



# **A joint inspection of search application and production order processes**

An inspection of the promised improvements from the National Crime Agency's warrant review in 2015

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# 1. Introduction

## Our commission

- 1.1. Her Majesty's Inspectorate of Constabulary and Fire & Rescue Services (HMICFRS) is an independent inspectorate which is required, under the Crime and Courts Act 2013, to carry out inspections of the National Crime Agency (NCA also referred to as 'the Agency'). Following an inspection, we must report to the Home Secretary on the efficiency and effectiveness of the NCA.
- 1.2. This inspection was carried out as part of HMICFRS's inspection programme for 2017/18, which was drawn up after public consultation and approved by the Home Secretary. The inspection was carried out jointly with Her Majesty's Crown Prosecution Service Inspectorate (HMCPsi).

## Background and context

- 1.3. In 2015, two high-profile NCA operations were found to have had significant deficiencies in relation to search warrants. These operations, Heterodon and Enderby 2, were widely reported in the press at the time. The NCA's legal department had identified a need to introduce effective training in search warrant applications, together with a proper review process prior to applications being made, and this had been included in the Agency's risk register earlier in 2015.
- 1.4. The NCA responded by conducting a review of all warrants and orders obtained from the courts in live pre-conviction criminal cases, so that any potential deficiencies could be identified and addressed. The review, overseen by an independent panel, started in the summer of 2015 and took six months to complete. The review itself was subject to external scrutiny and challenge by an external independent advisory panel. The NCA published a closing report<sup>1</sup> and shared the findings with the police and other law enforcement agencies. The report included the considerations of the independent advisory panel and their recommendation that HMICFRS and HMCPsi should undertake a joint inspection "to ensure that the promised improvements have taken effect".<sup>2</sup>

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<sup>1</sup> Warrant Review Closing Report, NCA, 12 April 2016. Available at: [www.nationalcrimeagency.gov.uk/publications/687-nca-warrant-review-closing-report/file](http://www.nationalcrimeagency.gov.uk/publications/687-nca-warrant-review-closing-report/file)

<sup>2</sup> *Ibid*, page 26, paragraph 14

- 1.5. Simultaneously, the NCA began to review its internal operational practices in relation to search warrants. This work was led by the operational standards, capability and assessment unit. The NCA established a dedicated group of search warrant applicants, and carried out awareness training for authorising officers, who were expected to be the sole route for any applications for search warrants and production orders.<sup>3</sup>
- 1.6. Training commenced in June 2015 throughout the agency, with a focus on obtaining search warrants under sections 8 and 9 of the Police and Criminal Evidence Act 1984 (hereafter referred to as PACE). Practical guidance was issued and warrant templates were updated and published centrally. All the training, guidance and templates were approved by an external lawyer before their use. Only those officers who had received this training could authorise new applications for search warrants under PACE.
- 1.7. In parallel, improvements on orders under the Proceeds of Crime Act 2002 (hereafter referred to as POCA) were led by the NCA's POCA lead. In a similar way to the PACE procedure, applications for POCA orders had to be undertaken by an accredited financial investigator and authorised by a financial investigation manager. As a result of what had been learnt from the NCA review, additional guidance and training were introduced relating to POCA.
- 1.8. Following the completion of the review by the NCA in March 2016, and in response to the recommendation from the independent advisory panel, the Director General of the NCA requested that HMICFRS and HMCPSPSI undertake a joint inspection.

## Definitions

- 1.9. There are various powers available to law enforcement organisations to secure evidence during investigations. The following summary provides a basic description of the legal powers used by the NCA and which we examined during our inspection.
  - Section 8 of PACE provides a magistrate or judge with the power to authorise a warrant to enter and search premises for evidence. Sections 15 and 16 of PACE set out the requirements for the application and execution of warrants whether under section 8 or other legislation, e.g. section 23 of the Misuse of Drugs Act 1971.

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<sup>3</sup> An order of the court requiring the person in possession or control of listed material, to produce it to an appropriate officer for him to take away, or to give the officer access to the material.

