



Special Report

An audit of applications for and the execution of search warrants by the Independent Commission Against Corruption in 2021-2023

31 October 2024

Acknowledgement of Country

The Office of the Inspector of the Independent Commission Against Corruption acknowledges the Traditional Custodians of the lands where we work and live. We celebrate the diversity of Aboriginal peoples and their ongoing cultures and connections to the lands and waters of NSW.

We pay our respects to Elders past, present and emerging and acknowledge the Aboriginal and Torres Strait Islander people.

Special Report

Published by The Office of the Inspector of the Independent Commission Against Corruption

<https://www.oicac.nsw.gov.au/>

First published: **31 October 2024**

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Office of the Inspector of the
Independent Commission Against Corruption



Ref: AD05-2425/A6222196

31 October 2024

The Hon Ben Franklin, MLC
President
Legislative Council
Parliament House
Sydney NSW 2000

The Hon Greg Piper, MP
Speaker
Legislative Assembly
Parliament House
Sydney NSW 2000

Re: Special Report

Dear Mr President and Mr Speaker

In accordance with ss 57B and 77A of the *Independent Commission Against Corruption Act 1988* (NSW) (ICAC Act), I furnish to each of you for presentation to the Parliament my Special Report: An audit of applications for and the execution of search warrants by the Independent Commission Against Corruption in 2021-2023.

Under s 78 (1A) of the ICAC Act, I recommend that the report be made public forthwith.

Sincerely

A handwritten signature in black ink, appearing to read "Gail Furness".

Gail Furness SC
Inspector of the Independent Commission Against Corruption

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Background

1.1 The Inspector's audit function

This is a report pursuant to ss 57B (5) and 77A of the *Independent Commission Against Corruption Act 1988* (NSW) (the ICAC Act) concerning an audit of the Independent Commission Against Corruption's (the Commission or ICAC) application for and execution of search warrants for the period 1 July 2021 – 30 July 2023. I carried out the audit under ss 57B(1)(a) and (d) of the ICAC Act which provide that I have the function:

- to audit the operations of the Commission for the purpose of monitoring compliance with the law of the State
- to assess the effectiveness and appropriateness of the procedures of the Commission relating to the legality or propriety of its activities.

This audit examined the Commission's compliance with the relevant legislation and the Commission's own policies and procedures.

1.2 The purpose of the audit

The purpose of the audit is to assess and determine whether in applying for and executing search warrants during the period 1 July 2021 – 30 July 2023, the Commission complied with the ICAC Act, the *Law Enforcement (Powers and Responsibilities) Act 2002* (NSW) (LEPR Act), its own policies, procedures and operating manuals. The specific provisions of the legislation will be set out in chapter 3 of this report. In chapter 4 I will set out the relevant Commission policies and procedures.

The purpose is also to determine whether the applications for, and execution of, those warrants constituted an abuse of power, impropriety or other forms of misconduct (referred to as misconduct) or maladministration including unreasonable invasions of privacy and action or inaction of a serious nature that is contrary to law, unreasonable, unjust, oppressive or improperly discriminatory or based wholly or partly on improper motives (referred to as maladministration).

The execution of a search warrant is a significant invasion of a person's privacy and liberties, as such, it is important for the Commission to comply with the law. Its impact in information gathering should not be underestimated and can be an effective tool that the Commission uses in conducting investigations. There is an obvious tension between the impact on an individual's right to privacy and the Commission's responsibility to fulfil its statutory mandate of investigating serious corrupt conduct.

The last audit was conducted over the period 1 July 2018 – 30 July 2019 and audited 37 search warrants. It was furnished to the Presiding Officers on 27 October 2020. In this audit, I compare outcomes of each audit.

1.3 Complaints about the use of the Commission's coercive powers

The use of the Commission's coercive powers was the subject of four complaints to me in the financial year, 1 July 2023- 30 June 2024.

1.3.1 First complaint

The complainant alleged, among other matters, that during the execution of a search warrant, Commission officers were disrespectful, were in their house for 8 hours and searched unnecessarily and inappropriately through personal effects.

I sought and obtained the Commission's response to this complaint. I also watched and listened to relevant parts of the recording of the execution of the search warrant from the officers' body worn cameras. While acknowledging that their experience was stressful, disrupting and confronting, I formed the view that the tone of the Commission officers was not disrespectful, and the search was conducted in an orderly and proper manner.

1.3.2 Second complaint

The same complainant later complained about their mobile phone not being returned after seizure pursuant to the warrant. I was satisfied that its retention was reasonably necessary for the purposes of the relevant investigation, as required under s 47 of the ICAC Act.

1.3.3 Third complaint

The third complaint was about a mobile phone which was lawfully seized pursuant to a Notice to Produce under s 22 of the ICAC Act. Due to technical difficulties the mobile phone was not able to be returned in the timeframe which the Commission had anticipated and conveyed to the complainant. There was personal material on the phone which the complainant wished to access. Following considerable correspondence with the Commission and the complainant the phone was returned. I considered that the Commission acted appropriately throughout.

1.3.4 Fourth complaint

In this complaint, the complainant claimed that the Commission acted unreasonably and in an oppressive manner in the process adopted to resolve the person's claims of legal professional privilege made over material seized by the Commission. The complainant sought my *'intercession to prevent the Commission from accessing the seized material until such time as this matter is resolved.'*

I explained my powers and functions, in particular, that I could only deal with complaints by making reports and recommendations. I indicated I would consider their broader complaint of unreasonable and oppressive behaviour, if the complainant wished me to do so. I have not received a response to that communication.

