

## **Warrant Review Closing Report**

### **Index**

1. Foreword
2. Executive Summary
3. Setting the scene
4. Legal requirements
5. The NCA warrant review
6. Review Panel process
7. Review Panel findings
8. Thematic issues
9. Review Panel recommendations and action taken
10. External assurance and review
11. Conclusion

## **1. Foreword**

*Lynne Owens, Director General of the NCA*

It is essential that the NCA retains the confidence of the public in how it goes about its work. To do that we must maintain high professional standards in all we do and, where standards are found to have slipped, we must take swift remedial action. As a responsible and transparent agency, we should also be willing to make public the action taken.

I am very grateful to the warrant Review Panel, including the Crown Prosecution Service, for undertaking such a thorough piece of work and to the external Independent Advisory Panel for its oversight. While I recognise that this report highlights some areas where we must improve, and have, I am reassured by the steps that have been taken to prevent reoccurrence. We will continue to audit our progress and welcome the further future external scrutiny suggested by our Independent Advisory Panel. It is likely that our learning in this review may be relevant to others and we have shared it widely, including with law enforcement partners and the courts.

My ambition for the Agency is that we are at the international forefront of the fight to cut serious and organised crime. This relies on our ability to present unassailable cases to the CPS (for criminal cases) or direct to civil courts in others based on thorough knowledge of the law and scrupulous attention to detail in case preparation; that will be our focus.

*Gregor McGill, Director of Legal Services CPS*

The CPS has worked closely with the NCA throughout their warrant review to ensure that any deficiencies are identified, disclosure obligations discharged and that lessons are learned. The review has been a substantial undertaking with significant input from prosecutors across the Organised Crime Division of the CPS. Where deficiencies have been identified, CPS prosecutors continue to work jointly with NCA officers to discharge their disclosure obligations.

The review has been an excellent example of successful partnership working. High standards have been adopted and I am satisfied with the scope of the review undertaken.

It is appropriate that this closing report is published, to explain the steps taken and share the thematic learning with others involved in the criminal justice process.

## **2. Executive Summary**

In the summer of 2015, as a result of deficiencies identified in the warrants and production orders in two separate operations, the NCA established a comprehensive review to examine its existing warrant

processes and review all warrants and orders in live cases for potential deficiencies.

By mid-September 2015 updated training and guidance had been issued across the agency to deliver an immediate improvement in standards. From that date, only those who had received this training could authorise new applications for warrants or orders under the Police and Criminal Evidence Act 1984 ("PACE") or the Proceeds of Crime Act 2002 ("POCA").

In addition, all of the warrants and orders obtained from the courts in live pre-conviction criminal cases have been reviewed so that any potential deficiencies can be identified and addressed. This work has been carried out by an independent Review Panel, chaired by a senior NCA lawyer, with participation from senior lawyers in the Organised Crime Division of the CPS, external counsel and senior operational managers. This documentary review has taken approximately six months to complete.

The review itself has been subject to external scrutiny and challenge, via an Independent Advisory Panel which has reviewed the methodology and work undertaken and heard from those involved in the review. The full report from the Independent Advisory Panel to the NCA's Board is contained at Appendix A. The external Independent Advisory Panel is satisfied that the review has been thorough and robust, with high standards expected from the warrants and orders reviewed.

In total the Review Panel reviewed all of the warrants and orders obtained in 326 operations, with over 3000 documents assessed.

733 PACE warrants were reviewed, covering 268 separate operations. 2279 orders, applications and warrants under POCA were reviewed, spanning 96 separate operations. (38 operations had a combination of warrants and orders obtained under PACE and POCA).

The Review Panel set a deliberately high standard for warrants and orders so as to capture any arguable deficiency. The majority of issues identified were judged as minor, such as a failure adequately to articulate the items sought, the inclusion of catch all phrases on the face of the warrant (eg "any other documentation") or the use of jargon in the applications in support. Full details of all the issues noted by the Review Panel are covered in the report.

In no case did the Review Panel identify any bad faith or misconduct on the part of individual officers.

The Review Panel noted deficiencies as potentially significant if there was a significant risk that they could result in challenges to the lawfulness of the retention of the material, for example if a warrant failed to specify the items sought, or a warrant was sought under a legislative provision which did not empower the court to make such an order.

Potentially significant deficiencies were noted in 51 of the operations reviewed. To date none of these deficiencies have resulted in any investigations or prosecutions being discontinued. In three cases, the NCA has invited the defendant to consent to the NCA's continued retention of material held (otherwise an application would be made to the court to seek authority to continue to retain the material seized)<sup>1</sup>. In all three cases the defendant has consented.

More minor deficiencies were identified in 242 operations. Such deficiencies were mostly technical in nature – for example a failure to precisely articulate the items sought and/or the inclusion of catch all phrases on the face of the document (eg “any other documentation”), a failure to confirm whether or not a suspect had a previous criminal record, a lack of detail about the nature of the investigation on the face of the warrant, or a failure to give adequate time estimates for the application before the court.

In cases where deficiencies were identified, disclosure has been, is being or will be made to the defence (or suspect if the case is pre-charge) regardless of the nature of the deficiency.

To date, no prosecutions have been discontinued as a result of deficiencies identified during the NCA's warrant review and the NCA has not made any applications to retain material under s59 CJPA as a result of the Review Panel's findings.