- Section 9 and Schedule 1 PACE orders and warrants can only be granted by a judge to allow access to material held on a confidential basis, e.g. documentation in relation to the conduct of a business. Such material is referred to as excluded<sup>4</sup> and special procedural<sup>5</sup> material. An authority given under this power can require the person named to produce the required material (a production order) and can also provide a power of entry and search under a warrant to secure material.
- 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 or she has reasonable grounds for suspecting that there is evidence on the premises that relates to that offence, or another indictable offence which is connected with or similar to that offence. This normally requires the written authority of an inspector (the NCA Grade 3 is equivalent to an inspector).
- Part 8 of POCA lists a number of financial orders that can be used by investigators. The main orders used by the NCA under the Act are production orders (section 345), customer information orders (section 363) and account monitoring orders (section 370). These orders can only be granted by a judge.

## **Our terms of reference**

1.10. In summary, our terms of reference asked that:

- The inspection should seek to provide assurance of the level of improvements within: search warrants; records of search authorisations given for section 18 of PACE; production orders under PACE and POCA, together with the information in support and applications.
- The inspection should seek to ensure progress had been made to address thematic issues that were identified during the NCA warrants review.
- The inspection should examine the governance and continued oversight provided by the operational standards, capability and assessment unit.

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<sup>4</sup> Section 11, Police and Criminal Evidence Act 1984.

<sup>5</sup> Section 14, Police and Criminal Evidence Act 1984.

## **Methodology**

- 1.11. The full details of the methodology are set out in Annex A. We reviewed a selection of search authorities, production orders and associated papers between September and November 2017 as the first stage of our inspection. As a result of this review, we made enquiries with 12 police forces about 30 of the searches conducted.
- 1.12. The findings from this preparatory work shaped the focus of our fieldwork, which was undertaken between February and March 2018. We carried out observations, conducted interviews within the NCA and analysed relevant data and documents. We also spoke to the Crown Prosecution Service's International Justice and Organised Crime Division, who regularly prosecute NCA cases.

## 2. Search applications and orders

### Introduction

- 2.1. This section looks at the first two elements of our terms of reference. It examines NCA applications to search premises to secure evidence and to obtain information held by others in the form of orders, e.g. financial institutions.
- 2.2. The NCA warrant review undertaken in 2015 had identified a number of areas in need of improvement, and during our inspection we assessed whether improvements had been made.
- 2.3. A main element of our inspection focused on seeking to establish whether there had been improvements in how the NCA dealt with applications to search premises and obtain productions orders. We conducted a document review of 60 applications. The methodology section at Annex A explains our approach to selection and the assessment criteria used.
- 2.4. The sample consisted of:
  - search warrants under section 8 of PACE, section 9 and Schedule 1 of PACE, and section 46 of the Firearms Act 1968;
  - searches under section 18 of PACE;
  - production orders under section 9 and Schedule 1 of PACE; and
  - production orders under part 8 of POCA.
- 2.5. The findings in the document review were discussed during interviews with NCA officers; this provided greater insight into the application processes.

### Findings

#### Search warrants

- 2.6. Overall, the standards of warrant applications were good. The effort that has been invested in training staff was evident. Applications were precise and explained the offences in sufficient detail; sufficient court time was allocated and intelligence managed appropriately. The minor deficiencies we identified were that in a third of cases a trained authorising officer was not used; and in almost a third of applications there was insufficient antecedent history about the subject.

