveillance Devices Commissioner appointed under section 51A.

terrorism related offender means a person who is any of the following within the meaning of the *Terrorism (High Risk Offenders) Act 2017*—

- (a) a convicted NSW terrorist offender,
- (b) a convicted NSW underlying terrorism offender,
- (c) a convicted NSW terrorism activity offender.

this jurisdiction means New South Wales.

tracking device means any electronic device capable of being used to determine or monitor the geographical location of a person or an object.

unsworn application for a warrant means an application referred to in section 17(4) or 25(4).

use of a surveillance device includes use of the device to record a conversation or other activity.

vehicle includes the following—

- (a) an aircraft,
- (b) a vessel,
- (c) a part of a vehicle,

whether in or outside this jurisdiction.

warrant means surveillance device warrant or retrieval warrant.

Note—

The *Interpretation Act 1987* contains definitions and other provisions that affect the interpretation and application of this Act.

- (2) For the purposes of this Act, an investigation into an offence against the law of this jurisdiction is taken to be conducted in this jurisdiction (whether or not it is also conducted in another jurisdiction) if a law enforcement officer of this jurisdiction participates in the investigation.

Note—

Subsection (2) is intended to cover the situation where an officer of this jurisdiction is conducting or participating in an investigation wholly in another jurisdiction for the purposes of an offence against a law of this jurisdiction (eg a NSW officer is investigating a conspiracy to import drugs into NSW from Victoria, and all the evidence of the offence is in Victoria).

(3) A thing is not precluded from being a listening device within the meaning of this Act merely because it is also capable of—

- (a) recording or transmitting visual images (for example a video camera), or
- (b) recording or transmitting its own position.

(4) A reference in this Act to—

- (a) a report of a private conversation includes a reference to a report of the substance, meaning or purport of the conversation, and
- (b) a record of a private conversation includes a reference to a statement prepared from such a record.

(5) A reference in this Act to the retrieval of a surveillance device includes, in relation to a data surveillance device, a reference to the removal or erasure of the device.

(6) Notes included in this Act do not form part of this Act.

1.2.2 Part 2 – Regulation of installation, use and maintenance of surveillance devices

The following provisions prohibit the installation, use and maintenance of the following kinds of surveillance devices:

- listening devices (section 7(1))
- optical surveillance devices (section 8(1))
- tracking devices (section 9(1))
- data surveillance devices (section 10(1))

Exceptions to those prohibitions are provided for in certain circumstances. Section 7(2) – (5) which are set out below provide examples of those exceptions:

-
- (2) Subsection (1) does not apply to the following—
- (a) the installation, use or maintenance of a listening device in accordance with a warrant, emergency authorisation, corresponding warrant or corresponding emergency authorisation,
 - (b) the installation, use or maintenance of a listening device in accordance with the Telecommunications (Interception and Access) Act 1979, or any other law, of the Commonwealth,
 - (c) the unintentional hearing of a private conversation by means of a listening device,
 - (d) the use of a listening device to record a refusal to consent to the recording of an interview by a member of the NSW Police Force in connection with the commission of an offence by a person suspected of having committed the offence,
 - (e) the use of a listening device and any enhancement equipment in relation to the device solely for the purposes of the location and retrieval of the device or equipment,
 - (f) the use of a listening device, being a device integrated into a Taser issued to a member of the NSW Police Force, to record the operation of the Taser and the circumstances surrounding its operation,
 - (g) the use, in accordance with section 50A, of body-worn video by a police officer.
- (3) Subsection (1)(b) does not apply to the use of a listening device by a party to a private conversation if—
- (a) all of the principal parties to the conversation consent, expressly or impliedly, to the listening device being so used, or
 - (b) a principal party to the conversation consents to the listening device being so used and the recording of the conversation—
 - (i) is reasonably necessary for the protection of the lawful interests of that principal party, or
 - (ii) is not made for the purpose of communicating or publishing the conversation, or a report of the conversation, to persons who are not parties to the conversation.
- (4) Subsection (1) does not apply to the use of a listening device to record, monitor or listen to a private conversation if—
- (a) a party to the private conversation is a participant in an authorised operation and, in the case of a participant who is a law enforcement officer, is using an assumed name or assumed identity, and
 - (b) the person using the listening device is that participant or another participant in that authorised operation.

(5) In this section—

authorised operation and ***participant*** in an authorised operation have the same meanings as in the *Law Enforcement (Controlled Operations) Act 1997*.

Note—

The definition of ***participant*** in an authorised operation includes a ***civilian participant*** within the meaning of the *Law Enforcement (Controlled Operations) Act 1997*.

Sections 8(2), (2A) and (3) which are set out below provide further examples:

(2) Subsection (1) does not apply to the following—

- (a) the installation, use or maintenance of an optical surveillance device in accordance with a warrant, emergency authorisation, corresponding warrant or corresponding emergency authorisation,
- (b) the installation, use or maintenance of an optical surveillance device in accordance with a law of the Commonwealth,
- (c) the use of an optical surveillance device and any enhancement equipment in relation to the device solely for the purpose of the location and retrieval of the device or equipment,
- (d) the installation, use or maintenance of an optical surveillance device by a law enforcement officer in the execution of a search warrant or crime scene warrant (including the use of an optical surveillance device to record any activity in connection with the execution of the warrant),

Note—

See also section 255 of the *Children and Young Persons (Care and Protection) Act 1998*.

(d1) the use of an optical surveillance device by a law enforcement officer in the conduct of a search or inspection (including the use of an optical surveillance device to record any activity in connection with the search or inspection) that is permitted without a warrant under the following—

- (i) the *Child Protection (Offenders Registration) Act 2000*,
- (ii) the *Firearms Act 1996*,
- (iii) the *Restricted Premises Act 1943*,
- (iv) the *Terrorism (Police Powers) Act 2002*,
- (e) the use of an optical surveillance device, being a device integrated into a Taser issued to a member of the NSW Police Force, to record the operation of the Taser and the circumstances surrounding its operation,
- (f) the use, in accordance with section 50A, of body-worn video by a police officer.

(2A) Subsection (1) does not apply to the use of an optical surveillance device to record visually or observe the carrying on of an activity if—

- (a) a party to the activity is a participant in an authorised operation and, if the participant is a law enforcement officer, the participant is using an assumed name or assumed identity, and
- (b) the person using the optical surveillance device is that participant or another participant in that authorised operation.