In all cases where the Review Panel identified deficiencies, the Gold Group continues to monitor how these deficiencies are being addressed by the investigation and prosecuting teams, as disclosures are made and criminal prosecutions come to trial.

The NCA is committed to learning from this review and ensuring that professional standards are maintained, without a repeat of past errors.

An Operational Standards department has been established with central responsibility for delivering guidance, training and templates that remain fit for purpose. Warrants and orders obtained since mid-September 2015 are subject to a rolling quality assurance programme, which is assessing the improvement in standards since the agency wide training was delivered. All warrants and orders obtained by NCA officers must now be centrally recorded to enable effective monitoring. CPS prosecutors within the Organised Crime Division (which prosecutes the majority of NCA cases) are alert to these issues and disclosure officers are instructed that all warrants, orders and applications for the same must always be considered for disclosure.

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<sup>1</sup> Applications may be made under s59 Criminal Justice and Police Act 2001 (“CJPA”).

Although the review has not identified any issues of bad faith or misconduct, going forwards, officers who fail to meet standards will be subject to professional competency and/or disciplinary review.

There will continue to be senior oversight of the Agency's improved standards after the warrant Gold Group is disbanded. A new Criminal Justice Delivery Group will be created from April 2016 which will review the effectiveness of the NCA's warrant procedures, current standards and any issues identified through the NCA's rolling quality assurance programme. The Group will be chaired jointly by the NCA's Deputy Director for Specialist Support and the Deputy Head of the CPS Organised Crime Division, who led and participated in the NCA's Warrant Gold Group.

The NCA has shared the findings of its review with the wider policing and law enforcement community, and with appropriate members of the judiciary and court officials.

The Independent Advisory Panel, which was convened to provide assurance to the NCA's Board that the warrant review has been carried out appropriately, has recommended that there should be a further external review of the NCA's warrant processes and standards in approximately 18 months, to ensure that lessons have been learned and that sustainable improvements have been made. The NCA accepts this recommendation, and the other recommendations made in the report, and will liaise with Her Majesty's Chief Inspector of Constabulary ("HMIC") and Her Majesty's Chief Inspector of the Crown Prosecution Service Inspectorate ("HMCPPI") to plan such a review. If a joint HMIC/HMCPPI inspection is not possible in this timeframe, another external review will be arranged. The NCA Board will also ask the NCA's Audit Risk and Assurance Committee to consider an annual report on the efficacy of the warrant quality assurance programme, as recommended by the Independent Advisory Panel.

## **The Report**

### **3. Setting the scene**

The powers that law enforcement officers have to obtain search warrants under PACE and other legislation, and orders giving access to information under POCA, raise important issues, not least the proper balance between those intrusive powers and the rights of suspects and members of the public.

In 2015 a number of warrants and production orders obtained by the NCA, issued by Magistrates' and Crown Courts were challenged in legal proceedings, first in Operation Heterodon (R (Chatwani & Others) v NCA), and then in Operation Enderby 2 (Ram and others).<sup>2</sup> Those cases identified areas where the NCA had failed to comply with legal requirements for warrants and orders under PACE and POCA. The deficiencies identified had the potential to undermine public confidence in the ability of the NCA to properly convict individuals suspected of involvement in serious and organised crime.

As a result, the NCA commenced an urgent and comprehensive review into its procedures for obtaining search warrants and orders under PACE and POCA. It began a documentary review of all of the warrants and orders granted by the courts in live pre-conviction criminal cases in order to identify and address any potential deficiencies. It also brought this work to the attention of prosecutors within the Organised Crime Division of the CPS, which has conduct of prosecutions resulting from NCA investigations.

This report is the closing report from that review.

### **4. Legal requirements**

#### **A. Statute**

##### **PACE**

The majority of search warrants obtained by the NCA are issued under PACE.

Searches are made under the authority of a warrant issued by a Magistrates' or Crown Court following an application under sections 8 or 9 of PACE. Applications are made to authorise entry onto specified premises to search and seize material which is believed to be relevant to an ongoing criminal investigation.

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<sup>2</sup> The Judicial Review proceedings which challenged the warrants and production orders in Operation Heterodon concluded in May 2015. The criminal proceedings in Enderby 2, in which further deficiencies were identified, concluded in August 2015.

If an individual has already been arrested, searches may also be carried out under s18 PACE without a warrant providing an officer has reasonable grounds for suspecting that there is evidence that relates to the offence under investigation or some other indictable offence which is connected with, or similar to, that offence.

Templates for applications for searches under sections 8 and 9 of PACE are provided within Part 47 of the Criminal Procedure Rules (“CrimPR”). The conduct of such searches and the seizure of any material found is governed by PACE Code B “Revised Code of Practice for Searches of Premises by Police Officers and the Seizure of Property found by Police Officers on Persons.”

It is well established that entry onto, or searches of, a premises under a warrant is unlawful unless it complies with sections 15 or 16 of PACE (see R v Chief Constable of Warwickshire Police ex parte Fitzpatrick [1999] 1 WLR 564) which require any warrants obtained to specify:

- the name of the person who applies for it;
- the date on which it is issued;
- the enactment under which it is issued;
- each set of premises to be searched; and
- the articles or persons to be sought.

A short guide to the main requirements under PACE is provided in Appendix B.