- 2.7. We did, however, find three warrants, under section 8 of PACE, that we assessed to have notable deficiencies:
- two linked warrants for searches of business premises looking for documents in relation to shipping goods; and
  - a warrant in relation to a conspiracy to murder, where the offence being investigated was incorrectly entered, and which had no power of search.
- 2.8. All three of these applications were referred to the operational standards, capability and assessment unit for further consideration and action where deemed necessary. We also followed up on these cases during our fieldwork.
- 2.9. In respect of the two linked warrants, the applicant stated that the businesses were believed to be 'fronts' for criminal activity. That being the case, it was our view that warrants should have been sought under section 9, Schedule 1 of PACE, as the business documents sought could potentially have been special procedure material.
- 2.10. In our subsequent interviews with officers and staff, we became aware that relevant guidance had recently been issued by the NCA legal department but had not been used in these cases. Where there is doubt over the legitimacy of a business (that may be in possession of special procedural material), but this cannot be proved, officers should err on the side of caution and seek an authority under section 9 and Schedule 1 of PACE. We are pleased to see that this revised guidance is in place.
- 2.11. In respect of the third warrant (where the incorrect offence had been entered), we were satisfied that this was a genuine error which had no impact on this case. However, our interview with the officers involved in the application raised a separate concern. This was an application that happened outside normal working hours, where neither the applicant nor the authorising officer were trained. The application was made in February 2017, at a time when there was an expectation that applications should be made by dedicated applicants, and authorised by officers who had received awareness training.
- 2.12. The NCA told us that the number of 'out-of-hours' applications each month is minimal and does not justify having trained officers on call solely for this purpose. That is a decision for the NCA, but as this one case in our dip-sample demonstrated, mistakes can be made when less experienced officers are used. As the number of such cases is low, it should be achievable where an untrained officer is involved, to review cases at an early stage and thereby ensure significant errors are not being made.

### **Recommendation 1**

With immediate effect, the NCA should put in place a system of assurance to review 'out-of-hours' warrant applications as soon as possible, to ensure that no significant errors are being made by untrained officers.

### **Section 18 PACE authorisations**

2.13. We found the rationales within section 18 authorisations to be well set out and powers clearly understood. The authorisations were documented in a variety of different places, for example, pocket books, day books, email and custody records.

### **Production orders – Police and Criminal Evidence Act 1984 (PACE)**

2.14. As with the applications for search warrants, the standard of applications for production orders was of a good standard, and we found no notable deficiencies. The minor deficiencies we identified were: in almost a third of cases, the authorising officer was not trained; and in the majority of the applications there was insufficient antecedent history about the subject. The applications contained comprehensive detail about the investigations but, on the whole, we found no reference to whether the subject had any previous convictions.

2.15. Greater emphasis needs to be placed on the importance of recording the antecedent history of suspects, in relation to both search warrant and production order applications. Despite training, this continues to be omitted, and authorising officers need to be more robust when reviewing and assessing applications.

### **Recommendation 2**

With immediate effect, the NCA should reinforce the need to include the antecedent history of a suspect within an application for a warrant or order.

### **Production orders – Proceeds of Crime Act (POCA)**

2.16. We found POCA orders to be of a very high standard. Officers applied for these orders under correct statutes, they explained the assertions fully and, where appropriate, indicated appropriate time allowances for court hearings. There was also greater reference to antecedent history, disclosure and candour about issues that could potentially undermine an application, than we observed within PACE order applications.

- 2.17. Although the standards in our POCA order sample were high, we found that the NCA had placed little emphasis on quality assurance. We found that the oversight process for POCA orders relied on one person, the NCA's POCA lead, whereas the process for search authorities under PACE was overseen by the operational standards, capability and assessment unit. So although the POCA lead has made a significant effort to train officers and staff and refine application practices, this has not been supported by an assurance regime. Indeed, no reviews of POCA orders had been conducted after the original NCA review in 2015 until the end of 2017.
- 2.18. We learnt that the NCA's POCA lead had voluntarily referred a proportion of POCA orders to the NCA legal department during December 2017 for review. This review highlighted a number of themes where improvements could be made concerning disclosure: notice to the respondent; detail on the reliability of intelligence; and the impact of the application on third parties.
- 2.19. At the time of our inspection, the NCA had no system in place for continued oversight of POCA orders. We think this presents a risk. The only significant assurance that exists, relies wholly on the authorising officer prior to the application being made, and does not mirror the independent process for PACE authorities. We were told by the deputy director, who leads on operational standards, that future transitional change within the Agency may give an opportunity for greater oversight of POCA orders by the operational standards, capability and assessment unit.

### **Recommendation 3**

By 31 August 2018, the NCA should introduce a review process for orders obtained under the Proceeds of Crime Act (POCA).

## Post-search record keeping

2.20. It was evident from the document review that, in many cases, the requirement set out in Code B of the Code of Practice for PACE<sup>6</sup> for officers to make or update a record on the local premises search register was not being met. We found in many cases there was no record made when a premises had been searched by NCA officers. This presents the following risks:

- were the premises to be searched again, the existence of a previous search should be known and could have a bearing on granting any new or further warrant application;
- the existence of a previous search should be known in order to assist with planning a subsequent search, as there could be factors identified that need to be taken into account, e.g. officer safety or community issues; and
- this would represent a breach of PACE.

