

Passed by both Houses



New South Wales

Law Enforcement (Powers and Responsibilities) Amendment (Search Powers) Bill 2009

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I certify that this public bill, which originated in the Legislative Assembly, has finally passed the Legislative Council and the Legislative Assembly of New South Wales.

*Clerk of the Legislative Assembly.
Legislative Assembly,
Sydney, , 2009*



New South Wales

Law Enforcement (Powers and Responsibilities) Amendment (Search Powers) Bill 2009

Act No , 2009

An Act to amend the *Law Enforcement (Powers and Responsibilities) Act 2002* with respect to search powers; and for other purposes.

I have examined this bill and find it to correspond in all respects with the bill as finally passed by both Houses.

Assistant Speaker of the Legislative Assembly.

The Legislature of New South Wales enacts:

1 Name of Act

This Act is the *Law Enforcement (Powers and Responsibilities) Amendment (Search Powers) Act 2009*.

2 Commencement

This Act commences on a day or days to be appointed by proclamation.

Schedule 1 **Amendment of Law Enforcement (Powers and Responsibilities) Act 2002 No 103**

[1] **Section 3 Interpretation**

Insert in alphabetical order in section 3 (1):

covert search warrant means a search warrant issued under Division 2 of Part 5 that may be executed covertly.

[2] **Section 3, note**

Omit the note at the end of the section. Insert instead:

Note. In a heading to a provision of this Act, a reference to the **Cth Act** is a reference to the *Crimes Act 1914* of the Commonwealth and a reference to the **former LEpra** is a reference to a provision of Part 5 as in force immediately before it was amended by the *Law Enforcement (Powers and Responsibilities) Amendment (Search Powers) Act 2009*.

[3] **Section 46 Interpretation**

Insert in alphabetical order in section 46 (1):

adjoining occupier's notice means a notice referred to in section 67B.

authorised officer for a covert search warrant means an eligible Judge.

eligible applicant, for a search warrant, means:

- (a) any police officer, or
- (b) if it is a covert search warrant—any person authorised to apply for such a warrant under section 46C.

eligible issuing officer means:

- (a) for a warrant other than a covert search warrant—an authorised officer, or
- (b) for a covert search warrant—an eligible Judge, or
- (c) for a notice to produce issued under Division 3—an authorised officer.

eligible Judge—see section 46B.

executing officer means:

- (a) for a warrant other than a covert search warrant—any police officer, or
- (b) for a covert search warrant:
 - (i) any police officer, or

- (ii) any member of staff of the Police Integrity Commission if the applicant for the warrant was authorised to make the application under section 46C (1) (b), or
- (iii) any member of staff of the New South Wales Crime Commission if the applicant for the warrant was authorised to make the application under section 46C (1) (c).

indictable offence includes any act or omission which if done, or omitted to be done, in New South Wales would constitute an offence punishable on indictment.

searchable offence—see section 46A.

subject premises, in relation to a warrant or an application for a warrant, means premises the subject of the warrant or the application (as the case may be).

[4] Section 46 (4)

Insert after section 46 (3):

- (4) Nothing in this Part applies to or in respect of, or affects the exercise of any power under, a covert search warrant issued under the *Terrorism (Police Powers) Act 2002*.

[5] Sections 46A–46C

Insert after section 46:

46A Searchable offences (cf former LEPRA, s 47 (1))

- (1) For the purposes of this Part, **searchable offence** in relation to a warrant:
 - (a) means any of the following:
 - (i) an indictable offence,
 - (ii) a firearms or prohibited weapons offence,
 - (iii) a narcotics offence,
 - (iv) a child pornography offence,
 - (v) an offence involving a thing being stolen or otherwise unlawfully obtained, and
 - (b) if the warrant is a covert search warrant—means a serious offence.
- (2) In subsection (1):

child pornography offence means an offence under section 91H or 578C of the *Crimes Act 1900*.

firearms or prohibited weapons offence means an offence under the *Firearms Act 1996*, the *Weapons Prohibition Act 1998* or a regulation made under either of those Acts, being an offence committed in respect of a firearm or a prohibited weapon within the meaning of those Acts.

narcotics offence means:

- (a) an offence under the *Poisons and Therapeutic Goods Act 1966*, or a regulation made under that Act, being an offence committed in respect of:
 - (i) a restricted substance prescribed for the purposes of section 16 of that Act, or
 - (ii) a drug of addiction within the meaning of that Act, or
- (b) an offence under the *Drug Misuse and Trafficking Act 1985* or a regulation made under that Act.

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,
Note. For example, section 193B of the *Crimes Act 1900*.
 - (iv) car and boat rebirthing activities,
Note. 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).
- (3) For the purposes of this section, an activity involving theft is carried out on an **organised basis** if:
- (a) it is planned, organised, structured or otherwise carried out in such a manner as to indicate that the activity is carried out on more than one occasion and involves more than one participant, and
 - (b) it is carried out for profit or gain.

46B Eligible Judges

- (1) In this Part:
eligible Judge means a Judge in relation to whom a consent under subsection (2) and a declaration under subsection (3) are in force.
- (2) A Judge of the Supreme Court may, by instrument in writing, consent to be nominated by the Attorney General under subsection (3).
- (3) The Attorney General may, by instrument in writing, declare Judges in relation to whom consents are in force under subsection (2) to be eligible Judges for the purposes of this Part.
- (4) An eligible Judge has, in relation to the exercise of a function conferred on the eligible Judge by this Part, the same protection and immunity as a Judge of the Supreme Court has in relation to proceedings in the Supreme Court.

