



New South Wales



Report of an audit of the ICAC's compliance with the Listening Devices Act 1984



New South Wales

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A. BACKGROUND

1. Introduction

Section 57B (1) (a) of the *Independent Commission Against Corruption Act 1988* ("the ICAC Act" authorises the Inspector of the Independent Commission Against Corruption ("the Inspector" and "the Commission" or "the ICAC") to "audit the operations of the Commission for the purpose of monitoring compliance with the law of the State".

From time to time, as part of its investigations into allegations concerning serious and systemic corrupt conduct, the Commission obtains warrants pursuant to the *Listening Devices Act 1984* ("the Act"). These warrants authorise officers of the Commission to listen and record private conversations which would otherwise be prohibited under the Act.

This is a report of an audit conducted in June 2008 by the Office of the Inspector of the ICAC (OIICAC) of a sample of warrants obtained by the Commission pursuant to the Act for the period 1 January 2004 to 31 May 2008. Commission officers advised OIICAC staff that the ICAC only listened to and recorded private conversations by way of warrants obtained pursuant to Part 4 of the Act. The audit therefore only focusses on the Commission's compliance with Part 4.

The ICAC's compliance with the Act was assessed against the following provisions:

Section 16 (6A): Whether warrants complied with the requirement of this provision that a warrant "may be in or to the effect of the form set out in Schedule 2" of the Act;

Section 16A (1): Whether any listening device(s) which remained on premises after the expiry of the warrant authorising its installation was retrieved as soon as practicable as required by the provision.

Section 16A (2): states that in the above case, the warrant is continued in force for a period of ten days after its expiry for the purpose of authorising retrieval of the listening device. Subsection 3 allows an application to be made for a longer period of time. Where an order is made pursuant to this section by an eligible Judge there are reporting requirements under s.19 (4). Therefore, where applicable, the ICAC's compliance with these provisions was audited to assess compliance.

Section 17 (1): Whether particulars of the warrants obtained pursuant to s.16 were notified by the ICAC to the Attorney General or a prescribed officer as required by this provision within the time frame specified in the warrant;

Section 19 ss (1) (2) and (4): Whether under:

- ss (1) a report containing prescribed particulars about the use of the listening device(s) authorised in the warrant within the time frame specified in the warrant was furnished by the ICAC to both the eligible Judge who granted the warrant and to the Attorney General;
- ss (2) where a direction was given by an eligible Judge that any record of evidence or information obtained by the use of

the listening device is to be brought into the Court, there was compliance with the direction;

- ss (4) where an order has been made under s.16A a report must be furnished to the eligible Judge and to the Attorney General stating whether or not the listening device was retrieved during the currency of the order and if not, why not.

Section 20 (4): Where, in accordance with s.20 (1) an eligible Judge directs that a person who has been the subject of surveillance be provided with information regarding a warrant and use of a listening device(s), that there has been compliance with any such direction.

2. The *Listening Devices Act 1984* (the Act)

The purpose of the Act is stated as being:

An Act to regulate the use of certain devices capable of being used for listening to private conversations; and to repeal the *Listening Devices Act 1969*.

The Act consists of five parts. These are:

Part 1 Preliminary: This Part is concerned with the commencement of the Act and definitions.

Part 2 Offences relating to listening devices: The use of a listening device to record or listen to a private conversation is prohibited under this Part and constitutes an offence unless it occurs in accordance with the listed exceptions.

Part 3 Admissibility of evidence: Part 3 prescribes the circumstances in which evidence obtained by use of a listening device may be deemed to be admissible in civil or criminal proceedings.

Part 4 Warrants: Part 4 sets out the requirements for an application, by a body such as the ICAC, to an "eligible Judge", as defined under the Act, for a warrant authorising use of a listening device. Under section 16 an eligible Judge may:

- authorise a warrant if satisfied that there are reasonable grounds for its issue (the criteria for making such a determination are set out in ss.2);
- authorise entry onto premises for installation and retrieval of listening devices;
- revoke a warrant before the period of its duration has expired.