2

The audit

2.1 Commencement of audit

On 4 April 2024, I wrote to the Chief Commissioner as follows:

Dear Chief Commissioner

Under section 57B(1)(a) and (d) of the Independent Commission Against Corruption Act 1988 (the Act), I propose to audit and assess the effectiveness and appropriateness of the procedures of the Commission in relation to the application for and execution of search warrants between 1 July 2021 and 30 June 2023 (the time period). I understand from the Commission's Annual Report that the search warrants powers were used on 8 occasions in 2022-2023 and once in the previous year.

The audit and assessment will examine:

- 1. the Commission's compliance with the formal and procedural requirements under:
 - a. Part 4, Division 4 of the ICAC Act,*
 - b. Part 5, Division 4 of the Law Enforcement (Powers and Responsibilities) Act 2002,*
 - c. Law Enforcement (Powers and Responsibilities) Regulation 2016**
- 2. the reasons behind the Commission's decisions to apply for search warrants;*
- 3. the manner in which the Commission applied for and executed search warrants, specifically, whether it complied with its own policies and procedures; and*
- 4. any other matters set out in section 57B of the Act.*

To assist me in the audit, I propose to review the Commission's files and records relating to:

- 1. all applications for search warrants applied for and executed by the Commission during the time period, including those that were granted or refused by authorised officers; and*
- 2. all applications for search warrants proposed by the Commission's Investigation Division during the time period and which were rejected by the Commission's Legal Division and/or executive management.*

I would appreciate you providing me with the relevant policies and procedures that guide Commission staff in applying for and executing search warrants.

I would also appreciate you indicating to which Commission operation the search warrants relate.

If you are concerned that disclosure of any records to me for the purposes of this exercise may prejudice or compromise any ongoing investigation by the Commission, I would consider altering the scope of this request so that those records are excluded.

Upon reviewing the materials identified above, I may request further information from the Commission and/or its officers for the purpose of completing this exercise.

I welcome any comments you may have on the proposed scope of this audit and assessment.

2.2 Initial response from the Commission

On 17 April 2024, I received the following response from the Solicitor to the Commission, Mr Roy Waldon, which I have redacted for operational reasons:

Dear Inspector,

The Chief Commissioner has asked me to respond to your letter of 4 April 2024 in which you advise you propose to audit and assess the effectiveness and appropriateness of the Commission's procedures in relation to the application for and execution of search warrants between 1 July 2021 and 30 June 2023.

During that period Commission officers applied for and executed the following nine search warrants.

- Operation [REDACTED] executed on [REDACTED] 2022.
- Operation [REDACTED] executed on [REDACTED] 2023.
- Operation [REDACTED] executed on [REDACTED] 2023.
- Operation [REDACTED] executed on [REDACTED] 2023.
- Operation [REDACTED] executed on [REDACTED] 2023.
- Operation [REDACTED] executed on [REDACTED] 2023.
- Operation [REDACTED] executed on [REDACTED] 2023.
- Operation [REDACTED] executed on [REDACTED] 2023.
- Operation [REDACTED] executed on [REDACTED] 2023.

In addition, an extra-territorial search warrant for Operation [REDACTED] [REDACTED] was executed in [REDACTED] on [REDACTED] 2023. This warrant was the subject of an application made by a member of the NSW Police Force pursuant to s 78 of the Law Enforcement (Powers and Responsibilities) Act 2002 and followed a request to NSW Police from the Commission for assistance. [REDACTED]

I am arranging for the documents relating to the applications and execution to be collated and will send them to you shortly.

Operations Manual Policy and Procedure IP09 applies, inter alia, to search warrants. Work Instruction IP09-A concerns the use of body worn cameras when, inter alia, executing a search warrant. A copy of each is enclosed.

During the relevant period no search warrants proposed by the Commission's Investigation Division were rejected by the Commission's Legal Division and/or executive management. Draft application packages comprising the application, occupiers notice, search warrant and clause 14 certificate, were returned to relevant applicants by the reviewing lawyer or myself (or a Principal Lawyer not involved in the investigation delegated by me to review the search warrant documents) from time to time for additional work or to clarify information contained in the relevant documents. Once settled, such application packages were then re-submitted for final approval.

All applications for search warrants were made to authorised officers. No applications were refused by an authorised officer.

I corresponded with the Commission about the audit on several occasions seeking further information, which was provided as requested.

3

Relevant legislation

3.1 Legislative changes over the time period

In NSW, the relevant statutory provisions which govern the Commission's application for, and execution of search warrants are contained in Division 4 of Part 4 of the ICAC Act, Division 4 of Part 5 of the LEPR Act and the Law Enforcement (Powers and Responsibilities) Regulation 2016 (NSW) (the LEPR Regulation).

As this audit period is 1 July 2021 – 30 July 2023, any changes to the relevant legislation need to be understood over that time. There have been no amendments made to Division 4 of Part 4 of the ICAC Act.

There were changes made to the Division 4 of Part 5 of the LEPR Act concerning digital access orders and email applications. Section 60A was inserted by the *Crimes Legislation Amendment Act 2021* No 46 (NSW), which was assented to on 8 December 2021, allowed for applications for search warrants to be made by email to the issuing officer.

The amendments relating to digital access orders had no impact on this audit as no such orders or applications were made. There was one email application which is dealt with in this Audit.

