



Office of the Inspector of the
Law Enforcement Conduct Commission

ANNUAL REPORT

**INSPECTOR OF THE LAW
ENFORCEMENT CONDUCT
COMMISSION**

FOR THE PERIOD

ENDING 30 JUNE 2019

Table of Contents

PART 1: THE OFFICE OF THE INSPECTOR OF LECC

1.1	PRELIMINARY OBSERVATIONS.....	1
1.2	ADMINISTRATION.....	3
1.2.1	PREMISES.....	3
1.2.2	STAFF.....	3
1.2.3	BUDGET AND FINANCE	3
1.2.4	WEBSITE.....	4

PART 2: THE ROLE OF THE INSPECTOR OF LECC

2.1	FUNCTIONS OF THE INSPECTOR.....	5
2.2	POWERS OF THE INSPECTOR.....	6
2.3	OTHER RELEVANT LEGISLATION	7
2.3.1	GOVERNMENT INFORMATION (PUBLIC ACCESS) ACT 2009 NO 52 (GIPA ACT)	7
2.3.2	PUBLIC INTEREST DISCLOSURES ACT 1994 (PID ACT).....	8

PART 3: REVIEW OF THE WORK OF THE OFFICE OF THE INSPECTOR OF LECC

3.1	THE INSPECTION FUNCTION – GENERAL OBSERVATIONS.....	10
3.2	THE PARTICULAR LEGISLATIVE REQUIREMENTS	11
3.2.1	TELECOMMUNICATIONS (INTERCEPTION AND ACCESS) ACT 1997	11
3.2.2	SURVEILLANCE DEVICES ACT 2007	13
3.2.3	LAW ENFORCEMENTS (POWERS AND RESPONSIBILITIES) ACT 2002 – COVERT SEARCH WARRANTS	14
3.2.4	LAW ENFORCEMENTS (POWERS AND RESPONSIBILITIES) ACT 2002 – CRIMINAL ORGANISATION SEARCH WARRANTS	17
3.2.5	LAW ENFORCEMENTS (CONTROLLED OPERATIONS) ACT 1997	19
3.3	THE COMPLAINT HANDLING FUNCTION.....	22
3.4	THE REMAINING FUNCTIONS – AUDITING THE OPERATIONS OF THE COMMISSION AND ASSESSING ITS POLICIES AND PROCEDURES	26

PART 4: CONCLUSION.....	32
--------------------------------	-----------

PART 1: THE OFFICE OF THE INSPECTOR OF LECC

1.1 PRELIMINARY OBSERVATIONS

On 30 June 2017 the Police Integrity Commission ceased to exist as an agency. It was replaced by the Law Enforcement Conduct Commission (“LECC”) which became fully operational on 1 July 2017. At the same time the position of Inspector of the Police Integrity Commission also ceased to exist. It has been replaced by the position of Inspector of the Law Enforcement Conduct Commission (“Inspector of LECC”).

Pursuant to s120 of the *Law Enforcement Conduct Commission Act 2016* (LECC Act) the Inspector is appointed by the Governor on the advice of the Executive Council. The Joint Committee on the Ombudsman, the Law Enforcement Conduct Commission and the Crime Commission (the Joint Committee) is empowered to veto the proposed appointment (Schedule 2 to the *LECC Act* and s31BA of the *Ombudsman Act 1974*). Schedule 2 to the LECC Act provides that the Office of Inspector can be either a full time or a part time position. My term as the inaugural Inspector of LECC commenced on 1 July 2017. I have been appointed on a part-time basis for a term of 5 years.

In addition to creating the position of the Inspector of LECC, Part 9 of the LECC Act also provides for the employment of staff. The Inspector of LECC, together with support staff, constitute the Office of the Inspector of LECC (OILECC).

Responsibility for the administration of Part 9 and Schedule 2 to the LECC Act was initially allocated to the Premier by virtue of the *Administrative Arrangements (Administration of Acts – General) Order 2017* (NSW), while responsibility for the administration of the remainder of the LECC Act was allocated to the Minister for Police. I am pleased to report that following representations, including in April 2019 from this Office to the Premier, it was recognised that such a state of affairs was untenable as it placed the Minister for Police in the invidious position of having to simultaneously administer both the NSW Police Force and the NSW Crime Commission as well as LECC, the

independent body charged with responsibility for their oversight. Accordingly, responsibility for the administration of the entirety of the LECC Act is now allocated jointly to the Premier and the Special Minister of State, Minister for the Public Service and Employee Relations, Aboriginal Affairs, and the Arts by virtue of the *Administrative Arrangements (Administration of Acts – General) Order (No.2) 2019 (NSW)*.