2.21. Interviews with NCA officers demonstrated a lack of knowledge relating to the requirements of Code B, but also a misunderstanding about whose responsibility it was to make a record. Some NCA officers thought that notifying the search to the NCA control centre was sufficient.

2.22. The NCA procedure in respect of searches is clear where it states “[a]s soon as practicable, the Scene Search Supervisor should record details of the search of premises in the Search Register at the local Divisional Police Station. The details of the search will be recorded in accordance with Code B of the Code of Practice. The local Search Register reference number should be noted and given to the Disclosure Officer for the investigation.”<sup>7</sup> In our assessment, this procedure is not commonly understood or followed.

### Recommendation 4

With immediate effect, the NCA should ensure that scene search supervisors are causing a local search record to be completed and that any reference number is being recorded at the NCA control centre.

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<sup>6</sup> Police and Criminal Evidence Act 1984 (PACE) Code of Practice – Code B Searching premises and seizing property, Home Office, 23 October 2013, page 19, paragraph 8.1. Available at: [www.gov.uk/government/uploads/system/uploads/attachment\\_data/file/306655/2013\\_PACE\\_Code\\_B.pdf](http://www.gov.uk/government/uploads/system/uploads/attachment_data/file/306655/2013_PACE_Code_B.pdf)

<sup>7</sup> *Planning, Preparation and Conduct of Evidential Searches*, NCA, 14 April 2014 (unpublished).

## **Complex applications**

- 2.23. We learnt that in complex or long-running operations, it could be difficult for a dedicated applicant to complete warrant applications and assimilate all the detailed information they may require. Some applicants told us that they may be asked to make an application in the latter stages of an operation in which they have not been previously involved. We discussed alternative options for such situations with NCA officers. There were differing views, which ranged from a purist approach, with only the applicant being involved, to the possibility of a case officer accompanying the applicant when making the application.
- 2.24. We formed the view that the NCA needs to involve an applicant at the earliest stage of an investigation. We were made aware that this direction is included within the warrant applicant course, but this should be reinforced to those leading operations. Where circumstances have meant that an applicant has become involved in the latter stages of an investigation, the NCA should consider involving a suitably knowledgeable case officer in the application process.

### 3. Oversight and standards

- 3.1. This chapter deals with the last element of our terms of reference. It examines the work of the operational standards, capability and assessment unit in delivering the improvements that were sought following the NCA review in 2015. In addition, we inspected the function of the NCA control centre, which has a core role in respect of search authorities and orders.

#### Findings

- 3.2. We found that the operational standards, capability and assessment unit had impressive oversight of warrants and search authorities. Although comprehensive training and guidance have been provided, there is still confusion over some procedures. The system for keeping central records within the NCA control centre is improving, but there needs to be a greater focus on how records are maintained.

#### **Operational standards, capability and assessment unit oversight**

- 3.3. The operational standards, capability and assessment unit has been at the forefront of delivering improvements since the NCA review in 2015. The unit has led an impressive amount of work, including detailed reviews and the implementation and training of dedicated applicants and authorising officers.
- 3.4. The unit has carried out a number of reviews since the original NCA review took place in 2015. These have predominantly focused on warrants that the NCA saw as the greatest risk, and, as such, there was a continuous review between September 2015 and February 2017. This also included, to a lesser extent, an examination of post-arrest powers of search and production orders under PACE.
- 3.5. The NCA took the decision to reduce the number of authorising officers to a smaller cadre of 18, who would gain greater exposure and experience; this was put in place in July 2017. All warrants authorised by the cadre between 31 July and 9 October 2017 were reviewed using a grading system to identify the level of deficiencies, ranging from minor deficiencies under category 1 to significant deficiencies requiring immediate action under category 3. The review did not identify any category 3 deficiencies, which had been present in previous reviews. We reviewed 5 percent of this sample and found no significant deficiencies. We are reassured that the NCA's review process is being continually refined and has been bringing about improvements in respect of warrant applications.

