

Report No. 75

A report on the Parliamentary Crime and Misconduct Commissioner's report on his inspection, pursuant to Section 362 of the *Police Powers and Responsibilities Act 2000*, of the CMC's records regarding surveillance device warrants for the period 1 July 2006 to 30 April 2007



LEGISLATIVE ASSEMBLY OF QUEENSLAND

PARLIAMENTARY CRIME AND MISCONDUCT COMMITTEE

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October 2007

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CHAIRMAN'S FOREWORD

The passage of the *Cross-Border Law Enforcement Legislation Amendment Act 2005* saw extensive changes to legislative provisions governing surveillance device warrants issued to Queensland law enforcement agencies, including the Crime and Misconduct Commission (the CMC or the Commission).

Those changes included the creation of a legislative regime of inspection and reporting regarding the use of surveillance devices. So far as the CMC is concerned, there is now a requirement that the Parliamentary Crime and Misconduct Commissioner (Parliamentary Commissioner) inspect the records of the Commission at six monthly intervals, to decide the extent of compliance by the CMC with the relevant statutory provisions in its use of surveillance warrants.

The Parliamentary Commissioner must provide a report on his inspection to the Parliamentary Crime and Misconduct Committee (the PCMC). In turn, that report must be tabled by the Chairperson of that Committee in the Legislative Assembly.

This report of the Committee attaches the first report of the Parliamentary Commissioner, Mr Alan MacSporran SC, under this new reporting scheme. The Parliamentary Commissioner's report, whilst in generally favourable terms, did disclose a number of instances of non-compliance by the Commission with the statutory provisions. The Committee wrote to the CMC Chairperson, Mr Robert Needham, expressing its concerns and seeking his advice regarding actions taken by the CMC to address these deficiencies. Relevant extracts from Mr Needham's response are included in the Committee's report.

Paul Hoolihan MP
Chairman

October 2007

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1. INTRODUCTION

The passage of the *Cross-Border Law Enforcement Legislation Amendment Act 2005* saw extensive changes to legislative provisions governing surveillance device warrants issued to Queensland law enforcement agencies, including the CMC.

Those changes included the creation of a legislative regime of inspection and reporting regarding the use of surveillance devices. So far as the CMC is concerned, there is now a requirement that the Parliamentary Crime and Misconduct Commissioner inspect the records of the Commission at six monthly intervals, to decide the extent of compliance by the CMC with the relevant statutory provisions in its use of surveillance warrants.

The Parliamentary Commissioner must provide a report on his inspection to the Parliamentary Crime and Misconduct Committee. In turn, that report must be tabled by the Chairperson of that Committee in the Legislative Assembly (section 363 of the *Police Powers and Responsibilities Act 2000*).

The inspection and reporting functions now established by statutory regime were previously substantially undertaken by the Parliamentary Commissioner, acting upon a series of periodic references from the PCMC to audit the CMC's records regarding its exercise of its coercive powers.

This report of the Committee attaches the first report of the Parliamentary Commissioner, Mr Alan MacSporran SC, under the new reporting scheme. The inspection covers the period from 1 July 2006 to 30 April 2007. Full details are set out in the Parliamentary Commissioner's report.

2. THE REPORT OF THE PARLIAMENTARY COMMISSIONER

The Parliamentary Commissioner's report, whilst in generally favourable terms, disclosed a number of instances of non-compliance by the Commission with the statutory provisions. Mr MacSporran's findings on his inspection are summarised at page 13 of his report. His overall conclusion is that:

Overall the impression gained during this first inspection pursuant to section 362 of the PPRA is that the CMC's record keeping and procedures were extremely well managed. However, whilst I appreciate that time constraints and staffing issues can impact on the matter, more care needs to be taken in the drafting of the applications, warrants and compliance affidavits.

The deficiencies identified by the Parliamentary Commissioner are summarised by him as follows:

- There was less than full compliance with the procedures for the discontinuance of the use of surveillance devices under warrants as set out in section 335 of the *Police Powers and Responsibilities Act 2000* (PPRA);
- The compliance affidavits for seven of the surveillance device warrants did not comply with section 357(3)(a) of the PPRA in that they were not provided within the time stated in the warrants;
- The compliance affidavits for these seven surveillance device warrants erroneously recited the time stated in the warrant in that they referred only to the later, "post-

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warrant deadline" and made no reference to the requirement that the affidavit be provided within 21 clear days of removal of the surveillance devices;

- The applications for five surveillance device warrants did not state the kind of surveillance devices sought to be authorised by the warrants in accordance with 328(3)(b) of the *PPRA*;
- Seven documents (applications, warrants or compliance affidavits) contained typographical errors or were otherwise inaccurate.

The Committee was concerned by the deficiencies referred to by Mr MacSporran, particularly in the light of a history of shortcomings identified by the Parliamentary Commissioner during past audits of the records of the CMC. Prior to finalising his report, Mr MacSporran had communicated to the CMC various issues arising from his inspection. The CMC provided the Parliamentary Commissioner with a response to these issues, and the Parliamentary Commissioner has made reference to aspects of that response in his report.

The Committee wrote to the CMC Chairperson, Mr Robert Needham, expressing its concerns and seeking his advice regarding actions taken by the CMC to address the deficiencies.