An eligible Judge is required to have regard to the following considerations in granting the warrant:

- the nature of the prescribed offence in respect of which the warrant is sought;
- privacy considerations;
- any alternative means of obtaining evidence;
- the evidentiary value of any evidence sought.

Part 5 Miscellaneous provisions: This Part contains provisions such as the destruction of irrelevant records and the requirement for the provision of an annual report by the Attorney General.

3. Consultation with the ICAC

On 27 February 2008 the Inspector wrote to the Commissioner of the ICAC, Mr Jerrold Cripps QC ("the Commissioner"), enclosing draft terms of reference for the proposed audit.

On 31 March 2008 OIICAC staff met with the following ICAC staff to receive a briefing on the ICAC's exercise of powers under the Act:

- Mr Michael Symonds, Executive Director, Investigations;
- Mr David Casserly, Chief Investigator, Surveillance and Technical Unit; and
- Ms Michelle Hele, Administrative Assistant

It was agreed during discussions with the ICAC staff that the audit would only review warrants from 1 January 2004 as this would provide a sufficient historical perspective on the ICAC's compliance with the relevant law.

The ICAC delivered ten files containing warrants obtained by it pursuant to the Act from the period of 1 January 2004 to 30 April 2008.

Following a preliminary review of the files and a consideration of the issues discussed in the meeting between OIICAC and ICAC staff on 31 March 2008, the Inspector amended the draft terms of reference in order to clarify the scope of the audit, the methodology to be used and the outcome of the assessment.

On 12 May 2008 the Inspector wrote to the Commissioner enclosing the amended draft terms of reference and inviting the

Commissioner's comments on the same. In the same letter the Commissioner was also advised that it was proposed to audit:

- approximately 30 per cent of the warrants obtained by the ICAC annually between 1 January and 31 December from 2004 to 2007; and
- 100 per cent of all warrants obtained by the ICAC from 1 January 2008.

The percentages were chosen to ensure that a sufficiently wide sample of the warrants obtained by the ICAC annually since 1 January 2004 was audited. The ICAC was advised that 100 per cent of the warrants granted in 2008 would be audited because at the time of providing the advice, the ICAC advised it had only obtained four warrants. It was therefore felt that this was a sufficiently small number to justify auditing all the warrants obtained. This figure was later revised to auditing only three warrants, which represented 37 per cent of the eight warrants obtained to date in 2008 by the time the audit was completed in June 2008. In a letter to the ICAC enclosing the audit report the ICAC has been advised of this change. The ICAC was also advised that one of the warrants audited was granted in May 2008 so the period for auditing in 2008 was now from 1 January 2008 to 31 May 2008.

On 26 May 2008 the Commissioner wrote to the Inspector advising that he had reviewed the amended draft terms of reference and had no objection to the proposed scope, methodology and outcome of the audit. The final terms of reference for the audit are reproduced below.

4. The Terms of Reference

Purpose

Audit the operations of the Commission for the purpose of monitoring compliance with the *Listening Devices Act 1984*.

Scope

Examine a fair sample of warrants obtained annually by the ICAC pursuant to the *Listening Devices Act 1984* from 1 January to 31 December each year from 2004 to 2007 and from 1 January 2008 to 30 April 2008;

Examine ICAC practices and procedures concerning applications for the use of a listening warrant;

Hold discussions with relevant ICAC officers, as may be required, about the circumstances in which the Commission exercises powers including applying for a warrant under the *Listening Devices Act 1984*.

Methodology

Review:

- any ICAC procedures, guidelines or practices, and the ICAC's compliance with any other laws, relevant to an exercise of powers pursuant to the *Listening Devices Act 1984*. The OIICAC will hold discussions with ICAC officers on any of the above issues as may be relevant to the audit.

- a fair sample of records held by the ICAC relevant to its exercise of powers pursuant to the exceptions authorised in Part 2 of the *Listening Devices Act 1984*; and
- a fair sample of applications for warrants obtained by the ICAC from 1 January to 31 December each year from 2004 to 2007 and from 1 January 2008 to 30 April 2008 under the *Listening Devices Act 1984*.