## **POCA**

Part 8 of POCA provides a wide range of investigative powers including powers to obtain production orders, account monitoring orders, customer information orders and search and seizure warrants.<sup>3</sup> These powers are distinguishable from those governed by PACE in that different criteria apply depending on whether the investigation is a money laundering investigation, a confiscation investigation, a cash detention investigation or a civil recovery investigation.

The applications made in support of any element of criminal proceedings are made in the Crown Court. Applications for production orders, account monitoring orders and customer information orders may be made ex parte to a judge in chambers. Applications for search and seizure warrants in support of criminal proceedings are made ex parte but must demonstrate that the investigation might be seriously prejudiced if a person arriving at the premises is not able to secure immediate entry.

The templates for such applications are provided in Part 47 CrimPR.

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<sup>3</sup> See Appendix B.

## **B. Case law**

In recent years the High Court has considered the statutory requirements for warrants and orders under PACE and POCA. These cases have involved a number of different law enforcement agencies.

It is a matter of public record that, in some cases, the court has quashed search warrants that were obtained unlawfully and ordered the return of material seized. Damages and costs have also been awarded against law enforcement agencies.

The main theme of recent case law is that warrants must be clear and precise. It has been stressed repeatedly that a search warrant must be a self contained document, sufficient to identify to the executing officer and the occupier of the premises the nature of the material to be searched for and the reason it is sought. Orders made under POCA must be similarly precise as to the material sought, in so far as it is possible to do so, and why.

## **5. The NCA Warrant Review**

### **A. Review of warrant processes and updated training**

From the summer of 2015, the NCA carried out a comprehensive review of its internal warrant procedures (including internal guidance and templates) and established an Operational Standards department to reinforce the delivery of appropriate training and guidance across the agency.

With effect from mid-September 2015 training had been delivered across the agency to improve standards.

In August 2015 the NCA's legal team delivered training to all NCA authorising officers (Grade 3s<sup>4</sup>) on the requirements for obtaining warrants under sections 8 and 9 of PACE. Practical guidance was issued and warrant templates were updated and published centrally. All of the training, guidance and templates were approved by external counsel before their use and, from September 2015, only Grade 3 officers who had received this training could authorise new applications for search warrants under PACE.

In mid-September 2015 training was delivered to all Financial Investigators responsible for authorising orders or warrants under POCA and revised templates were issued. This material was endorsed by the Head of the Financial Investigation profession prior to its use. From mid-September 2015, only officers who had completed this training could authorise new applications for warrants or orders under POCA.

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<sup>4</sup> Equivalent to a Detective Inspector.

## **B. Review of all warrants/orders obtained in live cases**

At the same time as the above, the NCA also commenced a review of all warrants and orders obtained in live pre-conviction criminal cases in order to identify and address potential deficiencies.

### Gold Group governance

To carry out this work a Review Panel was established under the direction of a Gold Group. The Gold Group was led by the NCA's Deputy Director for Specialist Support and attended by senior representatives from all NCA commands, the NCA's Legal Adviser, the Head and Deputy Head of the CPS Organised Crime Division and the Chair of the Review Panel.

The Gold Group has met approximately fortnightly since then to monitor the progress of the Review Panel and ensure that any broader issues requiring improvement are identified and addressed.

## **6. The Review Panel process**

The Review Panel was comprised of:

- NCA lawyers (with a senior NCA lawyer acting as Chair);
- An independent team of CPS Organised Crime Division prosecutors;
- Senior NCA operational officers; and
- Independent barristers.

None of the individuals who participated in the review had been involved in the operations under review.

The Review Panel has carried out a documentary review of all of the following documents in live pre-conviction criminal cases:

- Search warrants granted by a Magistrates' Court or a Crown Court, together with the information/application laid in support;
- Internal search and scene book records of the authorisations given for searches conducted under section 18 of PACE; and
- Production orders, account monitoring orders and customer information orders relating to confiscation or money laundering investigations, together with the information laid in support.

Historic operations where criminal proceedings had concluded and/or no further action was being taken were not reviewed. The Gold Group has kept under continual review whether historic cases should be considered and has sought counsel's advice on this issue. It remains satisfied with the scope of the review undertaken. The Panel has not noted any deficiencies which would render a conviction unsafe had a prosecution already concluded.

In total the Review Panel has examined warrants and orders obtained in 326 operations, broken down as follows:

- PACE warrants were reviewed in 268 separate operations. A total of 733 warrants were reviewed.
- Applications under POCA were reviewed in 96 separate operations (38 operations had a combination of PACE and POCA warrants and orders). In total 2279 POCA related documents (production orders, account monitoring orders, customer information orders, warrants and applications in support) were reviewed.

In total over 3000 documents were assessed during a documentary review that took approximately six months to complete.

The Review Panel received paperwork from all NCA operational offices in England, Wales and Northern Ireland. The scope of the review did not extend to Scotland due to the fact that its application system for such warrants and orders is procurator led. Orders sought from the Royal Courts of Justice in civil recovery investigations were outside the scope of the review since such applications are subject to significant pre-application review with counsel prior to any application.<sup>5</sup>

### Methodology

Members of the Review Panel were selected because of their expertise in the requirements for warrants and orders under PACE and/or POCA, and were briefed on the requirements of the documentary review and relevant case law before commencing the review.

Standard checklists were developed for the Review Panel members to confirm whether the statutory and case law requirements in respect of the various warrant and orders were met in the papers reviewed. These checklists were agreed with the CPS and external counsel prior to their use.