(3) In this section—

authorised operation and **participant** in an authorised operation have the same meanings as in the *Law Enforcement (Controlled Operations) Act 1997*.

Note—

The definition of **participant** in an authorised operation includes a **civilian participant** within the meaning of the *Law Enforcement (Controlled Operations) Act 1997*. **crime scene warrant** has the same meaning as it has in the *Law Enforcement (Powers and Responsibilities) Act 2002*.

search warrant means a search warrant issued under—

(a) any of the following provisions of the *Law Enforcement (Powers and Responsibilities) Act 2002*—

- (i) Division 2 (Police powers relating to warrants) of Part 5,
- (ii) Part 6 (Search, entry and seizure powers relating to domestic violence offences),
- (iii) Division 1 (Drug premises) of Part 11, or

(a1) a provision specified in Schedule 2 to the *Law Enforcement (Powers and Responsibilities) Act 2002*, or

(a2) Part 3 (Covert search warrants) of the *Terrorism (Police Powers) Act 2002*, or

(b) section 40 of the *Independent Commission Against Corruption Act 1988*, or

(c) section 17 of the *Crime Commission Act 2012*, or

(d) Division 2 or 3 of Part 4 of the *Criminal Assets Recovery Act 1990*,

(e) section 79 of the *Law Enforcement Conduct Commission Act 2016*.

Sections 11 to 14 contain the following further prohibitions:

- the communication or publication of ‘a private conversation or a record of the carrying on of an activity, or a report of a private conversation or carrying on of an activity, that has come to the person’s knowledge as a direct or indirect result of the use of a listening device, an optical surveillance device or a tracking device in contravention of a provision of [Part 2]’ (section 11),

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- the possession of a ‘a record of a private conversation or the carrying on of an activity knowing that it has been obtained, directly or indirectly, by the use of a listening device, optical surveillance device or tracking device in contravention of [Part 2]’ (section 12),
 - the manufacture, supply (or offer to supply) and possession of ‘a data surveillance device, listening device, optical surveillance device or tracking device with the intention of using it, or it being used, in contravention of [Part 2]’ (section 13) and
 - the communication or publication of ‘any information regarding the input of information into, or the output of information from, a computer obtained as a direct or indirect result of the use of a data surveillance device in contravention of [Part 2]’ (section 14).

As will be seen, section 17 enables a ‘law enforcement officer’ to apply for the issue of a surveillance device warrant. The terms ‘law enforcement officer’ and ‘law enforcement agency’ are described in section 4. Such agencies are listed below:

- NSW Police Force (NSWPF)
- NSW Crime Commission (NSWCC)
- The Law Enforcement Conduct Commission (LECC)
- The Independent Commission Against Corruption (ICAC).

1.2.3 Part 3 – Warrants

Section 15 provides that there are two types of warrants that may be used, namely a surveillance device warrant and a retrieval warrant. Section 16 provides that an eligible Judge may issue a warrant whilst an eligible Magistrate may only issue specific kinds of such warrants (section 5 defines the terms ‘eligible Judge’ and ‘eligible Magistrate’).

Surveillance device warrants (Part 3 – Division 2)

Section 17 outlines the application process for a surveillance device warrant. It is in the following terms:

(1) A law enforcement officer (or another person on his or her behalf) may apply for the issue of a surveillance device warrant if the law enforcement officer on reasonable grounds suspects or believes that—

- (a) a relevant offence has been, is being, is about to be or is likely to be committed, and
- (b) an investigation into that offence is being, will be or is likely to be conducted in this jurisdiction or in this jurisdiction and in one or more participating jurisdictions, and
- (c) the use of a surveillance device is necessary for the purpose of an investigation into that offence to enable evidence to be obtained of the commission of that offence or the identity or location of the offender.

(1A) A law enforcement officer (or another person on his or her behalf) may also apply for the issue of a surveillance device warrant for the use of a surveillance device in a correctional centre if the law enforcement officer on reasonable grounds suspects or believes that—

- (a) an eligible offender within the meaning of the *Terrorism (High Risk Offenders) Act 2017* is an inmate of the correctional centre, and
- (b) an investigation is being, will be or is likely to be conducted into whether an application for a supervision or detention order should be made under the *Terrorism (High Risk Offenders) Act 2017* in respect of the offender on the basis that the offender is a terrorism related offender, and
- (c) the use of a surveillance device is necessary for the purpose of an investigation into whether an application for a supervision or detention order under the *Terrorism (High Risk Offenders) Act 2017* should be made to enable evidence to be obtained that would be likely to support the application.

(2) The application may be made to—

- (a) an eligible Judge in any case, or
- (b) an eligible Magistrate in the case of an application for a surveillance device warrant authorising the use of a tracking device only.

(3) An application must include the following information—

- (a) the information required (having regard to the warrant being sought) to complete the surveillance device warrant particulars set out in section 20(1),
- (b) details of any other alternative means of obtaining the evidence or information sought under the warrant and the extent to which those means may assist or prejudice the investigation,
- (c) whether an attempt has been made to use an alternative means and, if so, the result of the attempts,

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- (d) details of any previous warrant or emergency authorisation sought or issued under this Act in connection with the same relevant offence.
- (3A) Subject to this section, an application must be accompanied by an affidavit that—
- (a) supports the application and sets out the grounds on which the warrant is sought, and
 - (b) as far as reasonably practicable identifies persons who may be incidentally recorded by the surveillance device, and
 - (c) includes any information known to the applicant that may be adverse to the warrant application or, if no adverse information is known, a statement to that effect.
- (4) If a law enforcement officer believes that—
- (a) the immediate use of a surveillance device is necessary for a purpose referred to in subsection (1)(c) or (1A)(c), and
 - (b) it is impracticable for an affidavit to be sworn before an application for a warrant is made,
- an application for a warrant may be made before an affidavit is prepared or sworn.
- (5) If subsection (4) applies, the applicant must—
- (a) provide as much information as the eligible Judge or eligible Magistrate considers is reasonably practicable in the circumstances, and
 - (b) not later than 72 hours following the making of the application, send a duly sworn affidavit to the eligible Judge or eligible Magistrate, whether or not a warrant has been issued.
- (5A) A notice containing the information in subsections (3) and (3A) must also be served on the Attorney General.
- (6) An application for a warrant is not to be heard in open court.