3.2 *The Independent Commission Against Corruption Act 1988 (NSW)*

3.2.1 Application and issuing a search warrant

The Commission has adopted a policy that search warrants will be sought from eligible issuing officers as defined under the LEPR Act, namely:

- a Magistrate or a Children's Magistrate
- a Registrar of the Local Court, or
- an employee of the Attorney General's Department authorised by the Attorney General as an authorised officer

and not from the ICAC Commissioner who, under s 40(2) of the ICAC Act, is authorised to issue search warrants. I understand that this power has never been exercised.

Section 40(4) of the ICAC Act provides that to apply for a search warrant under that section, an ICAC officer must have:

"... reasonable grounds for believing that there is in or on any premises a document or other thing connected with any matter that is being investigated under this Act or that such a document or other thing may, within the next following 72 hours, be brought into or onto the premises."

3.2.2 Execution of a search warrant

Section 41 authorises the person(s) named in the warrant to enter the premises and to search them for documents or other things connected with any matter that is being investigated under the ICAC Act and to seize any such documents or other things found in or on the premises and deliver them to the Commission.

Section 48(1) provides that Division 4 of Part 5 of the LEPR Act (other than ss 69-73A) applies to a search warrant issued under the ICAC Act.

If, in the course of such a search, the person executing the warrant finds a document or thing that the person believes on reasonable grounds to be evidence that would be admissible in the prosecution of a person for an indictable offence against the law of the Commonwealth, a State or a Territory; and if such person believes on reasonable grounds that it is necessary to seize the document or other thing in order to prevent its concealment, loss, mutilation or destruction, or its use in committing such an offence, then he/she may seize it (s 47(1) ICAC Act).

Section 42 imposes a duty on a person executing a search warrant to “*produce the warrant for inspection by an occupier of the premises if requested to do so by that occupier.*”

Section 43(1) permits the use of “*such force as is reasonably necessary*” for the purpose of entering premises under a search warrant. A person authorised to enter the premises may also, “*if it is reasonably necessary to do so, break open any receptacle in or on the premises for the purposes of the search*” (s 43(2) ICAC Act).

Section 45 prohibits the execution of a search warrant by night (between 9pm and 6am) unless the person issuing the warrant specifically authorises execution of the warrant between those hours.

Section 46 provides that a search warrant expires no later than one month after its issue or if it is withdrawn by the person who issued the warrant, or when it is executed, whichever first occurs.

3.2.3 Seizure of property

Section 47(2) provides that the ICAC may retain any items seized under a search warrant “*for so long as its retention by the ICAC is reasonably necessary for the purposes of an investigation to which it is relevant*”; and if the retention of the item is not, or ceases to be, reasonably necessary for such purposes, the Commission must cause it to be delivered to the person who appears to be entitled to possession of the item; or the Attorney General or the DPP, with a recommendation as to what action should be taken in relation to the item.

3.3 The Law Enforcement (Powers and Responsibilities) Act 2022 (NSW)

3.3.1 Application and issuing a search warrant

Division 4 of Part 5 of the LEPR Act sets out the provisions relating generally to warrants, including warrants obtained by the ICAC (s 59 (1)(b) and Sch 2 LEPR Act).

Section 60 of the LEPR Act provides that:

- an application for a warrant (other than a telephone warrant) must be in writing in the form prescribed by the regulations and must be made by the applicant in person, and
- the information given by the applicant in or in connection with the application must be verified before the eligible issuing officer on oath or affirmation or by affidavit.

Under s 60A of the LEPR Act, an application for a warrant may be made by email. The eligible issuing officer must not issue the warrant unless the information given by the applicant in, or in relation to, the application is verified before the issuing officer on oath or affirmation or by affidavit.

Under s 62(1) an application for a search warrant must include:

- the name of the applicant and details of the authority of the applicant to make the application for the warrant
- particulars of the grounds on which the application is based, including (without limitation) the nature of the searchable offence or other offence involved
- the address or other description of the subject premises
- if the warrant is required to search for a particular thing – a full description of that thing and, if known, its location
- if the warrant is required to search for a kind of thing – a description of the kind of thing
- if a previous application for the same warrant was refused – details of the refusal and any additional information required by s 64, and
- any other information required by the regulations.

An eligible issuing officer, when determining whether there are reasonable grounds to issue a warrant, is to consider (but is not limited to considering) the following matters under s 62(3):

- the reliability of the information on which the application is based, including the nature of the source of the information, and
- if the warrant is required to search for a thing in relation to an alleged offence — whether there is sufficient connection between the thing sought and the offence.

The applicant must provide (either orally or in writing) such further information as the eligible issuing officer requires concerning the grounds on which the warrant is being sought (s 62(5) LEPR Act).

The applicant for a warrant is not obliged to disclose the identity of a person from whom information was obtained if the applicant is satisfied that to do so might jeopardise the safety of any person (s 62(6) LEPR Act).

3.3.2 Examination and seizure of property

Section 75A(1) empowers a person executing or assisting in the execution of a warrant to:

- bring to the premises the subject of the warrant any electronic and other equipment reasonably necessary for the examination of a thing found at the premises
- operate any such equipment (or equipment already at those premises) to examine a thing found at the premises in order to determine whether it is or contains a thing that may be seized under the warrant, and
- move a thing found at the premises to another place (for up to 7 working days) for examination in order to determine whether it is or contains a thing that may be seized under the warrant if the occupier of the premises consents or if:
 - it is significantly more practicable to do so having regard to the timeliness and cost of examining the thing at another place and the availability of expert assistance
 - there are reasonable grounds to suspect it is or contains a thing that may be seized under the warrant.