The findings of each Review Panel member were ratified by at least one other member of the Review Panel and/or its Chair before being finalised.

The Review Panel set a deliberately high standard for warrants and orders to meet so as to capture any arguable deficiency.

### Steps taken subsequent to the document review

Once the Review Panel had concluded its assessment of the documentary material, its findings were provided to the Senior Investigating Officer (SIO) in each case for discussion with the relevant CPS prosecutor and agreement as to how potential deficiencies should be addressed.

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<sup>5</sup> Orders in post-conviction confiscation proceedings were also outside the scope of this review.

The significance and impact of the potential deficiencies identified by the Review Panel could only be assessed by those with detailed knowledge of the case, as potential deficiencies needed to be assessed within the totality of the investigation.

The importance of dealing with this at local level can be illustrated by examples:

(i) If a deficiency had been identified in a warrant which had not resulted in the acquisition of material relied on in the prosecution, the impact of the potential deficiency was likely to be appropriately addressed by making disclosure to the defence, in accordance with the prosecution's ongoing disclosure obligations. In this example the significance of the potential deficiency (ie whether the warrant had resulted in any information relied on) would only be known to those with detailed knowledge of the case.

(ii) The Review Panel may have noted as a potential deficiency a failure to properly articulate the connection between the address to be searched and the suspected criminality. This may, however, have been explored during the hearing before the court. Confirmation that these issues were explored during the course of the application, and disclosure of any notes taken by the court or officers attending, would be relevant to how such deficiencies should be addressed. Again, this context would only be known to those with detailed knowledge of the case.

For these reasons, responsibility for determining the appropriate method for addressing potential deficiencies was passed to the SIO and CPS prosecutor.

## **7. Thematic issues**

The most common issues identified by the Review Panel were as follows.

### **A. PACE search warrants – thematic issues**

#### Precision of drafting

Warrants and the applications in support were not always drafted using precise language.

The need to be precise when making applications for search warrants has been stressed repeatedly by the courts in recent case law including R (Rawlinson and Hunter Trustees and others) v Central Criminal Court [2012] EWHC 2254 (Admin) and the case of AC, RC, BK, GST v Nottingham and Newark Magistrates' Court HMRC [2013] EWHC 3790 (Admin), where it was held that:

"The purpose of this mandatory statutory requirement is to enable anyone interested in the exercise of a warrant to know

what are the limits of the power of search and seizure which have been granted. This is necessary so that such a person can be put in a position to enable him to challenge the lawfulness of the seizure of any particular item. Accordingly, it is now well established that the terms of the warrant must be precise and intelligible by reference exclusively to its own terms and not by reference to any other material.”

Common potential deficiencies identified by the Review Panel were the inclusion of catch all phrases on the face of the warrants (eg “any other material”) and a lack of specificity when describing the material sought (eg “telephones” – rather than “Apple mobile telephone”).

The Review Panel identified that some applications contained jargon and acronyms that may have been difficult for the authorising court to understand.

The Review Panel noted a lack of specificity and/or unclear use of language as a potential deficiency.

#### Failure to specify the lack of antecedents

Some applications did not confirm whether the subject of the warrant and/or occupier of the premises had a previous criminal record. While applications often confirmed when criminal records existed, they did not confirm the position when there were no previous criminal records. The Review Panel noted any such failures as a potential deficiency, as the lack of a criminal record is a factor of which the court should be made aware during an ex parte application.

#### Insufficient time estimates

Some applications provided an unrealistic time estimate for the application before the court. Given the complex nature of the investigations undertaken by the NCA, and the number of different warrants and orders that may be sought, applications should be afforded appropriate time to enable discussion of relevant issues. Realistic time estimates should be included to enable the court to determine an appropriate listing. The applications reviewed by the Panel did not demonstrate, as standard, a case by case assessment of the likely time required.

#### Consistency of information across warrants and applications

The Panel noted that in some cases there were inconsistencies in the information given in the application and the warrant itself.

By way of example, specific items referred to in the application in support of a warrant (e.g. black Apple iPhone 6) may have been referred to in more general terms on the face of the warrant itself (e.g. any mobile phone).

As the terms of the warrant must be clear by reference to its own terms and not by reference to any other material (see AC and others v

Nottingham and Newark Magistrates' Court) the Review Panel noted any such inconsistencies as potential deficiencies.

#### Detailing the reliability and sensitivity of information contained within warrants

Some applications reviewed did not comprehensively address the reliability and/or sensitivity of the underlying material. By way of example, some applications stated that the individual was under investigation because they were believed to be a member of an organised crime group, without providing details of why that belief was held, or the nature of the suspected criminality. Bare assertions, without an explanation of the nature and reliability of the underlying information are not sufficient and were noted as a potential deficiency by the Review Panel. Details of the reliability of the information should be included in order to comply with the duty to give "full, complete and frank disclosure" in ex parte applications.<sup>6</sup>

Equally when sensitive intelligence is relied on in support, this should be explained in a separate, sensitive document in accordance with Part 47 CrimPR. Applications that did not separate out the sensitive intelligence were noted as potentially deficient.

#### s18 search authorisations

Some records of s18 search authorisations did not fully explain why the statutory grounds were met, albeit the Review Panel recognised that this detail may be included in other records held by the investigation team, for example custody records and pocket notebooks. In such cases the Review Panel requested that the SIO and investigation team review any additional records held to determine potential deficiencies, and raise these with the CPS prosecuting lawyer.