It should be noted that the notice required to be served under section 17(5A) is served, in normal circumstances, upon the Surveillance Devices Commissioner as the Attorney-General's delegate.

Section 18(1) makes provision for remote warrants to be issued. They may be applied for by telephone, email, or any other means of communication if:

- (a) a law enforcement officer reasonably believes that it is impracticable for the application to be made in person, or
- (b) a law enforcement officer reasonably believes that the immediate use of a surveillance device is necessary, or

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- (c) the eligible Judge or eligible Magistrate who is to determine the application requests that it is made that way.

Section 18(2) provides that if an affidavit has been prepared, a copy must be transmitted to the eligible Judge or eligible Magistrate who is to determine the application.

Section 19, which is in the following terms, sets out what is to be considered in the determination of an application for a surveillance device warrant:

- (1) An eligible Judge or eligible Magistrate may issue a surveillance device warrant if satisfied—
- (a) that there are reasonable grounds for the suspicion or belief founding the application for the warrant, and
 - (b) in the case of an unsworn application—that it would have been impracticable for the application to have been prepared or sworn before the application was made, and
 - (c) in the case of a remote application—the application is made in accordance with section 18, and
 - (d) except in the case of a remote application—the notice referred to in section 17(5A) has been served on the Attorney General, and
 - (e) in the case of a remote application—the Attorney General has been notified of the application and been given as much of the information required to be included in the notice referred to in section 17(5A) as it is reasonable to provide in the circumstances, and
 - (f) the Attorney General has had an opportunity to be heard in relation to the granting of the warrant.
- (2) In determining whether a surveillance device warrant should be issued, the eligible Judge or eligible Magistrate must have regard to—
- (a) for an application under section 17(1)—the nature and gravity of the alleged offence in respect of which the warrant is sought, and
 - (b) the extent to which the privacy of any person is likely to be affected, and
 - (c) the existence of any alternative means of obtaining the evidence or information sought to be obtained and the extent to which those means may assist or prejudice the investigation, and
 - (d) the extent to which the information sought to be obtained would assist the investigation, and
 - (e) the evidentiary value of any information sought to be obtained, and

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- (f) for an application under section 17(1)—any previous warrant sought or issued under this Part or a corresponding law (if known) in connection with the same offence, and
 - (g) for an application under section 17(1A)—any previous warrant sought or issued under this Part or a corresponding law in connection with the same inmate.

Section 20 sets out the details which the warrant must contain whilst section 21 outlines what use a surveillance device warrant may authorise (including, for example, retrieval of a surveillance device if that is done within 10 days after expiry of the warrant (section 21(4)).

Section 22 enables the eligible Judge or Magistrate who issued the warrant to extend it ‘for a period not exceeding 90 days from the day on which it would otherwise expire’ or to vary any of its terms. Section 23 enables the eligible Judge or Magistrate who issued the warrant to revoke the warrant ‘at any time before the expiration of the period of validity specified in it’ on ‘application by or on behalf of a law enforcement officer.’

Section 24 makes provision for the discontinuance of the use of a surveillance device under warrant. Section 24(2) casts certain obligations upon the chief officer of the law enforcement agency as to the steps that are to be taken should that officer be satisfied that the use of a surveillance device under the warrant is no longer necessary for the ‘warrant purpose’ (a term which is defined in section 24(5)).

In particular, 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. 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.

However, section 24(2A) also provides that that revocation does not need to be sought under section 23 ‘if the warrant will cease to be in force within 5 days after the day on which the chief officer became satisfied the use of a surveillance device under the warrant was no longer necessary.’ Furthermore, section 24(3) provides that ‘if the chief officer is notified that the warrant has been revoked under section 23, he or she must take the steps

necessary to ensure that use of the surveillance device authorised by the warrant is discontinued immediately.’

Section 24(4) provides that if the law enforcement officer to whom the warrant is issued (or who is primarily responsible for executing the warrant) ‘believes that the use of a surveillance device under the warrant is no longer necessary for the warrant purpose, he or she must inform the chief officer of the law enforcement agency immediately.’

Retrieval warrants (Part 3 – Division 3)

As earlier indicated, section 21(4) provides that a surveillance device may be retrieved under the original warrant within 10 days after the expiry date of the warrant. After that time, a retrieval warrant is required in order to retrieve a surveillance device. Section 25(1) authorises a law enforcement officer to apply for the issue of such a warrant whilst sections 25(2) to (5) set out the conditions under which an application may be made and the information that it must contain. There is a requirement under section 25(5A) to serve a notice of such an application upon the Surveillance Devices Commissioner as the Attorney-General’s delegate.

The retrieval warrant application and reporting provisions are contained in sections 26 to 30. They substantially replicate the corresponding sections for surveillance device warrants (although the information required simply relates to the retrieval of the device or devices).

Emergency authorisations (Part 3 – Division 4)

The Act also provides for the use of a surveillance device by a law enforcement officer without a warrant in an emergency. Section 31(1) provides for such use if the officer:

- ... on reasonable grounds suspects or believes that—
 - (a) an imminent threat of serious violence to a person or substantial damage to property or that a serious narcotics offence will be committed exists, and
 - (b) the use of a surveillance device is immediately necessary for the purpose of dealing with that threat, and
 - (c) the circumstances are so serious and the matter is of such urgency that the use of a surveillance device is warranted, and

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- (d) it is not practicable in the circumstances to apply for a surveillance device warrant.

Section 32 provides that such emergency use may be extended to use in a participating jurisdiction if a senior officer of the relevant agency authorises it.

Section 33 requires that an application for retrospective approval for the emergency use provided for in section 31 and emergency authorisation provided for in section 32 is to be made to an eligible Judge within 2 business days. The information required by subsection 3 must be furnished with the application. However, section 33(1A) provides for an exception to that requirement to apply for retrospective approval for emergency use under section 31 ‘if the law enforcement officer uses an optical surveillance device to observe, but not record, the carrying on of an activity.’ Sections 34 and 35 identify the matters which the eligible Judge is to consider before approving such an application.

However, sections 35(4) and (5), which are in the following terms, provide that:

- (4) If the eligible Judge does not approve an application under this section, the Judge may—
- (a) order that the use of the surveillance device cease, and
 - (b) authorise, subject to any conditions the eligible Judge thinks fit, the retrieval of the surveillance device.
- (5) In any case, the eligible Judge may order that any information obtained from or relating to the exercise of powers without a warrant or under the emergency authorisation, or any record of that information, be dealt with in the way specified in the order.