- (5) A Judge who has given consent under this section may, by instrument in writing, revoke the consent.
- (6) The Attorney General may, by instrument in writing, amend or revoke a declaration under this section.

46C Authority to apply for covert search warrant

- (1) The following persons are authorised to apply for a covert search warrant:
 - (a) a police officer authorised to make the application by a police officer holding the rank of Superintendent or above,
 - (b) the Commissioner or an Assistant Commissioner for the Police Integrity Commission or a member of staff of the Police Integrity Commission authorised to make the application by the Commissioner or an Assistant Commissioner,
 - (c) the Commissioner or an Assistant Commissioner for the New South Wales Crime Commission or a member of staff of the New South Wales Crime Commission authorised to make the application by the Commissioner or an Assistant Commissioner.
- (2) An authorisation to apply for a covert search warrant in respect of a searchable offence may be given in accordance with this section if the person giving the authorisation:
 - (a) suspects on reasonable grounds that there is, or within 10 days will be, in or on the premises a thing of a kind connected with the searchable offence, and
 - (b) considers that it is necessary for the entry and search of those premises to be conducted without the knowledge of any occupier of the premises.

[6] Part 5, Division 2, heading

Omit the heading. Insert instead:

Division 2 Police and other law enforcement officers' powers relating to warrants

[7] Sections 47–50

Omit the sections. Insert instead:

- 47 Power to apply for search warrants** (cf Search Warrants Act 1985 s 5, Crimes Act 1900, ss 357EA, 578D, former LEPRA, s 47)
- (1) A police officer may apply to an eligible issuing officer for a search warrant in respect of any premises if the police officer believes on reasonable grounds that there is, or within 72 hours will be, in or on the premises a thing connected with a searchable offence in relation to the warrant.
 - (2) Without limiting subsection (1), a police officer may apply to an eligible issuing officer for a search warrant if the police officer believes on reasonable grounds that a child prostitution offence has recently been committed, is being committed, or within 72 hours will be committed, on or with respect to premises.
 - (3) An eligible applicant who proposes to enter and search premises covertly may apply to an eligible issuing officer for the issue of a covert search warrant if the eligible applicant:
 - (a) suspects on reasonable grounds that there is, or within 10 days will be, in or on the premises a thing of a kind connected with a searchable offence in relation to the warrant, and
 - (b) considers that it is necessary for the entry and search of those premises to be conducted without the knowledge of any occupier of the premises.
 - (4) To avoid doubt, an application may be made under this section with respect to an act or omission that would be a searchable offence for the warrant if done, or omitted to be done, in New South Wales even though the act or omission occurred outside New South Wales and was not an offence against the law of New South Wales.
 - (5) In this section:
child prostitution offence means an offence under section 91D, 91E, 91F or 91G of the *Crimes Act 1900*.
- 47A General authority conferred by search warrants** (cf former LEPRA, s 48)
- (1) A search warrant authorises any executing officer for the warrant:
 - (a) to enter the subject premises, and

- (b) to search the premises for things connected with a particular searchable offence in relation to the warrant.

Note. Section 67 requires that an occupier of the premises entered under a search warrant (other than a covert search warrant) be given notice on entry or as soon as practicable afterwards. Notice under a covert search warrant is not required to be given to the occupier on entry—see section 67A which permits the deferral of the giving of notice for up to 3 years in total in specified circumstances.

- (2) If the search warrant is a covert search warrant, the executing officer is also authorised:
 - (a) to conduct the entry and search of the subject premises without the knowledge of any occupier of the subject premises, and
 - (b) if necessary to do so to enter and search the subject premises—to enter premises adjoining or providing access to the subject premises (*adjacent premises*) without the knowledge of the occupier of the adjacent premises, and
 - (c) to impersonate another person for the purposes of executing the warrant, and
 - (d) to do anything else that is reasonable for the purpose of concealing anything done in the execution of the warrant from the occupier of the premises.

Note. Other sections of this Act authorise other things to be done under search warrants.

48 Issue of search warrants (cf Search Warrants Act 1985, s 6, Crimes Act 1900, s 357EA, former LEPPRA, s 48)

- (1) An eligible issuing officer to whom an application for a search warrant is made under section 47 may, if satisfied that there are reasonable grounds for doing so, issue the search warrant.

Note. See section 62 (3) in relation to matters to be considered by an eligible issuing officer in determining whether there are reasonable grounds to issue a warrant.

- (2) An eligible issuing officer to whom an application is made for a covert search warrant who is not satisfied that there are reasonable grounds for issuing the covert search warrant may, at the request of the eligible applicant (if the eligible applicant is a police officer), instead issue a search warrant that may not be executed covertly, but only if satisfied that there are reasonable grounds to do so.

49 Seizure of things pursuant to search warrant (cf Search Warrants Act 1985, s 7, former LEPRA, s 49)

- (1) A person executing a search warrant issued under this Division:
 - (a) may seize and detain a thing (or thing of a kind) mentioned in the warrant, and
 - (b) may, in addition, seize and detain any other thing that the person finds in the course of executing the warrant and that the person has reasonable grounds to believe is connected with any offence.
- (2) Without limiting subsection (1), the power to seize and detain a thing includes:
 - (a) a power to remove the thing from the premises where it is found, and
 - (b) a power to guard the thing in or on those premises, and
 - (c) if it is a covert search warrant that authorises the placing of a kind of thing in substitution for a seized thing—a power to place a thing of that kind on the subject premises in substitution for a thing seized.

