



31 October | 20

# 20TH ANNUAL REPORT – PUBLIC INTEREST MONITOR

Reporting Period 1 July 2017 – 30 June 2018

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*“The public interest is not one homogenous undivided concept. It will often be multi-faceted and the decision-maker will have to consider and evaluate the relative weight of these facets before reaching a final conclusion as to where the public interest resides. This ultimate evaluation of the public interest will involve a determination of what are the relevant facets of the public interest that are competing and the comparative importance that ought to be given to them so that “the public interest” can be ascertained and served. In some circumstances, one or more considerations will be of such overriding significance that they will prevail over all others.”*

**(Justice Brian Tamberlin McKinnon v Secretary, Department of Justice [2005]  
FCA FC 142)**

## Introduction

1. This is the 20th Annual Report of the Public Interest Monitor ("PIM") and covers the twelve-month period from 1 July 2017 to 30 June 2018.

2. The Report provides information required by statute to be provided with respect to the Queensland Police Service ("QPS") and the Crime and Corruption Commission ("CCC") (previously the Crime and Misconduct Commission). This report also includes information relating to the issuing of consorting notices

3. The Report encompasses:

- a) the annual report that is required pursuant to section 743 of the *Police Powers and Responsibilities Act 2000* (PPRA); and
- b) the annual report that is required pursuant to section 328 of the *Crime and Corruption Act 2001* (CCA) (formerly the Crime and Misconduct Act 2001); and
- c) the report required pursuant to section 363 (1) of the *PPRA* with respect to the QPS.

4. The above reporting requirements are with respect to:

- a) covert search warrants;
- b) surveillance device warrants, for example, listening devices, tracking devices, optical surveillance devices or a combination of devices obtained by the QPS and the CCC; and
- c) consorting notices issued by the QPS and public safety orders issued by Commissioned Officers.

5. In addition section 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.

6. Section 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.

7. Finally, Section 743(3A) of the PPRA requires that the PIM include in the annual report the following matters relating to official warnings for consorting:

- the number of official warnings for consorting given during the year;
- the number of times the giving of an official warning for consorting led to a person committing an offence against sections 790 or 791;
- the extent of compliance by the police service with chapter 2, part 6A (powers relating to the prevention of criminal consorting); and
- the use of official warnings for consorting generally.

Section 743(3B) of the PPRA also requires that the PIM include in the annual report the following matters relating to public safety orders made by Commissioned Officers under the *Peace and Good Behaviour Act 1982*:

- the number of public safety orders made by commissioned officers during the year;
- the extent of compliance by the police service with *the Peace and Good Behaviour Act 1982*, part 3, division 2; and
- the use of public safety orders generally.

Section 743(3C) of the PPRA requires that the PIM within four months after each financial year, give to the Minister responsible for administering the *Peace and Good Behaviour Act 1982* and the Minister responsible for administering the Criminal Code, a copy of any part of a report that relates to a matter mentioned in subsection (3A) or (3B).

In this Report I also 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.

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## The Queensland Police Service ("QPS") - Details of Warrant Applications

8. During the reporting period the Queensland Police Service:

- made no application to the Supreme Court for a covert search warrant;
- made 50 applications to the Supreme Court and Magistrates Court for surveillance device warrants; and
- made one application for retrieval warrant

9. A number of the 50 warrants issued were with respect to more than one device. There were 85 surveillance devices authorised by the warrants being 35 listening devices, 22 optical devices, 19 tracking devices and nine combination devices. All applications made by the QPS were successful.

10. There was one application sought for a retrieval warrant. Retrieval warrants are sought when it has not been possible to retrieve a surveillance device during the original warrant period.

11. 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.

12. 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.

13. There have been no applications with respect to control or preventative detention orders since the anti-terrorism regime was introduced.

### The Crime and Corruption Commission ("CCC") - Details of Warrant Applications

14. During the reporting period the Crime and Corruption Commission:

- made 34 applications to the Supreme and Magistrates Court for surveillance device warrants;
- made two applications to the Supreme Court for a covert search warrant; and
- no applications to the Supreme and Magistrates Court for a retrieval warrant.

15. All applications were successful.

16. A number of the 34 warrants issued were with respect to more than one device. There were 103 surveillance devices authorised by those warrants being 55 listening devices, 29 optical device and 19 tracking devices.

17. There were no applications by the CCC with respect to control orders or preventative detention orders.

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### QPS and CCC Applications

18. In earlier Reports I have monitored the number of covert search warrants and surveillance device warrants sought by both the QPS and CCC.

