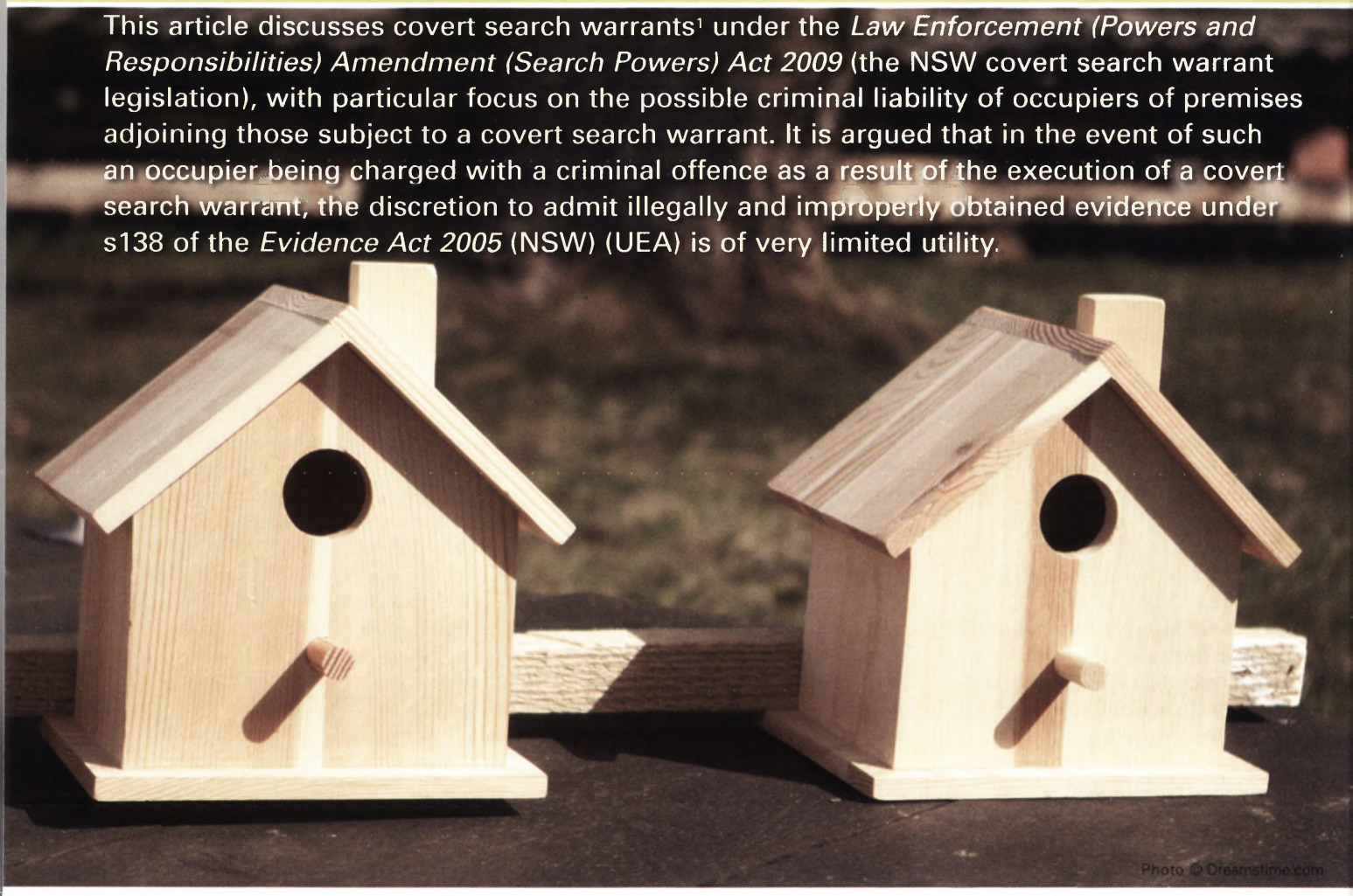
Choose your neighbours carefully!

By Dorne Boniface

'New' NSW covert search warrants and s138

This article discusses covert search warrants[1] under the *Law Enforcement (Powers and Responsibilities) Amendment (Search Powers) Act 2009* (the NSW covert search warrant legislation), with particular focus on the possible criminal liability of occupiers of premises adjoining those subject to a covert search warrant. It is argued that in the event of such an occupier being charged with a criminal offence as a result of the execution of a covert search warrant, the discretion to admit illegally and improperly obtained evidence under s138 of the *Evidence Act 2005* (NSW) (UEA) is of very limited utility.