Note. For the disposal of things seized pursuant to a search warrant, see Division 2 of Part 17.

49A Return or retrieval of thing seized or placed

- (1) A covert search warrant may authorise the return of a thing seized under section 49 (1) (a), or the retrieval of a thing placed under section 49 (2) (c), if the warrant expressly authorises such a return or retrieval.
- (2) If the covert search warrant authorises the return or retrieval of a thing, the subject premises may be re-entered by an executing officer, but only for the purpose of returning or retrieving the thing (as the case may be).
- (3) Any re-entry to return or retrieve a thing must occur within 7 days of the first entry under the covert search warrant (or such longer period as is allowed, prior to the expiration of the 7-day period, by an eligible issuing officer).
- (4) An executing officer authorised to re-enter premises and return or retrieve a thing under this section may do so with the aid of such assistants as the executing officer considers necessary.

50 Search of persons pursuant to warrant (cf Search Warrants Act 1985, s 8, former LEPR, s 50)

A person executing a search warrant issued under this Division may search any person found in or on the premises whom the person executing the warrant reasonably suspects of having a thing mentioned in the warrant.

Notes.

- 1 Under sections 99 and 100 a police officer or other person may arrest and take before an authorised officer to be dealt with according to law any person found in or on the premises whom the police officer or other person suspects on reasonable grounds of having committed an offence.
- 2 Division 4 of Part 4 contains provisions generally applicable to searches of persons.

[8] Section 51 Inquiries pursuant to warrant related to child prostitution offences

Omit “police officer”. Insert instead “person”.

[9] Part 5, Division 3 Notices to produce documents

Omit “authorised officer” wherever occurring.
Insert instead “eligible issuing officer”.

[10] Section 59 Application of Division

Omit “police officers” from section 59 (1) (a).
Insert instead “executing officers”.

[11] Section 59 (2) and (3)

Insert “, 67B” after “67” wherever occurring.

[12] Section 60 Application for warrant in person

Omit “authorised officer” wherever occurring.
Insert instead “eligible issuing officer”.

[13] Section 61 Telephone warrant

Omit “authorised officer” wherever occurring.
Insert instead “eligible issuing officer”.

[14] Section 62

Omit the section. Insert instead:

62 Information in, and consideration of, application for warrant (cf Search Warrants Act 1985, s 12A, former LEPRA, s 62)

- (1) An eligible issuing officer must not issue a warrant unless the application for the warrant includes the following information:
 - (a) the name of the applicant and details of the authority of the applicant to make the application for the warrant,
 - (b) particulars of the grounds on which the application is based, including (without limitation) the nature of the searchable offence or other offence involved,
 - (c) the address or other description of the subject premises,
 - (d) if the warrant is required to search for a particular thing—a full description of that thing and, if known, its location,
 - (e) if the warrant is required to search for a kind of thing—a description of the kind of thing,
 - (f) if a previous application for the same warrant was refused—details of the refusal and any additional information required by section 64,
 - (g) any other information required by the regulations.
- (2) In addition, an eligible issuing officer must not issue a covert search warrant unless the application for the warrant includes the following information:
 - (a) the name of the following persons:
 - (i) the occupier (if known) of those premises,
 - (ii) any person believed to have committed, or to be intending to commit, the searchable offence in respect of which the application is made,
 - (b) whether the occupier is believed to be knowingly concerned with the commission of that searchable offence,
 - (c) if it is proposed that premises adjoining or providing access to the subject premises be entered for the purposes of entering the subject premises—the address or other description of the premises that adjoin or provide such access and particulars of the grounds on which entry to those premises is required,
 - (d) any powers proposed to be exercised on entry to the subject premises that are sought to be authorised by the warrant under section 47A (2) (d),

- (e) details of any covert search warrant that has previously been issued in respect of the subject premises.
- (3) An eligible issuing officer, when determining whether there are reasonable grounds to issue a warrant, is to consider (but is not limited to considering) the following matters:
 - (a) the reliability of the information on which the application is based, including the nature of the source of the information,
 - (b) if the warrant is required to search for a thing in relation to an alleged offence—whether there is sufficient connection between the thing sought and the offence.
- (4) In addition, an eligible issuing officer, when determining whether there are reasonable grounds to issue a covert search warrant, is to consider the following matters:
 - (a) the extent to which it is necessary for the entry and search of those premises to be conducted without the knowledge of any occupier of the premises,
 - (b) the nature and gravity of the searchable offence in respect of which the application is made,
 - (c) the extent to which the privacy of a person who is not believed to be knowingly concerned in the commission of the searchable offence is likely to be affected if the warrant is issued,
 - (d) whether any conditions should be imposed by the eligible issuing officer in relation to the execution of the warrant,
 - (e) if it is proposed that premises adjoining or providing access to the subject premises be entered for the purposes of entering the subject premises:
 - (i) whether this is reasonably necessary in order to enable access to the subject premises, or
 - (ii) whether this is reasonably necessary in order to avoid compromising the investigation of the searchable offence or other offence.
- (5) The applicant must provide (either orally or in writing) such further information as the eligible issuing officer requires concerning the grounds on which the warrant is being sought.
- (6) Nothing in this section requires an applicant for a warrant to disclose the identity of a person from whom information was obtained if the applicant is satisfied that to do so might jeopardise the safety of any person.