### **B: POCA orders – thematic issues**

#### Application of the correct conditions contained in the Statute

Applications sometimes confused the relevant tests for making orders under POCA, for example applying the money laundering test to applications relating to confiscation investigations, or applying the confiscation test for applications in relation to suspected money laundering. This was noted as a potential deficiency.

#### Assertions

In some cases applications simply asserted that material would be of substantial value to an investigation and that it was in the public interest for the material to be produced, but failed to explain those assertions. The CrimPR state that officers applying for production orders must explain why

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<sup>6</sup> See G v Commissioner of the Police for the Metropolis [2011] EWHC 3331 Admin

material is of substantial value to an investigation, why it is in the public interest that the material be produced and demonstrate that consideration has been given to any collateral intrusion. As a result bare assertions (without explanation) were identified as potential deficiencies.

#### Period of time over which material is sought

In some cases no justification was provided for the period of time in respect of which material was sought. For example, officers might request material spanning a period of six years, presumably with confiscation proceedings in mind, but without articulating why information was needed for this period. Any failure to explain why the information was needed for a specific time period was noted as a potential deficiency.

#### Disclosure

As with PACE applications, some applications failed to confirm that a suspect, or occupier of premises, had no previous criminal record.

#### Inconsistencies in drafting

As with PACE applications, in some cases there were discrepancies between the material sought in an application and that sought on the face of the order itself. The Panel noted such discrepancies as potential deficiencies.

#### Copying and pasting

The Review Panel identified that officers had sometimes copied and pasted details from previous applications. As this is likely to suggest that insufficient consideration was given to the facts of each case the Review Panel noted this as a potential deficiency.

### **C: Broader issues**

#### Attendance at hearings and lack of a written record

The Review Panel found it was not always clear whether there had been discussion of specific issues and/or further explanation given when warrants and orders were sought at court. NCA officers did not usually attend with another person who could act as a note-taker during an application hearing.

As such applications are usually made in person, it is common for there to be some discussion between the applicant and the court. By attending alone, officers were not able to take a contemporaneous record which, if detailed written reasons were not provided by the court when making the warrant/order, meant that a full record of the application was not available.

### Complex cases

Some of the applications reviewed involved complex areas of the law which may not be familiar to all courts, for example applications made on behalf of foreign states under the Crime (International Co-operation) Act 2003 ("CICA") following a direction to do so by the United Kingdom Central Authority ("UKCA").

Whilst the officers making the applications were in most cases very experienced, the Review Panel considered that it would be helpful to instruct counsel in such cases to ensure that complexities are addressed and relevant legal submissions are made to the court considering the application.

### Templates

The Review Panel noted that a variety of different templates were in use across the NCA for similar applications.

## **8. Review Panel findings and actions taken**

The Review Panel has not identified any issues of bad faith or individual misconduct that could amount to a disciplinary matter.

Out of the 326 operations reviewed, the Review Panel noted potentially significant deficiencies in 51 operations. 22 of these operations involved warrants obtained from the courts under PACE. 29 operations involved warrants and orders obtained from the courts under POCA.

The Review Panel noted deficiencies as potentially significant if there was a significant risk that they could result in challenges to the lawfulness of the retention of the material. For example:

- A failure to specify any of the items sought on the face of the warrant;
- A warrant being issued under an enactment which did not empower the court to do so;
- A failure to adequately articulate in the supporting application why there were reasonable grounds for believing that the warrant or order was necessary.

More minor deficiencies were noted in an additional 242 operations: 189 operations involving PACE warrants, and 53 operations involving orders or warrants obtained under POCA. Issues noted as a more minor deficiency were mostly technical, such as the use of catch all phrases on the face of the document (eg "any other documentation"), a failure to confirm whether or not a suspect had a previous criminal record, a lack of detail about the nature of the investigation on the face of the warrant, or a failure to give adequate time estimates for the application before the court.

In every case where deficiencies were identified, disclosure of the deficiencies has been, is being or will be made to the defence (or suspect,

if the case is pre-charge). The warrants and applications in support are being disclosed in line with the prosecutor's ongoing disclosure obligations.<sup>7</sup>

In the most serious cases the CPS may be required to reconsider the test for Crown Prosecutors and/or an application may be made to retain any material that would otherwise fall to be returned under s59 Criminal Justice and Police Act 2001 ("CJPA").

To date, no prosecutions have been discontinued as a result of deficiencies identified during the NCA's warrant review and the NCA has not made any applications to retain material under s59 CJPA as a result of the Review Panel's findings. Section 59 applications were made by the NCA in two cases (Operation Enderby 2 and Operation Bastinado) where deficiencies were identified prior to the establishment of the Review Panel and Gold Group.

In three cases to date, the NCA has invited the defendants to consent to the continued retention of the material held by the NCA (otherwise an application to retain the material would have been made under s59 CJPA). In all three cases the defendant has given consent to the continued retention of the material.

#### Monitoring by Gold Group

In all cases where the Review Panel identified deficiencies, the Gold Group continues to monitor how these deficiencies are being addressed by the investigation and prosecuting teams, as disclosures are made and criminal prosecutions come to trial.

### **9. Review Panel recommendations and action taken**

The Review Panel has made the following recommendations.