19. Although the figures fluctuate from year to year it does seem that the number of applications remained constant when compared to the last reporting period.

20. I will continue to monitor the numbers of devices to determine if there are substantial increases or decreases in their numbers.

### Breaches of Warrant Conditions by QPS or CCC

21. There were minor concerns throughout the reportable period with respect to compliance with the conditions of warrants or with recordings.

22. In the case of the CCC there were no breaches of any surveillance device warrant conditions to report.

23. In the case of the QPS there was one occasion during this reporting period where prima facie breach of the terms and the conditions occurred. Details surrounding the prima facie breach are noted below: -

**Breach** - Once a surveillance device warrant is issued the QPS maintains a list of those officers authorised to exercise powers under the warrant, including the monitoring of devices. This written document is known as the Authority to Monitor. In this case, it was determined during the period the devices were monitored, that a police officer monitored the devices on four occasions when he was not included on the Applicant's Authority as a person authorised to exercise powers under the warrant. The officer had commenced duties within the investigative unit only three days prior to his first monitoring duty. The breach occurred between 6 and 12 March 2018, with the breach being reported on 28 March 2018.

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### Third Party Property Rights

24. In the reporting year there were occasions of interference with third parties' property rights. However, 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

**25.** To better understand the role of the PIM I have set out below how applications proceed and what, on a practical level, occurs when either the QPS or the CCC brings an application.

**26.** Applications proceed by way, usually, of telephone contact made with the PIM, or one of the two Deputies (DPIM) if the PIM is not available. The PIM or a DPIM is nominated by the PIM to appear at the hearing depending on their availability or their previous involvement in the particular investigative operation if it is ongoing. The application, the draft supporting affidavit and draft warrant are then delivered to the PIM/DPIM as early as is practicably possible for consideration. Sworn affidavits are usually provided just prior to the hearing of the application.

**27.** If the PIM/DPIM has any concerns or queries they are usually raised with the agency in advance of the hearing. At the hearing of the application a written outline of submissions is handed to the Judge or Magistrate by the agency. The PIM will also provide 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, if necessary, conditions are imposed on the agency with respect to the execution of the warrant, which satisfy the concerns of the Court.

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## Opposed Applications

**28.** In a small number of cases the PIM may have concerns about an application. This is the point at which the PIM may ask the relevant agency for more information, suggest a condition be imposed on the execution of the warrant or simply oppose the application.

**29.** In some instances 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 agency may be asked by the Judge or Magistrate to provide a further affidavit or sworn evidence may be taken while the hearing. The right to question, examine or cross-examine contained in section 742 (2) (c) of the PPRA is an important tool available to the PIM if needed.

**30.** Quite frequently an exchange will take place between the Court, the PIM and the agency during the course of the hearing 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. When an application is opposed conditions can be imposed or arrangements made to accommodate any issues raised by the PIM if so required by the Judge or Magistrate. Alternatively, of course, it may be that the application is refused.

**31.** In general, though, it is safe to say that the applications, almost without exception, brought by the CCC and QPS comply with all of the legislative requirements.

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## Compliance Affidavits – Warrant Outcomes

**32.** Once the use of the surveillance device has ceased or the covert search has been concluded the QPS and CCC must provide a timely "compliance affidavit" to the PIM. Those affidavits state, inter alia, what evidence was obtained which was of assistance to an investigation or was used in determining whether or not to charge an individual.

**33.** Similarly the affidavits report in the event that no evidentiary material was obtained of benefit to the investigation. On much of occasions, the compliance affidavits state that the material obtained has been helpful. On some occasions arrests have also been made as a result of evidence obtained under the warrants. Alternatively, it is envisaged that at some later date arrests will be made. It is usually proposed that any evidence obtained under the warrant will be put into evidence if the matter proceeds to a trial.

**34.** On a few occasions the surveillance devices have malfunctioned. In a small number of cases no evidence of any assistance was obtained. The affidavits of compliance also seek to provide information regarding any breaches of the terms and conditions of the surveillance device warrant. In the case of non-compliance, the QPS is requested to provide a written explanation as to the nature and causes of the noncompliance. As noted earlier in my report there was one occasion where the QPS reported non-compliance with a term or condition of the surveillance device warrant.

## Public Interest Monitor's Functions

35. 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;
- 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) 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.

36. 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*.

37. The PIM's functions set out in section 326 of the CCA, in so far as the CCC 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 CCC, that task being the responsibility of the Parliamentary Crime & Misconduct Commissioner pursuant to sections 322, 362 and 363 of the PPRA.

