

**Report under Section 49(1) of the
Surveillance Devices Act 2007
for the period ending 30 June 2015**

September 2015

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Introduction

The *Surveillance Devices Act 2007* (NSW) (the Act) allows for the use of surveillance devices to investigate crime and to enable evidence to be obtained of the commission of such crime or the identity or location of the offender(s). The Act covers the installation, use and maintenance of listening, optical, tracking, and data surveillance devices and restricts the communication and publication of private conversations, surveillance activities, and information obtained from their use.

The Act also establishes an accountability regime. Reporting and record keeping obligations are imposed on the law enforcement agencies eligible to use surveillance devices as are provisions for the safe keeping and destruction of information obtained from the use of surveillance devices.

The Act requires the NSW Ombudsman to conduct inspections of the surveillance device records of law enforcement agencies to determine the extent of compliance by those agencies and their officers with the Act.

Four law enforcement agencies¹ are currently the subject of these inspections:

- NSW Police Force
- NSW Crime Commission
- The Police Integrity Commission
- The Independent Commission Against Corruption

Legislative Changes

There have been no amendments to legislation affecting surveillance devices during the reporting period.

Reporting requirements

The Ombudsman is required by section 49(1) of the Act to report to the Minister at six monthly intervals on the results of inspections. The Minister is required by section 49(2) to lay the report or cause the report to be laid before both Houses of Parliament within 15 days after receiving the report.

This report is for the period 1 January 2015 to 30 June 2015.

Scope of the inspection

The aim of the Act is to enable law enforcement agencies to utilise surveillance devices to assist in the successful investigation and prosecution of certain offences. Such use is, of course, subject to meeting certain procedural and record keeping requirements. The inspection and monitoring by the Ombudsman aims to foster agency compliance with the Act and to provide public accountability through regular reporting to the Minister and Parliament. The approach taken in the inspections conducted by the Ombudsman is to examine the records of each agency for compliance with the record and document keeping requirements, while at the same time considering such other aspects of compliance as can be determined from those records and from questions asked of relevant officers.

Inspections focus on compliance outlined in three main areas of the Act:

- Part 3 dealing with warrants and emergency authorisations.
- Part 5 covering compliance and monitoring, including dealing with records obtained by use of surveillance devices, the use, communication or publication of protected information, reporting and record keeping.
- Part 6 requiring notification to the Attorney about warrants sought, as well as notification to the subject of surveillance if directed by the eligible Judge.

Surveillance device warrants are issued by eligible Judges of the Supreme Court or eligible Magistrates in the case of a surveillance device warrant authorising the use of a tracking device only, or for a retrieval warrant in respect of a tracking device. Applications must include certain information and be accompanied by an affidavit setting out the

¹ Note: The Act also empowers the use of surveillance devices by the Australian Crime Commission but the inspection and reporting of that agency's use of surveillance devices is carried out by the Commonwealth Ombudsman.

grounds for seeking the warrant. While the inspection of the records includes an examination of the matters required to be specified, it does not examine the sufficiency or otherwise of the information provided in support of the application. That is for the relevant judicial officer to determine.

The Ombudsman inspects each individual surveillance device warrant file at each agency. The inspection includes examining the application, warrant, notice to the Attorney General and the report to the issuing judicial officer and the Attorney General, and any other information contained on the file.

The inspection involves checking that:

- the application is made to an eligible Judge or, in appropriate cases, an eligible Magistrate
- the application includes the name of the applicant and the nature and duration of the warrant including the kind of device sought and is supported by an affidavit
- the warrant contains the information required by section 20
- any extension or variation to the warrant complies with section 22
- the revocation of a warrant complies with section 23
- the appropriate law enforcement officer notifies the chief officer immediately they are satisfied the use of the warrant is no longer necessary, and the chief officer takes steps to discontinue the use of the device or devices as soon as practicable
- where a warrant has been revoked the use of the device is discontinued immediately
- the section 51 notice contains the required information and has been provided to the Attorney General before the warrant has been issued, and that the Attorney General has been given an opportunity to be heard on the application if so desired
- the report under section 44 has been provided to the eligible judge and the Attorney General within the time specified in the warrant
- the report complies with the requirements of section 41
- the application for continued use of an authorised surveillance device in an emergency situation complies with sections 31-32
- where a surveillance device is used without a warrant, that an application for approval is made within two business days to an eligible judge and that such approval complies with section 33
- the register of warrants and emergency applications contains the information required by section 47
- that any directions under section 52 have been complied with.

