



NSW Ombudsman

Report under Section 49(1) of the  
*Surveillance Devices Act 2007*

for the 6 months ending 31 December 2010

April 2011





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NSW Ombudsman

Our logo has two visual graphic elements; the 'blurry square' and the 'magnifying glass' which represents our objectives. As we look at the facts with a magnifying glass, the blurry square becomes sharply defined, and a new colour of clarity is created.

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NSW Ombudsman

30 September 2010

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NSW Attorney-General  
Level 33, Governor Macquarie Tower  
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Dear Attorney-General

**Report under section 49(1) of the *Surveillance Devices Act 2007* for the six months ending 31 December 2010**

The *Surveillance Devices Act 2007* requires the Ombudsman to inspect the records of each law enforcement agency authorised to use surveillance devices to determine the extent of compliance with the Act by the agency and the law enforcement officers of the agency.

The Act also requires me to report to you at six monthly intervals on the results of these inspections.

I am pleased to present you with a report under section 49(1) of the *Surveillance Devices Act 2007* which covers our inspection of records relating to surveillance devices for the six months up to 31 December 2010.

Pursuant to section 49(2) of the Act, you are required to lay the report (or cause it to be laid) before both Houses of Parliament within 15 days.

Once tabled, it is my intention to publish the report on the Ombudsman's website [www.ombo.nsw.gov.au](http://www.ombo.nsw.gov.au)

I would therefore appreciate your earliest advice as to the tabling of the report.

Yours sincerely

Bruce Barbour  
**Ombudsman**



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# Introduction

The *Surveillance Devices Act 2007 (NSW)* (SD Act) began operation on 1 August 2008 and 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 SD 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 law enforcement agencies and law enforcement officers with the Act.

Four law enforcement agencies<sup>1</sup> 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 sections 49(1) of the Act to report to the Minister at 6-monthly intervals on the result 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 2010 until 31 December 2010.

## Scope of the inspection

The aim of the legislation 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 it is possible to determine from those records and from questions asked of relevant law enforcement officers.

There are three main areas of compliance that are the focus of the inspection process carried out under the Act. Part 3 of the Act deals with warrants and emergency authorisations and Part 5 of the Act deals with compliance and monitoring and includes dealing with records obtained by use of surveillance devices, the use, communication or publication of protected information and reporting and record keeping. Part 6 requires the particulars of warrants sought under Part 3 to be notified to the Attorney-General and requires the person to whom a warrant was issued to inform the subject of the 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 that authorises the use of a tracking device only or a retrieval warrant in respect of a tracking device. The Act requires that applications must 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 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.

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<sup>1</sup> 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 the case of an application for a surveillance device authorising the use of a tracking device only, 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 law enforcement officer to whom the warrant is issued or who is primarily responsible for executing the warrant and is satisfied the use of the warrant is no longer necessary informs the chief officer immediately and that the chief officer when informed that the use of the device is no longer necessary 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 s.31 and 32
- within 2 business days an application for approval after the use of a surveillance device without a warrant is made 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 July 2010 to 31 December 2010 a total of 395 surveillance device warrants were granted across the four NSW law enforcement agencies.

**Figure 1: Surveillance device warrants issued – 1 July 2010 to 31 December 2010**

Agency	Number
NSW Police Force	266
NSW Crime Commission	124
Independent Commission Against Corruption	0
Police Integrity Commission	5
<b>Total</b>	<b>395</b>

**Figure 2: Surveillance device warrants reports<sup>2</sup> – 1 July 2010 to 31 December 2010**

Agency	Number
NSW Police Force	313
NSW Crime Commission	136
Independent Commission Against Corruption	3
Police Integrity Commission	0
<b>Total</b>	<b>452</b>

**Figure 3: Surveillance device warrants revoked – 1 July 2010 to 31 December 2010**

Agency	Number
NSW Police Force	53
NSW Crime Commission	21
Independent Commission Against Corruption	0
Police Integrity Commission	0
<b>Total</b>	<b>74</b>

**Figure 4: Emergency use of surveillance devices – 1 July 2010 to 31 December 2010**

Agency	Number
NSW Police Force	1
NSW Crime Commission	0
Independent Commission Against Corruption	0
Police Integrity Commission	0
<b>Total</b>	<b>1</b>

<sup>2</sup> Reports received by the Attorney-General within the relevant year.



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# NSW Police Force

During the reporting period 329 surveillance device files were inspected, 266 warrants were issued. One emergency authorisation was granted and 63 applications were cancelled, no longer required or were still being processed at 31 December 2010.

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

## **Compliance with obligations relating to the keeping of documents connected with warrants and emergency authorisations**

### Warrants

#### **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 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**

14 warrants were varied or extended during the reporting period.

#### **Section 23 Revocation of surveillance device warrant**

There were 53 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 necessary for the purpose of enabling evidence to be obtained is discontinued as soon as practicable. NSW Police Force utilise a Notification of Discontinuance form to record such action. Section 24 (2) (b) further requires that following a discontinuation an application be made for the revocation of the warrant under section 23.