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Standard search warrant legislation[2] requires notice to be served upon entry of the premises. The occupier's notice informs occupants that a search is or has been authorised and provides details of the reason for the search and the nature of the powers conferred, as well as the rights of the occupant in terms of challenging the warrant. By contrast, covert search warrants authorise the entry and search of premises without the knowledge of the occupier. The occupier's notice can be postponed for years after the search. Covert entry of adjoining premises can be permitted to allow access to premises the subject of a covert search warrant. Searching adjoining premises is not authorised, although seizure of anything believed on reasonable grounds to be connected with any offence is permitted.

Covert search powers are not unique or new. They were included in the *Terrorism (Police Powers) Act 2002* (the NSW terrorism legislation) by amendments made in June 2005. The NSW terrorism legislation gave police powers to prevent imminent terrorist acts and to investigate terrorist acts after they occurred. These covert search powers were said to be 'extraordinary' and 'not designed or intended to be used for general policing'.[3]

However, covert searches facilitated by an informal practice had been used for general policing for some time.[4] This involved obtaining standard search warrants[5] and being granted permission by the issuing officer to postpone service of the occupier's notice. Postponement of the occupier's notice was granted solely for the purpose of enhancing the effectiveness of police investigations, and the covert execution of warrants using this practice was held to be invalid in 2007.[6]

On 4 March 2009, amendment to the standard search warrants legislation[7] providing for covert search warrants

was introduced to the NSW Legislative Assembly. The opposition did not oppose the legislation.[8] It passed rapidly through both houses[9] and, on 7 April 2009, the NSW covert search warrant legislation received royal assent and commenced on 29 May 2009.

The 'debate' and passing of the legislation occurred in an environment of moral panic about alleged 'bikie gang' violence and a government desperate to be seen to be doing something. Reverend the Hon Fred Nile summarised the context:

> 'As other speakers have said, bikie gangs have been involved in violent activities and drug dealing for some time, but there has been an elevation in their sophistication and organisation ... particularly in NSW. If we wish the police to deal with violent bikie gangs we have to increase their powers to do so. ...[O]ver the past few months there has been a dramatic increase in violent activity by bikie gangs. ... We have seen many shootings in different suburbs ... I am sure that speakers critical of the Bill will admit that such events did not occur in previous decades.'[10]

Reference was also made to the possibility that '[A]n overlap might be developing between potential terrorist groups and bikie gangs – a serious issue that should not be ignored. ... These incidents, which have drastically altered the face of law and order in this state, warrant the enactment of covert search warrant legislation.'[11]

Lip-service was paid to the detrimental affect on 'basic civil rights'. The Hon Trevor Khan summarised the pragmatic position of the opposition in the following way:

> 'This is bad legislation in its current form that will achieve outcomes that many do not properly understand. I fear, and I will be happy to be proven wrong, that once legislation such as this is introduced that takes away basic civil rights from all citizens of this state, we will in truth never see those liberties returned. This government would do better to spend the time of this Parliament in developing proper laws to deal with the violence on our streets caused by organised gangs, including outlaw motorcycle gangs, rather than pursuing this legislation in its current form. I find this legislation a bitter pill and do not hide the fact that I find it difficult to swallow, but swallow it I will.'[12]

Pragmatism and reassurance by the safeguards said to be contained in the legislation[13] were considered to be sufficient to pass the Bill, with no small comfort attributed to faith in the police.

> '[B]y affecting such a great expansion of powers, just as we place our everyday safety in the hands of the police, so here we entrust police with the weighty responsibility of protecting the innocent from undue incursions into their privacy and property, and with the task of using these new tools with only the highest level of integrity.'[14]

s138 AND POLICE ACCOUNTABILITY

Serious concerns about the manner in which the police investigate crime and the efficacy of the investigative process itself have been raised by many inquiries and academic studies over the past four decades.[15] It has been pointed out that 'such studies have identified process corruption,[16] corruption for personal gain,[17] discrimination,[18] the use of excessive force[19] and procedural incompetence[20] as impeding ethical and effective criminal investigations'.[21]

Internal police mechanisms, civil actions, criminal prosecutions, review bodies, and independent commissions of inquiry have all played an important part in improving investigative and ethical standards. Yet none of these is so directly geared to the minutiae of the investigative process as the judicial discretion to admit evidence obtained illegally or improperly. It could be argued that the capacity to exclude evidence so obtained may, in theory, be the most potentially effective of the existing mechanisms to encourage police to act legally and properly, because it targets the main purpose of criminal investigations – namely, successful prosecutions. Indeed, it is the only curial mechanism that is structured to dissuade illegal and improper obtaining of evidence.

