

**FOURTEENTH ANNUAL REPORT OF
THE QUEENSLAND PUBLIC INTEREST MONITOR**

DELIVERED PURSUANT TO

***THE POLICE POWERS AND RESPONSIBILITIES ACT 2000
THE CRIME AND MISCONDUCT ACT 2001
THE TERRORISM (PREVENTATIVE DETENTION) ACT 2005
THE CRIMINAL CODE OF THE COMMONWEALTH***

**REPORTING PERIOD
1 JULY 2011 - 30 JUNE 2012**

Report date: 31 October 2012

INTRODUCTION

1. This is the 14th Annual Report of the Public Interest Monitor (the PIM) and the first for which I have been responsible. It covers the twelve month period from 1 July 2011 to 30 June 2012.
2. The Report encompasses:
 - (a) the annual report that is required pursuant to section 743 of the *Police Powers and Responsibilities Act 2000* (the *PPRA*); and
 - (b) the annual report that is required pursuant to section 328 of the *Crime and Misconduct Act 2001* (the *CMA*); and
 - (c) the report required pursuant to s. 363 (1) of the *PPRA*.
3. The above reporting requirements are with respect to:
 - (a) covert search warrants; and
 - (b) surveillance device warrants for example, listening devices, tracking devices or optical surveillance devices

obtained by the Queensland Police Service and the Crime and Misconduct Commission.
4. In addition s. 743 (2) of the *PPRA* requires the PIM to report with respect to the *Terrorism (Preventative Detention) Act 2005* in relation to detention and prohibited contact orders. Those orders are made for the purpose of preventing a terrorist act occurring in the near future or to preserve evidence of, or relating to, a recent terrorist act.
5. Finally s. 743 (3) of the *PPRA* requires the PIM to report with respect to Division 104 of the *Criminal Code Act 1995* (Cth). Those reporting

requirements are in relation to control orders imposed for the purpose of protecting the public from a terrorist act.

6. Later in this Report I set out the functions of the PIM pursuant to the relevant legislation. I now turn to the issue of the applications brought during the relevant reporting period.

The Queensland Police Service (the QPS) – Warrant Applications

7. During the reporting period the Queensland Police Service made 3 applications to the Supreme Court for covert search warrants and 60 applications to the Supreme Court and Magistrates Court for surveillance device warrants (including variations and extensions to warrants already issued).
8. There were no applications for control orders pursuant to the provisions of the *Criminal Code Act 1995* (Cth) in which the PIM was required to be involved. Similarly, there were no applications for preventative detention orders pursuant to the State's *Terrorism (Preventative Detention) Act 2005* in which the PIM was required to be involved. In fact there have been no applications with respect to either order in this State since the anti-terrorism regime was introduced.

The Crime and Misconduct Commission (the CMC) – Warrant Applications

9. During the reporting period the Crime and Misconduct Commission made 20 applications to the Supreme and Magistrates Court for surveillance device warrants (including variations and extensions to warrants already

issued and retrieval warrants). There were no covert search warrant applications.

10. As was the case with the QPS there were no applications by the CMC with respect to control orders or preventative detention orders.

Increase in both QPS and CMC Applications Not Indicative of an Increase Generally

11. In the last Annual Report prepared by my predecessor Mr Colin Forrest (now the Honourable Justice Colin Forrest) the QPS was recorded as having made 46 covert and surveillance device applications and the CMC made 13. This compares with the 63 applications made by the QPS and 20 by the CMC recorded in this Report.

12. A consideration of figures recorded in earlier Annual Reports indicates that the number of applications varies from year to year. For example with respect to QPS applications in 2005/2006 there were 70, 64 in 2006/2007, 84 in 2007/2008, 61 in 2008/2009 and 46 in the last Annual Report. Given those figures it is apparent that there has been no change of significance in the number of applications before the courts during this reporting period.

No Breaches by QPS or CMC

13. I carried out inspections on 17 February, 14 March, 17 May, 14 June and 26 October to 30 October 2012 inclusive. Over the course of those inspections I examined each warrant application file opened during the relevant period. There were no breaches of warrant conditions and all relevant material was securely stored. All documents and actions

required to be undertaken with respect to the warrants were efficiently recorded.

14. I note this is a pleasing result and reflects the downward trend in that the number of breaches has fallen from 8 in the 2008 year to 4 in the 2009 year to 2 in the 2010 year to none with respect to this Annual Report.

Third Party Property Rights

15. In the reporting year there were instances of interference with third parties' property rights. As in previous years each instance of interference involved simply crossing or going through a third party's property in order to gain ingress and egress to and from target properties. These instances were permissible under the terms of the warrants.