Records relating to the use of protected information obtained by the use of surveillance devices, and the security of those records at various locations, are also inspected.

Overview of records inspected

During the period 1 January 2015 to 30 June 2015 we conducted inspections across the four NSW law enforcement agencies over 22 days. The following tables set out the total number of warrants issued, warrant reports received, warrants revoked, emergency uses of devices and retrieval warrants issued.

Table 1. Surveillance device warrants issued 1 January 2015 to 30 June 2015

	No. of warrants issued
NSW Police Force	368
NSW Crime Commission	22
Independent Commission Against Corruption	0
Police Integrity Commission	2
Total	392

Table 2. Surveillance device warrant reports received 1 January 2015 to 30 June 2015

	No. of warrant reports received
NSW Police Force	317
NSW Crime Commission	41
Independent Commission Against Corruption	1
Police Integrity Commission	2
Total	361

Table 3. Surveillance device warrants revoked 1 January 2015 to 30 June 2015

	No. of warrants revoked
NSW Police Force	65
NSW Crime Commission	2
Independent Commission Against Corruption	0
Police Integrity Commission	0
Total	67

Table 4. Emergency use of surveillance devices 1 January 2015 to 30 June 2015

	No. of emergency uses of surveillance devices
NSW Police Force	1
NSW Crime Commission	0
Independent Commission Against Corruption	0
Police Integrity Commission	0
Total	1

Table 5. Retrieval warrants issued 1 January 2015 to 30 June 2015

	No. of retrieval warrants issued
NSW Police Force	4
NSW Crime Commission	0
Independent Commission Against Corruption	0
Police Integrity Commission	0
Total	4

NSW Police Force

During the reporting period 368 surveillance device warrants were issued and four retrieval warrants were also issued. There was one emergency use of surveillance devices which was subsequently approved. There were 65 revocations in this period.

The majority of records are located at Police Prosecutions, Covert Applications Unit, including applications, warrants, section 51 notices and section 44 reports. In relation to the protected information received as a result of surveillance device warrants, this information is kept with the officer responsible for the warrants at the relevant operational command or local area command. The law enforcement officer responsible for the warrant is responsible for recording the use, communication or publication, and destruction of protected information obtained under their warrant.

Any exceptions we have identified with the NSW Police Force's compliance with the Act are detailed below.

Warrant requirements

Section 17 Applications for a surveillance device warrant

All applications during the period were made to eligible Judges. No applications for a surveillance device authorising the use of a tracking device only were made to eligible Magistrates.

Warrant SD 15/0327 had a typographical error at paragraph c) which misidentified the date the warrant was issued. The correct date was clear in the section indicating the period during which the warrant was in force.

At one inspection it came to notice that on one occasion a tracking device was attached to a vehicle, when in fact the warrant (SD14/0394) had authorised the use of listening devices and optical devices, not tracking devices. This error had not been noticed by the deponent of the affidavit, nor staff at Covert Applications Unit.

When we raised this issue we were told that the NSW Police Force had run a Regional Technical Surveillance Equipment Trial allowing certain operational squads to carry out the installation of surveillance devices under warrants. Until the trial, the installation of surveillance devices was centralised within the State Technical Investigation Branch. This error occurred during the trial. As a result we will now conduct inspections at operational units to assess compliance, and also examine processes and policies to ensure best practice. Since we raised this exception there has also been a change of procedures for staff at the Covert Applications Unit and a general reminder given to all relevant officers that the accuracy of the warrant is part of their overall responsibility for that warrant.

Section 18 Remote Application

Three (3) applications were made remotely.

All remote applications were notified to the Attorney General and affidavits were provided to the issuing judicial officer within the legislative time frame.

Section 22 Extension and variation of surveillance device warrant

Twenty four (24) warrants were extended during the reporting period, one of these was extended twice and two of these warrants were also varied. There was one warrant which had a single variation.

Section 23 Revocation of surveillance device warrant

There were 65 revocations during the reporting period, all of which were revoked by an eligible Judge.

Section 24 Discontinuance of use of surveillance device under warrant

Section 24 (2)(a) requires that a surveillance device which is no longer necessary must be discontinued as soon as practicable. The NSW Police Force uses a Notification of Discontinuation form to record such action. Section 24 (2)(b) further requires that when an application for discontinuation is made, an application is also made for the revocation of the warrant under section 23.