3.3.3 Removal of things from the premises for examination

Section 75A(2) provides that if a thing is moved to another place for examination under this section, an eligible issuing officer may authorise the removal of the thing for an additional period (not exceeding 7 working days at any one time) if satisfied that the additional period is required to determine whether it is or contains a thing that may be seized under the warrant. In exceptional circumstances the eligible issuing officer may authorise the removal of a thing exceeding a total of 28 days (s 75A(4)).

Under s 75A(3), the person executing the warrant must advise the occupier that they may make submissions to the eligible issuing officer on that matter and is to give them a reasonable opportunity to do so.

3.3.4 Post execution of a search warrant

Section 74(2) requires a report to be submitted to the eligible issuing officer who issued the warrant within 10 days after the execution or expiry (whichever is earlier) of the warrant. Under s 74A, the report must:

- state whether or not the warrant was executed
- if the warrant was executed – set out briefly the result of the execution of the warrant (including a brief description of anything seized)
- if the warrant was not executed – set out briefly the reasons why the warrant was not executed
- state whether or not an occupier’s notice has been served

- if a digital evidence access order was issued in connection with the warrant — setting out a brief description of the use of the order
- in the case of a telephone warrant — containing a copy of the form of warrant and, in the case of a search warrant, the form of occupier’s notice if those documents were not furnished to the person, and
- containing such other particulars as may be prescribed by the regulations.

If the eligible issuing officer who issued a warrant has died, has ceased to be an eligible issuing officer or is absent, the report must be provided to any other eligible issuing officer (s 75 LEPR Act).

3.4 Law Enforcement (Powers and Responsibilities) Regulation 2016

3.4.1 Seizure of property receipts

Clause 9(1) requires a person who seizes a thing while executing a search warrant in any premises to provide the occupier with a receipt acknowledging seizure of the thing if the occupier is then present and it is reasonably practicable to do so. A copy of the receipt must be attached to the s 74 report to the eligible issuing officer.

3.4.2 Records not available for inspection

Clause 14(1) enables an eligible issuing officer to issue a certificate to “seal” the Local Court’s records (or parts thereof) relating to an application for a search warrant if they are satisfied that disclosure of any such record:

- could disclose a person’s identity which in turn is likely to jeopardise that or any other person’s safety, or
- may seriously compromise the investigation of any matter.

Pursuant to clause 14(2), the document or part of the document to which the certificate relates is not to be made available for inspection under clause 13(6) or (7). The certificate is to be kept with the document to which it relates (clause 14(3)).

Under clause 14(4), an eligible issuing officer (whether or not the one that issued the certificate) may revoke the certificate if satisfied (after consideration of submissions from any interested party) that disclosure of the matter to which it relates is no longer likely to jeopardise any person’s safety or seriously compromise the investigation of any matter.

4

The Commission's search warrant policy and procedures

4.1 Operations Manual Policy and Procedure IP09, Use of ICAC Investigation Powers (Except Under s35)

The procedure for applying for and executing a search warrant is provided in the Commission's Operations Manual Policy and Procedure IP09, *Use of ICAC Investigation Powers (Except Under s35)* (the **procedures or IP09**). The purpose of the document is to outline the requirements for the use of certain powers under the ICAC Act, including s 40 – issuing search warrants. The procedure was first issued on 8 February 2017 and was reviewed on 21 September 2022, 14 December 2022 and 28 August 2023. The next review is due on 11 June 2025.

A comparison between the policies dated 8 February 2017, 14 December 2022 and 28 August 2023 shows that the two substantive changes made to the policy over the audit period were the inclusion of procedures relating to digital evidence access orders and application for a search warrant by email to the eligible issuing officer.

No digital evidence access orders were made during the audit period. One warrant was applied for by email under s 60A LEPRA Act in March 2022, after the amendments to the legislation were passed in December 2021. As this audit did not concern digital evidence access orders and only one email application was applied for during this period and verified by affidavit in accordance with s 60A(2)(b), I had regard to the most recent version of the policy being, 28 August 2023 in undertaking this audit.

IPO9 is to be read in conjunction with a number of other policies and procedures related to search warrants, including the IP12- *Property Management* procedure. This audit did not consider property management procedures.

4.1.1 General procedure for seeking the issue of a search warrant

Approval to commence an application to seek a search warrant must first be given by the Executive Director Investigation Division (ID). Approval is obtained by the applicant preparing and submitting a search warrant authorisation checklist through the Chief Investigator (now referred to as Manager, Investigations) to the Executive Director ID for consideration. A separate authorisation checklist is required for each warrant sought.

If the approval to commence a search warrant application is granted, the applicant will prepare an application package containing the following:

- draft search warrant application
- draft search warrant
- draft occupier's notice
- draft clause 14 certificate (see 3.4.2 above)
- a draft application for a digital evidence access order (if required)
- draft digital evidence access order (if required).

Each premises to be searched requires a separate search warrant and a separate search warrant application. The search warrant application must address the following:

- the name of the applicant and basis of their authority to make the application
- the nature of the matter that is being investigated and allegations involved
- the grounds for which the warrant is sought
- the address and description of the premises to be searched
- a description of the documents or things (or kind of things) to be searched for and if known, the location of those documents or things on the premises
- the connection between the documents and things sought under the warrant and the matter under investigation

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- if a clause 14 certificate is relevant to prevent the inspection of the search warrant and application records, then the grounds upon which the certificate is sought
- if a previous application for a search warrant was made and was refused, the details of that application and its refusal and additional information that now justifies making a further application
- if it is proposed to execute the warrant between 9:00pm and 6:00am, the reason why this is necessary.

Searches can only be conducted on occupied premises unless there are exceptional circumstances.