How an Application Proceeds

16. To better understand the role of the PIM I have set out below how applications proceed and what, on a practical level, occurs when an application is to be brought by either the QPS or the CMC.
17. Applications proceed by way of telephone contact made with the PIM, or one of the two Deputies (DPIM) if the PIM is not available, by the QPS or CMC. The PIM or a DPIM is nominated by the PIM to appear at the hearing depending on their availability at the expected time of hearing or their previous involvement in the particular investigative operation if it is ongoing. The legal officer of the relevant agency then advises what the application is about and fields any questions from the PIM about relevant matters. Draft affidavits and warrants are then delivered to the PIM as early as is practicably possible for his or her consideration. Sworn

affidavits are then usually provided just prior to the hearing of the application.

18. At the hearing of the application a written outline of submissions is handed to the judge or magistrate by the applicant's representative. The PIM's practice is to, generally, provide written submissions, although not always when the application is not opposed. In the case of opposed applications the PIM always provides written submissions. Sometimes, but not often, applicants or other witnesses are required to attend before the judge or magistrate to be questioned by the PIM or, on occasions, by the judge. Oral submissions are also made and sometimes, having heard comments in relation to concerns from the judge or magistrate during the hearing of the application, the PIM and the representative of the applicant agree on a modified position and conditions are imposed which satisfy the concerns of the court.

Opposed Applications

19. In a small minority of cases the PIM or a DPIM may have concerns about an application. This is the point at which the PIM or DPIM may ask more specific questions, make a particular recommendation or express some initial views about the application and matters relevant to it.
20. On occasions additional evidence or information is provided with a view to satisfying concerns expressed by the PIM prior to the hearing of the application. On other occasions during the actual hearing of an application the applicant (or their representative) may be asked by the judge or magistrate to provide a further affidavit or sworn evidence may be taken during the course of the hearing. Although used rarely the right

to question, examine or cross-examine contained in s. 742 (2) (c) of the *PPRA* is an important tool available to the PIM if needed.

21. On the very infrequent occasion when an application is opposed conditions can be imposed or arrangements made to accommodate any issues raised by the PIM or DPIM if so required by the judge or magistrate.
22. In general, though, it is safe to say that the applications, almost without exception, brought by the CMC and QPS comply with the legislative requirements with respect to the grounds for bringing an application. Quite frequently an exchange will take place between the court, the applicant's representative and the PIM or DPIM to clarify an issue. In the event that the issue remains unresolved the application may be stood down or adjourned pending the provision of further material. This has occurred in a very small number of cases.

Warrant Outcomes

23. Although on occasion the surveillance devices have malfunctioned during the reporting period in many instances evidence was obtained which was of assistance to the progress of an investigation or was used in determining whether or not to charge an individual. Arrests have also been made as a result of evidence obtained under the warrants. In the event that the matter may proceed to trial in the future it is usually proposed that any evidence obtained under the warrant will be put into evidence. In a minority of cases no evidence was obtained.

Public Interest Monitor's Functions

24. Pursuant to section 742 of the *PPRA* the PIM's functions are:-

- (a) to monitor compliance by police officers with chapter 9 in relation to matters concerning applications for covert search warrants; and
- (b) to monitor compliance by law enforcement officers with chapter 13 in relation to matters concerning applications for surveillance device warrants, retrieval warrants and approvals of the use of surveillance devices under emergency authorisations; and
- (c) to appear at any hearing of an application to a Supreme Court judge for a warrant or approval mentioned in paragraph (a) or (b), or to a magistrate for a warrant mentioned in paragraph (b), to test the validity of the application, and for that purpose at the hearing, to--
 - (i) present questions for the applicant to answer and examine or cross-examine any witness; and
 - (ii) make submissions on the appropriateness of granting the application; and
- (d) to appear at a consideration of a report made to a Supreme Court judge or a magistrate or given to the monitor and referred to a judge or magistrate under section 357 of the *PPRA*; and
- (e) to gather statistical information about the use and effectiveness of covert search warrants and surveillance device warrants; and
- (f) to report as required by the *PPRA* on any matter about which the *PPRA* expressly requires the public interest monitor to report; and

- (g) whenever the public interest monitor considers it appropriate--
 - (i) to give to the commissioner a report on noncompliance by police officers with chapter 9 of the *PPRA*; or
 - (ii) to give to the chief executive officer of a law enforcement agency a report on noncompliance by law enforcement officers of the law enforcement agency with chapter 13 of the *PPRA*.