Section 138 of the UEA provides a discretion to admit evidence obtained directly as a result of, or as a consequence of, illegality or impropriety.[22] It requires the court not to admit the evidence unless the desirability of admitting it outweighs the undesirability of admitting it. Illegally and improperly obtained evidence is inadmissible unless the prosecution can persuade the court that the evidence should nevertheless be admitted.

To determine whether to apply the discretion to admit >>

Warrants represent a control device that interpose an issuing officer between the executive and the private individual.

illegally or improperly obtained evidence, s138(3) requires consideration of eight mandatory but not exhaustive factors. Three of the factors look toward the potential desirability of admitting the evidence – the value of the evidence both in terms of its probative value and its importance in the context of the prosecution case as well as the nature of the relevant offence.[23] Four of the factors examine the potential undesirability of admitting the evidence and therefore examine the conduct constituting the impropriety or illegality – its gravity, whether deliberate or reckless, the difficulty (if any) of obtaining the evidence without the impropriety or illegality, and whether there has been a contravention of the International Covenant on Civil and Political Rights (ICCPR).[24] Section 138(3) also considers whether any other proceedings are likely that might effect reform or redress for the police misconduct.[25]

When each factor is taken into account, the courts have held that the more serious the denial of the defendant's rights, and the more egregious the illegality, the more likely it is that the balance will fall in favour of exclusion.[26] Also, where there is very serious impropriety, this conduct would be outweighed only where the evidence has extremely high probative value, and the offence is extremely serious.[27]

Occupiers of adjoining premises

In what context might occupiers of adjoining premises need to use s138?

Section 47A(2) essentially provides the powers conferred by a covert search warrant – namely, to enter and search the subject premises without the knowledge of the occupant; to enter the adjoining premises without the knowledge of the occupant; to impersonate anyone for the purpose of executing the warrant (including entry of the adjoining premises); and to do anything else that is reasonable to conceal anything done in the execution of the warrant from the occupier of the premises (including the adjoining premises).

There is no power under a covert search warrant for adjoining premises to be searched. However, s49 allows the seizure of anything found in the course of executing the warrant that the executing officer has reasonable grounds to believe is connected with any offence. This means that an executing officer can enter adjoining premises, seize anything in the adjoining premises believed on reasonable grounds to be connected with any offence, and do this before or after obtaining access to the premises that are the subject of the covert search warrant.

If things are seized in adjoining premises, the occupant could be the subject of a criminal charge. At trial, the defence could seek to have the seized thing (evidence) excluded, because it was obtained as a result of, or as a consequence of, an illegality or impropriety. To invoke s138, the defendant must first persuade the court, on the balance of probabilities, that evidence was illegally or improperly obtained.

There might be two sources of illegality or impropriety in the context of covert search warrants. First, there was not strict compliance with the legislative preconditions controlling the issue of the warrant, making it invalid. Second, the actual conduct of law enforcement officials when executing the covert search warrant was illegal or improper.

Proving the first source of illegality or impropriety would require the occupant of the adjoining premises to obtain the documents or the paper trail that shows non-compliance with the preconditions of issue of the covert search warrant. Proving the second source of illegality or impropriety would be contingent on obtaining information about the actual conduct of law enforcement officials when the covert search warrant was executed.

Occupiers of adjoining premises face impediments in regard to both of these matters, and consequent restriction of the utility of s138.