[15] Section 63 False or misleading information in applications

Omit “authorised officer” from section 63 (1).

Insert instead “eligible issuing officer”.

[16] Section 63 (1A)

Insert after section 63 (1):

- (1A) A person must not, in or in connection with a report or an occupier’s notice given in relation to a search warrant, give information to an eligible issuing officer that the person knows to be false or misleading in a material particular.

Maximum penalty: 100 penalty units or imprisonment for 2 years, or both.

[17] Section 64 Further application for warrant after refusal

Omit “authorised officer” wherever occurring in section 64 (1).

Insert instead “eligible issuing officer”.

[18] Section 64 (2)

Omit the subsection. Insert instead:

- (2) However, in the case of a warrant other than a covert search warrant, a further application may be made to a Magistrate following a refusal to issue the warrant by an eligible issuing officer who is not a Magistrate whether or not additional information is provided in the further application. Only one such further application may be made in any particular case.

[19] Section 65 Record of proceedings before eligible issuing officer

Omit “authorised officer” wherever occurring in section 65 (1) and (3).

Insert instead “eligible issuing officer”.

[20] Section 65 (1A)

Insert after section 65 (1):

- (1A) An eligible issuing officer who refuses to issue a warrant must cause a record to be made of all relevant particulars of the grounds the eligible issuing officer has relied on to justify the refusal to issue the warrant.

[21] Section 66 Form of warrant

Insert at the end of the section:

- (2) Without limiting subsection (1), a covert search warrant must specify the following:
 - (a) the address or other description of any premises that adjoin or provide access to the subject premises that may be entered under the warrant for the purposes of entering the subject premises,
 - (b) the name of the following persons:
 - (i) the occupier (if known) of those premises,
 - (ii) any person believed to have committed, or to be intending to commit, the searchable offence to which the warrant relates,
 - (c) whether the occupier is believed to be knowingly concerned with the commission of that searchable offence,
 - (d) any conditions imposed in relation to the execution of the warrant,
 - (e) a description of the kinds of things that may be placed in substitution for a seized thing,
 - (f) any other matter required by the regulations.

[22] Section 67 Notice to occupier of premises entered pursuant to warrant

Omit “authorised officer” wherever occurring in section 67 (1).

Insert instead “eligible issuing officer”.

[23] Section 67 (3)–(8)

Omit section 67 (3)–(5). Insert instead:

- (3) An occupier’s notice under this section may be served personally or in such other manner as the eligible issuing officer who issued the warrant may direct.
- (4) **Time for service of notice—warrant other than a covert search warrant**

A person executing a warrant other than a covert search warrant must:

- (a) on entry into or onto the premises or as soon as practicable after entry, serve the occupier’s notice on a person who appears to be an occupier of the premises and to be of or above the age of 18 years, or

- (b) if no such person is then present in or on the premises, serve the occupier's notice on the occupier of the premises within 48 hours after executing the warrant.
- (5) If an occupier's notice cannot practicably be served on a person in accordance with subsection (4) (b), the eligible issuing officer who issued the warrant may, by order, direct that, instead of service, such steps be taken as are specified in the order for the purpose of bringing the occupier's notice to the attention of the occupier.
- (6) An order under subsection (5) may direct that the occupier's notice be taken to have been served on the occupier on the happening of a specified event or on the expiry of a specified time.
- (7) Service in accordance with an order under subsection (5) is taken to constitute personal service for the purposes of subsection (4).
- (8) **Time for service of notice—covert search warrant**
A person executing a covert search warrant must serve the occupier's notice on the person who was the occupier of the subject premises at the time the covert search warrant was executed as soon as practicable after the warrant is executed, unless the service of the notice is postponed under section 67A.

[24] Sections 67A and 67B

Insert after section 67:

67A Postponement of service of occupier's notice—covert search warrant

- (1) Service of an occupier's notice relating to a covert search warrant may be postponed for a period of up to 6 months by the eligible issuing officer who issued the covert search warrant if that eligible issuing officer is satisfied that there are reasonable grounds for the postponement.
- (2) Service of an occupier's notice may be postponed on more than one occasion, but must not be postponed on any one occasion for a period exceeding 6 months or for more than 3 years in total.
- (3) The eligible issuing officer must not postpone service of an occupier's notice for periods exceeding 18 months in total unless satisfied that there are exceptional grounds that justify the postponement.

67B Notice to adjoining occupiers of execution of covert search warrant

- (1) The person to whom a covert search warrant is issued is to prepare a notice under this section (an *adjoining occupier's notice*) if the execution of the warrant will involve entering premises adjoining or providing access to the subject premises (*adjoining premises*) without the knowledge of the occupier of the adjoining premises.
- (2) Before the covert search warrant is executed, the adjoining occupier's notice is to be provided to the eligible issuing officer who issued the warrant for that officer's approval.
- (3) The adjoining occupier's notice:
 - (a) must specify the following:
 - (i) the name of the person who applied for the covert search warrant,
 - (ii) the date when the warrant was issued,
 - (iii) the address or other description of the subject premises, and
 - (b) is to specify or contain any other matters required by the regulations.
- (4) The adjoining occupier's notice must be served on the person who was the occupier of the adjoining premises at the time the covert search warrant was executed, on (or as soon as practicable after) service of the occupier's notice on the occupier of the subject premises under section 67 unless the eligible issuing officer directs that service of the notice may be dispensed with.
- (5) The adjoining occupier's notice may be served personally or in such other manner as the eligible issuing officer who issued the covert search warrant may direct.
- (6) In this section:
adjoining premises does not include common property within the meaning of the *Strata Schemes Management Act 1996*.

