

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

for the period ending 28 May 2013

**Covert Search Warrants**

**August 2013**



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# 1. Introduction

In May 2009 amendments to the Law Enforcement (Powers and Responsibilities) Act 2002 (LEPRA) came into force, including in relation to some search powers.

Amendments made to Part 5 of the 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

Certain law enforcement officers may apply to the Supreme Court for search warrants enabling them to covertly enter and search premises for the purpose of investigating serious criminal offences. Covert search warrants can only be obtained in relation to '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 involving 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).

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

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 occupier's notice that the search has occurred 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. Covert search warrants expire 10 days after the date on which they are issued, unless there is an earlier expiry date specified in the warrant. Warrants may be granted to allow a search for a particular thing, or a kind of thing.

## 1.2 Application Process

A Judge of the Supreme Court may consent to being nominated by the Attorney General as an 'eligible judge'. 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.

An applicant for a covert search warrant must make their application to an eligible judge in person. The applicant must be a police officer, who is duly authorised by a police officer of the rank of Superintendent or above to make such applications. 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 where 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 sections 66 and 67 of the Act in relation to these documents.

## 1.3 Reporting Requirements

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

## 1.4 Role of the Ombudsman

The amendments allowing for covert search warrants gave 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.

There are three law enforcement agencies 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 2012 to 28 May 2013.



## 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.

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

## 1.6 Inspection Detail

Most of the relevant records of the NSW Police Force are located at Special Applications Section, Sydney Police Centre, Surry Hills and were inspected on 22 May 2013. The NSW Police were helpful and co-operative in facilitating our inspections.

The NSW Crimes 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 15 proposed applications for covert search warrants during the reporting period - CSW12/013 to CSW12/027. Of these, 13 applications were made to the court and resulted in warrants being issued. Two proposed applications did not proceed.

### 2.1 Warrants

In relation to the 13 warrants granted, six authorised the search and seizure of particular things specified in the warrant and six 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 drug offences, firearms offences, and child pornography offences.

### 2.2 Occupiers notice

The service of the occupiers notice was postponed for six months for 11 warrants and in one of these warrants the service of the notice was postponed for a further two months. The occupiers notice for two warrants CSW12/021 and CSW12/027 was not contained on the warrant file.

### 2.3 Further inspections

Inspections were also conducted with law enforcement officers responsible for warrants at the Firearms and Organised Crime Squad and the Organised Crime (Targeting) Squad. In each case the warrant was executed and the postponed occupier's notice was served within the time specified.

### 2.4 Reports

While 13 warrants were granted to the NSW Police Force, only 12 were executed. The remaining warrant was not executed as information was obtained under another warrant. The reports for all warrants were provided to the eligible judge within the required 10 day period.

The reports for both CSW12/018 and CSW12/019 did not contain all the relevant material as it appeared that paragraphs 8 and 9 on the standard form were not included in the report.

### 2.5 Exceptions identified at inspection

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

- Warrant files CSW12/021 and CSW12/027 did not contain an occupier's notice
- Warrant file CSW12/021 did not contain a report to the eligible Judge.
- The reports for warrants CSW12/018 and CSW12/019 did not contain all the relevant material. Paragraphs 8 and 9 on the standard form were not included in the report on either warrant.

We were advised the occupier's notices were not on files CSW12/021 and CSW12/027 because they were stored electronically and had not been printed and placed on the warrant file, which are the records presented to our officers for inspection.

The NSW Police Force has advised us the report to the eligible Judge for CSW12/021 was completed and forwarded after our inspection identified the exception. The report was not prepared prior to this because the warrant was unable to be executed and the applicant officer did not turn their mind to it.

The reports for CSW12/018 and CSW12/019 did not contain all of the required information because of an administrative oversight. In preparing these reports officers use Form 20A as provided in the *Law Enforcement (Powers and Responsibilities) Regulation 2005* and delete unnecessary clauses. On these occasions clauses were deleted which should have been completed. As both reports had been submitted to and accepted by the issuing Judge, no amendments were made to the original forms once the exceptions were identified.

NSW Police Force has advised that the manner in which compliance is handled at the Covert 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 Covert 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 2012 to 28 May 2013 the NSW Police Force was generally compliant with Part 5 of the *Law Enforcement (Powers and Responsibilities) Act 2002* in so far as it related to covert search warrants, apart from the exceptions outlined above.

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