3. RESPONSE OF THE CMC

Mr Needham responded by letter to the Committee dated 4 September 2007. The issues identified by the Parliamentary Commissioner, together with a summary of Mr Needham's response, are set out below.

3.1. Issues relating to discontinuance of warrants

At pages 7 and 8 of his report, Mr MacSporran notes that he identified ten instances where events occurred such that the use of a surveillance device became no longer necessary, prior to the expiry of the term provided for in the relevant warrant. Section 335 of the *PPRA* requires certain actions to be taken in such circumstances:

- The officer to whom the warrant was issued or the officer primarily responsible for executing the warrant must immediately inform the CMC Chairperson; and
- The Chairperson must then take steps to ensure that use of the surveillance device is discontinued as soon as practicable, and advise the Public Interest Monitor in writing of the discontinuance.

The Parliamentary Commissioner reports that in two of these ten cases there was full compliance with these requirements. In two of the other eight cases, there was partial compliance, with the Public Interest Monitor being given written notification of the discontinuance of use of the device, though not by the chairperson, but by the officer to whom the warrant was issued or the officer primarily responsible for executing the warrant.

In the remaining six cases, there was no compliance with the notification requirements. The Parliamentary Commissioner notes that the devices were in fact removed as soon as practicable after their use ceased to be necessary for the purpose of obtaining evidence.

Mr Needham advised the Parliamentary Commissioner (and subsequently the Committee) that at the time the CMC officers responsible for the warrants took the view that the requirements of the relevant section (section 335) did not apply as the devices were no longer being used.

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The CMC has since accepted that this is not the better view of the effect of the section and the relevant officers have been advised accordingly. Mr Needham advised the Committee:

As I indicated in my correspondence to Mr MacSporran, ...I do not doubt that the legal officers concerned acted in good faith. However, after careful consideration, and having regard to the actual terms of section 335, I concluded that the view taken by Mr MacSporran was the better view and that the section 335 procedures should have been followed in the various instances, notwithstanding the removal of the devices.

Through the Assistant Commissioner, Crime, I have therefore caused CMC Crime lawyers, being the only CMC legal officers involved in applications under Chapter 13 of the PPRA, to be made aware of my instruction henceforth to adopt the section 335 procedures when applicable, even if all devices installed at the relevant premises have already been removed.

3.2. Compliance affidavit issues

The *PPRA* provides that the relevant law enforcement officer must make a report to the issuing judge or magistrate or to the Public Interest Monitor (known as a "compliance affidavit"). The report must be made within the time stated in the warrant. In practice, warrants issued to the CMC invariably provide for a compliance affidavit to be provided within 21 clear days from the date of removal of the devices, but in any event within 21 clear days.

Mr MacSporran identified seven instances where compliance affidavits had not been provided to the Public Interest Monitor within the deadline specified in the warrant itself. In essence, the Commission operated on the basis that the relevant time within which to provide the compliance affidavit ran from the date of cessation of the term of the warrant, rather than the date of cessation of use of the surveillance device.

In his response to the Committee, Mr Needham described these deficiencies as the most serious identified during the Parliamentary Commissioner's inspection audit. Mr Needham advised that all seven warrants were obtained in the course of the one investigation, and "it is assumed that the legal officer in question (who has since left the Commission), having made the error in the case of the first warrant, replicated the error in the case of subsequent warrants."

Mr Needham advised the Committee of steps taken by the Commission in the following terms:

Having regard to the number of occasions on which late and inaccurate compliance affidavits were furnished, I have caused all current Crime lawyers to be reminded of the following:-

- *the specific terms of the standard condition relating to the delivery of a compliance affidavit;*
- *the need to advert to the possibility of an earlier deadline than would otherwise apply in the event that the relevant devices are removed prior to the expiry of the warrant; and*

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- *the need to ensure that the relevant warrant condition is accurately recited in the compliance affidavit.*

I am advised that the Assistant Commissioner, Crime has convened a meeting of all Crime lawyers in the course of which the above matters were discussed and reinforced.

3.3. Other deficiencies

Mr MacSporran also referred to some other deficiencies and some typographical errors (see pages 10 and 11 of his report), which he categorised as “isolated oversights”.

In addressing these matters, Mr Needham stated:

I have considered the issues raised ...and am satisfied that the errors in question did not arise from any systemic or procedural defect. Accordingly, I do not consider that these matters warrant any formal remedial action.

Mr Needham advised the Committee that the Assistant Commissioner, Crime had nonetheless reinforced with staff the view expressed by Mr MacSporran that more care needed to be taken in the drafting of applications, warrants and compliance affidavits.

4. COMMITTEE'S OBSERVATIONS

In his letter to the Committee, Mr Needham stated:

Finally, can I assure the Committee that I am satisfied that a culture of “compliance” exists within the Office of the Assistant Commissioner, Crime. In particular, the several legal officers working in Crime are acutely aware of and take seriously the need for full compliance with all applicable statutory and accountability requirements relating to warrants, and more broadly, of their professional and ethical obligations.

Whilst I can understand and indeed share the Committee's concerns about the deficiencies identified in Mr MacSporran's report, I also note the overwhelmingly positive tone and contents of the report and trust that this will serve to reassure the Committee in its ongoing oversight of the Commission's work.