**38.** Pursuant to section 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; and
- g) any submissions made by a monitor.

**39.** 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 CCA or a corresponding law, if known, in connection with the same offence; and

- g) any submissions made by a monitor.

## CONSORTING NOTICES

**40.** The *Serious and Organised Crime Legislation Amendment Act 2016* (SOC Act) was assented to on 9 December 2016. The SOC Act represents the Government’s legislative policy response (a new Organised Crime Regime) to the recommendations of three independent reviews:

- the Queensland Organised Crime Commission of Inquiry;
- the Taskforce on Organised Crime Legislation; and
- statutory review of the now repealed *Criminal Organisation Act 2009*.

The SOC Act amended some 33 separate pieces of legislation (Acts or Regulations).

**41.** The SOC Act commenced in two main stages, with the exception of Part 7, Division 4 which commences two years after the date of assent.

Stage 1: Commenced on 9 December 2017 including the following key initiatives:

- a new ‘Colours’ offence in sections 10C (1) and (2) of the *Summary Offences Act 2005*;
- the inclusion of a new post-conviction control orders scheme in the *Penalties and Sentences Act 1992* (PSA);
- serious organised crime circumstance of aggravation in section 161R of PSA; and
- occupational licensing reforms across a range of acts that involve the QPS.

Stage 2: Commenced on 9 March 2017 including the following key initiatives:

- a new offence for Habitual Consorting with Recognised Offenders in section 77B of the Criminal Code; and
- the inclusion of a new Public Safety Order scheme comprising restricted premises, fortification removal and public safety orders (including short term commissioned officer issued public safety orders) in the *Peace and Good Behaviour Act 1982*.

42. Section 743(3A) of the PPRA requires that the PIM to include in the annual report the following matters relating to official warnings for consorting:

- the number of official warnings for consorting given during the year;
- the number of times the giving of an official warning for consorting led to a person committing an offence against sections 790 or 791;
- the extent of compliance by the police service with chapter 2, part 6A (powers relating to the prevention of criminal consorting); and
- the use of official warnings for consorting generally.

43. Section 743(3B) of the PPRA also requires that the PIM include in the annual report the following matters relating to public safety orders made by Commissioned Officers under the *Peace and Good Behaviour Act 1982*:

- the number of public safety orders made by commissioned officers during the year;
- the extent of compliance by the police service with the *Peace and Good Behaviour Act 1982*, part 3, division 2; and
- the use of public safety orders generally, and
- public safety orders made by QPS commissioned officers.

44. Section 743(3C) of the PPRA requires that the PIM within four months after each financial year, give to the Minister responsible for administering the *Peace and Good Behaviour Act 1982* and the Minister responsible for administering the Criminal Code, a copy of any part of a report that relates to a matter mentioned in subsection (3A) or (3B).

## QPS IMPLEMENTATION OF CONSORTING NOTICES

**45.** As noted in my 19<sup>th</sup> Annual Report, the new consorting legislation was being implemented by the QPS on a District (and equivalent) Command basis. This allows policing resources to be quickly directed at the District level to target problem places or people. There is no single centralised unit or individual responsible for state-wide monitoring and coordination of the way in which consorting is operationalised on a day to day basis. Districts and Commands are solely accountable for the way in which consorting is implemented and used within their area, including addressing any issues that arise.

**46.** Three types of warning notices are currently being issued:

- a hard copy ticket book style notice, similar to a Notice to Appear, which is considered an accountable form with unique numbers, but which are managed at the District/Regional level and not consecutively numbered or recorded in a central register;
- a hard copy word processed form, primarily for pre-emptive warnings, that allow multiple persons to be included in the document, but which has no individual numbers and is not consecutively numbered or recorded on a central register; and
- work is currently underway to allow the electronic issuing of consorting warning notices via QLite (iPad) devices, however current development scope does not allow for individual and consecutively numbered notices.

**47.** Each consorting warning event is recorded in the Queensland Police Records and Information Management Exchange database (“QPRIME”). In the case of retrospective warnings, each consorting event is recorded in QPRIME using a single occurrence number with persons involved in the consorting and who have been issued with a warning recorded under the

QPRIME occurrence number for that particular event. In the case of pre-emptive warnings, as the issuing of the warning is not event based and issued in advance of a future consorting event, it is recorded in QPRIME using a single occurrence number with each person listed on the pre-emptive warning having their own individual QPRIME occurrence number.