During the reporting period the support staff consisted of Angela Zekanovic as the Principal Legal Advisor and David Simpson as the Business Coordinator. Mr Simpson was on secondment from the Office of the Director of Public Prosecutions during the reporting period. Each of them has performed their services at a very high level, a matter for which I am most grateful. Ms Zekanovic and Mr Simpson also work in the Office of the Inspector of the Independent Commission Against Corruption (OIICAC).

At the time that the Office was established on 1 July 2017, two full-time staff from the Secure Monitoring Unit (SMU) within the Office of the NSW Ombudsman, Ian McCallan-Jamieson and Heather Brunello, were transferred to OILECC. That was to enable them to continue performing their pre-existing functions which related to the inspection of covert warrants that are issued to duly authorised investigative agencies. They had been performing those functions pursuant to a delegation from the Ombudsman. Section 128A of the LECC Act, which came into effect on 25 September 2017, enabled the Inspector to delegate his inspection functions to nominated members of staff. Appropriate delegations are now in existence and the responsibility for ensuring that those obligations are adhered to is performed by the two SMU staff.

It is my pleasure to present this Annual Report pursuant to s141 of the LECC Act and recommend that this Report be made public immediately pursuant to s145(4) of the Act. This Report relates to the year ending 30 June 2019 which was my second year as the Inspector of LECC.

1.2 ADMINISTRATION

1.2.1 PREMISES

OILECC shares premises with OIICAC. Both Offices relocated to new premises in August 2018 in order to accommodate the SMU staff as well as existing staff.

The contact details for the Office are:

Postal address: GPO Box 5341, Sydney, NSW, 2001
Telephone: (02) 9228 3023
E-mail: oilc executive@oiicac.nsw.gov.au

1.2.2 STAFF

The two SMU staff members report to the Inspector. As was indicated earlier, the Inspector also shares two staff, the Principal Legal Advisor and the Business Coordinator, with the Inspector of ICAC.

1.2.3 BUDGET AND FINANCE

The Office of the Inspector is a cost centre within the NSW Department of Premier and Cabinet (DPC).

Information provided by the finance section of DPC reveals that the actual expenditure for the 2018-2019 financial year was \$889,641 as against the projected budget which was \$909, 903.

The Inspector is paid a daily rate of \$1910 and also receives an annual retainer of \$10, 000.

1.2.4 WEBSITE

The website of OILECC is updated periodically by the Office and contains all relevant statutory and other information including details about its complaint handling processes for the benefit of members of the public.

As will become apparent, there are various Acts of Parliament which require the Inspector to provide reports concerning the monitoring of the use of covert powers by various investigative agencies. Those reports appear on the website after they have been tabled in Parliament.

The website address is www.oilecc.nsw.gov.au.

PART 2: THE ROLE OF THE OFFICE OF THE INSPECTOR OF LECC

2.1 FUNCTIONS OF THE INSPECTOR

Pursuant to s122(1) of the LECC Act, the Inspector is required to perform the functions of an inspecting officer. Those functions are conferred under various NSW Acts which deal with the use of covert powers that are issued to duly authorised investigative agencies. As has already been observed those functions were previously performed by the Ombudsman prior to the creation of the position of Inspector of LECC.

Pursuant to s122(2) of the LECC Act, the Inspector also has what are described as the principal functions of the Inspector which are to:

- a) audit the operations of the Commission for the purpose of monitoring compliance with the law of the State and
- b) deal with (by reports and recommendations) conduct amounting to agency maladministration on the part of the Commission and conduct amounting to officer misconduct or officer maladministration on the part of officers of the Commission, whether or not the subject of a complaint (this function also extends to former Officers of the Commission).
- c) assess the effectiveness and appropriateness of the policies and procedures of the Commission relating to the legality or propriety of its activities.

Pursuant to s123(1) of the LECC Act, the functions of the Inspector in relation to the matters set out above may be exercised on the Inspector's own initiative, at the request of the Minister, in response to a complaint made to the Inspector or misconduct information of which the Inspector becomes aware, or in response to a reference by the Joint Committee or by the Ombudsman, the ICAC, the Crime Commission, or any other government agency or member of a government agency.

The Inspector is not subject to LECC in any respect (s123(2)).