Mr Needham noted in his response to the Committee that CMC officers involved in obtaining surveillance device warrants “work in multi-disciplinary teams in a highly dynamic operational and investigative environment”. Having regard to this environment and to the work-load, the possibility of human error is ever present.

The Committee appreciates the responsive approach evidenced by Mr Needham's letter to the Committee. At the same time, the experience of the Committee, based on the results of a series of audits conducted by the Parliamentary Commissioner (and his predecessors) over a number of years, is that there has been an ongoing history of relatively minor, but persistent, non-compliance on the part of the CMC with legislative requirements, and the Committee urges the Commission to regularly review compliance with, and the effectiveness of, the systems it has in place to ensure compliance with statutory requirements as well as the more elementary but nonetheless important task of ensuring more attention is paid to detail.

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APPENDIX A

**REPORT ON THE RESULTS OF THE
INSPECTION OF THE RECORDS OF THE
CRIME AND MISCONDUCT COMMISSION
PURSUANT TO SECTION 362 OF THE
POLICE POWERS AND RESPONSIBILITIES ACT 2000**



**OFFICE OF THE
PARLIAMENTARY CRIME & MISCONDUCT COMMISSIONER**

APRIL-MAY 2007

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BACKGROUND

The *Cross-Border Law Enforcement Legislation Amendment Act 2005* made extensive changes to the legislation governing the issue of surveillance warrants to law enforcement agencies. Under the new legislative scheme, the Crime and Misconduct Commission (“CMC”) continues to derive its power to obtain surveillance warrants in respect of misconduct investigations from the *Crime and Misconduct Act 2001* (“*C&M Act*”). However, those sections of the *C&M Act* relating to surveillance warrants sought for crime investigations have been repealed or extensively amended.

The CMC’s power to obtain surveillance warrants in the course of crime investigations now exists exclusively under new provisions in Chapter 13 of the *Police Powers and Responsibilities Act 2000* (“*PPRA*”) inserted by the cross-border amendment Act. Warrants obtained under the provisions of Chapter 13 of the *PPRA* are now called “surveillance device warrants” and they are available for criminal investigations including those extending beyond the borders of this state. The *PPRA* also sets out the procedure to be followed in order to obtain emergency authorisations for the use of surveillance devices.

A new type of warrant was also created by the cross-border amendments, namely a retrieval warrant. A retrieval warrant, as the name implies, authorises entry onto premises to retrieve devices installed pursuant to surveillance device warrants.

Essentially, Chapter 13 of the *PPRA* is a code for the use and regulation of surveillance device warrants and retrieval warrants. According to section 321 of the *PPRA*, the main purposes of Chapter 13 are –

- (a) *to establish procedures for law enforcement officers to obtain warrants or emergency authorisations for the installation, use, maintenance and retrieval of surveillance devices in criminal investigations, including criminal investigations extending beyond this jurisdiction; and*
- (b) *to recognise warrants and emergency authorisations issued in other jurisdictions; and*
- (c) *to restrict the use, communication and publication of information obtained through the use of surveillance devices or otherwise connected with surveillance device operations; and*
- (d) *to impose requirements for the secure storage and destruction of records, and the making of reports to judges, magistrates and Parliament, in connection with surveillance device operations.*

INTRODUCTION

Section 362(1) of the *PPRA* requires that:

The inspection entity for a law enforcement agency must, from time to time, inspect the records of the law enforcement agency to decide the extent of compliance with this chapter [Chapter 13] by the agency and law enforcement officers of the agency.

Section 322 of the *PPRA* defines the inspection entity for the CMC to be the Parliamentary Commissioner. Pursuant to section 363(1) of the *PPRA* I am required to make a written report at six-monthly intervals on the results of each inspection under section 362. This is the first such report and, as such, it covers the period from the commencement of the provisions of Chapter 13, on 1 July 2006, to 30 April 2007.

On 19 April 2007 I provided the Chairperson of the CMC (“the Chairperson”) written notice pursuant to section 362(2)(a) of the *PPRA* that I intended to commence an inspection of the CMC’s records in the week of 23 April 2007. The inspection commenced on 27 April 2007.

This report deals primarily with the inspection of the CMC’s records as required by the legislation. The CMC’s compliance or otherwise with the provisions of Chapter 13 of the *PPRA* can be ascertained largely from its records.

There are however, some compliance issues which the records are incapable of establishing; issues such as the security and control of access to information obtained by the use of surveillance devices, the physical storage of registers and information, and the destruction of records or reports. This report makes some observations in relation to those issues.

I should acknowledge at this juncture, the co-operation provided by the Chairperson and staff of the CMC in facilitating my inspection. My Principal Legal Officer and I have been afforded full and unrestricted access to all records of the CMC relevant to the inspection and all requests for information and assistance have been promptly answered.

RESULTS OF THE INSPECTION UNDER SECTION 362**THE CMC'S REGISTERS AND OTHER RECORDS****Register of warrants and emergency authorisations**

There are a number of statutory provisions which govern the manner in which the CMC must maintain its records. Section 361 of the *PPRA* states that the Chairperson must cause a register of warrants and emergency authorisations to be kept. The register must be or form part of the register of covert acts kept pursuant to section 664(1) of the *PPRA*. Section 664(1) requires that the CMC keep a register of covert acts. The *PPRA* defines "covert act" to include the making of an application under Chapter 13 and the exercise of powers under a surveillance device warrant or a retrieval warrant.