Section 36, which concerns the admissibility of evidence obtained without a warrant in an emergency or under an emergency authorisation, provides that ‘evidence obtained because of the exercise of those powers is not inadmissible in any proceeding merely because the evidence was obtained before the approval.’

1.2.4 Part 4 – Recognition of corresponding warrants and authorisations

The Act makes provision for the cross-border use of surveillance devices. Section 37 provides that ‘[a] corresponding warrant may be executed in [NSW] in accordance with its

terms as if it were a surveillance device warrant or retrieval warrant (as the case requires) issued under Part 3' whilst section 38 makes similar provision in relation to a 'corresponding emergency authorisation'.

The terms 'corresponding emergency authorisation', 'corresponding law' and 'corresponding warrant' are defined in section 4 of the Act.

Clause 3 of the Surveillance Devices Regulation 2014 (the Regulation) declares that the '[t]he following laws of other jurisdictions are...corresponding laws for the purposes of the definition of corresponding law in section 4(1) of the Act':

- (a) the *Surveillance Devices Act* of the Northern Territory,
- (b) Chapter 13 of the *Police Powers and Responsibilities Act 2000* of Queensland,
- (c) the *Police Powers (Surveillance Devices) Act 2006* of Tasmania,
- (d) the *Surveillance Devices Act 1999* of Victoria,
- (e) the *Crimes (Surveillance Devices) Act 2010* of the Australian Capital Territory.

In similar vein, surveillance device warrants and authorisations issued in NSW are recognised by other jurisdictions so long as they constitute a 'participating jurisdiction' within the meaning of section 4.

At present, the following jurisdictions are participating jurisdictions:

- the Australian Capital Territory (see the *Crimes (Surveillance Devices) Regulation 2017 (ACT)*, Regulation 3)
- the Northern Territory (see the *Surveillance Devices Regulations 2008 (NT)*, Regulation 2)
- Queensland (see the *Police Powers and Responsibilities Regulation 2012 (Qld)*, Part 3 in Schedule 4)
- South Australia (see the *Surveillance Devices Regulations 2017 (SA)*, Regulation 10).
- Tasmania (see the *Police Powers (Surveillance Devices) (Corresponding Laws) Regulations 2010 (Tas)*, regulation 4)
- Victoria (see the *Surveillance Devices Regulations 2016 (Vic)*, regulation 6)

Western Australia does not recognise warrants or authorisations from NSW.

1.2.5 Part 5 – Compliance and monitoring

Division 1 of Part 5 contains restrictions upon the use, communication and publication of ‘protected information’, which is defined in section 39 as being:

- (a) any information obtained from the use of a surveillance device under a warrant, emergency authorisation, corresponding warrant or corresponding emergency authorisation, or
- (b) any information relating to—
 - (i) an application for, issue of, existence or expiry of, a warrant, emergency authorisation, corresponding warrant or corresponding emergency authorisation, or
 - (ii) an application for approval of powers exercised in an emergency without a warrant under section 31 or under an emergency authorisation, or
 - (iii) an application under a corresponding law for approval of powers exercised under a corresponding emergency authorisation, or
- (c) any information obtained from use of a surveillance device as referred to in section 7(4) or 8(2A), or
- (d) any information obtained from the use, in accordance with section 50A, of body-worn video by a police officer.

Sections 40(1) and (2) prohibit the use, communication and publication of protected information, unless it is a matter to which subsection (3) applies. Section 40(4) provides that protected information may be used, published or communicated if it is necessary to do so for any of the purposes which are listed there.

Section 41(1) casts the following obligations upon the chief officer of a law enforcement agency who:

- (a) must ensure that every record or report obtained by the use of a surveillance device by a law enforcement officer of the agency under a warrant, emergency authorisation, corresponding warrant or corresponding emergency authorisation or without a warrant in an emergency or as referred to in section 7(4) or 8(2A), is kept, in accordance with guidelines established by the chief officer, in a secure place that is not accessible to people who are not entitled to deal with the record or report, and

(b) must destroy or cause to be destroyed any record or report referred to in paragraph (a) if he or she is satisfied that it is not likely to be required in connection with a purpose referred to in section 40(4) or (5).

Reporting and record keeping (Part 5 – Division 2)

Section 44 relevantly provides that:

(1) A person to whom a surveillance device warrant is issued must, within the time specified in the warrant, furnish a report, in writing, to an eligible Judge (if the warrant was issued by an eligible Judge) or eligible Magistrate (if the warrant was issued by an eligible Magistrate) and to the Attorney General—

- (a) stating whether or not a surveillance device was used pursuant to the warrant, and
- (b) specifying the type of surveillance device (if any) used, and
- (c) specifying the name, if known, of any person whose private conversation was recorded or listened to, or whose activity was recorded, by the use of the device, and
- (d) specifying the period during which the device was used, and
- (e) containing particulars of any premises or vehicle on or in which the device was installed or any place at which the device was used, and
- (f) containing particulars of the general use made or to be made of any evidence or information obtained by the use of the device, and
- (g) containing particulars of any previous use of a surveillance device in connection with the relevant offence in respect of which the warrant was issued, and
- (h) in the case of a surveillance device warrant issued in this jurisdiction and executed in a participating jurisdiction—
 - (i) giving details of the benefit to the investigation of the use of the relevant surveillance device and of the general use made or to be made of any evidence or information obtained by the use of the device, and
 - (ii) giving details of the compliance with the conditions (if any) to which the warrant was subject.

(2) A person to whom an approval is given in respect of the use of a surveillance device in an emergency without a warrant must, within the time specified by the eligible Judge who

gave the approval, furnish a report, in writing, to an eligible Judge and to the Attorney General—

- (a) specifying the type of surveillance device used, and
- (b) specifying the name, if known, of any person whose private conversation was recorded or listened to, or whose activity was recorded, by the use of the device, and
- (c) specifying the period during which the device was used, and
- (d) containing particulars of any premises or vehicle on or in which the device was installed or any place at which the device was used, and
- (e) containing particulars of the general use made or to be made of any evidence or information obtained by the use of the device, and
- (f) containing particulars of any previous use of a surveillance device in connection with the relevant offence in respect of which the approval was given.

...