[25] Section 68 Announcement before entry

Insert "the warrant is a covert search warrant or if" after "section if" in section 68 (2).

[26] Section 69 Duty to show warrant

Insert "other than a covert search warrant" after "executing a warrant".

- [27] Section 70 Use of force etc to enter premises**
Omit “A police officer” and “the police officer” wherever occurring.
Insert instead “An executing officer” and “the executing officer”, respectively.
- [28] Section 70 (4)**
Insert after section 70 (3):
(4) A person authorised to search premises pursuant to a warrant may do anything that it is reasonably necessary to do to render safe any dangerous article found in or on the premises.
- [29] Section 72 Execution of warrant by day or night**
Insert before section 72 (1):
(1A) A covert search warrant may be executed by day or by night.
- [30] Section 72 (1)**
Insert “(other than a covert search warrant)” after “A warrant”.
- [31] Section 72 (1) and (2)**
Omit “authorised officer” wherever occurring.
Insert instead “eligible issuing officer”.
- [32] Section 73 Expiry of warrant**
Omit “authorised officer” wherever occurring in section 73 (2) and (4).
Insert instead “eligible issuing officer”.
- [33] Section 73 (2A)**
Insert after section 73 (2):
(2A) The time so specified for a covert search warrant is the date that is 10 days after the date on which the warrant is issued.
- [34] Section 73 (3)**
Insert “for a warrant other than a covert search warrant” after “time so specified” in section 73 (3).
- [35] Section 73 (5) and (6)**
Omit section 73 (5). Insert instead:
(5) If no time of expiry is specified in a warrant (other than a telephone warrant or a covert search warrant), the warrant expires 72 hours after issue.

- (6) If no time of expiry is specified in a covert search warrant, the warrant expires 10 days after issue.

[36] Section 73A Extension of warrant

Insert “a covert search warrant or” after “other than” in section 73A (1).

[37] Section 73A

Omit “authorised officer” wherever occurring.

Insert instead “eligible issuing officer”.

[38] Section 74 Report to eligible issuing officer on execution of warrant other than covert search warrant

Insert “other than a covert search warrant” after “whom a warrant” in section 74 (1).

[39] Section 74 (1)

Omit “authorised officer”. Insert instead “eligible issuing officer”.

[40] Section 74A

Insert after section 74:

74A Report to eligible issuing officer on execution of covert search warrant

- (1) An executing officer for a covert search warrant must provide a report in writing to the eligible issuing officer who issued the warrant:
- (a) stating the address or other description of the subject premises, and
 - (b) stating whether or not the warrant was executed, and
 - (c) if the warrant was executed:
 - (i) stating the date on which the warrant was executed, and
 - (ii) stating the name (or code-name) of the person in charge when the warrant was executed, and
 - (iii) stating the name (or code-name) of any person who entered the subject premises to assist in the execution of the warrant and the nature of the assistance provided, and
 - (iv) stating the powers that were exercised under the warrant, and

- (v) setting out briefly the result of the execution of the warrant (including a brief description of anything seized, placed in substitution for a seized thing or examined and any data accessed under section 75B), and
 - (d) if the warrant was not executed—setting out briefly the reasons why the warrant was not executed, and
 - (e) containing such other particulars as may be prescribed by the regulations.
- (2) The report must be provided within 10 days after the execution of the warrant or the expiry of the warrant, whichever first occurs.
- (3) If premises are entered for the purposes of returning or retrieving a thing under section 49A, a report must also be provided in writing to the eligible issuing officer who issued the warrant:
 - (a) stating the address or other description of the premises, and
 - (b) stating the date on which the premises were re-entered, and
 - (c) stating the name (or code-name) of any person who entered the premises for the purposes of the return or retrieval, and
 - (d) stating the name (or code-name) of any person who re-entered the subject premises to assist in the return or retrieval of the thing and the nature of the assistance provided, and
 - (e) setting out a brief description of the thing, and
 - (f) if the thing was not returned or retrieved—setting out the reasons why the thing was not returned or retrieved, and
 - (g) containing such other particulars as may be prescribed by the regulations.
- (4) The report is to be provided within 10 days after the entry to the premises for the purposes of retrieving or returning the thing under section 49A.
- (5) The Commissioner of Police, Commissioner for the New South Wales Crime Commission or Commissioner for the Police Integrity Commission is to ensure that a copy of any report provided under this section is given to the Attorney General.
- (6) A person may be referred to by a code-name in a report required under this section only if:
 - (a) the person who provides the report believes on reasonable grounds that use of the code-name is necessary to protect the safety of the person referred to, and

- (b) a record of the person's actual name and reasons for use of the code-name is kept by the authority in which the person is employed.
- (7) If an executing officer for a covert search warrant has died or is absent the report may be provided by another person from the authority in which the executing officer was or is employed who is authorised to make an application for a covert search warrant.