Section 664 of the *PPRA* allows the CMC to keep its register in the way the Chairperson considers appropriate. For example, the register may be kept on a computer or partly on a computer and partly written, as long as the register is kept in a secure place. The register may form part of another register whether the other register is kept under the *PPRA* or another Act.

Prior to the commencement of the provisions of Chapter 13 (on 1 July 2006) the CMC already kept registers of warrant applications as required by section 166 of the *C&M Act*. These "warrants registers" recorded search warrants, covert search warrants and surveillance warrants obtained by the CMC under the *C&M Act* and the *PPRA*.¹ Separate registers were kept for warrant applications for crime investigations and for misconduct investigations (although the latter is not relevant for the purposes of this report). These registers are still maintained in the same way although, since 1 July 2006, the register required by sections 361 and 664 of the *PPRA* now forms part of the warrants register for crime investigations.

The CMC manages its obligations under the *C&M Act* and the *PPRA* by maintaining the warrants registers partly in electronic format and partly in hard copy. The electronic part of the registers utilises the CMC's Recfind computer programme and contains sufficient identifying data about each warrant to enable it to be productively searched and audited.

The hard copy part of the warrants registers consists of the originating paperwork (internal approvals and authorisations, applications, affidavits etc.), the original warrants, compliance affidavits (referred to in some detail below) and other associated documentation kept together in well-ordered document wallets. A hand-written register is maintained as a back-up to the Recfind electronic information and as an easy reference source.

I am satisfied that the CMC has fully complied with its obligations pursuant to Chapter 13 of the *PPRA* in the manner in which the registers are maintained.

¹ In the 2005-2006 financial year there were also two warrants obtained under section 3E of the *Crimes Act (Cwth)*.

Information to be included in register for surveillance device warrants, retrieval warrants and emergency authorisations

Sections 668 and 669 of the *PPRA*² specify the information that must be recorded in the register about surveillance device warrants, retrieval warrants and emergency authorisations for the use of a surveillance device. In relation to surveillance device warrants and retrieval warrants the CMC must record:

- (a) *the date and time of issue of the warrant;*
- (b) *the name of the judge or magistrate who issued the warrant;*
- (c) *the name of the law enforcement officer stated in the warrant as the person primarily responsible for executing it;*
- (d) *the relevant offence for which the warrant was issued;*
- (e) *the period when the warrant is in force;*
- (f) *details of any variation or extension of the warrant;*
- (g) *whether the surveillance device was used in a participating jurisdiction;*
- (h) *information prescribed under the responsibilities code about the exercise of powers under the warrant.*

Similar information is required to be kept in relation to surveillance warrants obtained under the *C&M Act* in accordance with section 10 of the *Crime and Misconduct Regulation 2005*.

Notwithstanding that this information would be available through a close inspection of the documents kept on the register (for example, the applications, the warrants and the compliance affidavits) the CMC has, for some years, specifically recorded the prescribed information on forms placed with the corresponding warrants in the registers; forms 1 and 2 for *C&M Act* warrants and forms 3 and 4 for *PPRA* warrants. The forms 3 and 4 for surveillance device warrants have recently been re-drafted to reflect the changes brought about by the cross-border legislative amendments.

The documentation on the register for all surveillance device warrants sought up to the date of my inspection included a form 3 containing all the prescribed information about the warrant except in two instances. In those two cases, a form 1 had been used in error but the prescribed information was still recorded in the register.

Keeping documents connected with warrants and emergency authorisations

Section 359 of the *PPRA* lists the documents that the CMC must retain in relation to surveillance device warrants, retrieval warrants and emergency authorisations, namely:

² These sections replace section 62 of the *Police Powers and Responsibilities Regulation 2000* which prescribed the information about *PPRA* surveillance warrants that was required to be recorded in the register prior to 1 July 2006. This section of the regulations was omitted by the *Police Powers and Responsibilities and Other Legislation Amendment Regulation (No.1) 2006 SL No.145*.

- (a) *each warrant issued to a law enforcement officer of the agency;*
- (b) *each notice given to the chief executive officer under section 334(3) of revocation of a warrant;*
- (c) *each application made by a law enforcement officer of the agency for an emergency authorisation;*
- (d) *each emergency authorisation given to a law enforcement officer of the agency;*
- (e) *each application made by a law enforcement officer of the agency for—*
 - (i) *a warrant; or*
 - (ii) *variation, extension or revocation of a warrant; or*
 - (iii) *approval of the exercise of powers under an emergency authorisation;*
- (f) *each report made under section 357;*
- (g) *each certificate issued by a senior officer of the agency under section 364.*

For the purposes of my inspection, copies of the CMC's electronic and hand-written registers were obtained as a record of all surveillance device warrant applications made by the CMC during the period. (There were no applications for retrieval warrants or emergency authorisations.) The hard copy part of the registers, namely the paperwork contained in the document wallets, was then inspected to ensure that the CMC had kept the prescribed documents for each surveillance device warrant.

