

**Report under Section 49(1) of the
Surveillance Devices Act 2007
for the period ending
30 June 2014**

October 2014

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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 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

Legislative Changes

There have been no legislative changes since the previous report.

Reporting requirements

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 2014 to 30 June 2014.

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

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

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 when they determine the application for a warrant.

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.

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 under s.44 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.

Overview of records inspected

During the period 1 January 2014 to 30 June 2014 we conducted inspections across the four NSW law enforcement agencies over 15 days. The following tables set out the total number of warrants issued, warrants reports received, warrants revoked, emergency uses of devices, retrieval warrants issued and applications refused.

**Table 1. Surveillance device warrants issued
1 January 2014 - 30 June 2014**

	No. of warrants issued
NSW Police Force	363
NSW Crime Commission	53
Independent Commission Against Corruption	0
Police Integrity Commission	2
Total	418

**Table 2. Surveillance device warrant reports received
1 January 2014 - 30 June 2014**

	No. of warrant reports received
NSW Police Force	398
NSW Crime Commission	62
Independent Commission Against Corruption	1
Police Integrity Commission	2
Total	463

**Table 3. Surveillance device warrants revoked
1 January 2014 - 30 June 2014**

	No. of warrants revoked
NSW Police Force	66
NSW Crime Commission	20
Independent Commission Against Corruption	0
Police Integrity Commission	0
Total	86

**Table 4. Emergency use of surveillance devices
1 January 2014 - 30 June 2014**

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

**Table 5. Retrieval warrants issued
1 January 2014 - 30 June 2014**

	No. of retrieval warrants issued
NSW Police Force	6
NSW Crime Commission	0
Independent Commission Against Corruption	0
Police Integrity Commission	0
Total	6

**Table 6. Warrant applications refused
1 January 2014 - 30 June 2014**

	No. of warrant applications refused
NSW Police Force	6
NSW Crime Commission	7
Independent Commission Against Corruption	0
Police Integrity Commission	0
Total	13

NSW Police Force

During the reporting period 363 surveillance device warrants were issued, six retrieval warrants were also issued. There were no emergency uses of surveillance devices.

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.

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

369 applications were made to eligible Judges, 363 applications were granted and six applications were refused. No applications were made to eligible Magistrates for a surveillance device authorising the use of a tracking device only.

Section 18 Remote Application

There were three (3) remote applications made.

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

Section 22 Extension and variation of surveillance device warrant

Twenty five warrants which were issued during this reporting period were varied or extended. Forty warrants which were issued during previous reporting periods, but which were inspected during this period, were also varied or extended.

Section 23 Revocation of surveillance device warrant

There were 66 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. 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.

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.

Our inspections identified the following warrant which did not comply with the above because the warrant had not been revoked and there was no indication that the use of the device had been discontinued as soon as practical:

- Warrant SD14/0357 expired 17/8/14. The section 44 report was completed by the officer responsible for the warrant on 24/07/14. However, there was no record of discontinuance or revocation on the file.

We raised this exception with the Commissioner following the inspection. In responding the Commissioner noted this instance was a marked exception to the compliance practices of the Covert Applications Unit, highlighted by the fact it was the only instance in 509 files where this occurred.

Section 25 Application for retrieval warrant

Six applications were made for retrieval warrants and all 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 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 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

There was no emergency use of surveillance device warrants under this section.

Compliance and monitoring requirements

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 Canobolas and Chifley Local Area Commands. Inspections were also conducted at State Crime Command operational squads: Robbery and Serious Crime Squad, and Fraud and Cybercrime Squad. Staff at some of these locations used the Protected Information Registers and others used different recording procedures as discussed below. Protected information, however, was generally securely stored.

One issue which was repeated across all areas of these inspections was the lack of understanding about the destruction of protected information as required by section 41 of the *Surveillance Devices Act 2007*. In one case, records relating to Surveillance Device SD10/0364 were no longer required and had been sent to archives.

We advised the relevant officers that when the information obtained under a warrant is no longer required for a purpose connected with section 40(4) or (5) of the Act then there is an obligation to have the information destroyed. The details of the destruction should then be recorded in the protected information register to be available for inspection. In relation to SD10/0364, the officers subsequently arranged to retrieve the records from archives and make a determination as to the appropriateness of destroying the records. Issues relating to the destruction of protected information appear to be systemic and are discussed more fully below.

Section 41 Dealing with records obtained by use of surveillance devices

NSW Police Force personnel use the protected information register to record any dealing with protected information. Senior officers at each Local Area Command are also 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.

However, some personnel at some squads, particularly in State Crime Command, were instead using their own procedures to record details of protected information. In particular we found some officers using Master Tape Record (MTR) books to record the movement of protected information.