When the search warrant application package has been prepared, the applicant is to:

- endorse the authorisation check list
- submit the application package and authorisation checklist to the relevant chief investigator who will also check the contents of the documents for accuracy and completeness and endorse the authorisation checklist as appropriate.

The applicant should then refer the application package and authorisation checklist to the relevant case lawyer who will ensure that the documents meet the requirements of the ICAC Act and the LEPR Act and that any other relevant requirements of the policy and procedure have been adequately addressed.

Once the application package documents are in final form, the case lawyer endorses the authorisation checklist and refers the application package to the Executive Director Legal for approval.

The Executive Director Legal will then:

- in the case of a search warrant proposed to be executed on a parliamentary office where parliamentary privileged material is likely to be found, refer the application package to the Chief Commissioner for approval or
- in any other case, endorse the authorisation checklist.

Once the application package and authorisation checklist has been given all necessary approvals and endorsements, the application package and authorisation checklist are referred to the applicant who will:

- deliver the authorisation checklist to Property and Products for registration and obtain an authority source number (ASN) for the warrant application
- at the appropriate time, arrange an appointment with an authorised issuing officer
- attend upon the authorised officer for the purpose of the making the application.

A search warrant application can be made in person by the applicant (with the application being verified on oath or affirmation before the authorised officer) or by email (an email application must be supported by way of sworn affidavit) or by the applicant appearing before the issuing officer by audio visual link or telephone and the issuing officer administers the oath or affirmation by the same means.

Where the issuing officer issues the warrant on an application made by email, the issuing officer may email the signed warrant and occupier's notice to the applicant.

When a search warrant is issued, the applicant must, as soon as practicable, lodge the following with the Commission's Property and Products for retention in accordance with the Commission's policy and procedure IP12- Property Management:

- a copy of the search warrant application
- a copy of the search warrant
- a copy of the occupier's notice
- a copy of the clause 14 certificate
- digital evidence access order application (if applicable)
- a copy of the digital evidence access order (if applicable).

4.1.2 Planning and risk assessment for the execution of a search warrant

As part of the planning for the execution of a search warrant, completion of a search warrant operations plan and risk management plan, must be approved by the relevant Chief Investigator and the Executive Director ID prior to the search warrant being executed.

The search warrant operations plan includes (among other things) information relating to the facts about the matter under investigation, the objective of the search warrant activity and the approach to be taken in carrying out the planned search. The Commission officers involved in the execution of the search warrant also participate in a briefing which covers all aspects of both that plan and the risk management plan.

The risk management plan is used to determine the risks associated with the search, including the premises to be searched and the subject of the search. The Commission's procedure sets out escalation procedures if a risk is assessed as likely to materialise.

4.1.3 Executing a search warrant

Entry, use of force and assistance

A search warrant must be executed during the hours authorised by the warrant.

A warrant is executed when the search authorised by the warrant is completed and those authorised under the warrant to conduct the search have left the premises.

Where the warrant holder is satisfied that the documents and things (the property) described in the warrant have been located and seized or they are not on the premises, the warrant holder must terminate the search and must not remain on the premises, without the occupier's consent.

As soon as practical after execution of a search warrant, or the expiry of the warrant, which ever first occurs, the search warrant holder must:

- if executed, endorse a copy of the search warrant with details of the execution as per the form of endorsement set out on the final page of the warrant form
- return the original warrant, endorsed copy of the warrant (if applicable) and search warrant holder's checklist (if applicable) to the Commission's Property and Product Services in compliance with policy and procedure IP12 Property Management.

A search of unoccupied premises must not be conducted or continued only in exceptional circumstances which requires approval by the Executive Director ID.

A search warrant holder must announce that the person is authorised by the warrant to enter the premises and give any person then in or on the premises an opportunity to allow entry into or onto the premises. If the warrant holder believes that use of force to enter the premises is reasonably necessary, then unless, due to urgency, it is not practicable to do so, the warrant holder must obtain the approval of the Executive Director ID, if possible, through the Chief Investigator.

Where force has been used to enter the premises or break open a receptacle in or on the premises, the warrant holder must ensure that the basis for, and reasonable necessity for the use of that force is documented or recorded.

Video recording of the entry is to occur without exception.

Procedure upon entry

Upon access being gained to the premises the warrant holder is to:

- identify each of the search team members as members of the Commission, or otherwise the basis for their presence during the search
- read and explain the search warrant to the occupier and produce the warrant to the occupier for inspection if requested (the warrant holder must retain possession of the warrant)
- serve the occupier's notice to the occupier

- produce the digital evidence access order if requested (if applicable)
- advise the occupant of the use of video and audio recording equipment and seek the occupant's consent to the audio recording
- invite the co-operation of the occupier in the conduct of the search.

4.1.4 Management of seized property

In seizing property during the search, it is the responsibility of the warrant holder to ensure compliance with the Commission's Property Management policy and procedures (IP12 Property Management), as well as s 75A LEPR Act, in dealing with and handling the property.

4.1.5 Post execution of a search warrant

Within 10 days of the execution of the warrant or the expiry of the warrant, whichever occurs first, the applicant for a warrant must report to the authorised officer who issued the warrant. The report must attach the original warrant and if a document or thing was seized under the warrant, a copy of the property receipt/s issued to the occupier for the documents and things seized under the warrant. The applicant must ensure compliance with the procedures for registering a copy of the report to the authorised officer under IP12 Property Management.

