

Report under Section 49(1) of the
Surveillance Devices Act 2007
for the 6 months ending 30 June 2012

November 2012

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Surveillance Devices Act 2007
the period ending 30 June 2012

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Introduction	2
Scope of the inspection	2
Inspection Overview	3
NSW Police Force	5
Warrants requirements.....	5
Emergency authorisations requirements.....	6
Compliance and monitoring	6
Evidentiary certificates	7
Notifications to the Attorney General	8
Concluding comments	8
Recommendations.....	8
NSW Crime Commission	9
Warrants requirements.....	9
Emergency authorisations requirements.....	9
Compliance and monitoring	10
Evidentiary certificates	10
Notifications to the Attorney General	10
Concluding comments	10
Recommendations.....	10
Independent Commission Against Corruption	11
Warrants requirements.....	11
Emergency authorisations requirements.....	11
Compliance and monitoring	11
Evidentiary certificates	12
Notifications to the Attorney General	12
Concluding comments	12
Recommendations.....	12
Police Integrity Commission	13
Warrants requirements.....	13
Emergency authorisations requirements.....	13
Compliance and monitoring	13
Evidentiary certificates	13
Notifications to the Attorney General	14
Concluding comments	14
Recommendations	14

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 also 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

The Ombudsman is required by section 49(1) of the Act to report to the Minister at 6-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 2012 to 30 June 2012.

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 and 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 a retrieval warrant in respect of a tracking device. Applications are required to include certain information and generally must be accompanied by an affidavit setting out the grounds on which the warrant is sought. 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 a matter for the relevant judicial officer to determine.

The Ombudsman inspects each individual surveillance device warrant file at each agency. The inspection involves an examination of 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.

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.

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 s.20
- any extension or variation to the warrant complies with s.22
- the revocation of a warrant complies with s.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 s.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 s.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 s.41
- the application for continued use of an authorised surveillance device in an emergency situation complies with ss.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 s.33
- the register of warrants and emergency applications contains the information required by s.47
- that any directions under s.52 have been complied with.

The inspection also includes examining records relating to the use of protected information obtained by the use of surveillance devices and the security of those records at various locations.

Inspection Overview

During the period 1 January 2012 to 30 June 2012 we conducted inspections across the four NSW law enforcement agencies over 15 days.

Figure 1: Surveillance device warrants issued 1 January 2012-30 June 2012

Agency	Number
NSW Police Force	353
NSW Crime Commission	155
Independent Commission Against Corruption	4
Police Integrity Commission	7
Total	519

Figure 2: Surveillance device warrant reports received 1 January 2012-30 June 2012

Agency	Number
NSW Police Force	166
NSW Crime Commission	110
Independent Commission Against Corruption	3
Police Integrity Commission	7
Total	286

Figure 3: Surveillance device warrants revoked 1 January 2012-30 June 2012

Agency	Number
NSW Police Force	78
NSW Crime Commission	16
Independent Commission Against Corruption	0
Police Integrity Commission	0
Total	94

Figure 4: Emergency use of surveillance devices 1 January 2012-30 June 2012

Agency	Number
NSW Police Force	1
NSW Crime Commission	0
Independent Commission Against Corruption	0
Police Integrity Commission	0
Total	1

NSW Police Force

During the reporting period 353 warrants were issued, one was a retrieval warrant. One emergency authorisation was granted. Twenty two applications have not been proceeded with or cancelled.

The majority of records are located at Police Prosecutions, Covert Applications Unit. These include applications, warrants, s.51 notices and s.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 particular operational commands or local area commands as the case may be. The law enforcement officer responsible for the warrant is responsible for recording the use, communication or publication of protected information obtained under their warrant.

We were satisfied the NSW Police Force had generally complied with its obligations under the Act. The exceptions are detailed below.

Warrants requirements

Section 17 Applications for a surveillance device warrant

All applications were made to eligible Judges. 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 five remote applications made.

All 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

Seven warrants were varied and/or extended during the reporting period.

Section 23 Revocation of surveillance device warrant

There were 78 revocations during the reporting period.

Section 24 Discontinuance of use of surveillance device under warrant

Section 24 (2)(a) requires that a surveillance device which is no longer needed is to be discontinued as soon as practicable. NSW Police Force use 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.

While the Act requires that a surveillance device be discontinued as soon as practical 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 revocation of the warrant. As an administrative practicality, I have taken the view that it is not unreasonable that no application for revocation be made for any warrant which will in any case expire within 5 days of the use of the surveillance device being discontinued.

Our inspections identified the following warrants which did not comply with the above because the warrant had not been revoked

SD12/064 Discontinued 22/02/2012 Expired 20/04/2012

SD12/112 Discontinued 01/03/2012 Expired 23/03/2012

In all other cases inspected where there was a revocation, there was a notice of discontinuance of the use of the surveillance device on file with the exception of SD12/0060 which did not have a notice of discontinuation on the file.

Section 25 Application for retrieval warrant

One application was made for a retrieval warrant and was 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 authorisations requirements

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

There was no emergency use of surveillance device warrants.

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 one emergency use of surveillance device warrants.

Compliance and monitoring

The law enforcement officer responsible for the warrant is responsible for recording the use, communication or publication of protected information obtained under their warrant.

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

During this reporting period additional inspections were carried out at Far South Coast, Shoalhaven and Wollongong Local Area Commands. Staff at these locations used the Protected Information Registers and protected information was securely stored. Where protected information was obtained under controlled operations by law enforcement participants operating under assumed names this information was also recorded and stored securely.