If the warrant issued, the prescribed documents that should be kept for each warrant are (chronologically): the application for the warrant (subsection (e)(i)), the surveillance device warrant itself (subsection (a)) and the report made under section 357 (subsection (f), compliance affidavit).

Pursuant to section 357, the officer to whom the warrant is issued, or who is primarily responsible for executing the warrant, must provide a report to the issuing judge or the Public Interest Monitor ("the PIM") upon the expiry of the warrant. These are commonly referred to as "compliance affidavits" since they are intended to evidence compliance with the conditions imposed on the warrants, either by the legislation or by the issuing judge. Section 357 of the Act specifies the information that must be included in these reports. (I will refer to some issues with regard to compliance affidavits later in this report.)

Prior to the commencement of the cross-border amendments, the CMC's Records Management section prepared a schedule or a checklist of documents required to be retained for each warrant under the *C&M Act* and the *PPRA*. These schedules were used to follow up any outstanding paperwork, including internal documentation, relating to warrants to ensure that the records were complete. The schedule for *PPRA* surveillance device warrants has since been re-drafted to include the documents prescribed under section 359 of the *PPRA*.

The schedules or checklists appear to be operating most effectively since all the documentation prescribed by section 359 of the *PPRA* for each surveillance device warrant was located on the registers.

Other records to be kept

Section 360 of the *PPRA* lists other records that must be kept in relation to surveillance device warrants, retrieval warrants and emergency authorisations. No retrieval warrants or emergency authorisations for the use of surveillance devices were sought by the CMC during the period covered by the inspection. The information required pursuant to this section is maintained on a schedule entitled "Records to be Kept of Listening Device Product".

The CMC retained a copy of these schedules for each operation, updated for each surveillance device warrant, with the other documents on the register in compliance with section 360 of the Act.

Dealing with records obtained by use of surveillance devices

Pursuant to section 354 of the *PPRA* the Chairperson must ensure that every record or report obtained by the use of surveillance device warrants is kept in a secure place that is not accessible to persons not entitled to deal with the record or report. The CMC's Records Management section is a secure environment with effective access procedures in place to protect the security of the surveillance device records. The records themselves are stored in locked cabinets, the key to which is kept within another locked receptacle accessible only by the manager of the section.

Section 354 also deals with the destruction of records or reports obtained by the use of surveillance device warrants once they are no longer required by the CMC. Not unexpectedly, the CMC had no such records or reports ready for destruction at the time of my inspection. All are still needed.

OVERVIEW OF WARRANTS OBTAINED

During the period covered by this inspection the CMC sought 26 surveillance device warrants pursuant to section 328 and extensions of two of those warrants pursuant to section 333 of the *PPRA*. In my view, sufficient grounds existed to justify the CMC's decision to seek the warrants in each case. None of the CMC's applications for surveillance device warrants was refused during the period.

All the surveillance device warrants obtained by the CMC during the relevant period related to large crime investigations conducted pursuant to the CMC's Freshnet reference targeting established criminal networks engaged in the trafficking, production and possession of dangerous drugs.

During the period covered by this inspection the CMC obtained 19 surveillance device warrants in the course of Operation Sabre. The warrants related to the dwellings of three persons and to six motor vehicles. Ten of the warrants related to persons or premises that had been the subject of previous warrants. These were extensions in effect, rather than in form, of the previous warrants. (This issue will be discussed further, below.) Due to operational and other considerations, four of the warrants were not executed and one was formally discontinued in accordance with section 335 of the *PPRA*.

The CMC also obtained six surveillance device warrants in the course of Operation Danson. Four of the warrants (one of which was discontinued) related to the dwelling of a target of the operation. The other two warrants were obtained in respect of stated persons although specifically directed at their motor vehicles. One of these warrants was extended and the other varied in accordance with section 333 of the *PPRA*. Both were only sought for a short period of time.

The remaining warrant was still operational at the time of my inspection.

No retrieval warrants or emergency authorisations for the use of surveillance devices were sought by the CMC during the period covered by the inspection.

The applications, surveillance device warrants and compliance affidavits

To assist in my task of deciding the extent of the CMC's compliance with the provisions of Chapter 13 of the *PPRA*, checklists were formulated against which the records for each surveillance device warrant were assessed. The checklists extended to more than 100 questions over 13 pages covering all relevant sections of Chapter 13 and section 668 of the *PPRA*.

Amongst the records that were inspected were the section 357 reports to the PIM or compliance affidavits prepared for each surveillance device warrant obtained by the CMC. The CMC's compliance affidavits use bold headings which correspond with the information that must be contained in the report to the PIM pursuant to section 357(4) of the *PPRA*. I have found the information set out under these headings in the compliance affidavits of great assistance in the performance of the task of deciding the extent of compliance with Chapter 13 of the Act.

Once the inspection of the documents on the CMC's warrants registers was finalised, I sent a detailed summary of the results of my inspection to the CMC Chairperson. Since this was the first inspection pursuant to section 362(1) of the *PPRA*, I considered that this would be a useful exercise to assist the CMC in the formulation of policies for the exercise of its powers in respect of surveillance device warrants. The Chairperson subsequently provided a written response to the detailed summary of the results of my inspection. I have made reference to the Chairperson's response in this section of the report.