We noted that to ensure consistency across the Police Force the use of a Protected Information Register should be a standard practice. The Protected Information Register was designed to ensure compliance by all staff with the legislation.

As discussed above, the issue of the destruction of protected information which is no longer required also needed to be addressed within the commands we inspected.

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 timeframe 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.

Except for the eight exceptions set out in the appendices to this report, Section 44 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.

In our December 2012 report we identified 342 instances where Section 44 reports had not been provided as required. In our June 2013 report this had decreased to 79 instances of non-provision of reports. During this current period there were no instances where the Section 44 report had not been provided and we note that the NSW Police Force has maintained its improvement in this area.

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 New South Wales Police Force register contained the required particulars.

Evidentiary Certificates

Section 50 Provision for the issue of evidentiary certificates

Evidentiary certificates are retained by each officer responsible for the warrant as such no evidentiary certificates were inspected 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 NSW Police Force 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 following exceptions were identified and notified to the New South Wales Police Force at our inspection:

- The section 51 notices for warrants SD14/0193 and SD14/0281 did not indicate whether alternate means were available as required by section 51(e) and/or (f) of the Act.

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 outlined above.

Recommendations

Following our inspections we wrote to the Commissioner and made two suggestions for practice improvements relating to the:

- use of Protected Information Registers in the specialist commands, and
- actively considering the need to destroy protected information which is no longer required.

In response the Deputy Commissioner, Specialist Operations advised:

- The Covert Applications Unit has updated its instructions to Law Enforcement Officers (LEOs) on the grant of surveillance device warrants to provide LEOs with compliance information regarding 'protected information', and to include a copy of the current Protected Information Register.
- An article explaining compliance obligations will be disseminated by the Covert Applications Unit in the next Covert Law Newsletter. It will also be published in the *Police Monthly* for statewide dissemination.
- The Covert Applications Unit, in conjunction with the State Crime Command is conducting a Professional Development Day for investigators in December 2014 which will cover surveillance devices. The conference will be available to all relevant police personnel via a web based arrangement. Ombudsman staff have been invited to present at this Professional Development Day.

In relation to the issues we raised about specific matters identified at the command inspections, we were also advised that:

- Practices relating to State Crime Command internal oversight of the issues we identified would be amended to cover the issues raised.
- Protected Information Registers have been introduced at the commands for use by all personnel in all relevant circumstances.
- All material on hand at the commands have been reviewed to determine the ongoing need for retention.

We acknowledge the Deputy Commissioner's advice and on that basis we make no recommendations.

NSW Crime Commission

During the reporting period 53 surveillance device warrants were issued. There was also one emergency use of surveillance devices.

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

Warrant requirements

Section 17 Applications for a surveillance device warrant

There were 60 applications for surveillance device warrants and all applications were made to eligible Judges. Seven applications were refused. There was one application for the emergency use of surveillance devices, which was subsequently approved. No applications were made to eligible Magistrates 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

Eighteen warrants which were issued during this reporting period were varied or extended. Eleven warrants that were issued during previous reporting periods but which were inspected during this period were also varied or extended.

Section 23 Revocation of surveillance device warrant

There were 20 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 the revocation of a retrieval warrant.

Emergency authorisations requirements

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

There was one 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 one application for approval after use of a surveillance device and the use of the device was approved.

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 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 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 New South Wales Crime Commission 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.

Recommendations

No specific recommendations are made.

Independent Commission Against Corruption

During the reporting period the Independent Commission Against Corruption did not apply for any surveillance device warrants.

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 issued during the previous reporting period, 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

One report in relation to a warrant issued during the previous reporting period was provided to the Attorney General and Eligible Judge during the reporting period. This report was provided within the statutory timeframe.

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.

Concluding Comments

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

Recommendations

No 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 with only one exception identified, as outlined 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 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 requirements

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 of protected information carried out at the time of these inspections.

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

Two reports were provided to the Attorney General and Eligible Judge during the reporting period and within the required timeframe.

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, with the following exception.

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 recommendations are made.

Appendix 1 – Section 44 Reports provided to Attorney General and Eligible Judge outside of standard 60 days – NSW Police Force

Warrant Number	Expiry	Attorney General	Days	Eligible Judge	Days
SD12/0643	12-Jan-13	06-Feb-13	24	18-Apr-13	96
SD12/0653	04-Jan-13	12-Mar-13	68	18-Apr-13	104
SD12/0654	09-Jan-13	26-Feb-13	47	18-Apr-13	99
SD12/0656	02-Jan-13	26-Feb-13	54	18-Apr-13	106
SD12/0657	02-Jan-13	12-Feb-13	40	18-Apr-13	106

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