

**Report under Section 49(1) of the
Surveillance Devices Act 2007
for the period ending 31 December 2016**

March 2017

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ISBN 978-1-925569-26-1

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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

The *Law Enforcement Conduct Commission Act 2016* No 61 (the LECC Act) was assented to on 14 November 2016. The LECC Act when commenced will establish the Law Enforcement Conduct Commission (the LECC) and transfer to it the functions and powers of the Ombudsman and the Police Integrity Commission relating to the oversight of the NSW Police Force and the NSW Crime Commission. In addition, the LECC Act will establish an Inspector of the LECC which will take over the inspection functions currently performed by the Ombudsman under the *Surveillance Devices Act 2007*. It is anticipated that the LECC Act will commence in April 2017.

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 July 2016 to 31 December 2016.

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.

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.

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 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 July 2016 to 31 December 2016 we conducted inspections across the four NSW law enforcement agencies over 16 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 July 2016 to 31 December 2016

	No. of warrants issued
NSW Police Force	393
NSW Crime Commission	51
Independent Commission Against Corruption	0
Police Integrity Commission	0
Total	444

Table 4. Emergency use of surveillance devices 1 July 2016 to 31 December 2016

	No. of emergency uses of surveillance devices
NSW Police Force	2
NSW Crime Commission	0
Independent Commission Against Corruption	0
Police Integrity Commission	0
Total	2

Table 2. Surveillance device warrant reports received 1 July 2016 to 31 December 2016

	No. of warrant reports received
NSW Police Force	442
NSW Crime Commission	61
Independent Commission Against Corruption	1
Police Integrity Commission	3
Total	507

Table 5. Retrieval warrants issued 1 July 2016 to 31 December 2016

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

Table 3. Surveillance device warrants revoked 1 July 2016 to 31 December 2016

	No. of warrants revoked
NSW Police Force	68
NSW Crime Commission	19
Independent Commission Against Corruption	0
Police Integrity Commission	0
Total	87

Note: The number of reports received includes reports that may have been outstanding in earlier reporting periods

Table 6. Applications refused period 2010 to 2016

	2011	2012	2013	2014	2015	2016
NSW Police Force	0	4	5	15	8	16
NSW Crime Commission	0	0	0	8	3	2
Police Integrity Commission	0	0	0	0	0	0
Independent Commission Against Corruption	0	0	0	0	0	0
Total	0	4	5	23	11	18

NSW Police Force

During the reporting period 393 surveillance device warrants were issued and 4 retrieval warrants were also issued. There were 2 emergency uses of surveillance devices which were subsequently approved. There were 68 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.

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.

Section 18 Remote Application

Five (5) 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

Thirty four (34) warrants were extended during the reporting period, and one of the warrants was extended twice. There were three warrants which were varied.

Section 23 Revocation of surveillance device warrant

There were sixty eight (68) 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. Five warrants – SD 16/637, SD 16/0728, SD 16/0747, SD 16/0757 and SD 16/0762 – were revoked however it appears were not discontinued when they were no longer required. This was an error on behalf of the officer's responsible for these individual warrants despite clear written instructions.

All other 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 a retrieval warrant, which were granted.

Section 26 Remote application for retrieval warrant

No remote applications were made for retrieval warrants.

Section 30 Revocation of retrieval warrant

One (1) retrieval warrant was revoked.

Emergency authorisation requirements

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

There were two (2) emergency uses of surveillance devices under this section. The uses of these surveillance devices were subsequently approved.

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 two (2) applications for the emergency use of the surveillance devices were subsequently 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.

In this reporting period, regional field inspections were conducted at Manning Great Lakes Local Area Command and The Entrance Child Abuse Squad (CAS).

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.

As noted in previous reports the use of these registers has been sporadic, and many commands use other means to record this information. A working group was established by the Commissioner to ensure that the protected information registers were used in all commands. The working groups recommendations to improve awareness of, and compliance with, the requirements under the Act regarding protected information is still awaited.

Section 41 Dealing with records obtained by use of surveillance devices

The Entrance CAS had established a Surveillance Device Register and was using some aspects of the Protected Information Register to maintain a movement log associated with information on specific warrants but its use had not been consistent. Advice was provided to the Squad about documentation that is available to assist with this practice.