Issues relating to the discontinuance of the warrant

Section 335 of the *PPRA* sets out the procedures to be adopted for the discontinuance of the use of surveillance devices under warrants. According to section 335:

- (1) If the senior officer to whom the warrant is issued, or the law enforcement officer who is primarily responsible for executing the warrant, believes that the use of a surveillance device under the warrant is no longer necessary for the purpose of enabling evidence to be obtained of the commission of the relevant offence or the identity or location of the offender, the officer must inform the chief executive officer of the law enforcement agency immediately.*
- (2) If the chief executive officer of the law enforcement agency is satisfied, whether because of subsection (2) or otherwise, that the use of a surveillance device under the warrant is no longer necessary for the purpose of enabling evidence to be obtained of the commission of the relevant offence or the identity or location of the offender, the chief executive officer—*
 - (a) must take the steps necessary to ensure that the use of the surveillance device authorised by the warrant is discontinued as soon as practicable; and*
 - (b) must give written notice of that fact to the public interest monitor.*

My inspection of documents on the CMC's warrants registers identified ten instances in which, prior to warrants ending, events occurred which rendered the use of surveillance devices under the warrants no longer necessary for the purpose of enabling evidence to be obtained of the commission of the relevant offence or the identity or location of the offender. Those events included the target vacating or no longer utilising the subject premises or the closure of the operation.

In each of these instances, in accordance with section 335, the CMC officer to whom the warrant was issued or the officer primarily responsible for executing the warrant was required to immediately inform the Chairperson. Thereafter, the Chairperson was required to take the steps necessary to ensure that use of the surveillance devices authorised by the warrant was discontinued as soon as practicable and to give the PIM written notice of the discontinuance.

In two of the ten instances identified, there was full compliance with the procedures for the formal discontinuance of the use of surveillance devices authorised by the warrants pursuant to section 335 of the *PPRA*. In each case, the CMC officer to whom the warrant was issued or the officer primarily responsible for executing the warrant immediately notified the Chairperson that the use of a surveillance device under the warrant was no longer necessary. Written directions from the Chairperson to the Operations Coordinator and the Team Leaders pursuant to section 335(3)(a) and copies of the Chairperson's written notices to the PIM pursuant to section 335(3)(b) of the *PPRA* were located on the register.

In two other instances there was partial compliance in that the PIM was given written notice of the discontinuance, although not by the Chairperson, rather by the CMC officer to whom the warrant was issued or the officer primarily responsible for executing the warrant. The written notice was provided in a compliance affidavit prepared for the PIM.

In the remaining six instances, there was no compliance with the procedures set out in section 335 of the *PPRA*. It should be made clear that the surveillance devices installed pursuant to these six warrants (as well as those installed pursuant to the four warrants mentioned above) were removed from the various premises as soon as practicable after it became apparent that the use of surveillance devices under the warrants was no longer necessary for the purpose of enabling evidence to be obtained. Thus, in effect, the necessary steps had already been taken to ensure that the use of the surveillance devices authorised by the warrants was discontinued as soon as practicable in accordance with section 335(3)(a).

According to the Chairperson's response, the legal officers responsible for the warrants took the view that section 335 did not apply in such circumstances as there were no surveillance devices then being used and it was impossible to conduct further monitoring of the devices. The legal officers believed that the section applied to circumstances in which the devices were still in place and CMC officers might continue to monitor the devices unless directed to discontinue by the Chairperson pursuant to section 335(3)(a).

However, the Chairperson advised that, after careful consideration, and having regard to the wording of section 335, he concluded that the procedures set out in the section should have been followed in these six instances, notwithstanding the removal of the surveillance devices. He has therefore instructed *"legal officers involved in applications under Chapter 13 of the PPRA, to adopt the section 335 procedures for "stated premises" warrants when applicable, even if all devices installed at the relevant premises have already been removed."*³

The removal of the surveillance devices prior to the expiry of the warrant also appears to have given rise to some reporting problems for the responsible officers.

³ The instruction should also apply to surveillance device warrants obtained in respect of "stated persons" in situations where the use of a surveillance device under the warrant is no longer necessary for the purpose of enabling evidence to be obtained of the commission of the relevant offence or the location of the offender – for example when an operation is closed much earlier than the date the warrant ends.

Issues relating to reports to the PIM (Compliance affidavits)

Section 357 of the *PPRA* states that:

- (1) *A law enforcement officer to whom a warrant is issued, or who is primarily responsible for executing a warrant issued, under this chapter must make a report as required under this section*
- (2) *The report must be made to the judge or magistrate who issued the warrant or to the public interest monitor as stated in the warrant.*
- (3) *The report must be made—*
 - (a) *within the time stated in the warrant; or*
 - (b) *if the warrant is revoked before the end of the time stated in the warrant – as soon as practicable after the warrant is revoked and within the time stated in the warrant.*

These reports are mandatory pursuant to section 357 of the *PPRA* and invariably, the terms of surveillance device warrants issued to the CMC stated that the reports were to be supplied to the PIM in the form of a sworn affidavit, commonly known as a “compliance affidavit”. The standard clause in all surveillance device warrants obtained by the CMC since the commencement of the *Cross-Border Law Enforcement Legislation Amendment Act 2005* effectively provides:

That [the senior officer to whom the warrant is issued] or [the law enforcement officer who is primarily responsible for executing the warrant] provide an affidavit to the Public Interest Monitor in accordance with [section 357] Police Powers and Responsibilities Act 2000 ... within twenty-one (21) clear days of the removal of the surveillance devices, provided that in any event, [the senior officer to whom the warrant is issued] or [the law enforcement officer who is primarily responsible for executing the warrant] provide such affidavit to the Public Interest Monitor by [time and date - 21 clear days after the time the warrant ends].