(6) A person whose application is granted under section 25 must, within the time specified in the retrieval warrant, furnish a report, in writing, to an eligible Judge or eligible Magistrate and to the Attorney General—

- (a) stating whether or not the surveillance device concerned was retrieved during the currency of the warrant, and
- (b) if the surveillance device was not so retrieved, giving the reasons why it was not retrieved, and
- (c) in the case of a retrieval warrant issued in this jurisdiction and executed in a participating jurisdiction—
 - (i) giving details of any premises entered, anything opened and any object removed or replaced under the warrant, and
 - (ii) giving details of the compliance with the conditions (if any) to which the warrant was subject.

Maximum penalty (subsections (1), (2) and (6)): 20 penalty units or imprisonment for a term of 12 months, or both.

It should be noted that the report required to be furnished under section 44(6) is, in normal circumstances, furnished to the Surveillance Devices Commissioner as the Attorney-General's delegate.

Section 46 provides that certain documents and records connected with warrants and emergency authorisations executed in NSW must be kept. It is in the following terms:

The chief officer of a law enforcement agency must cause to be kept records containing such information as is determined by the Attorney General in consultation with the chief officer with respect to warrants and emergency authorisations sought and obtained by, and the use of surveillance devices and information obtained from use of surveillance devices by, the agency or law enforcement officers of the agency for the use or retrieval of surveillance devices in this jurisdiction.

Section 46A makes similar provision for certain documents and records connected with warrants and emergency authorisations executed in participating jurisdictions.

Section 47(1) provides that, the ‘chief officer of a law enforcement agency must cause a register of warrants and emergency authorisations to be kept,’ the details of which are specified in sections 47(2) and 47(3).

Section 50 provides for evidentiary certificates to be issued. It is in the following terms:

- (1) A senior officer of a law enforcement agency, or a person assisting him or her, may issue a written certificate signed by the officer or person setting out the facts he or she considers relevant with respect to—
 - (a) anything done by a law enforcement officer of the agency, or by a person assisting or providing technical expertise to him or her, in connection with the execution of a warrant or in accordance with an emergency authorisation, or
 - (b) anything done by a law enforcement officer of the agency in connection with—
 - (i) the communication by a person to another person of, or
 - (ii) the making use of, or
 - (iii) the making of a record of, or
 - (iv) the custody of a record of,information obtained by the use of a surveillance device under a warrant, emergency authorisation, corresponding warrant or corresponding emergency authorisation.
- (2) A document purporting to be a certificate issued under subsection (1) or under a provision of a corresponding law that corresponds to subsection (1) is admissible in evidence in any proceeding.
- (3) Subsection (2) does not apply to a certificate to the extent that the certificate sets out facts with respect to anything done in accordance with an emergency authorisation or

corresponding emergency authorisation unless the use of powers under the authorisation concerned has been approved under section 35 (Eligible Judge may approve emergency use of powers) or under a provision of a corresponding law that corresponds to section 35.

Section 52 provides that:

- (1) Where, under a warrant issued under Part 3, a surveillance device has been used to record or listen to the private conversation of a person or to record visually or observe an activity of a person, an eligible Judge may direct the person to whom the warrant was issued to supply to that person, within a period specified by the eligible Judge, such information regarding the warrant and the use of the device as the eligible Judge may specify.
 - (2) An eligible Judge must not give a direction under subsection (1) unless the eligible Judge is satisfied that, having regard to the evidence or information obtained by the use of the surveillance device and to any other relevant matter, the use of the surveillance device was not justified and was an unnecessary interference with the privacy of the person concerned.
 - (3) Before giving a direction under subsection (1), the eligible Judge must give the person to whom the warrant was issued an opportunity to be heard in relation to the matter.
 - (4) A person to whom a direction is given under subsection (1) must comply with the direction.
- Maximum penalty—20 penalty units or imprisonment for a term of 12 months, or both.

1.3 OILECC inspection methodology

As was indicated earlier, section 49 requires the Inspector to report to the Attorney-General at 6 monthly intervals about the results of inspections conducted at the four law enforcement agencies in question.

By far the largest number of surveillance device warrants are sought by the NSWPF. The NSWCC only rarely applies for such warrants in its own right as the NSWPF Organised Crime Squad performs that function on its behalf. LECC and ICAC seek such warrants infrequently.

The frequency and duration of those inspections is set out below:

NSWPF	Between 3 and 4 inspections every 6 months with each inspection taking about 5 days
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NSWCC	Inspections are conducted only when the need arises (i.e. only when a warrant has been sought).
ICAC	1 inspection every 6 months with each inspection taking about 2 hours
LECC	1 inspection every 6 months with each inspection taking about 2 hours

Although inspections deal with the extent of compliance with all aspects of the Act, particular attention is directed to the matters covered by Parts 3 and 5 of the Act. In doing so, attention is directed not only to what is apparent from an inspection of the records themselves, but also from what can be gleaned by asking pertinent questions of relevant officers.

While the inspections of records include an examination of the matters required to be specified, they do 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.

OILECC inspected every surveillance device warrant file at the relevant agency. Inspection of a surveillance device warrant file involved an examination of the application, the warrant, the required notice to the Surveillance Devices Commissioner (as the Attorney-General's delegate) under sections 17(5A) and 25(5A) and the report to the eligible Judge who issued the warrant and to the Surveillance Devices Commissioner (as the Attorney-General's delegate) as required by section 44, together with any other information contained on the file.

Each inspection involved checking the following details (with reference to the relevant section of the Act) to ensure 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.
- in relation to a surveillance device warrant:

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- the section 17(5A) notice not only contained the required information but had been provided to the Surveillance Devices Commissioner (as the Attorney-General's delegate) before the surveillance device warrant was issued, and that he had had an opportunity to consider whether he wished to be heard on the application
 - the warrant contained the information required by section 20
 - any extension or variation to the warrant complied with section 22
 - the revocation of a warrant complied with section 23
 - 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 (sections 24(2) – (2A))
 - where a warrant was revoked, that the use of the device was discontinued immediately (section 24(3))
 - the report required under section 44(1) of the Act had been provided to the eligible Judge and to the Surveillance Devices Commissioner (as the Attorney-General's delegate) within the time frame specified in the warrant.
 - In relation to a retrieval warrant:
 - the section 25(5A) notice not only contained the required information but had been provided to the Surveillance Devices Commissioner (as the Attorney-General's delegate) before the warrant was issued, and that he had had an opportunity to consider whether he wished to be heard on the application
 - the warrant contained the information required by section 28
 - the report required under section 44(6) of the Act had been provided to the eligible Judge and to the Surveillance Devices Commissioner (as the Attorney-General's delegate) within the time frame specified in the warrant
 - that the devices for which the retrieval warrant is granted corresponds with the devices that were installed pursuant to the original warrant.
 - In relation to an emergency authorisation:
 - the application for continued use of an authorised surveillance device in an emergency situation complied with sections 31 and 32 of the Act

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- where a surveillance device has been used without a warrant in an emergency, retrospective approval has been given by an eligible Judge in compliance with section 33
 - the report required under section 44(2) of the Act had been provided to the eligible Judge and to the Surveillance Devices Commissioner (as the Attorney-General's delegate) within the time frame specified in the warrant.

