

**Report under section 242(3) of
the *Law Enforcement (Powers
and Responsibilities) Act 2002***

for the period ending 28 May 2014

Covert Search Warrants

August 2014

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1. Introduction

Amendments made in May 2009 to Part 5 of the *Law Enforcement (Powers and Responsibilities) Act 2002* (LEPRA) Act enable the NSW Police Force, the NSW Crime Commission and the Police Integrity Commission to apply to eligible judicial officers of the Supreme Court for a 'covert search warrant'. These are defined as a search warrant which may be executed covertly, and is issued under Division 2 of part 5 of LEPRA.

1.1 Purpose of covert search warrants

The Act does not intend for the use of covert search warrants to be a routine investigative tool. Certain law enforcement officers may apply to the Supreme Court for search warrants enabling them to covertly enter and search premises in relation to the investigation of 'serious offences' as defined in the Act.

Section 46A of the Act defines a '**serious offence**' as:

- (a) any indictable offence punishable by imprisonment for a period of 7 or more years and that involves the following:
 - (i) the supply, manufacture or cultivation of drugs or prohibited plants,
 - (ii) the possession, manufacture or sale of firearms within the meaning of the *Firearms Act 1996*,
 - (iii) money laundering,
 - (iv) car and boat re-birthing activities,
 - (v) the unauthorised access to, or modification or impairment of, computer data or electronic communications,
 - (vi) an activity involving theft carried out on an organised basis,
 - (vii) violence causing grievous bodily harm or wounding,
 - (viii) the possession, manufacture or supply of false instruments
 - (ix) corruption,
 - (x) destruction of property,
 - (xi) homicide,
 - (xii) kidnapping,
- (b) any offence under Division 10 (Offences in the nature of rape, offences relating to other acts of sexual assault etc) of Part 3 of the *Crimes Act 1900* punishable by imprisonment for a period of 7 or more years,
- (c) an offence under section 80D (Causing sexual servitude) or 80E (Conduct of business using sexual servitude) of the *Crimes Act 1900*,
- (d) an offence under section 93FA (Possession, supply or making of explosives) of the *Crimes Act 1900*,
- (e) an offence under Division 15 (Child prostitution) or 15A (Child pornography) of Part 3 of the *Crimes Act 1900*,
- (f) an offence under section 308F (Possession of data with intent to commit serious computer offence) or 308G (Producing, supplying or obtaining data with intent to commit serious computer offence) of the *Crimes Act 1900*,
- (g) an offence of attempting to commit, or of conspiracy or incitement to commit, or of aiding or abetting, an offence referred to in paragraphs (a)–(f).

The issuing Judge must also be satisfied it is necessary for the entry and search to be conducted without the knowledge of the occupier before a covert search warrant can be granted.

Also, while the initial searching may be done covertly, the occupier must eventually be given notice of the search. The issuing Judge may authorise delayed service of the notice to the occupier advising them about the search for up to six months at a time. In exceptional circumstances the service of the notice may be delayed beyond 18 months, but it must not be delayed beyond three years in any circumstances. Unless there is an earlier expiry date specified in the

warrant, a covert search warrant expires 10 days after the date on which it was issued. Warrants may be granted to allow a search for a particular thing, or a kind of thing.

1.2 Application Process

An applicant for a covert search warrant must make their application to an eligible judge in person. A Judge of the Supreme Court may consent to being nominated by the Attorney General as an 'eligible judge' and if consent is given, the Attorney General may then declare those judges to be 'eligible judges' under the Act. This declaration must be made in writing. The police officer making the application to the judge must be authorised to do so by a police officer of the rank of Superintendent or above. Applicants from the NSW Crime Commission and the Police Integrity Commission must be a member of staff authorised by the Commissioner or Assistant Commissioner of the relevant Commission.

The Act also provides for applications to be made by telephone so long as the eligible issuing officer is satisfied the warrant is required urgently, and the application cannot be made in person.

Applications are made using the form prescribed in the *Law Enforcement (Powers and Responsibilities) Regulation 2005* – Form 1A. The form contains all the relevant information section 62 of the Act requires to be considered for a covert search warrant application.

The Regulation also prescribes the form of the warrant (Form 9A) and the occupiers notice (Form 17A). These forms cover the criteria set out in section 66 and section 67 of the Act in relation to these documents.

1.3 Reporting Requirements

Under section 74A the executing officer is required to provide a report to the issuing judge within 10 days of the execution of the warrant, or of the warrant expiry date if it was not executed. The report must comply with Form 20A or Form 20B depending on the type of report. These forms are also contained in the Regulation.

1.4 Role of the Ombudsman

Covert search warrants give eligible law enforcement agencies, and their officers, considerable power to enter premises without the knowledge of the occupiers. While the warrant may only be granted in relation to the investigation of serious offences, covert searching of premises is a significant departure from usual expectations of privacy.

To provide rigorous external oversight of the use of these powers, the NSW Ombudsman is required to inspect the records of law enforcement agencies to check on their compliance, and the compliance of their officers, with Part 5 of the Act. Inspections must take place at least every 12 months.

Three law enforcement agencies are currently inspected for the purpose of this Act:

- NSW Police Force
- NSW Crime Commission
- Police Integrity Commission

Section 242(1) of the Act commenced on 29 May 2009. The Ombudsman must furnish a report to the Attorney General and the Minister for Police as soon as practicable after the expiration of each year following the commencement of the section. The Attorney is required by section 242(4) of the Act to lay the report, or cause the report to be laid, before both Houses of Parliament as soon as practicable after receiving the report.

This report is for the period 29 May 2013 to 28 May 2014.