Section 41 Dealing with records obtained by use of surveillance devices

NSW Police Force personnel use the protected information registers to record any dealing with protected information. Certain staff at each Local Area Command are tasked with inspecting these records in addition to our inspections. During our inspections at the above locations we noted the registers were kept in accordance with the Act.

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

Section 44 of the Act requires a report to be furnished to the eligible Judge, or eligible Magistrate, as the case may be, and to the Attorney General within the time frame specified in the warrant. The maximum penalty for failure to comply with Sections 44 (1),(2) and (6) is 20 penalty units or imprisonment for a term of 12 months, or both.

The following warrants issued during the reporting period had not been reported to the eligible Judge and the Attorney General within the specified number of days following the expiry or revocation of the warrant as required. The standard number of days is generally 60 days.

Warrant Number	Issued	Expiry	Revoked	Report to Eligible Judge
SD12/0048	18-Jan-12	16-Apr-12	15-Feb-12	01-May-12
SD12/0057	23-Jan-12	20-Apr-12	08-Feb-12	01-May-12
SD12/0032	12-Jan-12	09-Apr-12	03-Feb-12	01-May-12
SD12/0052	19-Jan-12	16-Apr-12	01-Feb-12	01-May-12
SD12/0165	14-Mar-12	12-Apr-12	22-Mar-12	20-Jun-12
SD12/0074	06-Feb-12	05-May-12	13-Mar-12	20-Jun-12
SD12/0037	15-Jan-12	12-Apr-12	14-Feb-12	31-May-12
SD12/0058	27-Jan-12	24-Apr-12	02-Mar-12	20-Jun-12
SD12/0034	12-Jan-12	10-Apr-12	08-Feb-12	31-May-12
SD12/0043	17-Jan-12	15-Apr-12	01-Feb-12	31-May-12
SD12/0002	05-Jan-12	03-Apr-12	01-Feb-12	31-May-12
SD12/0150	02-Mar-12	15-Apr-12	02-Apr-12	08-Aug-12

In response to our previous recommendation, the New South Wales Police Force has implemented procedures to improve compliance in this regard. As a result, this is a substantial improvement in compliance over previous reporting periods.

Time period	Number
1/1/11 to 30/6/11	51
1/7/11 to 31/12/11	115
1/1/12 to 30/6/12	12

The following warrant file did not contain section 44 reports.

Warrant Number	Issued	Expiry	Revoked
SD12/0062	03-Feb-12	02-May-12	22-Feb-12

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 NSWPF register contained the required particulars.

Evidentiary Certificates

Section 50 Provision for the issue of evidentiary certificates

No evidentiary certificates were issued 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

In general the NSWPF was compliant in this regard, with the exception of some minor typographical errors. These errors were drawn to the attention of relevant staff during our inspections.

The Attorney General was provided with particulars of all warrants sought.

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 Police Force was generally compliant with the Act.

Following concerns raised in previous reports about delays with the provision of Section 44 reports, the Deputy Ombudsman (Police and Compliance) had discussions with the Commander of Police Prosecutions about strategies to deal with this issue. To address this area of non-compliance, the NSWPF introduced procedures to increase the awareness of individual officers about their responsibilities for reporting on surveillance devices to the eligible Judge and the Attorney General. This report demonstrates the level of compliance has improved as a result of those changes.

Recommendations

No specific recommendations are made

NSW Crime Commission

During the reporting period 155 surveillance device files were inspected, all applications for warrants were granted. We were satisfied that the NSW Crime Commission had generally complied with its obligations under the Act.

Warrants requirements

Section 17 Applications for a surveillance device warrant

All 155 applications were made to eligible Judges. 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

13 warrants were varied or extended.

Section 23 Revocation of surveillance device warrant

There were 16 revocations 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 a retrieval warrant and so no revocations were required.

Emergency authorisations 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 were no applications for approval after use of a surveillance device

Compliance and monitoring

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 deal with 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

Reports were generally provided to the eligible Judge and Attorney General within the time specified in the warrant and the reports contained all the required information. The only exception, being SD12/0002, which was delivered late to both the eligible Judge and the Attorney-General due to an administrative error.

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 issued 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 relevant 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 with the exception of one section 44 report which was submitted late due to an administrative error.

Recommendations

No specific recommendations are made.

Independent Commission Against Corruption

During the reporting period four surveillance device files were inspected and all warrants were granted.

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

Warrants requirements

Section 17 Applications for a surveillance device warrant

Four applications were made to eligible Judges. All warrants were issued.

Section 18 Remote Application

There were no remote applications made.

Section 22 Extension and variation of surveillance device warrant

There were no variations or extensions to the warrants issued.

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

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 authorisations 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

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

While protected information was obtained through the use of surveillance devices, records of each use, communication and publication were recorded appropriately.

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 deal with 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

All reports were provided to the eligible Judge and Attorney General within the required time frame and all reports contained 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 issued 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 Independent Commission Against Corruption was compliant with the Act.

Recommendations

No specific recommendations are made.

Police Integrity Commission

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

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

Warrants requirements

Section 17 Applications for a surveillance device warrant

All applications were made to eligible Judges. 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.

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

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 authorisations 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

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

While 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 deal with 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 no reports due to be provided to the Attorney General or Eligible Judge during the reporting period.

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 issued 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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