STRICT COMPLIANCE WITH THE LEGISLATIVE PRECONDITIONS

Warrants represent a control device that interpose an issuing officer (the person who issues the warrant) between the executive action (by the law enforcement authority), and the private individual (usually the suspect). The theory is that if police have to demonstrate to an issuing officer the reasonableness of their belief or suspicion,[28] and their proposed investigative action, then private individuals are protected from over-zealous police practices. Strict compliance is required with the legislative preconditions governing the issue of the warrant,[29] or the warrant will be invalid on its face. Justice Kirby, in *State of NSW v Corbett,*[30] summarised the reasons for this rule of strictness in terms of the protection of the quiet and tranquillity of our home; avoidance of occasional violence that can arise from unwarranted or excessive searches; the beneficial control of agents of the state and

> '[t]he provision in advance to those persons of a warrant signifying, with a high degree of clarity, both the lawful ambit of the search and seizure that may take place and the assurance that an independent office-holder has been persuaded that a search and seizure, within that ambit, would be lawful and has been justified on reasonable grounds'.[31]

Preconditions for authorising entry to adjoining premises

If it is proposed that premises adjoining or providing access to the subject premises be entered for the purposes

of entering the premises (the subject of the covert search warrant), 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.[32] The eligible issuing officer is to take into account whether entering adjoining premises is reasonably necessary in order to enable access to the subject premises, or whether this is reasonably necessary in order to avoid compromising the investigation of the searchable offence or other offence.[33] Though these two factors are concerned with the effectiveness of police investigations, and the rights of the occupiers of the adjoining premises is not a specific matter to be considered within the context of allowing entry, a consideration to be taken into account when determining whether a covert search warrant is to be issued is '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'.[34]

Such legislative preconditions on their face provide some confidence that a reasonable balance will be maintained between invading the privacy of persons unconnected to the investigation, and the effectiveness of that investigation.

Some insight into the effectiveness in practice of the same legislative preconditions safeguarding the privacy of occupants of adjoining premises is provided by the NSW ombudsman in an Issues Paper[35] reviewing the exercise of covert search warrant powers under the NSW terrorism legislation.[36]

The covert search warrant powers of the NSW terrorism legislation have been in operation since June 2005. By April 2007, NSW Police had applied for five covert search warrants and all five were issued.[37] Two of the five warrants were not executed. One warrant was not executed because there was no opportunity to execute it covertly. Another warrant was not executed because the address on the application was incorrect.

Eligible issuing officers (Supreme Court judges) who issued the warrants, commented to the ombudsman's office staff that warrant applications had conformed to a high standard. A *proforma* document was used for those covert search warrants. It sets out a standard list of powers available under the legislation. The ombudsman reported that 'it appears these powers are granted, unless the judge crosses any of them out'.[38]

Entry to adjoining premises was authorised in four out of five warrants.[39] The Ombudsman reported:[40]

> 'In three warrants authority to enter adjoining premises was provided. NSW Police subsequently advised that the applicants did not intend to apply for entry to adjoining premises, but did so by default because entry to adjoining premises was included in the proforma warrant document. In each case, the judge signed the warrant without crossing out the reference to entry to adjoining premises.
>
> In one warrant, authority to enter adjoining premises was provided. NSW Police subsequently advised that the application did not in fact provide any grounds upon which entry was required, or provide the address or other description of the adjoining premises, and that "the request in the affidavit to exercise this particular power was erroneous".
>
> In one warrant, no request to enter adjoining premises was made. The judge crossed out the reference to entry to adjoining premises and so the power was not authorised.
>
> ... entry to adjoining premises is still included in the proforma warrant document. This means that, unless the applicant or the judge crosses out the relevant part of the document, the default position will still be that the power to enter adjoining premises will be granted.'

Although this data is a small sample, there is no opportunity to examine a larger sample because the ombudsman's oversight of the exercise of these powers under NSW terrorism legislation finished in September 2007. The fact remains that of the five warrants issued, on one occasion only did the eligible issuing officer delete the *proforma* reference to authorisation to enter adjoining premises.

In practice, the legislative preconditions for issuing a covert search warrant under the NSW terrorism legislation have not safeguarded the privacy of occupants of adjoining premises. This provides a timely warning for issuing covert search warrants under the NSW covert search warrant legislation – more vigilant compliance with the preconditions for issuing a covert search warrant, and less *proforma* documentation.

The existence of documentation related to the application for, and issue of, a covert search warrant creates a paper trail >>

that can be used to show that the warrant has been invalidly issued. In this way, an illegality or impropriety could be substantiated for the purpose of s138 of the UEA. However, occupiers of adjoining premises may not be able to access the relevant paper trail.