In order to assess compliance with the requirements of Part 5 of the Act, records relating to the use of protected information obtained by the use of surveillance devices, and the security of those records are thoroughly reviewed. In particular, inspecting officers check to ascertain whether the agency in question:

- kept and destroyed records in accordance with section 41, and
- kept an appropriate register of warrants and emergency authorisations in compliance with section 47.

So far as the NSWPF is concerned, its Surveillance Devices Database is inspected for that purpose. So far as ICAC and LECC are concerned, cover sheets kept on the front of each agency's file are inspected for that purpose.

The inspection of registers kept under section 47 involves the inspecting officers reviewing the relevant register to ascertain whether it records the required details.

For each warrant obtained by the agency the register should record:

- the date of issue
- the name of the eligible Judge (EJ) who issued the warrant
- the name of the law enforcement officer (LEO) named in the warrant as the person primarily responsible for executing it
- the relevant offence
- the period during which the warrant is in force, and
- the details of any variation or extension

For each emergency authorisation given to a law enforcement officer of the agency the register should record:

- the date the emergency authorisation was given
- the name of the senior officer who gave the emergency authorisation
- the name of the law enforcement officer to whom the emergency authorisation was given
- the relevant offence in relation to which the emergency authorisation was given, and
- the date on which the application for approval of powers exercised under the emergency authorisation was made.

In addition to the inspection functions outlined above, OILECC inspecting officers routinely conduct what are referred to as ‘Operational Command Inspections’. An Operational Command Inspection is an additional auditing tool which OILECC inspecting officers utilise as part of their overall oversight functions. As such, it supplements the relevant legislative requirement as to the number and/or frequency of inspections that are to be conducted.

Such inspections are conducted in relation to the NSWPF because, in addition to having a high volume of surveillance device warrants, its operations and record keeping functions are dispersed across the state. Operational Command Inspections involve inspecting surveillance device warrant records held by the NSWPF at a variety of commands both in the metropolitan and in country areas which are separated from the centralised CAU. This additional form of inspection is not necessary in respect of other agencies because their operations and record keeping functions are all maintained at their respective head offices.

Each of the agencies has a designated unit which is responsible for record keeping and compliance. OILECC’s post-inspection process involves its delegated inspection officers conducting an exit interview with the relevant manager of warrant administration. The interview is followed by correspondence between the officers and that manager in order to resolve any issues identified during the inspection. After those steps are taken, formal post-inspection correspondence is sent by the Inspector to the relevant chief officer to report upon the outcome of the inspection and to identify any matters of concern which may have arisen.

As a result of these processes, OILECC has developed good working relationships with each of those units. 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 higher level of compliance with the legislative requirements.

Chapter 2 NSW Police Force

As the majority of records are located at the Covert Applications Unit (CAU), all of the inspections during the reporting period were conducted at those premises.

2.1 Warrants – general requirements**2.1.1 Section 17 Application for a surveillance device warrant**

418 applications for surveillance device warrants were applied for during the reporting period, of which 411 were issued and 7 were refused. 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.

2.1.2 Section 17(5A) Notice to be served on the Surveillance Devices Commissioner (as the Attorney General’s delegate)

Although a number of minor issues were identified, they were able to be resolved during the course of inspections. Inspections revealed that the NSWPF was otherwise compliant with this requirement.

2.1.3 Section 18 Remote Application

349 such applications were made during the reporting period as this provision was used frequently due to COVID-19. This provision enabled the relevant documentation to be provided electronically to the eligible Judge.

In one instance where there was particular urgency, a warrant was issued orally. The supporting documentation was nevertheless subsequently provided within the required statutory timeframe.

2.1.4 Section 22 Extension and variation of surveillance device warrant

47 extensions and 2 variations were issued during the reporting period.

2.1.5 Section 23 Revocation of surveillance device warrant

101 such warrants were revoked during the reporting period, all of which were revoked by an eligible Judge.

2.1.6 Section 24 Discontinuance of use of surveillance device under warrant

The NSWPF records the information that this provision requires in a form described as a Notification of Discontinuation. Inspections revealed that the NSWPF had been compliant with this requirement.

Inspections also 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 further revealed that in each instance the warrant had in fact been revoked.

2.1.7 Section 25 Application for retrieval warrant

3 such applications were made during the reporting period, all of which were granted.

2.1.8 Section 25(5A) Notice to be served on the Surveillance Devices Commissioner (as the Attorney General's delegate)

Inspections revealed that the NSWPF was compliant with this requirement.

2.1.9 Section 26 Remote application for retrieval warrant

No such applications were made during the reporting period.

2.1.10 Section 30 Revocation of retrieval warrant

1 revocation of such a warrant was made during the reporting period.

2.1.11 Section 31 Emergency use of surveillance devices without a warrant

There were two such uses of a surveillance device during the reporting period.

2.1.12 Section 32 Emergency authorisation of the use of a surveillance device in a participating jurisdiction

No authorisation of a surveillance device in such circumstances was made during the reporting period.

2.1.13 Section 33 Application for approval after use of surveillance device without warrant or under emergency authorisation

As there were two emergency uses of a surveillance device during the reporting period, two such applications were made. Both applications were approved.

2.2 Compliance and monitoring

2.2.1 Section 40 Prohibition on use, communication, publication of protected information

As reported previously, the NSWPF had adopted a practice whereby a Protected Information Register (PIR) is provided to each law enforcement officer to whom a warrant is issued. The use and communication of protected information is recorded on that register. Also recorded are the details of the destruction of any protected information which is no longer required for the purposes set out in sub-sections (4) or (5).