As soon as practicable following the execution of a search warrant, the Chief Investigator must convene a post warrant operations assessment de-briefing. All Commission staff identified in the search warrant operations plan attend the de-briefing. The purpose of the de-briefing is to assess the efficiency and effectiveness of what was done and also, how it was done.

Following the debriefing the Chief Investigator is to prepare a report and refer the report to the Executive Director ID for consideration and determination of any recommended action.

5

Compliance with the legislation

5.1 Introduction

It is unnecessary to set out the steps taken in each individual application for, and execution of, the search warrants. I have examined all the material in respect of each of the warrants executed.

I note the following:

- I have not interviewed occupiers who were subject of a search warrant
- I have not examined whether items seized or moved (if any) have been returned to the occupier, in compliance with s 75A LEPR Act
- I have not examined whether the ICAC has followed procedures relating to the filing and storage of its documents on its case and document management systems.

5.2 Reasonable belief

Section 40(4) of the ICAC Act provides that to apply for a search warrant under that section, an ICAC officer must have:

“... reasonable grounds for believing that there is in or on any premises a document or other thing connected with any matter that is being investigated under this Act or that such a document or other thing may, within the next following 72 hours, be brought into or onto the premises.”

The question arises as to whether the contents of the application for search warrants are true to the best of the applicant’s knowledge and belief.

It is impracticable for me or my staff to cross-examine every applicant upon every application that we have examined in the course of this audit.

However, an examination of the material available from the Commission shows that a belief was held by reason of information obtained from individuals, lawfully obtained telephone intercepts or surveillance (with or without the aid of surveillance devices). An examination of each application shows an internal consistency of information supporting the conclusions and raises a high degree of probability that the contents of those affidavits were true and correct.

5.3 Section 75A(3) LEPR Act

On 16 August 2024, I asked the Commission to provide to me the documents which evidenced compliance with s 75A(3) LEPR Act. From that material, it was clear that in four of the audited search warrants, items were moved and in three, s75A applications were made to the issuing officer for an extension. Each of those three applications was supported by an affidavit in which the applicant attested to notifying the occupier of the applicant and the occupier’s right to make submissions.

I have reviewed the material provided by the Commission and I am satisfied that the Commission complied with s 75A(3) of the LEPR Act, in that the Commission advised the occupier that they may make submissions to the eligible issuing officer and provided them with a reasonable opportunity to do so.

When providing that information to me, the Commission indicated that the property movement receipt that is provided to the occupier would be amended to include the following endorsement to be signed by them:

“ I have been advised that this allows the item(s) to be moved for 7 working days. If an application is made to an issuing officer for an additional period to determine whether the moved item(s) is or contains a thing that may be seized under the warrant, I will be informed and will be able to make submissions to the issuing officer. I wish to be informed by:

Email: (occupier to provide preferred email address) or

Telephone: (occupier to provide preferred telephone number)”

On 24 September 2024, the Commission confirmed that the receipt had been amended in accordance with the above wording to include additional information to the occupier.

I agree with the amendments made by the Commission to the property movement receipt. This amendment will provide clarity and information to the occupier as to their rights under s75A (3) of the LEPR Act in relation to moved property.

5.4 The authorising officer

As outlined in chapter 3, the issuing officer of a search warrant must be an ‘authorised officer’, as defined in s 3 LEPR Act. Of the search warrants audited:

- three search warrants were signed noting the authorised officer’s first name and last name
- one was signed but did not note their name
- the remaining search warrants were signed and had an initial for their first name and full surname.

I raised this matter with the Commission, noting that it was not its responsibility to ensure that the authorised officer completed the warrants. The Commission responded:

“The form of the search warrant used by the Commission is a prescribed form, being form 15 as set out in Schedule 1 to the Law Enforcement (powers and Responsibilities) Regulation 2016. I note that the forms identifies the authorised officer’s power to issue a search warrant as coming under s 40(1) of the ICAC Act and there is provision for the name of and signature of the authorised officer at the bottom of the form.”

This is not a matter for me, as it does not concern the ICAC, however, I raised it with the Chief Commissioner as he may want to inquire further. The Chief Commissioner has advised me that he has written to the Secretary of the Department of Communities and Justice to bring this issue to his attention for him to take whatever action he considers appropriate.

5.5 Conclusion

Based on the examination of the materials, I am satisfied in relation to the nine search warrants executed in NSW:

- each applicant had reasonable grounds, pursuant to s 40(4) of the ICAC Act, for believing that there is in or on any premises a document or other thing connected with any matter that is being investigated or that such a document or other thing may, within the next following 72 hours, re-brought into or onto the premises
- the application requirements under s 62 of LEPR Act were satisfied
- the applications were in the prescribed form and verified by oath or affirmation in accordance with ss 60, 60A and 66 LEPR Act
- the occupier’s notices were in the prescribed form, in accordance with s 67 LEPR Act and served in each case on a person who appeared to be an occupier of the premises and who was of or above the age of 18 years
- the person executing the search warrant produced the warrant for inspection to an occupier of the premises when requested
- the warrants were executed within the hours of the day permitted by them (6:00am-9:00pm, pursuant to s 45 of the ICAC Act) and within the period of their validity
- no unreasonable force was used for the purpose of entering premises under the search warrant
- the items seized, the documents or other things were connected with a matter that was being investigated under s 47 of the ICAC Act
- in relation to the one application made by e-mail, the requirements under s 60A LEPR Act were satisfied.

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There is no evidence of abuse of power, impropriety, or other forms of misconduct on the part of the Commission or officers of the Commission in the applying for and executing the search warrants.