OBTAINING INFORMATION

The paper trail

Section 67A of the NSW covert search warrant legalisation allows postponement of the occupier's notice for a period of up to six months, if the eligible issuing officer is convinced that there are reasonable grounds for the postponement. Further postponement can occur in blocks of six-month periods, but for no more than three years in total. The eligible issuing officer, however, must not postpone service of the occupier's notice for longer than 18 months, unless satisfied that there are exceptional grounds for justifying postponement. The legislation provides no hint as to those exceptional grounds, or the less exceptional grounds, that might provide satisfaction to postpone service of the occupier's notice for 18 months.

Section 67B provides that the occupier's notice should be served on the occupier of the adjoining premises after the occupier's notice has been served on the occupier of the subject premises, unless the eligible issuing officer directs that service of the notice may be dispensed with.

There is no suggestion that an occupier's notice for an occupier of the premises the subject of the covert search warrant will be dispensed with;[41] presumably s/he will eventually receive service of the occupier's notice. It is difficult to understand why the occupant of the subject premises should have more right to notice of the covert entry and search than an occupant of adjoining premises.

If the occupier's notice for an adjoining premises is dispensed with, cl10(5A) of the Regulations[42] precludes the occupier of the adjoining premises from inspecting any written application for the warrant, any record relating to the warrant made by or on behalf of an eligible issuing officer or a copy of any occupier's notice.[43] Establishing that a covert search warrant has been issued invalidly is very difficult without the documents that provide the paper trail. In these circumstances, proving an illegality or impropriety based on the invalidity of the issue of the warrant for the purpose of s138 is very limited.

Another illegality or impropriety might be detected from the conduct of law enforcement officers when the covert search warrant was executed.

Law enforcement conduct

The covert search warrant does not authorise search of adjoining premises. Seizing things reasonably believed to be connected to any offence following a search would be unlawful. This makes evidence of the conduct of law enforcement officers while executing the warrant central to proving an illegality or impropriety.

The Australian Human Rights Commission[44] has expressed a concern that:

> 'the delayed notification will mean individuals whose houses have been searched will not be able to challenge searches that are unreasonable, not based on proper grounds, or are excessive – because, in some cases, they will not know that a search has occurred for three years. This is particularly important given some or all of the individuals residing in the premises may not be involved in any criminal activity.'[45]

It is true that by the time an occupier becomes aware of the covert search, memories will have faded and other potential evidence may be lost or destroyed. Without independent evidence of the conduct undertaken when executing a covert search warrant, police notes will be the primary source of information. Police can be cross-examination about their conduct, but because years are likely to have elapsed between the trial and the execution of the covert search warrant, they cannot be expected to have any memory of their specific conduct. As a result, cross-examination will be limited, unless there is some inconsistency between police notes and the s74A report to the eligible issuing officer required after the execution of a covert search warrant (presuming that that has been obtained).

Proving an illegality or impropriety will be very difficult without some independent scrutiny of the conduct resulting in the seizure. Without such evidence, it is difficult even to know whether a search took place. If the defence is unable to persuade the court that evidence has been obtained as a result of, or as a consequence of an illegality or impropriety, s138 is of no utility. There is no express provision in s138 for complaining about the unfairness of this unavailable information.[46]

Independent evidence corroborating the conduct of law enforcement officials would solve this problem. However, the NSW covert search warrant legislation makes no provision for this. By contrast, the comparable Queensland legislation specifically provides for covert searches to be videotaped if practicable.[47] The NSW covert search warrant legislation should also have such a provision.

The NSW Police Standard Operating Procedures (SOPs) apply when exercising powers under the NSW terrorism legislation. Some SOPs relate to the execution of covert search warrants, and in those procedures there is a reference to the presence of an independent officer and video-recording of the execution of the warrant where practicable. The ombudsman's Issues Paper[48] reported that, of the five covert search warrants issued, three were executed and, in one of those, video-recording of the search took place.

The NSW covert search warrants legislation regulations[49] has no clause related to video-recording or SOPs. Video-recording of the execution of covert search warrants, especially entry and access through adjoining premises, should be mandatory and the onus should be on law enforcement officials to provide an acceptable explanation if video-recording did not take place.[50]

The absence of independent evidence of conduct undertaken by law enforcement officials when the covert search warrant is executed has implications beyond s138. It will leave the police vulnerable to repeated allegations >>

of corrupt behaviour because of 'planting' evidence. There is arguably potential for the re-emergence of the stigma on police that resulted from repeated allegations of verballing. Those allegations were manifestly reduced by ERISP (video-recording of police interviews).