As also reported previously, the CAU has received funding to enable a state-wide Surveillance Devices Database to be developed and implemented. That new Database is now being used for surveillance device record keeping purposes in substitution for the use of PIRs. The old system remains in place but only for warrants which were issued prior to the installation of the Database. A number of warrants were selected at random from the new Database for examination.

Inspections revealed that there had been compliance with this requirement.

2.2.2 Section 41 Dealing with records obtained by use of surveillance devices

The NSWPF has established guidelines to enable it to comply with this provision. The information required by section 41 which is maintained by the CAU is stored in a secure location with access restricted to staff of the CAU.

Inspections conducted at the CAU revealed that that there had been compliance with this requirement.

2.2.3 Section 44 Reports to eligible Judge or eligible Magistrate and the Surveillance Devices Commissioner (as the Attorney General's delegate)

Inspections revealed that 366 such reports were completed during the reporting period. Each of those reports contained all of the required information and each report was also provided within the timeframe specified in the warrant.

During the previous reporting period an issue had arisen in relation to a warrant identified as SD20/0609. That warrant had been issued by an eligible Judge on 31 July 2020 but with a condition. However, the section 44 report which had been provided to the eligible Judge and to the Surveillance Devices Commissioner (as the Attorney-General's delegate) on 19

November 2020 revealed that the condition which had been imposed had not been complied with when the warrant was executed. When this issue was raised with the NSWPF, it acknowledged that there had been a breach. It also agreed to provide a supplementary report both to the eligible Judge and to the Surveillance Devices Commissioner acknowledging that there had been a breach of the condition of the warrant.

The officer who is responsible for the warrant is now required to include in the standard form documentation, information as to whether any condition that is attached to the warrant has been complied with. That information is now also required to be included in the section 44 report which is provided to the eligible Judge and to the Surveillance Devices Commissioner (as the Attorney-General's delegate).

2.2.4 Section 47 Register of warrants and emergency authorisations

All of the required information was recorded on the register.

2.2.5 Section 50 Provision for the issue of evidentiary certificates

8 evidentiary certificates were issued during the reporting period.

In the previous report, it was observed that there were inconsistencies between the information provided in the certificates and what appeared in the reports furnished under section 44. Inspections revealed that not only have those inconsistencies now been resolved but amended certificates containing the correct information have been issued.

2.3 Miscellaneous

2.3.1 Section 52 Requirement to inform subject of surveillance

No such orders were made during the reporting period.

2.4 Concluding Comments

Apart from the issues that were identified earlier, the NSWPF has been generally compliant with its obligations under the Act during the reporting period.

2.5 Recommendations

No specific recommendations are made.

Chapter 3 NSW Crime Commission**3.1 Warrants – general requirements****3.1.1 Section 17 Application for a surveillance device warrant**

As no applications for surveillance device warrants were made during the reporting period, none were issued.

3.1.2 Section 17(5A) Notice to be served on the Surveillance Devices Commissioner (as the Attorney General’s delegate)

As no surveillance device warrants were issued, no notices were required to be served.

3.1.3 Section 18 Remote Application

No such applications were made during the reporting period.

3.1.4 Section 22 Extension and variation of surveillance device warrant

No extensions or variations were issued during the reporting period.

3.1.5 Section 23 Revocation of surveillance device warrant

No such warrants were revoked during the reporting period.

3.1.6 Section 24 Discontinuance of use of surveillance device under warrant

As no applications for surveillance device warrants were applied for during the reporting period, none were discontinued.

3.1.7 Section 25 Application for retrieval warrant

As no such applications were made during the reporting period, none were issued.

3.1.8 Section 25(5A) Notice to be served on the Surveillance Devices Commissioner (as the Attorney General’s delegate)

As no retrieval warrants were issued, no notices were required to be made.

3.1.9 Section 26 Remote application for retrieval warrant

No such applications were made during the reporting period.

3.1.10 Section 30 Revocation of retrieval warrant

No such warrants were revoked during the reporting period.

3.1.11 Section 31 Emergency use of a surveillance device without a warrant

No use of a surveillance device in such circumstances was made during the reporting period.

3.1.12 Section 32 Emergency authorisation of the use of a surveillance device in a participating jurisdiction

No authorisation of a surveillance device in such circumstances was made during the reporting period.

3.1.13 Section 33 Application for approval after use of surveillance device without warrant or under emergency authorisation

As there were no emergency uses or authorisations during the reporting period, no such applications were required to be made.

3.2 Compliance and monitoring

3.2.1 Section 40 Prohibition on use, communication or publication of protected information

As was explained earlier, the NSWPF Organised Crime Squad applies for surveillance device warrants on behalf of the NSWCC. The NSWCC also uses the NSWPF's Protected Information Register (which is now substituted by its new Surveillance Devices Database) for the purpose of recording 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) or (5). As the NSWCC uses the NSWPF register and Database, inspections were conducted of the records held on those systems.

Inspections revealed that there had been compliance with this requirement.

3.2.2 Section 41 Dealing with records obtained by use of surveillance devices

The NSWCC has adopted the NSWPF practice to enable it to comply with this provision. The information required by section 41 is securely stored at the NSWCC premises with access restricted to authorised officers.

Inspecting officers made enquiries with the NSWCC to ascertain whether during the reporting period it held any protected information that it no longer required for the purposes set out in sections 40 (4) and 40 (5). Those enquiries revealed that it did not hold any such information and that accordingly, it did not destroy any protected information during the reporting period.

3.2.3 Section 44 Reports to eligible Judge or eligible Magistrate and the Surveillance Devices Commissioner (as the Attorney General's delegate)

No such reports were made during the reporting period.

3.2.4 Section 47 Register of warrants and emergency authorisations

It was earlier observed that the NSWCC only rarely applies for such warrants in its own right (at 1.3). Inspections revealed that no such warrants were sought during this or indeed recent reporting periods.

3.2.5 Section 50 Provision for the issue of evidentiary certificates

No evidentiary certificates were issued during the reporting period.

3.3 Miscellaneous

3.3.1 Section 52 Requirement to inform subject of surveillance

No such orders were made during the reporting period.

3.4 Concluding Comments

The NSWCC complied with its obligations under the Act during the reporting period.

3.5 Recommendations

No specific recommendations are made.