2.2 POWERS OF THE INSPECTOR

Pursuant to s124 of the LECC Act, the Inspector is able to investigate any aspect of the Commission's operations or any conduct of its officers. The Inspector is entitled to full access to the records of the Commission and to take or have copies made of them. The Inspector is able to require officers of the Commission to supply information or to produce documents or other things about any matter, or any kind of matter, relating to the Commission's operations or any conduct of its officers. The Inspector is able to require officers of the Commission to attend before the Inspector to answer questions or to produce documents or other things relating to the Commission's operations or any conduct of its officers.

The Inspector is able to investigate and assess complaints about the Commission or its officers and is able to refer matters relating to the Commission or its officers to other agencies for consideration or action. The Inspector may also recommend disciplinary action or criminal prosecution against officers of the Commission.

Pursuant to s126 of the LECC Act, the Inspector is empowered to make or hold inquiries. The powers, authorities, protections and immunities conferred on a Commissioner by the *Royal Commission Act of 1923* are conferred on the Inspector when holding an inquiry. Any witness summoned by or appearing before the Inspector also has the benefit of the protection and immunities under the *Royal Commission Act*.

2.3 OTHER RELEVANT LEGISLATION

2.3.1 GOVERNMENT INFORMATION (PUBLIC ACCESS) ACT 2009 NO. 52 (GIPA ACT)

The *Government Information (Public Access) Act 2009* (“GIPA Act” or “GIPA”) came into force on 1 July 2010 replacing the *Freedom of Information Act 1989*. Section 43 of the GIPA Act prevents an access application from being made to an agency for ‘excluded information’ of the agency.

Schedule 2(2) of the GIPA Act provides that so far as OILECC is concerned, the ‘excluded information’ is information relating to its operational auditing, handling of misconduct matters (within the meaning of the LECC Act) investigative and reporting functions.

Schedule 1 of the GIPA Act provides that it is to be conclusively presumed that there is an overriding public interest against disclosure of information held by OILECC, the disclosure of which is prohibited by the LECC Act. Section 180(2) of the LECC Act provides that the Inspector or an officer of the Inspector must not, except for the purposes of carrying out their functions under the LECC Act, make a record of or divulge any information acquired in the exercise of the person’s functions under the Act. Section 180(5) provides that such information may however be disclosed in certain circumstances which are identified.

In compliance with s125 of the GIPA Act and clause 8(b) of the Regulation, OILECC advises that there were no access applications made under the GIPA Act to OILECC during the current reporting period.

Section 20 of the GIPA Act requires each agency to have an agency information guide. During the reporting period the Office prepared its Agency Information Guide which is available on its website at www.oilecc.nsw.gov.au.

In compliance with s7(3) of the GIPA Act, OILECC advises that it has conducted a review of its program to proactively release information which is in the public interest. All such information appears on the Office website.

In compliance with s7 of the GIPA Act, OILECC also reviewed the web site content to assess what, if any, further information could be proactively released. During the reporting period, OILECC made available on its website a number of reports concerning inspections conducted by the SMU.

2.3.2 THE PUBLIC INTEREST DISCLOSURES ACT 1994 (PID ACT)

The *Public Interest Disclosures Act 1994* (“the PID Act”) provides for public servants and other public officials to report serious wrong doing in public sector agencies on a confidential basis. Under the PID Act complaints or allegations made by public servants and public officials are called disclosures. The PID Act provides for public servants and public officials making disclosures to be protected against actual or potential reprisals. Pursuant to s4 of the PID Act the Inspector is an investigating authority to whom a public disclosure can be made under the Act.

Pursuant to s125(1) of the LECC Act a public official within the meaning of the PID Act may complain to the Inspector about the conduct of LECC, an officer of LECC or an officer of the Inspector.

Pursuant to s12A(2) of the PID Act, to be protected by the Act, a disclosure by a public official to the Inspector must:

- (a) be made in accordance with the LECC Act and
- (b) be a disclosure of information that the person making the disclosure honestly believes, on reasonable grounds, shows or tends to show corrupt conduct, maladministration or serious and substantial waste of public money by the LECC, a LECC officer or an officer of the LECC Inspector.

Section 31(1) of the PID Act requires each public authority within 4 months after the end of each reporting year to prepare an annual report on the public authority's obligations under the PID Act.

