

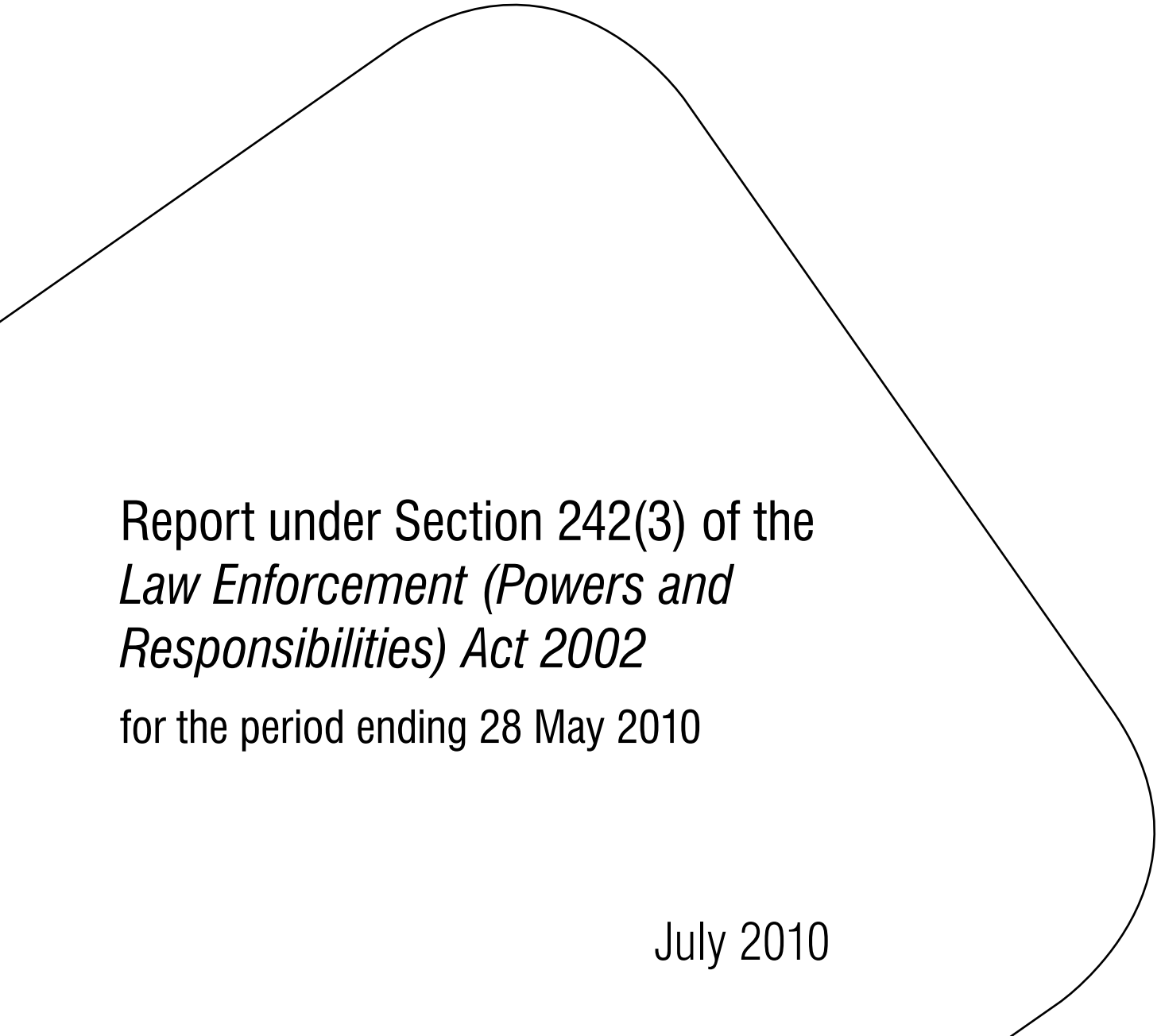


NSW Ombudsman

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

for the period ending 28 May 2010

July 2010



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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 July 2010

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The Honourable Michael Daley, MP  
Minister for Police  
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Dear Ministers

**Report under section 242(3) of the *Law Enforcement (Powers and Responsibilities) Act 2002* for the period ending 28 May 2010.**

The *Law Enforcement (Powers and Responsibilities) Act 2002* requires the Ombudsman to inspect the records of the NSW Police Force, the New South Wales Crime Commission and the Police Integrity Commission in relation to their use of covert search warrants to determine whether or not the requirements of the Act are being complied with.

The Act also requires me to report to you as soon as practicable after each year following the commencement of the provisions.

I am pleased to present you with the first report under section 242(3) of the *Law Enforcement (Powers and Responsibilities) Act 2002* which covers our inspection of records relating to covert search warrants for the 12 months up to 28 May 2010.

Pursuant to section 242(4) of the Act, the Attorney-General is required to lay the report (or cause it to be laid) before both Houses of Parliament as soon as practicable following its receipt.