All the warrants which were revoked had been discontinued as soon as practicable.

While the Act requires that a surveillance device 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, there is no time limit specified for making an application for the revocation of the warrant.

Section 25 Application for retrieval warrant

There were four (4) applications for retrieval warrants, which were granted.

Section 26 Remote application

No remote applications were made for retrieval warrants.

Section 30 Revocation of retrieval warrant

No retrieval warrants were revoked.

Emergency authorisation requirements**Section 31 Emergency use of surveillance devices – threat of serious personal violence or substantial property damage**

There was one (1) emergency use of surveillance devices under this section.

Section 32 Emergency authorisation - continued use of surveillance devices in participating jurisdiction

There was no emergency use of surveillance device warrants in participating jurisdictions.

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

The application for the emergency use of the surveillance devices was approved in accordance with the Act.

Compliance and monitoring requirements

The law enforcement officer responsible for the warrant is responsible for recording the use, communication or publication, and destruction of protected information obtained under their warrant. We test the compliance of these individual law enforcement officers by conducting 'field' inspections at specialist commands or local area commands throughout metropolitan and regional areas.

This period, regional field inspections were conducted at Tamworth, Coffs/Clarence, Mid North Coast and Tuggerah Lakes Local Area Commands. Metropolitan field inspections were also conducted at Northern Beaches, Ku-Ring-Gai and The Hills Local Area Commands.

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

The NSW Police Force developed 'Protected Information' Registers to record the use and communication of protected information, as well as to record the destruction of protected information no longer required for the purposes set out in section 40 (4) or (5) of the Act.

The use of these registers has been at best sporadic, and many commands have been using other means to record this information. The Commissioner has agreed that the use of protected information registers should be standard and has established a working group to:

- assess the education/training currently available to investigators on their obligations under the Act
- review the current policies/guidelines about the storage and destruction of protected information
- make recommendations to improve awareness of, and compliance with, the requirements under the Act regarding protected information.

Our senior compliance and investigation officer has provided advice to this working group and some progress has already been made.

Section 41 Dealing with records obtained by use of surveillance devices

As already noted, management of the records associated with the use and destruction of protected information is being reviewed by a working group within the NSW Police Force.

Our field inspections conducted at the above-mentioned commands found a general willingness among the officers concerned to be compliant with the Act. There has, however, been a lack of understanding of, and failure to follow, the standard procedures developed to ensure such compliance.

All of the commands inspected have now addressed the exceptions we identified around their use of protected information registers and the destruction requirements of the Act.

In some of the cases we inspected there was also a problem with the identification of the relevance of protected information, and what is then included in the subsequent report under section 44. On some occasions the responsible officer had written in the section 44 report that the protected information was 'not relevant' (meaning it should be destroyed) when in fact it was considered as 'somewhat relevant' and should be retained.

The commands we inspected have addressed this issue and have destroyed any protected information which was deemed not relevant. Once again, the NSW Police Force working group will review necessary training, policies and procedures to ensure any similar problems across the state are also addressed.

At Mid North Coast LAC the protected information from warrant SD09/0107, Operation 'Marquette', was unable to be located prior to our inspection. Subsequently this information was located, and the Mid North Coast Commander has confirmed that the protected information is no longer required and will be destroyed, and the records of those destructions will be available for inspection.

Section 44 Reports to eligible Judge or eligible Magistrate and Attorney General

The section 44 Report for warrant SD 15/0022 and SD 15/0053 did not accurately specify the actual period for which the devices were used. These errors were notified to the Commissioner.

Section 44 reports were received within the time specified in the warrant for all the warrants which were issued during this reporting period. This represents a significant improvement in timeliness when compared with previous reporting periods.

Section 47 Register of warrants and emergency authorisations

The Act requires the chief officer of the law enforcement agency to keep a register of warrants and emergency authorisations. The register is required to specify certain particulars. The NSW Police Force register contained the required particulars.

Evidentiary Certificates

Section 50 Provision for the issue of evidentiary certificates

No evidentiary certificates were checked during this reporting period.

Notifications to the Attorney General

Section 51 Particulars of warrants sought under Part 3 to be notified to the Attorney General

While the NSW Police Force was generally compliant in this area, we noted the following exceptions.

The section 51 notices to the Attorney General for the following eleven applications were deficient in various ways: SD 15/0204, SD 15/0221, SD 15/0222, SD 15/0349, SD 15/0236, SD 15/0256, SD 15/0303, SD 15/0351, SD 15/0378, SD 15/0398 and SD 15/0291.