Manning Great Lakes was also using a Surveillance Device Register and Protected Information Registers, and had destroyed some protected information in keeping with the destruction requirements of the Act. The LAC took on advice in relation to best practice to specifically record the date(s) and time(s) on each disc(s) when a device was used.

The field inspections continued to show a general understanding among the officers concerned about the need for compliance with the Act. Further guidance and education from the Working Party will further assist in this regard.

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

Section 44 reports were received within the time specified in the warrant for all the warrants which were issued during this reporting period, with the following exceptions. The following 51 reports were not provided to the Eligible Judge and Attorney General within the time specified in the warrant. This remains an area where improvement is needed.

Warrant Numbers				
SD15/0118	SD15/0840	SD16/0084	SD16/0262	SD16/0393
SD16/0055	SD15/0861	SD16/0090	SD16/0274	SD16/0397
SD16/0199	SD15/0882	SD16/0095	SD16/0275	SD16/0415
SD16/0364	SD16/0007	SD16/0109	SD16/0282	SD16/0436
SD15/0140	SD16/0021	SD16/0115	SD16/0310	SD16/0451
SD15/0783	SD16/0047	SD16/0127	SD16/0315	SD16/0455
SD15/0800	SD16/0058	SD16/0129	SD16/0336	SD16/0458
SD15/0809	SD16/0064	SD16/0189	SD16/0344	SD16/0498
SD15/0827	SD16/0069	SD16/0210	SD16/0360	SD16/0521
SD15/0832	SD16/0079	SD16/0254	SD16/0361	SD16/0567

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

In general the NSW Police Force was compliant in this regard, with the exception of a small number of files which were incomplete, such as hard copy versions of warrant applications and receipts for Section 51 notices not being printed and placed on warrant files. These instances were drawn to the attention of the relevant staff at the time of our inspections.

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 fifty one (51) surveillance device warrants were issued. Nineteen (19) 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

Seven (7) warrants issued during this reporting period were extended and two (2) of these warrants were extended twice. A further ten (10) warrants issued during the previous reporting period were extended during this reporting period and two (2) of these were extended a total of three (3) times.

Section 23 Revocation of surveillance device warrant

There were nineteen (19) 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 for retrieval warrant

There were no remote applications for a retrieval warrant.

Section 30 Revocation of retrieval warrant

There were no revocations of retrieval warrants.

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.

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 which was 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 application was made to an eligible Judge or Magistrate.

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 revoked during the reporting period.

Section 24 Discontinuance of use of surveillance device under warrant

No revocations or discontinuances during the reporting period were made.

Section 25 Application for retrieval warrant

No applications for a retrieval warrant were made.

Section 26 Remote application for retrieval warrant

No remote applications for a retrieval warrant were made.

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

One (1) report was provided to the eligible Judge and Attorney General within the time specified in the warrants 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

There were no warrants issued and therefore no section 51 notifications were issued.

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 no surveillance device warrants were applied for. Three (3) reports were received which were in relation to a warrant issued during previous reporting periods.

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

No application was made to an eligible Judge or Magistrate.

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 revocations during the reporting period.

Section 24 Discontinuance of use of surveillance device under warrant

No revocations or discontinuances during the reporting period were made.

Section 25 Application for retrieval warrant

No applications for a retrieval warrant were made.

Section 26 Remote application for retrieval warrant

No remote applications for a retrieval warrant were made.

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. 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 three (3) reports provided to the Attorney General or Eligible Judge during the reporting period. Two reports, being PIC16/003, which was provided during the previous reporting period, and PIC16/004, had errors due to an oversight by the officers in preparing these reports, this was addressed and corrected. The report for PIC16/004 was also provided to the Eligible Judge and Attorney-General outside the time specified in the warrant.

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

There were no warrants issued and therefore no section 51 notifications were issued.