The surveillance devices installed pursuant to the ten warrants mentioned at page 7 were removed from the various premises prior to the time the warrant ended, namely, soon after it became apparent that the use of the devices was no longer necessary for the purpose of obtaining evidence. Therefore, pursuant to section 357(3)(a) of the *PPRA* and in accordance with the standard clause (above), the compliance affidavits for these warrants should have been provided to the PIM within 21 clear days of the removal of the surveillance devices.

The compliance affidavits for seven of the surveillance device warrants were not provided within this period – the time stated in the warrants. The responsible officers did not comply with the standard condition in the warrants nor with section 357(3)(a) of the *PPRA*. It should be noted however that all the compliance affidavits were provided to the PIM within 21 clear days after the time the warrants ended (“the post-warrant deadline”).

Of further concern is the fact that the compliance affidavits for these seven surveillance device warrants erroneously recited the standard condition in that they referred only to the later, “post-warrant deadline” and made no reference to the requirement that the affidavit be provided within 21 clear days of the removal of the surveillance devices.

Section 357(4) of the *PPRA* sets out the information that must be included in compliance affidavits. Pursuant to section 357(4)(b)(ix), the report must “give details of the compliance with the conditions, if any, to which the warrant was subject.” In purported compliance with that requirement, the compliance affidavits for five of these seven surveillance device warrants contained a paragraph in the following terms:

I am informed and verily believe that all conditions stipulated in the said warrant were complied with.

Whilst the officers swearing the affidavits may have believed that the conditions of the respective warrants were complied with, as stated above, there was non-compliance with the standard condition of the warrants relating to the deadline for the provision of the compliance affidavits.

In his response to the summary of the results of my inspection, the Chairperson advised that, having regard to the number of occasions on which late compliance affidavits were furnished, it was proposed to remind CMC legal officers of:

- *the specific terms of the standard condition relating to the delivery of a compliance affidavit;*
- *the need to advert to the possibility of an earlier deadline than would otherwise apply in the event that the relevant devices are removed prior to the expiry of the warrant; and*
- *the need to ensure that the relevant condition is accurately recited in the compliance affidavit.*

The issues relating to compliance affidavits and the discontinuance of warrants were the only significant problems identified in the inspection of the CMC's warrants registers. There were other problems which might fairly be regarded as isolated oversights.

The kind of surveillance device sought to be authorised

Section 328(3)(b) of the *PPRA* requires that applications for surveillance device warrants state "*the kind of surveillance device sought to be authorised*".⁴ The CMC made concurrent applications for four surveillance device warrants to be used in a particular operation; one lengthy affidavit made application for all four warrants. Each of the four warrants being sought was an extension of a previous warrant in respect of the same premises. Whilst the details of the surveillance devices installed in the four premises pursuant to those previous warrants were contained in the application, the application did not state the kind of surveillance devices sought to be authorised by the new warrants.

The Deputy PIM also noted that an application for a surveillance device warrant made by the CMC in February 2007 similarly did not state the kind of surveillance device sought to be authorised.

Typographical errors

Four other warrants obtained concurrently pursuant to a single application contained typographical errors. Sections of the warrants appear to have been "cut and pasted" from previous warrants causing the name of the senior officer to whom the previous warrant was issued, to erroneously appear at certain places and rendering the paragraph numbering incorrect in parts.

The application and compliance affidavit for one warrant referred to six listening devices whereas authorisation was only sought for three listening devices and only three were in fact used.

The compliance affidavit for another warrant stated that the judge had issued the surveillance device warrant authorising the use of six (6) listening surveillance devices and three (3) optical

⁴ The *PPRA* defines a number of surveillance devices, including listening devices, visual surveillance devices, tracking devices and devices containing any combination of listening, visual surveillance and tracking devices.

surveillance whereas the warrant actually authorised the use of three listening surveillance devices and two optical surveillance devices.

More care needs to be taken in the drafting of these documents, and in particular the warrants, which should be entirely without defects.

PRACTICE ISSUES RESOLVED

Stating the parts of the dwelling in which optical surveillance devices may be used

As stated above, one of the principal reasons I provided a detailed summary of the results of my inspection to the Chairperson was in order to assist the CMC in the formulation of policies for the exercise of its powers in respect of surveillance device warrants. Two issues in particular appear to have been resolved by this process.

The first issue concerns the applicability of section 331(1)(b)(vi) of the *PPRA* to warrants obtained in respect of stated persons. According to that section, the surveillance device warrant must state:

-if the warrant authorises the use of an optical surveillance device that is to be installed in a dwelling – the parts of the dwelling in which the device may be installed.⁵

Surveillance device warrants obtained in respect of stated premises regularly authorise the use of optical surveillance devices in a dwelling. However one of the warrants obtained by the CMC authorised the use of optical surveillance devices in respect of a stated person, namely “*on premises where the stated person is believed to be or is likely to be.*” The stated person’s dwelling fell within that description and two listening devices were installed in the dwelling pursuant to the warrant.