25. Also, the Public Interest Monitor has the following functions--

- (a) under the Criminal Code of the Commonwealth, to exercise the power conferred on the monitor under the following sections--
 - (i) section 104.12 (Service, explanation and notification of an interim control order)
 - (ii) section 104.14 (Confirming an interim control order)
 - (iii) section 104.18 (Application by the person for a revocation or variation of a control order)
 - (iv) section 104.19 (Application by the AFP Commissioner for a revocation or variation of a control order)
 - (v) section 104.23 (Application by the AFP Commissioner for addition of obligations, prohibitions or restrictions);
- (b) Under the *Terrorism (Preventative Detention) Act 2005*, to exercise the power conferred on the monitor under the following sections-

- (i) section 14 (General provisions that apply if the PIM must be notified about an application to an issuing authority)
 - (ii) section 73 (Supreme Court hearing and decision);
- (c) to gather statistical information about the use and effectiveness of control orders and preventative detention orders under the Acts mentioned in paragraphs (a) and (b);
- (d) whenever the public interest monitor considers it appropriate--to give to the commissioner a report on noncompliance by police officers with the *Terrorism (Preventative Detention) Act 2005*.
26. The PIM's functions set out in section 326 of the *CMA*, in so far as the CMC is concerned, effectively mirror those set out in section 742 of the *PPRA*. However, the PIM is not the inspection and reporting entity for the CMC, that task being the responsibility of the Parliamentary Crime & Misconduct Commissioner pursuant to sections 322, 362 and 363 of the *PPRA*.
27. Pursuant to s. 214 of the *PPRA* judges who determine covert search warrant applications must be mindful of the highly intrusive nature of a covert search warrant and consider the following:
- (a) the nature and seriousness of the suspected offence or terrorism;
 - (b) the extent to which issuing the warrant would help prevent, detect or provide evidence of, the offence or terrorism;

- (c) the benefits derived from any previous covert search warrants, search warrants or surveillance warrants in relation to the relevant person or place;
- (d) the extent to which police officers investigating the matter have used or can use conventional ways of investigation;
- (e) how much the use of conventional ways of investigation would be likely to help in the investigation of the matter;
- (f) how much the use of conventional ways of investigation would prejudice the investigation of the matter;
- (g) any submissions made by a monitor.

28. Pursuant to section 330 of the *PPRA*, when determining surveillance device warrant applications judges and magistrates have to consider:-

- (a) the highly intrusive nature of a surveillance device warrant;
- (b) the nature and gravity of the relevant offence for which the warrant is sought;
- (c) the extent to which the privacy of any person is likely to be affected;
- (d) the existence of alternative ways of obtaining the evidence or information sought to be obtained and the extent to which those ways may help or prejudice the investigation;
- (e) the evidentiary or intelligence value of any information sought to be obtained;

- (f) any previous warrant of a similar kind sought or issued under the PPRA, the CMA or a corresponding law, if known, in connection with the same offence;
- (g) any submissions made by a monitor.

29. Mindful that the above matters are those which the issuing judge or magistrate has to consider, these are the matters that also exercise the mind of the PIM or DPIM who is involved in each application. It is worth repeating here Mr Forrest's observations in each of his Annual Reports about the discharge of the PIM's functions. That is:-

“Discharge of the Public Interest Monitor’s functions requires a delicate balancing of two competing facets of public interest. The first is the public interest in ensuring that serious criminal conduct is detected, prevented and made the subject of successful prosecution by our law enforcement and prosecutorial authorities, particularly during a time of rapid technological change. The second, and no less important, is that fundamental rights of individual members of our community, such as the right to privacy, are respected and interfered with as little as possible in the process of detecting, preventing and punishing that serious criminal conduct. In addition, a commitment to the principle that independent accountability of our law enforcement agencies strengthens the fabric of our democratic society and aids the rule of law has been central to the creation of the office and the discharge of its functions.”

30. Co-operative relationships between the PIM and the QPS and CMC during this reporting period have resulted in applications for warrants being made where little opposition is offered by the PIM or DPIMs. Where there are concerns the procedures set out in paragraphs 17 to 22 above, including the right to cross-examination as set out in paragraph 20, play an important part.

31. On that issue I concur with Mr Forrest in his strongly held view that the existence of the right to cross-examine applicants remains critically important. As he has said in previous reports:-

“It is considered that the continued existence of this right in conjunction with the integrity of those senior officers at the QPS and the CMC who make the applications and the professionalism of the legal officers who draft the supporting affidavit material contributes significantly to circumstances that generally do not require applicants to be cross-examined, thus freeing up valuable judicial and police time and resources that would otherwise be occupied if cross-examination was a regular practice in these applications.”

32. Finally I express my appreciation for the professionalism with which the legal officers at the QPS and the legal officers at the CMC discharge their duties in relation to the surveillance device warrant and covert search warrant legislation. I thank my two Deputies, Mr. Peter Lyons and Mr. Nathan Jarro, for their assistance and the manner in which they have discharged their responsibilities.



Karen Carmody

Public Interest Monitor

31 October 2012