Section 52 Requirement to inform subject of surveillance

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

Concluding Comments

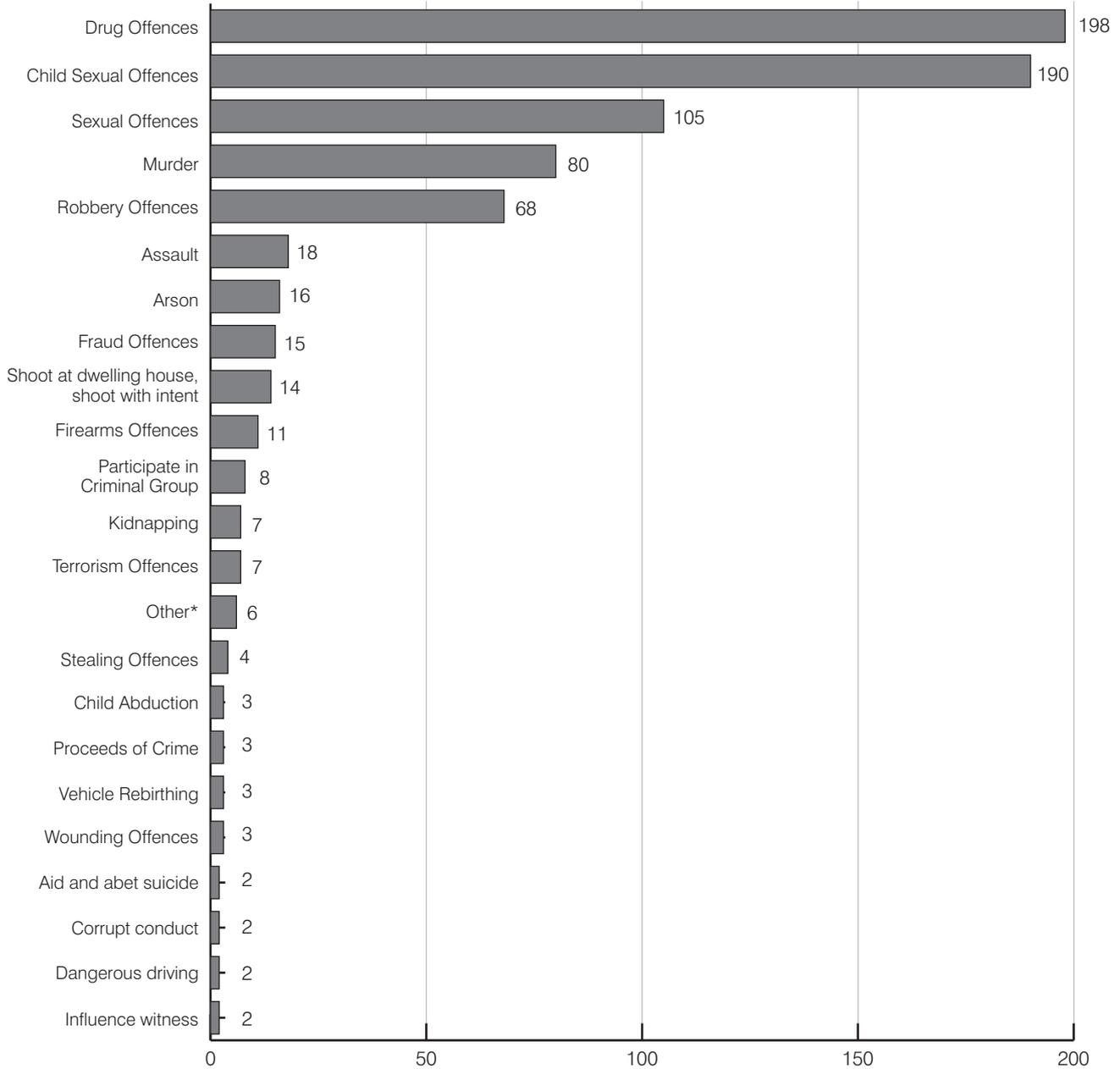
For the reporting period the Police Integrity Commission was compliant with the Act.

Recommendations

No specific recommendations are made.