Outcome

An audit report will be submitted that will indicate the extent to which the ICAC complies with the *Listening Devices Act 1984*.

B. THE AUDIT

1. Relevant ICAC Policies and Procedures

The following parts of the previous and current ICAC Operations Manuals that were applicable to the preparation of warrant applications from 1 January 2004 to 30 April 2008 were reviewed as part of the audit:

- (1) "Procedures for Obtaining a Listening Device Warrant"
Procedure No 21, "Last revised" September 2000
- (2) "Procedure for Obtaining & Executing Listening Device Warrants"
Procedure No 10, Approved May 2005
- (3) "Procedure for Obtaining & Executing Listening Device Warrants"
Procedure No 10, Approved August 2007
- (4) "Procedure for Obtaining & Executing Listening Device Warrants"
Procedure No 10. second Draft 19 June 2008,
Approved August 2007
- (5) "Procedures for Obtaining & Executing Surveillance Device Warrants, Draft Changes 23 June 2008,
Approved 10 April 2008

The above Procedures set out the role and responsibilities of various officers in preparing a warrant application, and specify the documentation required to accompany a warrant application and the management approval process for a warrant application.

2. Warrant Applications Audited

Period: 1 January 2004 – 31 December 2004

115 warrants granted

35 warrants audited = 30 per cent

(1)	1/2004	(15)	40/2004	(29)	82/2004
(2)	3/2004	(16)	44/2004	(30)	85/2004
(3)	6/2004	(17)	47/2004	(31)	88/2004
(4)	9/2004	(18)	50/2004	(32)	102/2004
(5)	12/2004	(19)	52/2004	(33)	104/2004
(6)	14/2004	(20)	55/2004	(34)	109/2004
(7)	16/2004	(21)	56/2004	(35)	112/2004
(8)	19/204	(22)	59/2004		
(9)	22/2004	(23)	61/2004		
(10)	23/2004	(24)	63/2004		
(11)	26/2004	(25)	66/2004		
(12)	30/2004	(26)	70/2004		
(13)	32/2004	(27)	73/2004		
(14)	37/2004	(28)	79/2004		

Period: 1 January 2005 – 31 December 2005

41 warrants granted

13 warrants audited = 32 per cent

(1)	1/2005	(7)	16/2005	(13)	39/2005
(2)	4/2005	(8)	18/2005		
(3)	8/2005	(9)	21/2005		
(4)	10/2005	(10)	25/2005		
(5)	13/2005	(11)	28/2005		
(6)	14/2005	(12)	32/2005		

Period: 1 January 2006 – 31 December 2006

24 warrants granted

8 warrants audited = 33 per cent

(1)	1/2006	(5)	10/2005
(2)	3/2006	(6)	19/2006
(3)	5/2006	(7)	22/2006
(4)	7/2006	(8)	24/2006

Period: 1 January 2007 – 31 December 2007

41 warrants granted

13 warrants audited = 32 per cent

(1)	1/2007	(7)	20/2007	(13)	41/2007
(2)	3/2007	(8)	24/2007		
(3)	9/2007	(9)	28/2007		
(4)	13/2007	(10)	31/2007		
(5)	16/2007	(11)	34/2007		
(6)	19/2007	(12)	38/2007		

Period: 1 January 2008 – 30 April 2008

8 warrants granted

3 warrants audited = 37 per cent

(1)	1/2008
(2)	2/2008
(3)	7/2008

C. RESULTS

The audit showed that the ICAC has complied with all of the requirements in Part 4 of the *Listening Devices Act 1984*.

1. Section 16 (6A): A warrant “may be in or to the effect of the form set out in Schedule 2” of the Act.

A copy of Schedule 2 is attached at Annexure A of this report. All warrants audited were set out in compliance with Schedule 2.

Section 16A:

ss(1): This provision requires that any listening device which remains on premises after the expiry of the warrant authorising its installation is to be retrieved as soon as practicable.