[41] Section 75

Omit the section. Insert instead:

75 Death, absence of eligible issuing officer who issued warrant (cf Search Warrants Act 1985, s 22, former LEPRA, s 75)

If the eligible issuing officer who issued a warrant has died, has ceased to be an eligible issuing officer or is absent:

- (a) a report required to be provided to that eligible issuing officer under section 74 or 74A, or
- (b) a power exercisable by that eligible issuing officer under section 67 (5), 67A (1), 67B (4) and (5), 73 (4), 73A or 75A (2) or (4),

must be provided to, or may be exercised by, as the case may be, any other eligible issuing officer.

[42] Sections 75A and 75B

Insert after section 75:

75A Operation of electronic and other equipment at premises and removal of things from premises for examination

- (1) A person executing or assisting in the execution of a warrant to which this Division applies may:
 - (a) bring to the premises the subject of the warrant any electronic and other equipment reasonably necessary for the examination of a thing found at the premises, and
 - (b) operate any such equipment (or equipment already at those premises) to examine a thing found at the premises in order to determine whether it is or contains a thing that may be seized under the warrant, and

- (c) move a thing found at the premises to another place (for up to 7 working days) for examination in order to determine whether it is or contains a thing that may be seized under the warrant if the occupier of the premises consents or if:
 - (i) it is significantly more practicable to do so having regard to the timeliness and cost of examining the thing at another place and the availability of expert assistance, and
 - (ii) there are reasonable grounds to suspect it is or contains a thing that may be seized under the warrant.
- (2) If a thing is moved to another place for examination under this section, an eligible issuing officer may authorise the removal of the thing for an additional period (not exceeding 7 working days at any one time) if satisfied that the additional period is required to determine whether it is or contains a thing that may be seized under the warrant.
- (3) The person executing the warrant must advise the occupier that the occupier may make submissions to the eligible issuing officer on the matter and is to give the occupier a reasonable opportunity to do so (except in the case of a covert search warrant).
- (4) The eligible issuing officer may authorise the removal of a thing for a period exceeding a total of 28 days only if satisfied that it is justified on the basis that there are exceptional circumstances in the case.
- (5) The limitation imposed by this section on the period that a thing may be removed to another place ceases when it is determined that it is or contains a thing that may be seized under the warrant.
- (6) This section does not authorise the operation of equipment already at the premises the subject of the warrant to examine a thing unless the person operating the equipment has reasonable grounds to believe that the examination can be carried out without damaging the equipment or the thing.

75B Access to and downloading of data from computers (including access to computers outside premises the subject of a warrant)

- (1) The person executing or assisting in the execution of a warrant to which this Division applies may operate equipment at the premises the subject of the warrant to access data (including data held at premises other than the subject premises) if the person

believes on reasonable grounds that the data might be data that could be seized under the warrant.

Note. Under section 49, data may be seized under a warrant if connected with an offence. Section 46 (3) provides that a thing is connected with an offence if, for example, it will provide evidence of the commission of the offence.

- (2) The person executing or assisting in the execution of the warrant may:
 - (a) copy any accessed data to a disk, tape or other data storage device brought to the premises, and
 - (b) with the approval of the occupier of the premises, copy any accessed data to a disk, tape or other data storage device already at the premises, and
 - (c) take the disk, tape or other data storage device from the premises to examine the accessed data to determine whether it (or any part of it) is data that could be seized under the warrant.
- (3) The person executing or assisting in the execution of the warrant may operate the equipment to put any data that could be seized in documentary form and seize the document so produced.
- (4) The person executing or assisting in the execution of the warrant may seize the equipment and any disk, tape or other data storage device:
 - (a) if it is not practicable to exercise the powers referred to in subsection (2) or (3) in relation to the data, or
 - (b) if possession by the occupier of the equipment or device could constitute an offence.
- (5) This section does not authorise the operation of equipment already at the premises the subject of the warrant to access data unless the person operating the equipment has reasonable grounds to believe that the equipment can be operated without damaging the equipment or the data.
- (6) The responsible officer for an authority must arrange for the removal of any data obtained by the exercise of a power referred to in this section by a member of the authority from any device under the control of the authority and the destruction of any other reproduction of the data in the control of the authority if the responsible officer is satisfied that the data is data that could not be seized under the warrant.
- (7) Subsection (6) does not require the destruction of court records.

- (8) In this section, *responsible officer for an authority* means the following:
- (a) in relation to data obtained by a police officer—the Commissioner of Police,
 - (b) in relation to data obtained by a member of staff of the Police Integrity Commission—the Commissioner for the Police Integrity Commission,
 - (c) in relation to data obtained by a member of staff of the New South Wales Crime Commission—the Commissioner for the New South Wales Crime Commission,
 - (d) in relation to data obtained in execution of a search warrant issued under a provision of an Act specified in Schedule 2—the person prescribed by the regulations.

[43] Sections 76A and 76B

Insert before section 77:

76A Applications with respect to covert search warrants to be dealt with in absence of public

Applications under this Part, and any matters arising under this Part, in respect of covert search warrants that are dealt with by an eligible issuing officer are to be dealt with in the absence of the public.

76B Publication of documents relating to search warrants

- (1) A person must not intentionally or recklessly publish an application for a covert search warrant, a report prepared under section 74 or 74A, an occupier's notice or any information directly derived from such an application, report or notice unless:
- (a) an occupier's notice that relates to the execution of the warrant has been given under section 67 or 67B, or
 - (b) directions have been given in relation to the giving of the occupier's notice under section 67.

Maximum penalty: 50 penalty units or imprisonment for 12 months, or both.