Appendix A – Annual Statistics for 2016

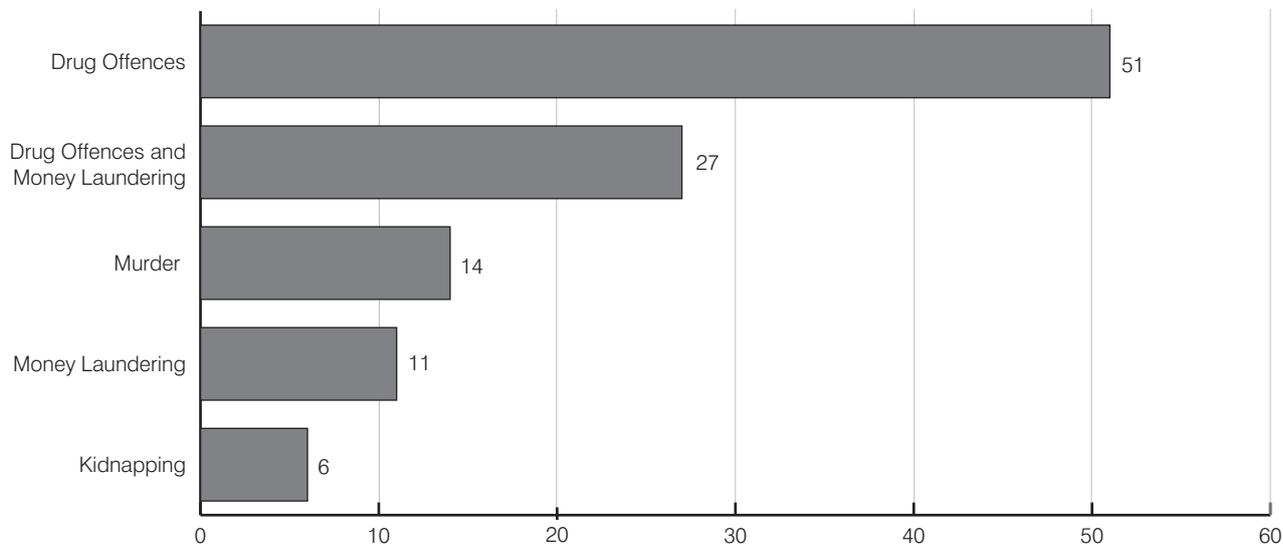
NSW Police Force Types of Offences Targeted - 2016



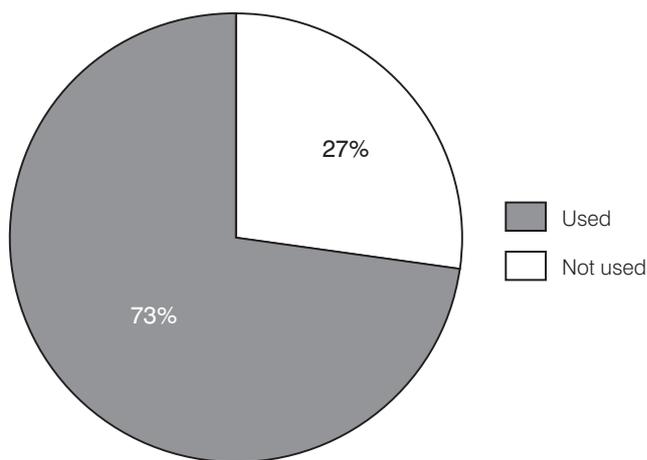
***Other:**

- Animal Cruelty
- Blackmail
- Demand property with intent
- Escape lawful custody
- Manslaughter
- Money laundering.

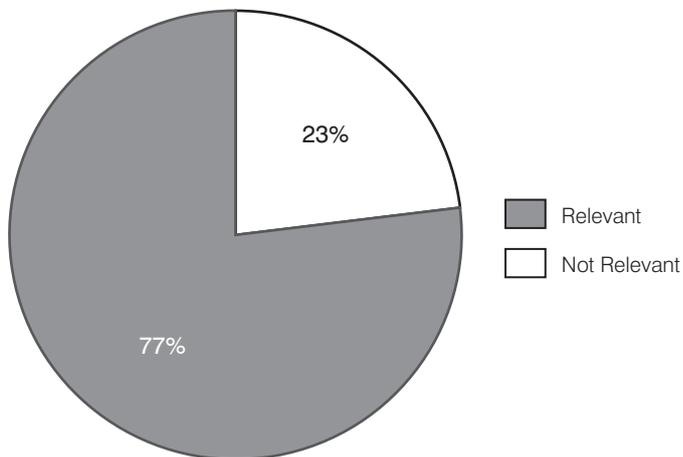
NSW Crime Commission Types of Offences Targeted - 2016



Use of Surveillance Devices on Warrants Granted - 2016



Relevant information obtained when surveillance devices used - 2016





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