These errors generally appeared to be the result of either typographical errors or cut and paste type errors, this is a large number compared to previous reporting periods, which we drew to the attention of the Commissioner.

Section 52 Requirement to inform subject of surveillance

No orders were made requiring the subject of the surveillance to be informed.

Concluding Comments

The NSW Police Force was generally compliant with the requirements of the Act during this reporting period apart from the exceptions discussed above.

Recommendations

No specific recommendations are made.

NSW Crime Commission

During the reporting period 22 surveillance device warrants were issued and two surveillance device warrants were revoked. No retrieval warrants were issued.

We were satisfied the NSW Crime Commission had complied with its obligations under the Act.

Warrant requirements

Section 17 Applications for a surveillance device warrant

All 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.

Section 18 Remote Application

There were no remote applications made.

Section 22 Extension and variation of surveillance device warrant

Twenty three (23) warrants issued during this reporting period were extended. A further 16 warrants issued during the previous reporting period were extended during this reporting period.

Section 23 Revocation of surveillance device warrant

There were two (2) revocations of surveillance device warrants during the reporting period.

Section 24 Discontinuance of use of surveillance device under warrant

Section 24 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.

All warrants which had been used were discontinued in a timely manner. Some warrants were never used and were subsequently revoked.

Section 25 Application for retrieval warrant

There were no applications for a retrieval warrant.

Section 26 Remote application

There were no remote applications for a retrieval warrant.

Section 30 Revocation of retrieval warrant

There were no applications for the revocation of a retrieval warrant.

Emergency authorisation requirements

Section 31 Emergency use of surveillance devices – threat of serious personal violence or substantial property damage

There was no emergency use of a surveillance device during the reporting period.

Section 32 Emergency authorisation - continued use of surveillance devices in participating jurisdiction

There was no emergency use of surveillance device warrants in participating jurisdictions.

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

There was no emergency use of a surveillance device during the reporting period.

Compliance and monitoring requirements

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

While protected information was obtained through the use of surveillance devices, the information may be used in the future and the records of each use, communication and publication will be inspected in the future.

Section 41 Dealing with records obtained by use of surveillance devices

The Commission has established guidelines for dealing with protected information. Protected information is stored at the Commission premises with those officers authorised to access and manage it.

There were no destructions of protected information carried out at the time of these inspections.

Section 44 Reports to eligible Judge or eligible Magistrate and Attorney General

Reports were provided to the eligible Judge and Attorney General within the time specified in the warrant and the reports contained all the required information.

Section 47 Register of warrants and emergency authorisations

The Act requires the chief officer of the law enforcement agency to keep a register of warrants and emergency authorisations. The register is required to specify certain particulars.

The register of warrants at the NSWCC contained all the particulars required and was accurate.

Evidentiary Certificates

Section 50 Provision for the issue of evidentiary certificates

No evidentiary certificates were checked during this reporting period.

Notifications to the Attorney General

Section 51 Particulars of warrants sought under Part 3 to be notified to the Attorney General

Section 51 notifications were provided in relation to all warrant applications. The notifications contained the information required.

Section 52 Requirement to inform subject of surveillance

No orders were made requiring the subject of the surveillance to be informed.

Concluding Comments

For the reporting period the NSW Crime Commission was compliant with the Act.

Recommendations

No specific recommendations are made.

Independent Commission Against Corruption

During the reporting period no surveillance device warrants were issued and one report was received in relation to a warrant issued during the previous reporting period.

We were satisfied that the Independent Commission Against Corruption had complied with its obligations under the Act.

Warrant requirements

Section 17 Applications for a surveillance device warrant

No applications were made to eligible Judges.

Section 18 Remote Application

There were no remote applications made.

Section 22 Extension and variation of surveillance device warrant

No surveillance device warrants were extended or varied.

Section 23 Revocation of surveillance device warrant

There were no surveillance device warrants issued during the reporting period.

Section 24 Discontinuance of use of surveillance device under warrant

There were no surveillance device warrants issued during the reporting period.

Section 25 Application for retrieval warrant

There were no applications for a retrieval warrant.

Section 26 Remote application for retrieval warrant

There were no applications for a retrieval warrant.

Section 30 Revocation of retrieval warrant

No retrieval warrants were issued and consequently none were revoked.

Emergency authorisation requirements

Section 31 Emergency use of surveillance devices – threat of serious personal violence or substantial property damage

There was no emergency use of a surveillance device during the reporting period.