So much more could have been done to create a little balance. The Queensland legislation, for example, employs the advocacy of a Public Interest Monitor, who must be advised of a covert search warrant application,[51] and any submission it makes must be taken into account by the eligible issuing officer.[52] This, in itself, could draw specific attention to the necessity (or not) of allowing entry to adjoining premises. When issuing a warrant under the Queensland legislation, the eligible issuing officer may also impose any conditions necessary in the public interest.[53]

The NSW covert search warrant legislation has a legitimacy deficit. Its enactment provided very limited time to review the balancing mechanisms in other states. The ombudsman's Final Report concerning covert search warrants under the NSW terrorism legislation was also not publicly available. This is very regrettable, since the attorney-general had the Final Report but did not table it.[54] That report could have provided an assessment of the balance that had been struck between police and private interests in legislation with an identical scheme for covert search warrants. It could have provided input for submissions by concerned community and professional groups and parliamentary debate. It could have made a significant contribution to rationally assessing the relative balance between intrusion into people's privacy and police operational effectiveness for the NSW covert search warrant legislation.

CONCLUDING COMMENTS

A great deal more can be said about the NSW covert search warrant legislation. This article has merely focused on the position of occupants of adjoining premises and the possibility of them being charged with any offence after seizure of something on their premises. If the offence is serious, s138(3)(c) would encourage admission of the thing (evidence), even if the illegal conduct was serious and deliberate. If the offence is not serious, exclusion would be encouraged. However, in order to invoke s138, the occupant of adjoining premises must show that the evidence has been obtained illegally or improperly. Two critical ways in this context that an illegality or impropriety may be shown have been discussed. The first was proving invalidity of the covert search warrant on its face by virtue of non-compliance with the pre-conditions of its issue. Reference was made to the data obtained by the NSW ombudsman's Issues Paper[55] concerning covert search warrants under the NSW terrorism legislation. That legislation has an identical scheme of preconditions for issuing a covert search warrant as the NSW covert search warrant legislation. The ombudsman's empirical research suggests that if the same *proforma* warrant is used for the NSW covert search warrant legislation, there will be plenty of challenges to warrants based on invalidity on its face.

It has been argued that the NSW covert search warrant legislation allows for the possibility that an occupier's notice for those in adjoining premises can be dispensed with. Clause 10(5A) of the Regulations would then prevent the occupant of adjoining premises from obtaining access to all the documentation necessary to prove that the warrant was invalidly issued. Without a paper trail, the second suggested way of proving an illegality or impropriety would have to be relied upon. This requires occupants of adjoining premises to be able to obtain evidence about the actual conduct of the law enforcement officers when the warrant was executed. The covert search warrant does not authorise a search of the adjoining premises, and if a search took place, any evidence seized would be obtained unlawfully. Neither the NSW search warrant legislation, nor regulations, provide for independent evidence such as video-recording of the execution of the warrant. This will make proof of an illegality or impropriety very difficult, and therefore substantially limit the utility of s138.

The NSW covert search warrant legislation allows our homes to be entered by law enforcement officers without our knowledge and seizure is permitted of anything in our home reasonably believed to be connected with any offence – all by virtue of having a suspicious neighbour.[56] The occupant of adjoining premises can be charged with any offence (serious or not), based on evidence that would not have been available, but for the power permitting entry in order to provide access to premises that are the subject of the covert search warrant. In view of the forgoing discussion, a piece of practical legal advice is 'choose your neighbours carefully'. ■