#### **A: Supervision, management and training of those preparing warrant applications**

##### *Recommendation*

The Review Panel recommends that officers obtaining warrants and orders under PACE and POCA should receive appropriate training and accreditation, with relevant updates communicated and delivered through a yearly CPD programme. Operational managers authorising warrants should receive the same training. Practical guidance notes should be developed to assist those who approve applications.

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<sup>7</sup> A defendant is entitled to request a copy of the application in support of a warrant – see Part 47 and Part 5 of the CrimPR.

In complex cases (eg applications for special procedure material or warrants made under CICA or following a direction from the UKCA), officers should seek advice from NCA Legal, who will determine whether counsel should be instructed.

#### *Action taken*

The Operational Standards department is now responsible for ensuring that the NCA's training material, guidance notes and templates remain fit for purpose.

In addition to the training which had been delivered to all Grade 3 warrant authorising officers and Financial Investigation Managers by mid-September 2015, a new programme of continuous professional development is being rolled out by Operational Standards, with new warrant experts being trained in all NCA sites. The expectation now is that new applications will be brought by these specifically trained officers and all new applications will be authorised by a specifically trained Grade 3 authorising officer. Officers who have completed the training successfully but who fail to meet standards will be subject to professional competency and/or disciplinary review.

Practical guidance notes have been developed in consultation with NCA Legal and the Organised Crime Division of the CPS. These are published centrally on the NCA intranet. The guidance notes and training material will be reviewed at appropriate intervals to ensure that they remain fit for purpose.

NCA Officers making applications for investigative orders or warrants under POCA in support of potential or on-going criminal proceedings will be restricted to accredited financial investigators. The training provided will be enhanced by a further programme of mandatory continual professional development. The training will also be undertaken by the Financial Investigation Managers charged with authorising the applications.

### **B: Templates**

#### *Recommendation*

A standard set of templates should be used across the NCA.

The Operational Standards department should ensure that the templates are updated as necessary and whenever required as a result of updates to relevant court rules and/or legislation.

The NCA search and scene book template should be updated to prompt the inclusion of sufficient information to explain how the statutory criteria are met.

*Action taken*

A standard set of templates is now in use and is published centrally on the Operational Standards part of the NCA intranet. The NCA uses the templates published by the CrimPR Committee.

Updated search and scene book templates are being issued across the NCA.

**C: Use of separate documents to detail sensitive material**

*Recommendation*

If an application for a warrant or order contains sensitive intelligence which should only be provided to the court, this should be included on a separate document in accordance with the requirements under CrimPR Part 47.

*Action taken*

This requirement was included in the training delivered to authorising officers in the summer of 2015 and is included in the ongoing warrant CPD training programme.

**D: Disclosure**

*Recommendation*

Disclosure officers should be instructed that in cases where a warrant or order has been granted, both the warrant/order itself and the application made in support should be listed for disclosure on the form MG6C (non-sensitive schedule) unless they contain sensitive information which needs to be protected (see above). The sensitive part of any application should be listed on the form MG6D by the disclosure officer.

These disclosure requirements should be included in the training requirements for disclosure officers.

*Action taken*

Disclosure officers have been instructed to ensure that warrants, orders and applications for the same are listed for disclosure on the MG6C. If sensitive information is included in a separate document, the non-sensitive material should be disclosed, with the sensitive part of any application protected.

This requirement is included in CPD training for disclosure officers.

**E: Early identification of potential deficiencies and liaison with the CPS**

*Recommendation*

To facilitate early identification of potential deficiencies, any warrants and/or orders sought should be reviewed at the earliest opportunity with the relevant CPS prosecutor, for example at the early case conferences which take place upon allocation of an investigation to a prosecutor.

*Action taken*

NCA officers and CPS prosecutors within the Organised Crime Department have been instructed to consider warrant issues at an early stage.

The requirement to consider and review any warrants and orders obtained has been added as a standing agenda item to the early case management conference which takes place between the SIO, disclosure officer and CPS prosecuting lawyer.

**F: Ongoing Quality Assurance**

*Recommendation*

A regular quality assurance review should be undertaken to monitor the improvements in standards since the agency wide training was delivered and ensure that any future issues are identified at an early stage.

The NCA should ensure that central records are kept of all applications made and develop effective management information which can be used to target future quality assurance reviews.

*Action taken*

The Operational Standards department has developed a quality assurance programme to monitor ongoing standards. This assurance programme is currently reviewing the standards in warrants and orders obtained in all branches, across all NCA commands, since September 2015 to assess the improvement in standards since the agency wide training was delivered. The quality assurance programme is applying the same methodology as the Review Panel, reviewing warrants and orders and applications for the same against the Review Panel checklists.

Since mid-September 2015, all applications made for warrants and orders must be recorded centrally with the NCA's Control Centre. These statistics are being developed into management information, which will help target future quality assurance reviews and allow central monitoring of the use of these powers.

**G: Liaison with the court**

*Recommendation*

Officers should ensure (in so far as operational requirements allow) that courts are given sufficient notice of any applications and papers are submitted sufficiently far in advance to enable the court to review the material prior to any hearing. Realistic time estimates that reflect the seriousness and/or complexity of the case should be given when papers are submitted to the court.

Officers should consider attending court with a note-taker. They should encourage the court to give written reasons for any warrants or orders made so that this is available for future reference and disclosure to the defence.

The provision of written reasons (and the taking of a written note) will ensure that there is a greater degree of transparency in relation to the hearing of the application.