**48.** As I noted in my 19<sup>th</sup> Annual Report, there was no current single purpose central register of all consorting notices issued, other than the QPRIME database generally which is considered the Register of Enforcement Acts for the purposes of section 678 of the PPRA. There is also no unique warning number for each warning issued, other than the QPRIME occurrence number. Whilst not part of a separate standalone register, a search tool has been developed that allows the creation of a list of all warnings issued and recorded on QPRIME that can be sorted by warning type and date through the use of an excel spreadsheet.

**49.** Whilst each consorting event (or in the case of pre-emptive warnings the issuance) has a unique identifying number (QPRIME number) it is not currently possible to allocate unique numbers to each individual warning form each time a warning notice is issued in hard copy or printed or issued across the State. This includes for example, where a warning notice is printed with errors and is required to be amended and re-printed prior to being served, such that both versions have separate and unique numbers for auditing purposes. It is also not currently possible to consecutively list those warnings on a single register.

**50.** In short, it is still not currently possible to identify through an audit process, cases where a warning may have been issued to a recognised offender but not subsequently recorded in QPRIME by the officer.

**51.** The QPS has undertaken some initial consideration of the work that would be required to provide an ability to issue individual and consecutively numbered notices that are recorded on a central standalone register and

which are fully auditable and administered. The QPS advised that it has not been able to identify a software solution that would be capable of generating a unique consecutive number for all consorting notices.

My audit of consorting notices for the reportable period also highlighted the following matters:

1. Ongoing education for QPS officers on the use and recording of consorting notices. As noted in my 19<sup>th</sup> Annual report the legislative provisions of the *Serious and Organised Crime Legislation Amendment Act 2016* (SOC Act) were implemented in two stages. The QPS has confirmed that at the times of such implementation training was provided across the QPS on the new consorting laws. Officers are able to enrol and completed a training package which includes an on-line training module of consorting. Other training initiatives include specific training for Police Prosecutors in relation to changes in jurisdiction to deal with the new offences, court applications including public safety orders, consorting offences and recognised offenders and control orders;
2. Entering of “Effective date and time” on the QPRIME occurrence – an audit of QPRIME records generated in regard to the issuing of consorting notices noted there was a limited number of cases where the “effective to date and time” had not been entered. The QPS has advised that officers who have not entered this date will be required to enter that information. Further, the Organised Crime Regime Steering Committee has advised it will make further inquiries to determine whether changes to the QPRIME system can be implemented to ensure that the QPRIME occurrence cannot be loaded unless the “effective to date and time” particulars are entered; and
3. Automatic Identification of a person who no longer falls within the definition of a ‘recognised offender’ – an audit of QPRIME records

highlighted the need to ensure there was a capacity in QPRIME to automatically identify when a person is no longer deemed by definition to be a “recognised offender”. QPRIME now automatically updates the information in regard to spent convictions.

**53.** With regard to those matters to be reported against on this report as outlined in Sections 743(3A), 743(3B) and 743(3C) of the PPRA for the reporting period to 30 June 2018 I note that:

- 423 pre-emptive verified warnings have been issued state-wide;
- 156 retrospective verified warnings have been issued state-wide;
- 129 consorting preventative directions have been issued;
- Nil persons have been charged with an offence under section 790 (Assault or obstruct police officer) as a result of being issued with an official warning for consorting; and
- Nil persons have been charged with an offence under section 791 (contravene direction or requirement of police officer) as a result of being issued with an official warning for consorting; and
- five persons have been charged with Habitual Consorting under section 77B of the *Criminal Code* (as at 30 June 2018). All charges still before the courts.

**54.** There were nine (9) public safety orders (PSO), all being Commissioned Officer issued public safety orders, made during the reporting period.

**55.** Co-operative relationships between the PIM and the QPS and CCC during this reporting period have resulted in applications for warrants proceeding in a timely manner. Where there are concerns the procedures set out above, including the right to cross-examination play an important part of the application process.

**56.** On that issue and as noted in my last Annual Report, I concur with former Public Interest Monitor, Mr Forrest S.C. in his strongly held view that the

existence of the right to cross-examine an applicant 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 CCC 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."*

**57.** Finally I express my appreciation for the professionalism with which the legal officers at the QPS and at the CCC discharge their duties in relation to the surveillance device warrant and covert search warrant legislation.

**58.** I also wish to thank my two Deputies, Mr Nathan Jarro and Ms Patricia Kirkman-Scroope, for their assistance and the dedicated manner in which they have discharged their responsibilities.



**Peter Lyons**

*Public Interest Monitor*  
29 October 2018