Notes: **1** Not discussed are the s75A power to operate, examine, remove electronic equipment; or s75B access to and download of data from computers of the *Law Enforcement (Powers and Responsibilities) Amendment (Search Powers) Act 2009*. **2** Part 5 of the *Law Enforcement (Powers and Responsibilities) Act 2002* (NSW), formerly the *Search Warrants Act 1985* (NSW). **3** The Hon Bob Debus, Legislative Assembly *Hansard*, 9 June 2005. **4** Phillip Bradley, NSW Crime Commissioner, evidence given before the NSW Parliamentary Joint Committee on the Office of the Ombudsman and the Police Integrity Commission Inquiry into scrutiny of NSW Police counter-terrorism and other powers, 20 September 2006; Greg Smith, Legislative Assembly *Hansard*, 4 March 2009; Parliamentary debate concerning the *Law Enforcement (Powers and Responsibilities) Amendment (Search Powers) Act 2009* (NSW): The Hon Tony Kelly (Minister for Police, Minister for Lands, and Minister for Rural Affairs), Reverend the Hon Fred Nile and the Hon. John Hatzistergos (attorney-general, and minister for industrial relations), Legislative Council *Hansard*, 24 March 2009. **5** Under Part 5 of the *Law Enforcement (Powers and Responsibilities) Act 2002* (NSW), formerly the *Search Warrants Act 1985* (NSW). **6** *Ballis v Randall* [2007] NSWSC 422 (7 May 2007). **7** Part 5 of the *Law Enforcement (Powers and Responsibilities) Act 2002* (NSW). **8** The Greens opposed the legislation. **9** The Bill received in principle agreement in the NSW Legislative Assembly on 11 March and was introduced to the Legislative Council on the same day. It was passed with amendment on 24 March and returned to the Legislative Assembly where the legislation was passed on 31 March. **10** Legislative Council *Hansard*, 24 March 2009. **11** *Ibid.* **12** *Ibid.* **13** In the Second Reading of the legislation, the Hon John Hatzistergos (Legislative Assembly, 24 March 2009 [3.48pm]) indicated that "Covert search warrants will be available only in connection with certain serious offences and may be authorised only by a Supreme Court judge. Before a warrant can be granted the issuing judge must be