There was no specific information provided to the OIICAC about when a listening device was retrieved which would allow the Inspector to gain an understanding as to whether:

- (1) any listening devices had remained on premises after the expiry of an authorising warrant;
- (2) in such a situation, the listening device was retrieved as soon as practicable in accordance with requirements of s16A; and
- (3) any applications were made by the ICAC pursuant to s16A.

The ICAC was asked to advise on this issue.

The ICAC advised that in respect of the warrants audited, only the listening device installed pursuant to warrant 1/2005 was not retrieved during the period of the warrant, or during the period required by s16A of the Act (i.e. within 10 days after the expiry of the warrant). The ICAC advised however, that prior to the expiry of the period allowed by s16A it applied for and obtained an order from the Supreme Court authorising the retrieval period. The ICAC also advised that it provided a report pursuant to s.19 (4) of the Act concerning the retrieval of the listening device to the Supreme Court.

ss(3): There were no applications sought or granted for an order under s.16A. There were no reports under s.19 (4) of the Act.

2. Section 17:

ss(1): This provision requires prescribed particulars of warrants sought under Section 16 to be notified by the ICAC to the Attorney General or a prescribed officer. The particulars to be provided are stated as being:

- a) the prescribed offence in respect of which the warrant is sought,
- b) where practicable, the type of listening device intended to be used,
- c) where practicable, the name of any person whose private conversation is intended to be recorded or listened to by the use of the listening device,
- d) where practicable, the premises on which the listening device is intended to be installed or the place at which the listening device is intended to be used,

- e) whether any attempt has been made to obtain by alternative means the evidence or information sought, and if so, the result of any such attempt,
- f) any other alternative means of obtaining the evidence or information sought to be obtained,
- g) the period in which the listening device is intended to be used,
- h) the name of the person who is to use the listening device,
- i) details of any previous warrant sought or granted under this Part in connection with the same prescribed offence.

All warrants audited complied with s17 (1) by serving on the Attorney General a notice containing all of the prescribed particulars as required in s.17 (1) (a) to (i).

3. Section 19:

ss (1) This section requires that a report is to be furnished to the eligible Judge who granted the warrant and to the Attorney General about the use of the listening devices authorised in the warrant(s) granted within the time specified in the warrant. The report is to be furnished in the following terms:

- (a) stating whether or not a listening device was used pursuant to the warrant, and
- (b) if a listening device was so used:
 - (i) specifying the name, if known, of any person whose private conversation was recorded or listened to by the use of the device,
 - (ii) specifying the period in which the device was used,
 - (iii) containing particulars of any premises on which the device was installed or any place at which the device was used,

(iv) containing particulars of the general use made or to be made of any evidence or information obtained by the use of the device, and

(v) containing particulars of any previous use of a listening device in connection with the prescribed offence in respect of which the warrant was granted.

The dates on the reports provided to the eligible Judge and the Solicitor General as a prescribed officer pursuant to s.19 (1) appeared to indicate that all s. 19 (1) reports were provided within the time specified in the warrants audited. All reports provided pursuant to s.19 (1) provided particulars in compliance with s.19 (1) ss (a) and (b).

ss (2): This section provides that:

Where a report is given to an eligible Judge under ss (1), an eligible Judge may direct that any record of evidence or information obtained by the use of the listening device to which the report relates be brought into the Court, and a person to whom any such direction is given shall comply with the direction.

There was no documentation provided to the OIICAC which indicated that any of the listening devices granted in the warrants audited were subject to such a direction. The ICAC was asked to advise on this issue. The ICAC's response will be incorporated in the final audit report.

4. Section 20 (4): This section provides that where an eligible Judge has directed pursuant to s.20 (1) that a person who has been the subject of surveillance be provided with information regarding a

warrant and use of a listening device(s), the person to whom the direction is given must comply.

The ICAC has advised that there have been no directions pursuant to s.20 (1) of the Act. Compliance with s.20 (4) therefore does not arise.

Graham Kelly
Inspector
27 June 2008