Although no optical surveillance device was installed in the dwelling in this case, it seems to me that, if, at the time a surveillance device warrant in respect of a stated person is sought, installation of optical surveillance devices in the stated person’s dwelling is contemplated, section 331(1)(b)(vi) requires that the warrant state the parts of the dwelling in which the devices may be installed.

Whilst the Chairperson did not concede that section 331(1)(b)(vi) was applicable to warrants obtained in respect of stated persons, he advised that all such warrants subsequently obtained and which authorise the use of optical surveillance devices have included the following condition:

“If the optical surveillance device is to be installed in a dwelling, then the optical surveillance device can be installed in any part of the dwelling.”

This is a sensible practice. The condition adequately addresses my concerns regardless of whether such a condition is mandated by section 331(1)(b)(vi) of the *PPRA*.

⁵ Interestingly, the *Cross-Border Law Enforcement Legislation Amendment Act 2005* amended the corresponding section (section 125) of the *C&M Act* by deleting the requirement that surveillance warrants state the parts of the dwelling in which visual surveillance devices may be installed. This only applies to misconduct investigations. For crime investigations, section 331(1)(b)(vi) of the *PPRA* still requires surveillance device warrants that authorise the use of optical surveillance devices in dwellings to state the parts of the dwelling in which the devices may be installed.

Extending warrants under section 333

Section 333 of the *PPRA* sets out the procedure for the extension of surveillance device warrants. Warrants may be extended for further periods of not more than 90 days from the day on which the warrants would otherwise expire. If the judge or magistrate grants an application for the extension of the warrant, the judge or magistrate must write the new expiry date or other varied term on the original warrant.

In the course of my inspection I noted that, rather than apply for extensions of existing warrants as contemplated by section 333 of the *PPRA*, the CMC invariably sought and obtained new warrants in similar terms to the previous warrants except for the new expiry dates. In my summary to the Chairperson I observed that section 333 of the *PPRA* did not preclude applications for extensions of surveillance device warrants in these circumstances.

The Chairperson agreed that, as a matter of law, a 90 day warrant may be extended under section 333. However, he stated that none of the provisions of Chapter 13 of the *PPRA* require proceeding in this way as opposed to applying for a fresh warrant. The CMC is of the view that the decision as to which course should be taken should rest with the responsible legal officer in consultation with the PIM or, indeed, with the issuing judge. The Chairperson also indicated that logistical consideration might impact on the decision as to which procedure to adopt.

In discussing the proposed cross-border amendments in 2005, in particular the procedure now enacted in section 333, I expressed the following view in a letter to the Director-General, Department of the Premier and Cabinet:

"I am not convinced that endorsing the new expiry date or varied term on the original warrant is the most satisfactory approach. I would consider a fresh warrant to be a neater method together with a requirement that all earlier warrants are maintained and kept on the same file. This is possibly not a significant matter but in my view allowing the original warrant to be endorsed with variations could lead to some confusion as to what the warrant at any given point in time actually authorises. It is a much neater result to have all warrants kept but fresh dated warrants which easily indicate what powers the warrant authorises at any given point in time."

I remain of that view and therefore consider that the approach taken by the CMC in seeking new warrants rather than extending previous warrants is the best practice.

CONCLUSIONS

The CMC has fully complied with its obligations pursuant to Chapter 13 of the *PPRA* in the manner in which the registers are maintained.

The registers recorded all the information prescribed by section 668 of the *PPRA* in respect of all surveillance device warrants sought up to the date of my inspection.

All the documentation prescribed by section 359 of the *PPRA* for each surveillance device warrant was located on the registers.

The CMC maintained schedules of the information required by section 360 of the Act for each operation, updated for each surveillance device warrant, on the register.

The CMC's records and reports obtained by use of surveillance devices are kept in a secure environment with effective access procedures in place. The records are not accessible to people who are not entitled to deal with them.

There was less than full compliance with the procedures for the discontinuance of the use of surveillance devices under warrants as set out in section 335 of the *PPRA*.

The compliance affidavits for seven of the surveillance device warrants did not comply with section 357(3)(a) of the *PPRA* in that they were not provided within the time stated in the warrants.

The compliance affidavits for these seven surveillance device warrants erroneously recited the time stated in the warrant in that they referred only to the later, "post-warrant deadline" and made no reference to the requirement that the affidavit be provided within 21 clear days of the removal of the surveillance devices.

The applications for five surveillance device warrants did not state the kind of surveillance devices sought to be authorised by the warrants in accordance with 328(3)(b) of the *PPRA*.

Seven documents (applications, warrants or compliance affidavits) contained typographical errors or were otherwise inaccurate.

Overall the impression gained during this first inspection pursuant to section 362 of the *PPRA* is that the CMC's record keeping and procedures were extremely well managed. However, whilst I appreciate that time constraints and staffing issues can impact on the matter, more care needs to be taken in the drafting of the applications, warrants and compliance affidavits.