Chapter 4 Independent Commission Against Corruption**4.1 Warrants – general requirements****4.1.1 Section 17 Application for a surveillance device warrant**

As no applications for surveillance device warrants were made during the reporting period, none were issued.

4.1.2 Section 17(5A) Notice to be served on the Surveillance Devices Commissioner (as the Attorney General’s delegate)

As no surveillance device warrants were issued, no notices were required to be served.

4.1.3 Section 18 Remote Application

No such applications were made during the reporting period.

4.1.4 Section 22 Extension and variation of surveillance device warrant

No extensions or variations were issued during the reporting period.

4.1.5 Section 23 Revocation of surveillance device warrant

No such warrants were revoked during the reporting period.

4.1.6 Section 24 Discontinuance of use of surveillance device under warrant

As no applications for surveillance device warrants were applied for during the reporting period, none were discontinued.

4.1.7 Section 25 Application for retrieval warrant

As no such applications were made during the reporting period, none were issued.

4.1.8 Section 25(5A) Notice to be served on the Surveillance Devices Commissioner (as the Attorney General’s delegate)

As no retrieval warrants were issued, no notices were required to be made.

4.1.9 Section 26 Remote application for retrieval warrant

No such applications were made during the reporting period.

4.1.10 Section 30 Revocation of retrieval warrant

No such warrants were revoked during the reporting period.

4.1.11 Section 31 Emergency use of surveillance devices without a warrant

No use of a surveillance device in such circumstances was made during the reporting period.

4.1.12 Section 32 Emergency authorisation of the use of a surveillance device in a participating jurisdiction

No authorisation of a surveillance device in such circumstances was made during the reporting period.

4.1.13 Section 33 Application for approval after use of surveillance device without warrant or under emergency authorisation

As there were no emergency uses or authorisations during the reporting period, no such applications were required to be made.

4.2 Compliance and monitoring**4.2.1 Section 40 Prohibition on use, communication or publication of protected information**

Inspections revealed that no protected information (the use of which is simply recorded on the warrant file) had been used during the reporting period.

4.2.2 Section 41 Dealing with records obtained by use of surveillance devices

ICAC has established guidelines to enable it to comply with this provision. The information required by section 41 is securely stored at the ICAC premises with access restricted to authorised officers.

Inspecting officers made enquiries with ICAC to ascertain whether during the reporting period it held any protected information that it no longer required for the purposes set out in sections 40 (4) and 40 (5). Those enquiries revealed that it did not hold any such information and that accordingly, it did not destroy any protected information during the reporting period.

4.2.3 Section 44 Reports to eligible Judge or eligible Magistrate and the Surveillance Devices Commissioner (as the Attorney General's delegate)

Inspections revealed that 2 such reports were completed during the reporting period. Each of those reports contained all the required information and each was also provided within the time frame specified in the warrant.

4.2.4 Section 47 Register of warrants and emergency authorisations

All of the required information was recorded on the register.

4.2.5 Section 50 Provision for the issue of evidentiary certificates

No evidentiary certificates were issued during the reporting period.

4.3 Miscellaneous

4.3.1 Section 52 Requirement to inform subject of surveillance

No such orders were made during the reporting period.

4.4 Concluding Comments

ICAC complied with its obligations under the Act during the reporting period.

4.5 Recommendations

No specific recommendations are made.

Chapter 5 Law Enforcement Conduct Commission**5.1 Warrants – general requirements****5.1.1 Section 17 Application for a surveillance device warrant**

3 surveillance device warrants were applied for during the reporting period, all of which were issued.

5.1.2 Section 17(5A) Notice to be served on the Surveillance Devices Commissioner (as the Attorney General’s delegate)

Inspections revealed that the LECC was compliant with this requirement.

5.1.3 Section 18 Remote Application

No such applications were made during the reporting period.

5.1.4 Section 22 Extension and variation of surveillance device warrant

No extensions or variations were issued during the reporting period.

5.1.5 Section 23 Revocation of surveillance device warrant

No such warrants were revoked during the reporting period.

5.1.6 Section 24 Discontinuance of use of surveillance device under warrant

No surveillance devices were discontinued during the reporting period.

5.1.7 Section 25 Application for retrieval warrant

As no such applications were made during the reporting period, none were issued.

5.1.8 Section 25(5A) Notice to be served on the Surveillance Devices Commissioner (as the Attorney General’s delegate)

As no retrieval warrants were issued, no notices were required to be made.

5.1.9 Section 26 Remote application for retrieval warrant

No such applications were made during the reporting period.

5.1.10 Section 30 Revocation of retrieval warrant

No such warrants were revoked during the reporting period.

5.1.11 Section 31 Emergency use of surveillance devices without a warrant

No use of a surveillance device in such circumstances was made during the reporting period.

5.1.12 Section 32 Emergency authorisation of the use of a surveillance device in a participating jurisdiction

No authorisation of a surveillance device in such circumstances was made during the reporting period.

5.1.13 Section 33 Application for approval after use of surveillance device without warrant or under emergency authorisation

As there were no emergency uses or authorisations during the reporting period, no such applications were required to be made.

5.2 Compliance and monitoring**5.2.1 Section 40 Prohibition on use, communication or publication of protected information**

Inspections revealed that no protected information (the use of which is simply recorded on the warrant file) had been used during the reporting period.

5.2.2 Section 41 Dealing with records obtained by use of surveillance devices

LECC has established guidelines to enable it to comply with this provision. The information required by section 41 is securely stored at the LECC premises with access restricted to authorised officers.

Inspecting officers made enquiries with LECC to ascertain whether during the reporting period it held any protected information that it no longer required for the purposes set out in sections 40 (4) and 40 (5). Those enquiries revealed that it did not hold any such information and that accordingly, it did not destroy any protected information during the reporting period.

5.2.3 Section 44 Reports to eligible Judge or eligible Magistrate and the Surveillance Devices Commissioner (as the Attorney General's delegate)

No such reports were made during the reporting period.

5.2.4 Section 47 Register of warrants and emergency authorisations

All of the required information was recorded on the register.

5.2.5 Section 50 Provision for the issue of evidentiary certificates

No evidentiary certificates were issued during the reporting period.

5.3 Miscellaneous

5.3.1 Section 52 Requirement to inform subject of surveillance

No such orders were made during the reporting period.

5.4 Concluding Comments

LECC complied with its obligations under the Act during the reporting period.

5.5 Recommendations

No specific recommendations are made.