The following information is provided pursuant to s31(1) of the PID Act and clause 4(2) of the PID regulation which specifies the information to be included in reports by public authorities:

- a) The number of public officials who made a public interest disclosure to the Inspector – 3

- b) The number of public interest disclosures received by the Inspector:
 - i. Corrupt conduct – 0
 - ii. Maladministration – 3
 - iii. Serious and substantial waste of public money – 0
 - iv. Government information contraventions - 0

None of the matters that were treated as public interest disclosures were finalised during the reporting period.

Section 6D(1) of the PID Act requires each public authority to have a policy that provides for its procedures for receiving, assessing and dealing with public interest disclosures. During the reporting period OILECC developed its PID policy and procedure which is available on its website at www.oilecc.nsw.gov.au.

PART 3: REVIEW OF THE WORK OF THE OFFICE OF THE INSPECTOR OF LECC

3.1 THE INSPECTION FUNCTION – GENERAL OBSERVATIONS

As has already been observed, there are various pieces of legislation which provide duly authorised investigative agencies with the power to investigate criminal activities. Those powers can involve significant intrusion into people's lives. In order to provide the community with some degree of assurance that those covert powers are being used lawfully, the agencies in question are subject to legislative measures that are designed to ensure a measure of accountability.

Reporting and record keeping obligations are imposed upon those agencies which are authorised to use those powers. Provision is also made for the safe keeping and destruction of information obtained from the use of those powers.

While the inspections of records include an examination of the matters which are specified in the relevant legislation, they do not examine the sufficiency or otherwise of the information provided in support of the application as that is the function of the relevant judicial officer.

Prior to 1 July 2017, the NSW Ombudsman was required to conduct inspections of the records of those investigative agencies in order to determine the extent of compliance by those agencies and their officers with the relevant legislation. As has been noted, the functions previously carried out by the NSW Ombudsman were transferred to the Inspector of LECC following its establishment on 1 July 2017. As from that date, the Inspector has taken possession of all relevant information, documents and records previously held by the Ombudsman in relation to those functions and has also taken over the Ombudsman's work in progress.

The inspection and monitoring process is not only designed to foster agency compliance with the relevant legislation but also to provide public accountability through regular reporting to the relevant Minister and/or Parliament. The records of each agency are examined in order to determine if there has been compliance with those record and document keeping

requirements. There is also a focus upon such other aspects of compliance as can be determined from those records as well as what can be gleaned from asking questions of relevant officers.

Such deficiencies as are identified as a result of the inspection and monitoring process are brought to the attention of the relevant agency prior to the furnishing of the final report. In due course, the head of each agency is provided with a copy of the section of the final report which pertains to the inspection of their particular agency.

Finally, I wish to acknowledge the professionalism which the two SMU staff members, Mr McCallan-Jamieson and Ms Brunello, have displayed in performing their functions.

3.2 THE PARTICULAR LEGISLATIVE REQUIREMENTS

3.2.1 TELECOMMUNICATIONS (INTERCEPTION AND ACCESS) (NSW) ACT 1987

The *Telecommunications (Interception and Access) Act 1979* (Cth) (the Commonwealth Act) covers the field in relation to the interception of telecommunications in this country. Section 83 of the Act enables the Commonwealth Ombudsman to inspect the records of Commonwealth agencies. Complementary state legislation mirrors the inspection functions in the various states. In NSW those functions are provided for in the *Telecommunications (Interception and Access) Act 1987 (NSW)* (the State Act).

Sections 4 and 5 of the State Act require the ‘chief officer of an eligible authority’ to keep certain information which is connected with the issue of warrants or the interceptions. Sections 6 and 7 of the State Act require that certain reports be furnished to the relevant Minister. Section 8 makes provision for the keeping and destruction of restricted records.

Section 10(1) of the State Act provides that an “inspecting officer” must inspect the records of an “eligible authority” at least twice during each financial year. The purpose of the inspections is to ascertain the extent to which the authority’s

officers have complied with the requirements of Part 2 of the State Act (ss4-8) which imposes certain obligations upon eligible authorities.

Section 11(1) of the State Act requires an inspecting officer to provide a written report to the Minister about the inspections as soon as practicable and no later than three months after the end of the financial year. Section 11(4) of the State Act requires that the chief officer of an eligible authority must be provided with a copy of the report. Section 11(2) of the State Act requires that the inspecting officer must include the following information in the report:

- (a) a summary of the inspections conducted in the financial year
- (b) particulars of any deficiencies identified that impact on the integrity of the telecommunications interception regime established by the Commonwealth Act,
- (c) particulars of the remedial action (if any) taken or proposed to be taken to address those deficiencies by the eligible authority.