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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# 1. Introduction

The *Law Enforcement (Powers and Responsibilities) Amendment (Search Powers) Act 2009* commenced on 29 May 2009. The Act amended the *Law Enforcement (Powers and Responsibilities) Act 2002*, (LEPRA) with respect to search powers; and for other purposes.

In particular the Act provides for the NSW Police Force, NSW Crime Commission and the Police Integrity Commission to apply to eligible judicial officers for 'covert search warrants'. The definition of 'covert search warrant' means a search warrant issued under Division 2 of Part 5 that may be executed covertly.

## Serious offences

The objective of the amendments to Part 5 of LEPRA is to enable law enforcement officers to apply to the Supreme Court for search warrants that enable officers of the agencies 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'.

'serious offence' means the following:

- (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, for example, section 193B of the *Crimes Act 1900*
  - (iv) car and boat rebirthing activities, for example, section 154G of the *Crimes Act 1900*
  - (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. As a result the issuing judge may authorise delayed service of the occupier's notice in relation to the search for up to six months at a time. Only in exceptional circumstances can service of the notice be delayed beyond 18 months and it may not be delayed in any circumstances beyond three years. Covert search warrants expire 10 days after the date on which it is issued unless an earlier expiry date is specified in the warrant. Warrants may be granted in order to search for a particular thing or a kind of thing.

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## Application process

A judge of the Supreme Court may consent to be nominated as an eligible judge by the Attorney-General. The Attorney-General may by instrument in writing declare judges in relation to whom consents are in force to be 'eligible judges' under the Act.

The application must be made to an 'eligible judge' by the applicant in person. An applicant must be a police officer authorised to make the application by a police officer holding the rank of Superintendent or above. In relation to the New South Wales Crime Commission and the Police Integrity Commission the applicant must be a member of staff authorised by the Commissioner or Assistant Commissioner of the relevant Commission as the case may be.

The Act also provides for applications to be made by telephone where the eligible issuing officer is satisfied that the warrant is required urgently and it is not practicable for the application to be made in person.

Applications are made using the form prescribed in the Law Enforcement (Powers and Responsibilities) Regulation 2005, as amended (Form 1A). The application form contains all the relevant information required by the Act in consideration of an application for a covert search warrant as set out in section 62 of the Act.

The regulations also prescribe the form of the warrant (Form 9A) and the occupier's notice (Form 17A). These forms address the criteria set out in section 66 and section 67 of the Act, respectively.

## Reporting requirements

Section 74A of the Act requires the executing officer for a covert search warrant to provide a report in writing to the eligible officer who issued the warrant within 10 days of the execution of the warrant or the expiry date if the warrant was not executed. The regulations prescribe the form of the report (Form 20A) or (Form 20B) as the case may be.

## Role of the Ombudsman

The Act requires the NSW Ombudsman to conduct inspections of the records of law enforcement agencies to determine the extent of compliance by law enforcement agencies and law enforcement officers with Part 5 of the Act relating to covert search warrants every 12 months.

There are three law enforcement agencies currently the subject of these inspections:

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

The Ombudsman is required by sections 242(3) of the Act to 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 section 242(1) which commenced on 29 May 2009. The Minister is required by section 242(4) 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 2009 until 28 May 2010 and as such is the first report.

## Scope of the inspection

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

The inspection involved checking that:

- the applicant is authorised to apply for the covert search warrant under s.46C
- the application is in the form [Form 1A] prescribed by the regulations 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 [Form 9A] prescribed by the regulations
- the warrant fulfils the requirements of s.66
- the occupier's notice is in the form [Form 17A] prescribed by the regulations
- the occupier's notice contains the particulars specified in s.67(2)

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- the occupier's notice is served as soon as practicable after execution of the warrant or at a postponed date that is authorised in accordance with s.67A
  - where an occupier's notice is postponed for more than 18 months there are exceptional circumstances provided to the eligible judge s.67A(3)
  - on occasions where adjoining premises are entered in execution of the covert search warrant, that the adjoining occupier's notice is in the form [Form 17B] prescribed by the regulations and contains the information specified and has been served on the adjoining occupier at the time the covert search warrant was executed unless the eligible issuing officer directs that the service of adjoining occupier's notice may be dispensed with s.67B
  - the report on execution of the covert search warrant is in the form [Form 20A] prescribed by the regulations and contains the particulars specified in s.74A
  - where a covert search warrant authorises the return or retrieval of thing seized or placed the report is in the form [Form 20B] prescribed by the regulations 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 first occurs or within 10 days after the entry to the premises for the purposes 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 in order to ascertain the accuracy of the reports to the issuing judge. This also involves follow up inspections to confirm that the occupier's notices have been served as soon as practicable after the period of postponement has expired.

## Inspection detail

In the case of the NSW Police Force most records are located at Special Applications section located at the Sydney Police Centre, Surry Hills and were inspected in December 2009, March 2010 and May 2010.

In the case of the NSW Crime Commission the records are located in the Commission offices and were inspected in May 2010.