- 3.6. We sought the opinion of the Crown Prosecution Service's International Justice and Organised Crime Division. As the prosecuting agency for the NCA, it has an insight into the quality of cases. There was collective agreement among the lawyers we interviewed that significant improvements have been made by the NCA since the original review in 2015, and the same problems were no longer recurring. Also, they stated that the oversight process had been further strengthened by a review of case files before submission to the CPS, and because of the warrant history in the NCA the CPS takes an active interest in warrants.
- 3.7. The review work undertaken by the operational standards, capability and assessment unit up to and including February 2017 was a considerable undertaking and, in our opinion, unsustainable. At the time of our inspection, the NCA had already decided to move to a monthly dip-sample of cases; we think this is a sensible approach. Even the small sample we used for our document review identified deficiencies for further consideration and is of value.
- 3.8. In our interviews with the dedicated applicants and authorising officers, we heard consistent comments about how the application process has been professionalised. Officers told us they had greater confidence when carrying out their roles and that this had been underpinned by the training they had undertaken. Officers also told us about the investment in continuing professional development, which they broadly welcomed. While progress has been made, we found no signs of complacency.
- 3.9. We examined the relevant guidance posted on the NCA's intranet. Although comprehensive, we found some inconsistencies in various documents provided to officers. For instance, there was a lack of clarity on whether post-arrest powers (such as section 18 of PACE) should be used as opposed to obtaining a warrant; this corroborated evidence we obtained through interviews. We were told of a 'soft policy' direction from management towards using post-arrest powers rather than obtaining a warrant. While it may be appropriate to use post-arrest powers in certain circumstances, this will not always be the case; if the person to be arrested is not present, a post-arrest search cannot take place; this could have been avoided had a warrant been obtained.

### **Recommendation 5**

By 31 October 2018, the NCA should ensure there is clear guidance on the use of post-arrest search powers.

- 3.10. We found a lack of clarity in the guidance about how the NCA creates and maintains records. The guidance states that a record will not be made of a search under a warrant, or a unique reference number allocated, until an application has been agreed by an authorising officer. This is at odds with the process for production orders where a record can be made, and a unique reference number given, before an application is authorised.
- 3.11. We were told by the NCA's POCA lead that orders were allocated a unique reference number prior to authorisation to identify applications rejected by an authorising officer. However, we established that there was no process in place to identify rejected applications by authorising officers.
- 3.12. We also identified that there was mixed understanding about the need to provide a copy of POCA application documentation when an application was complete. This would certainly explain the backlogs mentioned in the next section, particularly in relation to POCA orders.

### **Recommendation 6**

By 31 July 2018, the NCA should review and, where necessary, amend its current guidance on applications for searches and orders to ensure that there is consistency and clarity.

- 3.13. We found that there was a close working relationship between officers and the NCA legal department, and a process for referral of cases where required. In the period that followed the NCA review in 2015, the NCA legal department was inundated with requests, but with the introduction of dedicated officers in this process, referrals are now rare and only come via an authorising officer. This is further evidence of the knowledge and confidence of dedicated applicants and authorising officers.

### **NCA control centre**

- 3.14. The NCA control centre provides a 24-hour operational support function for the Agency. The role it performs in relation to search applications and production orders is only a small but not insignificant part of what it does. This role only came to the control centre in 2015 following the NCA review, in order to establish a central record of all searches and production orders. Before this, the Agency did not have oversight of the extent of this activity, and had no simple means of accessing the required information.
- 3.15. All NCA officers are now required to report search and order applications to the control centre and provide all the associated documentation, including a copy of the search authority for post-arrest powers, the executed warrant or authorised production order.

- 3.16. The central recording function has become the responsibility of the control centre, but we established during interviews that not all control centre officers had previous experience of the legislation in respect of this area of operations. This was also evident in the list of records we reviewed, where there were some errors in how searches were recorded. We were told that the operational standards, capability and assessment unit had provided awareness training to control centre officers in 2017, which had been well received. It is too early to say whether this has improved the quality of recording, as the period we examined in our document review pre-dated the training.
- 3.17. We examined the data<sup>8</sup> held by the control centre and found no evidence that NCA officers were not informing the control centre as required, but there were notable backlogs in the documents that were outstanding and needed to finalise the control centre records (see Table 1).