#### *Action taken*

The requirement to give realistic time estimates for court applications has been communicated to officers. NCA officers have been encouraged to take note-takers to court and seek written reasons from the court when warrants and orders are made.

These recommendations are included in the warrant CPD training programme and the practical guidance notes available on the NCA intranet.

### **H: Liaison with law enforcement partners and others**

#### *Recommendation*

The lessons learned by the NCA as a result of this review should be communicated across law enforcement partners.

There should be continuing engagement with the Ministry of Justice to ensure that the templates used by the NCA are up to date with those prescribed by the CrimPR, and that user feedback is provided on those templates.

#### *Action taken*

The NCA shared the early results of its review with the wider policing community and has shared this report with them, including the College of Policing.

The NCA is fully engaged with the CrimPR Committee (which sets the templates used in the CrimPR) and has briefed them on the ongoing warrant review. The NCA will continue to share any feedback on the templates via this process.

## **10. External assurance and review**

The NCA Board has sought external assurance from an Independent Advisory Panel on the nature and scope of the review and on the processes that have been established to improve standards.

That Panel, which was made up of senior members of the Attorney General's Office, policing, HMCPSP and a non-executive director of the NCA, is satisfied that the review has been thorough and robust, with high standards expected from individual warrants and orders.

The Panel has made a number of recommendations, which the NCA accepts in full. In particular, the Panel has recommended that there should be a further external review of the NCA's warrant processes and standards in approximately 18 months, to ensure that lessons have been learned and that sustainable improvements have been made. The NCA accepts this recommendation and will liaise with Her Majesty's Chief Inspector of Constabulary and Her Majesty's Chief Inspector of the Crown Prosecution Service Inspectorate to plan such a review. It will also ask the NCA's Audit Risk and Assurance Committee to consider an annual report on the efficacy of the warrant quality assurance programme.

## **11. Conclusion**

The NCA is committed to learning from this review and ensuring that professional standards are maintained.

Although the Review did not identify issues of bad faith or misconduct in relation to prior warrants and orders, going forwards, officers who fail to meet standards will be subject to professional competency and/or disciplinary review.

To ensure continued oversight when the Gold Group disbands, a new Criminal Justice Delivery Group will be created from April 2016 which will review the effectiveness of the NCA's warrant procedures, current standards and any issues identified through the NCA's rolling quality assurance programme. It will continue to monitor the deficiencies identified by the Review Panel in live cases as criminal proceedings progress. The Group will be chaired jointly by the NCA's Deputy Director for Specialist Support and the Deputy Head of the CPS Organised Crime Division, who led and participated in the NCA's Warrant Gold Group.

The NCA's Board will consider an annual report on ongoing warrant standards and any future inspection report from HMIC and HMCPSP to satisfy itself that there is no repeat of past issues.

The NCA has shared this closing report with the wider policing and law enforcement community and appropriate stakeholders within the judiciary.

**Appendix A: Report of the Independent Advisory Panel**

**NCA Warrants Review**  
**Independent Advisory Panel Report**

**Introduction**

1. In 2015 a number of warrants and production orders obtained by the National Crime Agency (NCA), issued by Magistrates' and/or Crown Courts, were challenged in legal proceedings connected with two NCA Operations (Heterodon and Enderby 2). The cases identified ways in which the NCA had failed to comply with legislative and case law requirements for warrants and orders under the Police and Criminal Evidence Act 1984 (PACE) and Proceeds of Crime Act 2002 (POCA).
2. As a result of the deficiencies identified, the NCA commenced an urgent and comprehensive review into its procedures for obtaining search warrants and orders under PACE and POCA. It was further decided to review all the warrants and orders granted by the courts in live NCA cases in order to identify and address any potential deficiencies.
3. Recognising the seriousness of the issues raised and the public concern, the NCA Board convened an external panel of experts to provide oversight and challenge to the review process. The Panel (named the Independent Advisory Panel) convened following completion of the NCA's Warrant Review and prior to the conclusions and report being finalised.
4. The Independent Advisory Panel (referred to as the Panel from hereon) of experts comprised:
  - i. Michelle Crotty (Director, Attorney General's Office);

- ii. Kevin McGinty (HM Chief Inspector, HM Crown Prosecution Service Inspector); and
- iii. Detective Chief Superintendent Chris Green (North West Regional Organised Crime Unit).

The Panel was Chaired by Jane Furniss (Non-Executive Director, NCA).

The NCA Board was grateful for the time and expert assistance offered by the Panel.

5. Prior to meeting, the Panel had the benefit of receiving a number of documents reviewed or produced by the Review team. The Panel also received details of the guidance and training provided to NCA officers in late 2015 which was designed to ensure that officers learned from the previous mistakes and amended their practice rapidly. Additionally the quality assurance and management oversight which has been introduced was described.
6. The Independent Advisory Panel received a detailed presentation from the team who had led the Review, namely:
  - i. Jonathan Richards (NCA Legal Adviser);
  - ii. Sarah Pritchard (Deputy Director, NCA Legal);
  - iii. Chris McKeogh (Deputy Director, Specialist Support Department); and
  - iv. Joanne Jakymec (Deputy Director, Organised Crime Division, Crown Prosecution Service).

The presentation covered:

- i. an introduction to and explanation of the cases that led to the establishment of the review;

- ii. the Gold Group; its purpose and governance;
  - iii. an overview of the Warrant Review methodology;
  - iv. an outline of the Warrant Review findings, including examples; and
  - v. conclusions and ongoing quality assurance.
7. The Panel was keen to satisfy itself of the robustness and independence of the Warrant Review. It therefore questioned and challenged the methodology and judgments made during the Warrant Review.