- (2) This section does not make it an offence to publish any application, report, notice or information if the publication is for the purposes of:
- (a) exercising any functions under this Part, or

- (b) the internal management of the NSW Police Force, the New South Wales Crime Commission, the Police Integrity Commission, the Supreme Court or the Attorney General's Department.

[44] Section 79 References in other Acts to "authorised justice" or "authorised officer"

Omit "an authorised officer within the meaning of this Act".

Insert instead "an eligible issuing officer within the meaning of paragraph (a) of the definition of *eligible issuing officer* in section 46 (1) of this Act".

[45] Section 201 Supplying police officer's details and giving warnings

Insert after section 201 (3):

- (3AA) Despite subsection (3), this section does not apply to the exercise of a power to enter premises or to search premises or a vehicle, vessel or aircraft that is conferred by a covert search warrant.

[46] Section 242 Monitoring of operation of certain provisions of Act by Ombudsman

Omit section 242 (1) and (2). Insert instead:

- (1) The Ombudsman must inspect the records of the NSW Police Force, the New South Wales Crime Commission and the Police Integrity Commission under Part 5 in relation to covert search warrants every 12 months after the commencement of this subsection for the purpose of ascertaining whether or not the requirements of that Part (in so far as it relates to covert search warrants) are being complied with.
- (2) For that purpose, the Ombudsman may require the Commissioner of Police, the Commissioner for the New South Wales Crime Commission and the Commissioner for the Police Integrity Commission to provide access to the relevant records.

[47] Section 242 (3)

Omit the subsection. Insert instead:

- (3) The Ombudsman must, as soon as practicable after the expiration of each year after the commencement of subsection (1) (as substituted by the *Law Enforcement (Powers and Responsibilities) Amendment (Search Powers) Act 2009*), prepare a report of the Ombudsman's work and activities under this section and furnish a copy of the report to the Attorney General and the Minister for Police.

[48] Section 242A

Insert after section 242:

242A Annual reports to be given to Attorney General and Police Minister

- (1) The Commissioner of Police, the Commissioner for the New South Wales Crime Commission and the Commissioner for the Police Integrity Commission must each report annually on the exercise of powers under Part 5 with respect to covert search warrants by police officers and staff members of the New South Wales Crime Commission and Police Integrity Commission, respectively.
- (2) Each report is to be provided, within 4 months after each 30 June, to the Minister for Police and the Attorney General.
- (3) The report is to specify the following matters in relation to the year ended on that 30 June:
 - (a) the number of applications for covert search warrants made under Part 5 and the number of those applications granted,
 - (b) the number of applications for telephone covert search warrants and the number of those applications granted,
 - (c) the number of covert search warrants executed,
 - (d) the number of covert search warrants under which any things were seized,
 - (e) the number of covert search warrants under which any things were placed in substitution for seized things,
 - (f) the number of covert search warrants under which any things were returned or retrieved,
 - (g) the number of covert search warrants under which the powers referred to in sections 75A and 75B were exercised,
 - (h) the number of covert search warrants under which any things were tested,
 - (i) the number of arrests made in connection with searchable offences in respect of which covert search warrants were executed and the number of those arrests that have led to the laying of charges in relation to the searchable offences concerned,
 - (j) the number of complaints that are made under any Act about conduct relating to the execution of a covert search warrant by an executing officer and the number of those

- complaints that are, or have been, the subject of an investigation under any Act,
- (k) any other matters requested by the Minister for Police or the Attorney General.
- (4) The reports may be combined with any other annual report of the NSW Police Force, the New South Wales Crime Commission or the Police Integrity Commission.
- (5) The reports are to be tabled in each House of Parliament as soon as practicable after they are received by the Attorney General.

[49] Schedule 5 Savings, transitional and other provisions

Insert at the end of clause 1 (1):

Law Enforcement (Powers and Responsibilities) Amendment (Search Powers) Act 2009

[50] Schedule 5

Insert at the end of the Schedule with appropriate Part and clause numbering:

**Part Provisions consequent on enactment of
Law Enforcement (Powers and
Responsibilities) Amendment (Search
Powers) Act 2009**

Definition

In this Part:

amending Act means the *Law Enforcement (Powers and Responsibilities) Amendment (Search Powers) Act 2009*.

Changes to search warrant provisions

A provision of Part 5, as amended by the amending Act, does not apply to or in respect of a search warrant issued before the commencement of the amendment of that provision. Part 5, as in force immediately before the amendment, continues to apply to and in respect of such a search warrant.

Schedule 2 Amendment of other Acts and regulation

2.1 Law Enforcement (Powers and Responsibilities) Regulation 2005

[1] Clause 3 Definitions

Omit paragraph (a) of the definition of *search warrant* in clause 3 (1).

Insert instead:

- (a) a Part 5 search warrant (other than a covert search warrant),

[2] Clause 8 Receipts for things seized

Insert “other than a covert search warrant” after “search warrant” in clause 8 (1).

[3] Clause 10 Keeping and inspection of records

Insert “or eligible issuing officer (as the case requires)” after “authorised officer” wherever occurring in clause 10 (1) (b) and (3) (b).

[4] Clause 10 (2) (a)

Insert “(including a covert search warrant)” after “warrant”.