There is also no evidence of maladministration, including unreasonable invasions of privacy, or of any action or inaction of a serious nature that was contrary to law, unreasonable, unjust, oppressive or improperly discriminatory or based wholly or partly on improper motives, in the applying for and executing the search warrants.

I conclude that, the ICAC has complied with the relevant law in each of the nine warrants the subject of this audit.

6

Compliance with Operations Manual Policy and Procedure IP09

6.1 Compliance with internal policies

I reviewed the nine search warrants to determine whether they complied with the Commission's search warrant policy IP09. The policy had been reviewed on 8 February 2017, 14 December 2022 and 28 August 2023, however, generally there has been little substantive change over the years (except for the items set out in 4.1).

6.1.1 Planning and risk assessment

Each search warrant executed in NSW must be accompanied by an operations plan and risk assessment plan which must be endorsed by the Chief Investigator and Executive Director ID. The ICAC has indicated to me that the term 'Chief Investigator' is no longer used, and the position is now known as 'Manager Investigations'.

Compliance with IP09

Each of the nine search warrants executed in NSW had a completed operations plan (one for each operation, three in total) and risk assessment plan containing the requisite information.

Missing endorsements

No one signed one of the three operations plans, although the Executive Director ID signed the risk assessment plan which accompanied the operations plan.

None of the nine risk assessment plans had endorsements by a Manager Investigations, however they were signed by the applicant and the Executive Director, ID

6.1.2 Authorisation checklist

Approval to commence an application to seek a search warrant must be first given by the Executive Director ID. The applicant is to prepare and submit a search warrant authorisation checklist via the relevant Manager Investigations, to the Executive Director ID.

After approval is given by the Executive Director ID, the relevant documents are prepared for the application package.

There are several endorsements which are needed on the authorisation checklist by:

- the investigator drafting the documents (i.e. the applicant)
- the Manager Investigations
- the case lawyer
- the Executive Director Legal
- the Chief Commissioner (if applicable).

This is to ensure the accuracy of the form and contents of the drafted documents.

Compliance with IP09

I am satisfied that the relevant documents were prepared for each search warrant.

Missing endorsements

In one of the nine search warrants, the Manager Investigations did not endorse the authorisation checklist. However, it was endorsed by the Executive Director ID.

In five of the nine search warrants, the applicant did not endorse the authorisation checklist, however, the Manager Investigations signed it.

6.1.3 Email applications

The policy indicates that an application may be made by email as prescribed by the regulations, The email application must be supported by sworn affidavit or by the applicant appearing before the issuing officer by audio visual link or telephone and the issuing officer administers the oath or affirmation by the same means.

One application during the audit period was made by email in March 2022.

As I indicated above the requirements of s 60A were satisfied.

6.1.4 Result of the application for a search warrant

Part 4 of the authorisation checklist is to be completed with details of the result of the application to the issuing officer.

Incomplete section

None of the nine search warrants had Part 4 result of the application completed.

6.1.5 Execution of the search warrant

The policy requires that search warrant holders follow procedure regarding occupied premises (except in exceptional circumstances) and that the occupier be given a receipt of property seized at the conclusion of the search.

Compliance with IP09

I have reviewed the video body worn recordings of the nine search warrants executed in NSW. I am satisfied that all:

- were conducted on occupied premises, with a person over the age of 18 years of age present
- the search warrant holder followed the entry procedures including:
 - identifying the ICAC team members and basis for their presence
 - reading and explaining the search warrant to the occupier, if it was requested
 - advising that the search will be audio and video recorded
 - inviting co-operation from the occupier in the search
 - allowing them to see a copy of the warrant
- the occupiers were not denied their rights during the search of the premises which are:
 - being present during the search
 - being given a copy of the Occupier's Notice
 - being given a receipt of the property seized and/or moved
 - requesting a copy of any document seized or any other thing that can be readily copied.

Search warrant holder's checklist

The policy indicates that the search warrant holder's checklist should be used to record key information about the execution of the search warrant to assist with maintaining proper records.

In eight of the nine warrants, the search warrant holders did not complete the checklist.

Missing endorsement

After the search warrant has been executed, the warrant holder must endorse the warrant with details of the execution on the last page. In one of nine warrants, this was not completed.

6.1.6 Post warrant execution assessments

The policy indicates that a post warrant operations assessment must be conducted after the execution of each search warrant.

This assessment was not conducted in the nine search warrants that were executed.

6.2 The Commission's response

On 2 October 2024, I forwarded to the Commission a copy of my draft audit report to provide it an opportunity to make comments if it so wished.

On 11 October 2024, I received the Commission's response, setting out its comments and the actions that it would take to address the issues I identified.

Operations plan and risk management plan

In response to the issues set out in 6.1.1, the Commission has indicated that *'the forms for the operations and risk management plans will be amended to make it clearer that the relevant Manager, Investigations is required to enter their name and sign the plans. Once amended, relevant staff will be sent an email reminding them of the requirement to sign these plans.'*

Authorisation checklist

As to the issues set out in 6.1.2, the Commission has informed me that the *'form of the authorisation checklist will be amended to require signing by the relevant Manager, Investigations. Once amended, relevant staff will be sent an email reminding them of the requirement to sign the checklist.'*

In relation to the issues set out in 6.1.4 relating to the completion of Part 4 of the authorisation checklist, the Commission noted that:

"...the Acting Executive Director ID sent an email to relevant staff on 28 August 2024 reminding them of the need to ensure Part 4 of the authorisation checklist is completed. This will be reiterated in the email to be sent when the authorisation checklist has been updated."