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 the making of an application to revoke the warrant. As a matter of administrative practicality, I have taken the view that where a warrant expires in any event within 5 days of the formal discontinuance of the use of a surveillance device, I will not consider any failure to make application for a revocation to be unreasonable.

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 or the warrant was not used and therefore a discontinuance notice was not required.

#### **Section 25 Application for retrieval warrant**

No retrieval warrants were applied for during the reporting period.

#### **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

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

There was one emergency use of surveillance device without a warrant.

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

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

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

The application for the emergency use of the surveillance device without warrant was approved.

## Compliance and monitoring

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

During this reporting period additional inspections were carried out at Wagga Wagga and Coffs Harbour Police Stations. 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 within each LAC are tasked with inspecting these records in addition to our inspections. The registers were noted to be kept in accordance with the Act during our inspections at the above locations.

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

Section 44 of the *Surveillance Devices Act 2007* 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 specified in the warrant. Apart from the warrant files mentioned below, there were copies of the relevant reports required on all files.

The provision of Section 44 Reports has improved dramatically although the following reports were not provided to the eligible Judge or to the Attorney General within the time specified in the warrant. In all cases the time specified was 60 days from expiry.

Warrant number	Issued	Expiry	Report to EJ	Notice to AG	EJ	AG
SD10/0415	17 Aug 10	01 Oct 10	03 Feb 11	14 Dec 10	125 days	74 days
SD10/0351	06 Jul 10	16 Jul 10	23 Nov 10	27 Oct 10	130 days	103 days

At the time of the inspection the following files did not contain s 44 reports. These reports were required within 60 days of expiry, which was the time specified in each of the warrants.

<b>Warrant number</b>	<b>Issued</b>	<b>Expiry</b>
SD10/0342	06 Jul 10	04 Oct 09
SD10/0388	02 Aug 10	01 Oct 10
SD10/0368	04 Aug 10	03 Oct 10
SD10/0443	09 Sep 10	18 Oct 10
SD10/0254	13 Jul 10	11 Sep 10
SD10/0432	10 Sep 10	25 Oct 10
SD10/0421	10 Sep 10	09 Oct 10

### **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. At inspection the 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**

All notifications to the Attorney General were in order.

### **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 substantially compliant with the Surveillance Devices Act.

## **Recommendation**

No recommendations





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# NSW Crime Commission

During the reporting period 124 surveillance device files were inspected, 124 warrants were issued. No applications were refused. There were no applications for emergency use of devices.

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

## **Compliance with obligations relating to the keeping of documents connected with warrants and emergency authorisations**

### Warrants

#### **Section 17 Applications for a surveillance device warrant**

All 124 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**

Nine warrants were varied or extended.

#### **Section 23 Revocation of surveillance device warrant**

There were 74 revocations during the reporting period.

#### **Section 24 Discontinuance of use of surveillance device under warrant**

Section 24 of the *Surveillance Devices Act 2007* ("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**

No applications were made for a retrieval warrant.

#### **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

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

There were no applications for the emergency use of surveillance devices 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.

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

No applications were made.

## **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, where this information was used in relation to further surveillance device applications the use of the information was recorded and was used for an appropriate purpose under the Act. The responsibility for the appropriate use of protected information is the responsibility of the law enforcement officer responsible for the warrant. In the case of the Crime Commission law enforcement officer responsible for the warrant is also a member of the NSW Police Force and as such the use, communication or publication of protected information will be inspected during the next reporting period.

### **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**

All 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 inspected 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.

### **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 New South Wales Crime Commission was compliant with the Surveillance Devices Act.

## **Recommendations**

No recommendations

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# Independent Commission Against Corruption

During the reporting period no warrants were applied for.

## **Compliance with obligations relating to the keeping of documents connected with warrants and emergency authorisations**

### Warrants

#### **Section 17 Applications for a surveillance device warrant**

No applications were made.

#### **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.

#### **Section 23 Revocation of surveillance device warrant**

There were no revocations.

#### **Section 24 Discontinuance of use of surveillance device under warrant**

No surveillance devices were discontinued.

#### **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

#### **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.

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## 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 issued during the previous period, the information may be used in the future and the records of each use, communication and publication will be inspected as necessary.

### **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**

Reports were provided to the eligible Judge and Attorney General for warrants issued during the previous reporting period and these were provided 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**

No Section 51 notices were issued during the reporting period..

### **Section 52 Requirement to inform subject of surveillance**

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

## Concluding Comments

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

## **Recommendations**

No recommendations

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# Police Integrity Commission

During the reporting period five new surveillance device warrants were applied for.

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

## **Compliance with obligations relating to the keeping of documents connected with warrants and emergency authorisations**

### Warrants

#### **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**

One of the warrants issued during this reporting period was 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

#### **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.

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## 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 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**

There were no fresh applications during the reporting period.

### **Section 52 Requirement to inform subject of surveillance**

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

## Concluding Comments

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

## **Recommendations**

No Recommendations.



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