[5] Clause 10 (5A)

Insert after clause 10 (5):

- (5A) During the hours that the Supreme Court registry is open to the public, the documents referred to in subclause (1) relating to a covert search warrant may be inspected by the occupier of the premises to which the covert search warrant relates or by any other person who is given an occupier’s notice relating to the warrant under the Act.

[6] Clause 10 (6)

Insert “, other than those referred to in subclause (5A),” after “documents” where firstly occurring.

[7] Clause 11A

Insert after clause 11:

11A Certified records not available for inspection

- (1) An eligible Judge may at any time issue a certificate to the effect that the Judge is satisfied that:

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- (a) a document or part of a document referred to in clause 10 relating to a covert search warrant contains matter:
 - (i) that could disclose a person's identity, and
 - (ii) that, if disclosed, is likely to jeopardise that or any other person's safety, or
 - (b) a document or part of a document referred to in clause 10 contains matter that, if disclosed, may seriously compromise the investigation of any matter.
- (2) The document or part of the document to which the certificate relates is not to be made available for inspection under clause 10 (5A).
 - (3) The certificate is to be kept with the document to which it relates.
 - (4) An eligible Judge (whether or not the one that issued the certificate) may revoke the certificate if satisfied (after consideration of submissions from any interested party) that disclosure of the matter to which it relates is no longer likely to jeopardise any person's safety or seriously compromise the investigation of any matter.

2.2 New South Wales Crime Commission Act 1985 No 117

Section 11 Search warrants

Insert after section 11 (5):

Note. Covert search warrants may be obtained under Part 5 of the *Law Enforcement (Powers and Responsibilities) Act 2002*.

2.3 Terrorism (Police Powers) Act 2002 No 115

[1] Sections 270A and 270B

Insert after section 270:

270A Operation of electronic and other equipment at premises and removal of things from premises for examination

- (1) An eligible person (within the meaning of section 270) executing or assisting in the execution of a warrant may:
 - (a) bring to the premises the subject of the warrant any electronic and other equipment reasonably necessary for the examination of a thing found at the premises, and
 - (b) operate any such equipment (or equipment already at those premises) to examine a thing found at the premises in order

to determine whether it is or contains a thing that may be seized under the warrant, and

- (c) move a thing found at the premises to another place (for up to 7 working days) for examination in order to determine whether it is or contains a thing that may be seized under the warrant if the occupier of the premises consents or if:
 - (i) it is significantly more practicable to do so having regard to the timeliness and cost of examining the thing at another place and the availability of expert assistance, and
 - (ii) there are reasonable grounds to suspect it contains or constitutes a thing that may be seized under the warrant.
- (2) If a thing is moved to another place for examination under this section, an authorised officer may authorise the removal of the thing for an additional period (not exceeding 7 working days at any one time) if satisfied that the additional period is required to determine whether it is or contains a thing that may be seized under the warrant.
- (3) The authorised officer may only authorise the removal of a thing for a period exceeding a total of 28 days if satisfied that it is justified on the basis that there are exceptional circumstances in the case.
- (4) The limitation imposed by this section on the period that a thing may be removed to another place ceases when it is determined that it is or contains a thing that may be seized under the warrant.
- (5) This section does not authorise the operation of equipment already at the premises the subject of the warrant to examine a thing unless the person operating the equipment has reasonable grounds to believe that the examination can be carried out without damaging the equipment or the thing.

270B Access to and downloading of data from computers (including access to computers outside premises the subject of a warrant)

- (1) An eligible person (within the meaning of section 270) executing or assisting in the execution of a warrant may operate equipment at the premises the subject of the warrant to access data (including data not held at the premises the subject of the warrant) if the person believes on reasonable grounds that the data might be data that could be seized under the warrant.
- (2) The person executing or assisting in the execution of the warrant may:

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- (a) copy any accessed data to a disk, tape or other data storage device brought to the premises, and
 - (b) with the approval of the occupier of the premises, copy any accessed data to a disk, tape or other data storage device already at the premises, and
 - (c) take the disk, tape or other data storage device from the premises to examine the accessed data to determine whether it (or any part of it) is data that could be seized under the warrant.
- (3) The person executing or assisting in the execution of the warrant may operate the equipment to put any such data in documentary form and seize the document so produced.
 - (4) The person executing or assisting in the execution of the warrant may seize the equipment and any disk, tape or other data storage device:
 - (a) if it is not practicable to exercise the powers referred to in subsection (2) or (3) in relation to the data, or
 - (b) if possession by the occupier of the equipment or device could constitute an offence.
 - (5) This section does not authorise the operation of equipment already at the premises the subject of the warrant to access data unless the person operating the equipment has reasonable grounds to believe that the equipment can be operated without damaging the equipment or the data.

[2] Section 27W Destruction of records

Insert “(other than data of a kind referred to in section 27OB)” after “record” in section 27W (1).

[3] Section 27W (6)–(8)

Insert after section 27W (5):

- (6) The responsible officer for an authority must arrange for the removal of any data obtained by the exercise of a power referred to in this section by a member of the authority from any device under the control of the authority and the destruction of any other reproduction of the data in the control of the authority if the responsible officer is satisfied that the data is data that could not be seized under the warrant.
- (7) In subsection (6), *responsible officer for an authority* means the following:

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- (a) in relation to data obtained by a police officer—the Commissioner of Police,
 - (b) in relation to data obtained by a member of staff of the New South Wales Crime Commission—the Commissioner for the New South Wales Crime Commission.
- (8) Subsection (6) does not require the destruction of court records.