satisfied that it is necessary for the entry and search of the premises to be conducted without the knowledge of the occupier, and specifically give consideration to the nature and gravity of the searchable offence and the extent to which the privacy of any person not believed to be knowingly concerned in the commission of the offence is likely to be affected. Furthermore, while the issuing judge may authorise that service of an occupier's notice be delayed for up to six months at a time, service may be delayed beyond 18 months only in exceptional circumstances and may not be delayed beyond three years in total." Reference was also made to reporting requirements by law enforcement agencies to the issuing judge following execution of the covert search warrant (a copy to be furnished to the attorney-general); agencies and the NSW ombudsman (who has an ongoing oversight role) are also required to report annually on the exercise of covert search warrant powers. 'The scheme is based on the existing scheme for covert search warrants for terrorism offences and incorporates the same safeguards and protections; in particular, the need to seek approval from a senior officer prior to making an application and the need to seek a warrant from the Supreme Court.' **14** The Hon John Ajaka Legislative Council *Hansard*, 24 March 2009. **15** See *Research Report on Trends in Police Corruption*, Committee on the Office of the Ombudsman and the Police Integrity Commission, December 2002. See http://www.parliament.nsw.gov.au/prod/PARLMENT/committee.nsf/0/a467316feb212c4cca256cfb0013c1d2/$FILE/Research%20Report%20on%20Trends%20in%20Police%20Corruption.PDF **16** NSW, Royal Commission into the NSW Police Service, *Final Report* (1997) vol 1 ('Wood Report'); James Morton, *Bent Coppers: A Survey of Police Corruption* (1993) 343; Malcolm Sparrow, Mark Moore and David Kennedy, *Beyond 911: A New Era for Policing* (1990) 133. **17** Queensland, Commission of Inquiry into Possible Illegal Activities and Associated Police Misconduct, *Report of a Commission of Inquiry Pursuant to Orders in Council* (1989) ('Fitzgerald Report'); *Wood Report*. **18** Commonwealth, Royal Commission into Aboriginal Deaths in Custody, *National Report* (1991); Jenny Brockie (director), Janet Chan, *Changing Police Culture: Policing in A Multicultural Society* (1997). **19** Vicki Dalton, 'Police Shootings 1990–97' (*Trends and Issues in Crime and Criminal Justice*, No. 89, Australian Institute of Criminology, 1998); John Sylvester, Andrew Rule and Owen Davies, *The Silent War: Behind the Police Killings that Shook Australia* (1995). **20** P Greenwood & J Petersilia J, *The Criminal Investigation Process: Summary and Policy Recommendations* (1975) vol 1, reproduced in David Bayley (ed), *What Works in Policing* (1998) 75. **21** B Presser, 'Public Policy, Police Interest: A Re-Evaluation of the Judicial Discretion to Exclude Improperly or Illegally Obtained Evidence' - [2001] MULR 24; (2001) 25 *Melbourne University Law Review* 757 at 757. **22** See *Robinson v Woolworths* (2005) 158 A Crim R 546. **23** *Evidence Act 2005* (NSW) s138(3)(a),(b),(c). **24** *Ibid*, s138(3)(d),(e),(g),(h). **25** *Ibid*, s138(3)(f). **26** *R v Gilham* [2008] NSWSC 88 (18 February 2008) at [22]. **27** *R v Camm*; *R v Cary*; *R v Quince* [2008] NSWDC 40 (19 February 2008) at [32]; see also *R v Dalley* (2002) 132 A Crim R 169 per Spigelman CJ at 172 [7] 'In my opinion, the public interest in the conviction and punishment of those guilty of crime is entitled to greater weight in the case of crimes of greater gravity, both at common law and pursuant to s138(3)(c). (See also *R v Burrell* [2001] NSWSC 120 at [38] per Sully J.)' Blanch AJ agreeing at 189 [102]; *R v MM* [2004] NSWCCA 364. **28** The state of mind required for standard search warrants is reasonable grounds to believe (s47(1) *Law Enforcement (Powers and Responsibilities) Act 2002* (NSW)). The state of mind required for covert search warrants is reasonable grounds to suspect (s47(3)(a) *Law Enforcement (Powers and Responsibilities) Act 2002* (NSW) – this state of mind must be held by the applicant and by a police superintendent or above, etc, see s46C. **29** *George v Rockett* (1990) 170 CLR 104. **30** *State of New South Wales v Corbett* [2007] HCA 32. **31** *Ibid*, per Kirby J at [22]. **32** *Law Enforcement (Powers and Responsibilities) Act 2002* (NSW), s62(2)(c). **33** *Ibid*, s62(4)(e). **34** *Ibid*, s62(4)(c). **35** NSW Ombudsman, Issues Paper Review of Parts 2A and 3 of the *Terrorism (Police Powers) Act 2002*, April 2007, Preventative Detention and Covert Search Warrants, Chapter 3. **36** The NSW Ombudsman's oversight of the exercise of the powers in the NSW terrorism legislation finished in September 2007. *Ibid*, p42. **37** See note 35 at p35. **38** See note 35 at p38. **39** No adjoining premises were entered during the execution of the warrants issued, see note 35 at p39. **40** See note 35 at pp39-40. **41** See *Law Enforcement (Powers and Responsibilities) Act 2002* (NSW),ss67 and 67A. **42** *Law Enforcement (Powers and Responsibilities) Regulation 2005*. **43** This is so, because the occupier of adjoining premises is not 'the occupier of the premises to which the covert search warrant relates' and if the occupier's notice has been dispensed with, is not a 'person who is given an occupier's notice relating to the warrant'. See cl.10(5A) *Law Enforcement (Powers and Responsibilities) Regulation 2005*. **44** Previously known as the Human Rights and Equal Opportunity Commission. **45** Letter dated 18 March 2009 to the Hon John Hatzistergos MP, attorney-general and the Hon Greg Smith MP, shadow attorney-general – footnotes omitted. **46** See also *R v EM* [2003] NSWCCA 374 at [74], Howie J (Ipp JA and Hulme J agreeing). Whether there are arguments concerning s137 and 'unfair prejudice' is a discussion for another time. **47** *Police Powers and Responsibilities Act 2000* (Qld) s216(e). **48** See note 35 at p39. **49** *Law Enforcement (Powers and Responsibilities) Regulation 2005*. **50** Section 281 *Criminal Procedure Act 1986* could provide a model. **51** *Police Powers and Responsibilities Act 2000* (Qld) s212(4). **52** *Ibid*, s214(g). **53** *Ibid*, s215(2). **54** The NSW Ombudsman's Final Report reviewing Part 3 (Covert Search Warrants) of the *Terrorism (Police Powers) Act 2002* was completed in September 2008. It was sent to the attorney-general, but it has not been tabled in Parliament at the time of writing. **55** See note 35. **56** Surprisingly, the state of mind required to apply for a covert search warrant compared to a standard search warrant is less onerous, see note 28.

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Editor's note: This article has been peer-reviewed in line with standard academic practice.