**Table 1: NCA control centre – outstanding documents 2015 to 2017**

<b>Record type</b>	<b>Number of records</b>	<b>Number of records with documents outstanding</b>
Search warrants	591	87
Section 18 searches	738	260
PACE and POCA production orders	1,225	283

- 3.18. Prior to our visit, the NCA had introduced procedures to address the backlogs. We were reassured that a concerted effort was being made to address this.

### **Learning from the NCA review**

- 3.19. In April 2016, the closing report of the NCA review was shared with the police, law enforcement and criminal justice bodies. The report was also published by the NCA and is available to the public.
- 3.20. The report was circulated to all chief constables to consider the issues it raised in the context of their own internal systems and processes. We established that the College of Policing and the National Police Chiefs' Council (NPCC) lead were meeting to make progress on this, and the NCA is being consulted to ensure all relevant learning is included.

<sup>8</sup> Data supplied by the NCA on 22 February 2018, 27 February 2018 and 22 March 2018.

## 4. Key findings and conclusion

- 4.1. This inspection has its origins in a recommendation from the 2015 NCA internal review of warrants. We have therefore, in conjunction with HMCPSI, considered what improvements have been made by the NCA, in line with our terms of reference.
- 4.2. Our inspection found that the NCA has been working to tackle the areas of concern highlighted in the 2015 review. Our inspection of search authorities, search warrants and production orders identified some deficiencies, but overall we believe that these are completed to a good standard. We were also impressed by the effort placed on training officers and providing guidance in order to maintain a consistent approach for the Agency.
- 4.3. We have made six recommendations which, when completed, will improve procedures and update guidance. We firmly believe these recommendations can be completed to enhance what is already a mature process.
- 4.4. The NCA had openly shared what it had learnt and has set a high standard for the oversight of warrants and orders. We would therefore encourage other bodies to examine the NCA's approach and consider whether they have confidence in their own procedures.
- 4.5. We conclude that the NCA has achieved the improvements sought following the recommendations made in the 2015 review.

## Annex A – Methodology

The inspection took place between September 2017 and March 2018.

To determine what documents should be reviewed in advance of our fieldwork, we asked for a full list of the records created by the NCA control centre in the year preceding our inspection.<sup>9</sup> It was assessed that this period would record the most recent data and improvements put in place by the NCA.

The list included:

- warrants, production orders and section 18 searches under PACE; and
- orders under POCA.

A sample of 60 applications (or 5 percent of records) was identified to cover the various types of search authorities and production orders in that period. It was tailored to ensure that a geographical spread of applications and, where possible, the various NCA commands were included. The rationale behind this was to assess standards across the NCA regardless of which branch or command they emanated from.

This document review was conducted in conjunction with HMCPSI. The criteria we used for assessing the existence of any deficiencies were as follows:

### **None**

- No deficiencies found.

### **Minor deficiencies**

- Procedural issues post-search, e.g. relating to the completion of scene search books and/or recording what happened to the notice of powers and rights.
- Lack of candour by an applicant, or insufficient background on the subject(s) with regard to antecedent history and/or other occupiers of target premises.
- Lack of appropriate training for the authorising officer and/or applicant.
- Insufficient time estimates for a court to deal with an application.
- Incorrect officers or staff identified on the warrant or application.

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<sup>9</sup> Data supplied by the NCA on 8 September 2017 for the period 1 September 2016 to 31 August 2017.

## **Notable deficiencies**

- Issues relating to statute, for example, applying for a warrant under the incorrect power.

Where we found notable deficiencies, we referred the cases to the NCA for further consideration and any action needed.

We also made enquiries with 12 police forces about 30 searches conducted by the NCA in their police areas to confirm compliance with Code B of PACE. The findings from all this preparatory work shaped the focus of our fieldwork.

The fieldwork consisted of observations, interviews and focus groups with approximately 30 NCA officers in various roles. We also spoke to the Crown Prosecution Service's International Justice and Organised Crime Division, who regularly prosecute NCA cases.