1.5 Scope of an Inspection

The Ombudsman inspects each individual covert search warrant file at each agency. The inspection involves an examination of the application, warrant, occupiers notice, and report to the issuing judicial officer, and any other information contained on the file.

Each inspection involves checking:

- the applicant is authorised to apply for the covert search warrant (s.46C)
- the application is in the form prescribed by the Regulation and is made in person by the applicant (s.60)
- the application contains the information required by s.62
- the warrant is in the form prescribed by the Regulation (Form 9A)
- the warrant fulfils the requirements of s.66, which includes detailed information about the premises, the occupant and their likely involvement in the searchable offence
- the occupiers notice is in the form prescribed by the Regulation (Form 17A)
- the occupiers notice contains the particulars specified in s.67(2) to provide the occupier with sufficient information about the warrant
- any postponement of service of the occupiers notice for up to 6 months, that any occasion of postponement does not exceed 6 months, and that postponement is not delayed for more than 3 years in total (s.67A(1) and (2))
- where an occupiers notice is postponed for more than 18 months there are exceptional circumstances provided to the eligible judge (s.67A(3))
- if adjoining premises are entered in execution of the covert search warrant, that the adjoining occupiers notice is in the form prescribed by the Regulation (Form 17B) and contains the information specified, and was served on the adjoining occupier at the time the covert search warrant was executed – unless the eligible issuing officer directs that service of the adjoining occupiers notice may be dispensed with (s.67B)
- the report on execution of the covert search warrant is in the form prescribed by the Regulation (Form 20A) and contains the particulars specified in s.74A
- where a covert search warrant authorises the return or retrieval of a thing seized or placed, the report is in the form prescribed by the Regulation (Form 20B) and contains the particulars specified in s.74A
- the report was provided within 10 days after the execution of the warrant or the expiry – whichever occurs first – or within 10 days after the entry to the premises for the purpose of retrieving or returning a thing (s.74A)
- copies of any reports provided to the eligible issuing officer under s.74A are given to the Attorney General.

During inspection records relating to the execution of covert search warrants and the records relating to entry and seizures are also examined so the accuracy of the reports to the issuing judge can be ascertained. On later inspections we also follow up to confirm that occupiers' notices have been served as soon as practicable after any period of postponement has expired.

1.6 Inspection Detail

The relevant records of the NSW Police Force are located at Special Applications Section, Sydney Police Centre and were inspected on 26 February 2014 and 2 July 2014. The NSW Police were helpful and co-operative in facilitating our inspections.

The NSW Crime Commission did not seek any covert search warrants during the reporting year and consequently no inspections were conducted.

The Police Integrity Commission also did not seek any covert search warrants during the reporting year so no inspections were conducted.

2. NSW Police Force

We inspected the files containing records relating to 39 proposed applications for covert search warrants during the reporting period being files CSW13/0001 to CSW14/015. Of these, 31 applications were made to the court and resulted in warrants being issued. Eight proposed applications did not proceed.

2.1 Warrants

In relation to the 31 warrants granted, 12 authorised the search and seizure of particular things specified in the warrant and 18 authorised kinds of things. The remaining warrant authorised the search and seizure of both particular things and kinds of things. The types of offences investigated in relation to the warrants granted were murder, drug offences, firearms offences, money laundering, kidnapping and child pornography offences.

2.2 Occupiers notice

The service of the occupiers notice was postponed for six months for all 31 warrants.

2.3 Further inspections

No further inspections were conducted during this reporting period.

2.4 Reports

While 31 warrants were granted to the NSW Police Force, 25 were executed. The remaining 6 warrants were not executed. The reports for all warrants were provided to the eligible judge within the required 10 day period with the exception of warrants 13/001, 13/003, 13/005 and 13/011.

2.5 Exceptions identified at inspection

As outlined above, the exceptions identified at inspection for the NSW Police Force were:

- Due to a typographical error the postponement date for service of the occupier's notice for warrants 13/010, 13/011 and 13/015 incorrectly referred to 2013, rather than 2014.
- The report on the execution for warrant 13/001 did not indicate which powers were exercised under the warrant.
- The application for 13/012 did not specify the occupier of the premises.
- The warrants for 13/013 and 13/014 indicated that these warrants were issued on 16/09/13. However the warrants were issued on 06/09/13 and were to expire on 16/09/13
- The report for 13/018 indicated that the warrant was executed. However the report was not signed by the Issuing Judge and the report indicated that no powers were exercised. Staff at Special Applications indicated that the signed form was left with the Judge and a copy will be obtained for the file and also that the officer responsible for the warrant misunderstood the question of powers as being a question regarding the exercise of special powers under the warrant.

The NSW Police Force has advised that the manner in which compliance is handled at the Special Applications Unit is being significantly changed. It is anticipated these changes will include improving the timeliness of follow up by Legal Consultants with investigators regarding the submission of compliance reports. We were also told a guide is being prepared to assist Special Applications Unit staff in checking the reports prepared by applicants for issue to the eligible Judge to help ensure similar exceptions do not occur again.

2.6 Concluding comments

For the reporting period 29 May 2013 to 28 May 2014, apart from the exceptions outlined above, the NSW Police Force had complied with Part 5 of the *Law Enforcement (Powers and Responsibilities) Act 2002* in so far as it related to covert search warrants.

We are also satisfied the action proposed by the NSW Police Force in response to the identified exceptions is appropriate and make no specific recommendations.



3. NSW Crime Commission

The NSW Crime Commission did not apply for any covert search warrants during the period covered by this report.

4. Police Integrity Commission

The Police Integrity Commission did not apply for any covert search warrant during the period covered by this report.

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