An inspection officer may also, pursuant to s12 of the State Act, include information concerning contraventions of the Act in the report to the Minister.

Inspecting officers are also provided with specific powers to enable them to obtain relevant information from an eligible authority: s13 and s14 of the State Act.

Inspections were conducted at the NSW Police Force, NSW Crime Commission, Independent Commission Against Corruption and Law Enforcement Conduct Commission for the reporting period 1 July 2018 to 30 June 2019. Of all telecommunications interception warrants sought during the reporting period, the overwhelming majority of them were made by the New South Wales Police Force.

Since no certified records or lawfully obtained information was received by either the Inspector of ICAC or the Inspector of LECC during the reporting period no inspections of the records of those agencies were conducted.

The report that related to the reporting period 1 July 2018 to 30 June 2019 was delivered to the Attorney General on 27 August 2019.

In addition, the Inspector is included as an “eligible authority” for the purposes of the Commonwealth Act. In accordance with reporting requirements under s96(1) of that Act, the Commonwealth Attorney-General’s Department was advised by the Inspector that there was no usage of the relevant provisions of the Commonwealth Act during the reporting period.

3.2.2 SURVEILLANCE DEVICES ACT 2007

The *Surveillance Devices Act 2007* (NSW) (the Act) provides for the use of surveillance devices to investigate certain offences and to enable evidence to be obtained of the commission of such offences as well as the identity and/or the whereabouts of potential suspects. The Act covers the installation, use and maintenance of listening, optical, tracking, and data surveillance devices. It also places restrictions upon the communication and publication of private conversations, surveillance activities and other information obtained from the use of such devices.

Surveillance device warrants are issued by an ‘eligible judge’ of the Supreme Court or an ‘eligible Magistrate’ in the case of a surveillance device warrant which authorises the use of a tracking device only, or for a retrieval warrant in respect of a tracking device. Applications must include certain required information and must be accompanied by an affidavit setting out the grounds for seeking the warrant.

The investigative agencies which were the subject of inspections for the reporting periods in question were:

- NSW Police Force
- NSW Crime Commission
- Independent Commission Against Corruption
- Law Enforcement Conduct Commission

All surveillance device warrant files at each agency which applied for a surveillance device warrant were inspected. Inspections focussed upon the extent of compliance with the following parts of the Act:

- Part 3 which deals with warrants and emergency authorisations
- Part 5 which covers compliance and monitoring, including dealing with records obtained by the use of surveillance devices, the use, communication or publication of protected information, reporting and record keeping
- Part 6 which requires notification to the Attorney General about warrants sought, as well as notification to the subject of surveillance if so directed by the eligible judge

The inspection process included examining the application, the warrant itself, the required notice to the Attorney General under s51 of the Act, as well as the subsequent report to the issuing judicial officer and the Attorney General which is required under s44 of the Act, and any other information which was contained on the file.

The Inspector is required, pursuant to s49(1) of the Act, to report to the Minister at six monthly intervals on the results of inspections. The Minister is required by s49(2) to lay the report or cause the report to be laid before both Houses of Parliament within 15 days after receiving the report.

In compliance with that requirement, on 4 March 2019 the Attorney General was provided with a report detailing the results of inspections conducted of agency records for the period from 1 July 2018 to 31 December 2018.

On 13 September 2019 the Attorney General was provided with a report detailing the results of inspections conducted of agency records for the period from 1 January 2019 to 30 June 2019.

3.2.3 LAW ENFORCEMENT (POWERS AND RESPONSIBILITIES) ACT 2002 – COVERT SEARCH WARRANTS

Sections 46C and 47 of the *Law Enforcement (Powers and Responsibilities) Act 2002* (the Act) provide that duly authorised persons within the NSW Police Force, the NSW Crime Commission and, since 1 July 2017, the Law Enforcement Conduct Commission may apply to an ‘eligible judge’ of the Supreme Court for “a covert search warrant”.

Covert search warrants give eligible law enforcement agencies, and their officers, authority to enter and search premises without the knowledge of the occupiers, in relation to the investigation of serious offences. The occupier of the property does not need to be told about the search until the time specified in the warrant by the issuing Judge which will usually be several months after the search.

It is not intended that covert search warrants are to be used as a routine investigative tool as covertly entering and searching premises is a significant departure from traditional entry and search powers. Nevertheless, an application may be made to the Supreme Court for a covert search warrant in the investigation of 'serious offences' as defined in s46A(2) of the Act.