Section 32 Emergency authorisation - continued use of surveillance devices in participating jurisdiction

There was no emergency use of surveillance device warrants in participating jurisdictions.

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

There was no application for approval after use of a surveillance device.

Compliance and monitoring requirements

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

While protected information was obtained through the use of surveillance devices, the information may be used in the future and the records of each use, communication and publication will be inspected in the future.

Section 41 Dealing with records obtained by use of surveillance devices

The Commission has established guidelines for dealing with protected information. Protected information is stored in the Commission premises with those officers authorised to access and manage it.

There were no destructions carried out of protected information at the time of these inspections.

Section 44 Reports to eligible Judge or eligible Magistrate and Attorney General

The report was provided to the eligible Judge and Attorney General within the time specified in the warrant and the report contained all the required information.

Section 47 Register of warrants and emergency authorisations

The Act requires the chief officer of the law enforcement agency to keep a register of warrants and emergency authorisations. The register is required to specify certain particulars.

The register of warrants at the ICAC contained all the particulars required and was accurate.

Evidentiary Certificates

Section 50 Provision for the issue of evidentiary certificates

No evidentiary certificates were checked during this reporting period.

Notifications to the Attorney General

Section 51 Particulars of warrants sought under Part 3 to be notified to the Attorney General

No warrant applications were made during the reporting period.

Section 52 Requirement to inform subject of surveillance

No orders were made requiring the subject of the surveillance to be informed.

Concluding Comments

For the reporting period the Independent Commission Against Corruption was compliant with the Act.

Recommendations

No specific recommendations are made.

Police Integrity Commission

During the reporting period two surveillance device warrants were applied for and granted.

We were satisfied that the Police Integrity Commission had complied with its obligations under the Act.

Warrant requirements

Section 17 Applications for a surveillance device warrant

The applications were made to an eligible Judge. No applications were made to eligible Magistrates in the case of applications for a surveillance device authorising the use of a tracking device only.

Section 18 Remote Application

There were no remote applications made.

Section 22 Extension and variation of surveillance device warrant

None of the warrants issued during this reporting period were extended or varied.

Section 23 Revocation of surveillance device warrant

There were no revocations during the reporting period.

Section 24 Discontinuance of use of surveillance device under warrant

There were no situations where the use of any surveillance device was discontinued during the reporting period and therefore no requirement to seek revocations of any warrants.

Section 25 Application for retrieval warrant

No applications were made for retrieval warrants.

Section 26 Remote application for retrieval warrant

No remote applications were made for retrieval warrants.

Section 30 Revocation of retrieval warrant

No retrieval warrants were issued and consequently none were revoked.

Emergency authorisation requirements

Section 31 Emergency use of surveillance devices – threat of serious personal violence or substantial property damage

There were no emergency uses of surveillance devices.

Section 32 Emergency authorisation – continued use of surveillance devices in participating jurisdiction

There was no emergency use of surveillance device warrants in participating jurisdictions.

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

There were no emergency uses of surveillance devices.

Compliance and monitoring requirements

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

Where protected information was obtained through the use of surveillance devices, the records of each use, communication and publication are contained in a register for this purpose.

Section 41 Dealing with records obtained by use of surveillance devices

The Commissioner has established guidelines for dealing with protected information. The protected information is stored on the Commission premises and restricted to those authorised to access and manage it.

There were no destructions carried out of protected information at the time of these inspections.

Section 44 Reports to eligible Judge or eligible Magistrate and Attorney General

There were two reports provided to the Attorney General or Eligible Judge during the reporting period. The reports contained all the required information.

Section 47 Register of warrants and emergency authorisations

The Act requires the chief officer of the law enforcement agency to keep a register of warrants and emergency authorisations. The register is required to specify certain particulars.

The register of warrants contained all the particulars required and was accurate.

Evidentiary Certificates

Section 50 Provision for the issue of evidentiary certificates

No evidentiary certificates were checked during this reporting period.

Notifications to the Attorney General

Section 51 Particulars of warrants sought under Part 3 to be notified to the Attorney General

All notifications were provided to the Attorney General in relation to each application and contained all the required particulars.

Section 52 Requirement to inform subject of surveillance


No orders were made requiring the subject of the surveillance to be informed.

Concluding Comments

For the reporting period the Police Integrity Commission was compliant with the Act.

Recommendations

No specific recommendations are made.



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