The Police Integrity Commission had not sought any covert search warrants during the relevant period, so no inspection of Commission records was required.

I am pleased to report that both NSW Police Force and the NSW Crime Commission were helpful and co-operative in facilitating our inspections.



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## 2. NSW Police Force

During the reporting period 46 covert search warrant files were inspected, CSW09/001 to CSW10/026. 10 applications were not proceeded with.

### Applications

There were 36 covert search warrant applications made during the reporting period. All 36 applications were granted and warrants issued. After the issue of warrant CSW09/004 it was ascertained that the warrant was invalid as the applicant had not applied for the warrant in person. The application was made by an officer attached to the special applications section on behalf of the applicant. This warrant was cancelled and a fresh application was made and granted as CSW09/005.

One of the applications was made by telephone and granted under section 61 of the Act.

### Warrants

In relation to the 36 warrants granted, nine authorised the search and seizure of particular things specified in the warrant and the remaining 27 warrants authorised the search and seizure of kinds of things. Three warrants authorised the entry into adjoining premises if required. The types of offences investigated in relation to the warrants granted were: four warrants in relation to murder, two warrants in relation to fraud, one warrant in relation to motor vehicle re-birthing, three in relation to armed robbery and firearm offences and the remaining 26 warrants were in relation to drug offences.

One warrant authorised the return or retrieval of the things seized under section 49A of the Act.

Thirty four of the warrants authorised the postponement of the occupier's notice for six months and one of those was extended for a further six months. The remaining two warrants authorised the postponement of the occupier's notice for three months.

### Reports

In relation to the 36 warrants granted to the NSW Police Force 30 were executed. The remaining six were not executed for various operational reasons. There was one occasion where a report was not provided to the eligible judge within the 10 day statutory period as noted below.

## Results of inspection of NSW Police Force covert search warrant records

We were satisfied that the NSW Police Force had generally complied with its obligations under the Act.

The following issues, however, were noted during the inspection of the records and brought to the attention of the NSW Police Force:

- In relation to warrant CSW09/011 the name of the occupier was not stated in the warrant as required by section 66(2)(b)(i) of the Act. Also the name of the person believed to have committed or intending to commit, the searchable offence was not stated in the warrant as required by section 66(2)(b)(ii) of the Act. The section 74A report on this operation indicated that the warrant was executed but did not set out briefly the result of the execution of the warrant as required by section 74A(c)(v).
- In relation to warrant CSW010/001 the name of the occupier was not stated in the warrant as required by section 66(2)(b)(i) of the Act.
- The 74A report in relation to warrant CSW10/011 indicated that the warrant was executed on 3/03/10 but the report was not provided to the eligible issuing officer until 22/03/10 which was not within 10 days of the execution of the warrant as required by section 74A(2).
- In relation to warrant CSW10/014 the report to the eligible Judge did not indicate the brief result of the execution of the warrant as required by section 74A(1)(c)(v) of the Act.

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- In relation to warrant CSW09/017 the application indicated that no previous warrant had been applied for. However, warrant CSW10/015 appeared to be a relevant previous application relating to the same premises. Section 62(2)(e) requires the details of previously issued covert search warrants to be included in the application.
  - The 74A report in relation to warrant CSW10/020 did not indicate the powers exercised as a result of the execution of the warrant as required by 74A(1)(c)(iv).
  - The 74A report in relation to warrant CSW10/024 did not indicate the powers exercised as a result of the execution of the warrant as required by 74A(1)(c)(iv).

## **Concluding comments**

For the reporting period the NSW Police Force was substantially compliant with Part 5 of the *Law Enforcement (Powers and Responsibilities) Amendment (Search Powers) Act 2009* in so far as it related to covert search warrants.

As with the implementation of any piece of new legislation there were some teething problems experienced. The errors detailed above have been brought to the attention of the responsible officers and additional checking mechanisms have been implemented to reduce errors made in applications and ensure compliance with the mandated time frames for reporting.

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## 3. NSW Crime Commission

During the reporting period two covert search warrant files were inspected CSW10/001 and CSW10/002.

### Applications

There were two applications for covert search warrants and both applications were granted. There were no telephone applications.

### Warrants

The two warrants granted authorised the search and seizure of particular things. One warrant investigated the offence of murder and the other involved drug offences. Both warrants authorised the postponement of the serving of the occupier's notice for six months.

### Reports

One warrant was executed and the other warrant was not executed due to operational reasons. Both were reported on within the statutory time frame.

### Results of inspection of NSW Crime Commission covert search warrant records

We were satisfied that the NSW Crime Commission had generally complied with its obligations under the Act. No issues of concern were identified.

### Concluding comments

For the reporting period the NSW Crime Commission was compliant with Part 5 of the *Law Enforcement (Powers and Responsibilities) Amendment (Search Powers) Act 2009* in so far as it related to covert search warrants.

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## 4. Police Integrity Commission

During the reporting period no covert search warrants were applied for by the Police Integrity Commission.

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