Execution details on search warrant

In response to the issue identified at 6.1.5, relating to the missing endorsement on the back of the search warrant the Commission indicated that:

"...the Acting Executive Director ID sent an email to relevant staff on 28 August 2024 reminding them of the need to ensure Part 4 of the authorisation checklist is completed. This will be reiterated in the email to be sent when the authorisation checklist has been updated."

Search warrant holder's checklist

In response to my observations in 6.1.5, relating to the search warrant holder's checklist, the Commission has informed me that it will remove the requirement for this checklist as it is no longer required. Further, it has indicated that the policy will be amended to include the following:

"An action is created in the Commission's case management system regarding the execution of each search warrant. The action must contain relevant information including, the time/date of execution and conclusion of the warrant, names of Commission officers in attendance, names(s) of occupiers, a summary of items recovered and/ or moved and any issues that arose during the execution.' Post Warrant Operation Assessments."

Post warrant operation assessments

In relation to the post warrant operation assessments, the Commission has indicated that it will amend the policy to clarify the circumstances in which an assessment is required as follows:

"The purpose of the post warrant operations assessment (PWOA) is to assess whether a warrant was conducted in accordance with the relevant legislation and Commission policy. The Commission's

PWOAs are conducted on a risk-based approach for those warrants identified by the Investigation Division Management team as requiring an assessment. The Manager Investigations will convene a PWOA meeting and all Commission staff roles identified in the search warrant operations plan should attend (except that the attendance of the Executive Director ID and manager Communications and Media is optional).

This requires an assessment of how well the search warrant operations planning and execution was undertaken (processes and procedures) and the benefits or value of the search warrant activity to the investigation (quality and strategy) by identifying what worked and where there are areas or opportunities for improvement.

Following the assessment the Manager Investigations is to prepare a PWOA report and refer the report to the Executive Director ID for consideration and determination of any recommended action.”

6.2.1 Execution of search warrant – legal practitioner

During the time period there was one search warrant that was executed on a practising solicitor at a residential property. I noted in my letter to the Commission, dated 16 August 2024 that it had not provided documents in accordance with Appendix C – Search Warrants on Lawyer’s Offices in IPO9, as referenced in the Risk Management Plan. Appendix C requires compliance with procedures set out regarding claims for legal professional privilege and conducting searches on a lawyer’s office.

In response, the Commission noted that prior to the execution of the search warrant, it was aware that the occupant was a practising solicitor who also had their own company. There was no information that the occupant was conducting the legal practice at the location the search warrant was to be executed.

I accept that explanation.

6.3 Conclusion

I am satisfied that the steps taken or to be taken by the Commission adequately addresses the matters raised in this audit.

7

Interstate search warrant

7.1 Search warrant not executed by the ICAC

I now turn to the warrant that was executed interstate. Interstate warrants are treated differently as the Commission considers its role to be an observer and the NSW Police Force acts as its agent to request that the interstate Police Force make the search warrant application in the state it is to be executed.

As a result, the ICAC obtains or receives limited completed documentation. It is also not aware of the interstate Police Force policies relating to search warrant applications.

This audit covers the NSW ICAC practices and compliance with legislation and not those of other agencies.



Five years on: a comparison

8.1 A comparison

This section compares the findings of the 2020 audit, which considered 37 warrants and the findings of this audit, which considered 10 warrants.

Risk assessment forms

In 2020

- The risk assessment forms were not endorsed by the relevant officers in three search warrants.
- The risk assessment form was not signed by the Executive Director, ID in one search warrant.
- The risk assessment form was incomplete in one search warrant.

In 2024

- Endorsement by the relevant persons remains an issue in this audit, as none of the risk assessment Forms were endorsed by the Manager Investigations.

Authorisation checklists

In 2020

- The authorisation checklist was not completed or incomplete in three search warrants.
- The authorisation checklist was not signed by the applicant in one search warrant.
- The authorisation checklist was not endorsed by the Chief Investigator in two search warrants.
- The authorisation checklist did not note the completion of an occupier's notice in three search warrants.

In 2024

- All search warrants contained an authorisation checklist. However, Part 4 of the checklist was not completed.
- In five of the search warrants, the authorisation checklist had not been signed by the applicant and one did not contain an endorsement by the Chief Investigator.
- All search warrants noted completion of all relevant documents on the checklist.

Retention of copies

In 2020

- A copy of the occupier's notice was not retained in one search warrant.
- Signed copies of the application for a search warrant were not retained in 15 search warrants as the Court did not always provide signed copies of the applications.

In 2024

- All search warrants were accompanied by signed copies of the Occupier's Notice and application for the search warrant.

9

Conclusion

9.1 Conclusion

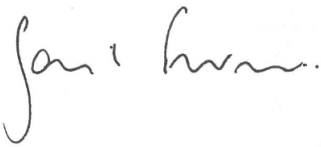
This audit has demonstrated the need for the Commission to regularly ensure alignment between its practices and policies in relation to the application and execution of search warrants.

It also evidences that the Commission has acted lawfully and in substantive compliance with those policy requirements which support lawful conduct.

The comparison between the 2020 audit and this audit, reveals that the Commission has improved its practices, albeit with far fewer search warrants being issued and executed during this audit. It also is evidence that there is real benefit in such audits being conducted periodically to ensure ongoing alignment.

However, I am satisfied that the steps taken or to be taken by the Commission adequately addresses the matters raised in this audit.

I will be monitoring the Commission's response to this audit and will report on any developments in my annual report for 2024-2025.



Gail Furness SC
Inspector of the Independent Commission Against Corruption
31 October 2024

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