## **Findings**

8. The Panel was satisfied that the review had been undertaken independently in partnership between the NCA and the Crown Prosecution Service. It was evident that as a result of the joint work the NCA and CPS had developed closer working relationships, which it is expected will assist in improved preparation of cases and assist the future delivery of the NCA's mission against serious and organised crime. The Panel noted the need to continue developing and nurturing those relationships.
9. The Panel noted that the Review did not identify any issues of bad faith or individual misconduct. It was, however concerned to see that in the majority of cases reviewed some deficiencies had been found in the warrant process. It recognised that in some cases the deficiencies were relatively minor. The low threshold set by the Warrant Review team to determine the categorisation of deficiencies did reassure the Panel that the process has been conducted self critically and to a considerable level of detail. The Panel was therefore satisfied that the processes applied during the Warrant Review were thorough and robust.

10. The Panel was further concerned that it had taken the collapse of two cases for the deficiencies to be identified. Basic quality assurance and management oversight systems had failed in addition to the poor operational practice represented in the warrants reviewed. The lack of any engagement between operational officers and NCA Legal and external lawyers in relation to warrants was stark. It was however evident to the Panel that the NCA had recognised these failures and the importance of the issues identified and had moved quickly to take remedial action. A number of significant changes have been made as a result of the review but continuous attention will be needed to ensure that, with the passage of time, the lessons learned from the review are not forgotten.
11. The Panel was satisfied that the process applied in all the individual cases, with the CPS and through disclosure to the defence/suspect, appeared sufficient to address the deficiencies prior to any further criminal justice process but noted that many cases had yet to reach trial.
12. The Panel noted that the NCA had provided written guidance, training and briefing to all relevant staff in very quick time. It had also mandated a system of management sign off of all warrants prior to application. The Panel was also satisfied that going forwards it was intended that failure to comply with the policy and guidance and/or to submit to the quality assurance process will result in professional competency and/or disciplinary review.
13. The Panel recognised that all the warrants reviewed had been granted by either a Magistrate, advised as necessary by a Justices' Clerk, or a Judge. It was clear they had not been helped by the poor paperwork provided by NCA officers but it was also apparent that insufficient scrutiny had been applied as very few warrant applications had been refused.

## **Recommendations**

14. The Director General of the NCA should invite Her Majesty's Chief Inspector of Constabulary (HMIC) and Her Majesty's Chief Inspector of the Crown Prosecution Service Inspectorate (HMCPSI) to undertake a joint inspection in 18 months to ensure that the promised improvements have taken effect. If this is not possible another external review should take place.
15. The panel recommended that the NCA Audit and Risk Assurance Committee (ARAC) consider an annual report on the efficacy of the quality assurance programme implemented following the warrants review.
16. A copy of the report should be shared with the Senior Presiding Judge, the Chief Magistrate and the Society of Clerks to the Justices for their consideration.
17. The report should also be shared with the National Police Chiefs Council (NPCC) and the College of Policing.

31 March 2016

## **Appendix B: A quick guide to warrants and orders in scope of the NCA's review**

### **Section 8**

This section provides for the issue by a magistrate or judge of a warrant to enter and search premises. There is a large body of authority which establishes three important propositions: (1) The issue of a search warrant or a warrant for seizure is a very serious interference with the liberty of the subject; (2) The officer applying for such a warrant must give full, complete and frank disclosure to the magistrate so as to enable the latter to base their decision on the fullest possible information; (3) the court itself must give the most mature and careful consideration to all the facts of the case.<sup>8</sup>

### **Section 9 Schedule 1**

Section 9 and Schedule 1 of PACE deal with law enforcement access to material held (usually by a third party) on a confidential basis which is routinely referred to as excluded and special procedure material. Section 9 also applies to the procedures envisaged under the Act to searches for such material under the authority of other legislation.

Such applications must be made to a Judge (not a lay magistrate) and are convoluted in their nature. A court can either grant an order (*inter partes*) and or a warrant (*ex parte*) under two sets of access conditions as set out in Schedule 1, paragraphs 2 and 3.

### **Section 18 authorisations**

Section 18 of PACE gives an officer the power to enter and search any premises occupied or controlled by a person who is under arrest for an indictable offence, if he has reasonable grounds for suspecting that there is evidence on the premises (other than LPP) that relates to:

- that offence; or
- another indictable offence which is connected with or similar to that offence.

A search of a person's home after an arrest normally requires the written authority of an Inspector (NCA Grade 3 – equivalent to a Detective Inspector).

### **POCA orders**

Applications for investigative orders under Part 8 of POCA 2002 include:

- Production Orders;
- Search and Seizure Warrants;

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<sup>8</sup> See *G v Commissioner of the Police for the Metropolis* [2011] EWHC 3331 Admin at [17]



National Crime Agency

- Customer Information Orders; and
- Account Monitoring Orders.

All of the above orders are sought by the NCA to assist with investigations that relate to money laundering and/or the confiscation of the proceeds of crime and require internal authorisations before they are submitted to the Crown Court for consideration and issuance as appropriate. An NCA Grade 3 officer, who is accredited with the Proceeds of Crime Centre, is the authorising officer for such applications.

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