The Act provides that applications may be made by telephone if the issuing Judge is satisfied that a warrant is required urgently and the application cannot be made in person.

Applications are made by using a prescribed form which contains all the relevant information that s62 of the Act requires to be considered for a covert search warrant application.

Before granting a covert search warrant, the issuing Judge must also be satisfied that it is necessary for the entry and search to be conducted without the occupier's knowledge.

While the initial searching may be done covertly, the occupier must eventually be given formal notice that it has occurred. The length of time before the occupier's notice must be served is determined by the issuing Judge who may authorise delaying service of the notice for up to six months at a time. In exceptional circumstances the service of the notice may be delayed beyond 18 months, but it must not be delayed beyond three years in any circumstances. Covert search warrants expire 10 days after the date on which they are issued, unless the warrant specifies an earlier expiry date. Warrants may be granted to allow a search for a particular thing or things, or a kind of thing or things.

Within 10 days of executing the warrant, or of the warrant expiry date if the warrant is not executed, the executing officer is required under s 74A of the Act to provide a report in writing to the issuing Judge.

The Inspector is required to inspect the records of law enforcement agencies to check on their compliance, and the compliance of their officers, with Part 5 of the Act. Each covert search warrant file for the reporting period was inspected, a process that involved an examination of the application, the warrant itself, the occupier's notice, and the report to the issuing Judge, together with any other information contained on the file, to ensure that there had been compliance with the various statutory requirements.

Records about the execution of covert search warrants and those relating to entry and seizures to ascertain the accuracy of the reports to the issuing Judge were also examined. This also involves follow up inspections to confirm that occupier's notices have been served as soon as any period of postponement has expired.

Pursuant to s242(1) of the Act inspections must take place at least every 12 months. During the reporting period, only the NSW Police Force applied for covert search warrants and as such only those records were inspected for the purposes of this Act.

Pursuant to s 242(3) of the Act, the Inspector must as soon as practicable after 28 May 2017 and as soon as practicable after the expiration of each subsequent year, prepare a report of the Inspector's work and activities under subsection (1) and furnish a copy of the report to the Attorney General and the Minister for Police. The Attorney is required by s242(7) of the Act to lay the report, or cause the report to be laid, before both Houses of Parliament as soon as practicable after receiving the report.

Reports detailing the results of inspections conducted for the period between 29 May 2018 and 28 May 2019 were sent to the Attorney General and the Minister for Police respectively on 6 August 2019.

3.2.4 LAW ENFORCEMENT (POWERS AND RESPONSIBILITIES) ACT 2002 – CRIMINAL ORGANISATION SEARCH WARRANTS

A duly authorised police officer, may apply to an ‘eligible judge’ of the Supreme Court for a “criminal organisation search warrant”, which is defined in s3 of the Act as a “a search warrant issued under Division 2 of Part 5 in relation to an organised crime offence”.

If an eligible applicant has reasonable grounds to suspect that there is, or within 7 days there will be, in or on nominated premises a thing connected with a searchable offence, they may apply to an eligible issuing officer for a criminal organisation search warrant in respect of the premises. Under the Act an *eligible issuing officer* for the purposes of a criminal organisation search warrant means an *eligible judge*.

A “searchable offence” is defined in s46A of the Act as, in so far as it relates to a criminal organisation search warrant, an “organised crime offence”.

An "organised crime offence" is defined as “any serious indictable offence arising from, or occurring as a result of, organised criminal activity”.

The terms “organised criminal activity”, “serious violence offence” and “serious indictable offence” are defined in s46AA of the Act:

The Act also provides that applications may be made by telephone if the eligible issuing officer is satisfied that the warrant is required urgently and the application cannot be made in person.

Applications are made by using a prescribed form which contains all the relevant information that s62 of the Act requires to be considered for a search warrant application - and in particular the requirements of s62(2A) which are specifically related to criminal organisation search warrants.

The Regulation also prescribes the form of the warrant and the occupier’s notice. These forms cover the criteria set out in s66 and s67 of the Act in relation to these documents.

The time specified for the expiry of a criminal organisation search warrant is 7 days after the date on which the warrant is issued.

The reporting requirements for a criminal organisation search warrant are the same as those for standard search warrants, which are set out in s74 of the Act. The report must be furnished to the eligible issuing officer within 10 days after the execution of the warrant or the expiry of the warrant, whichever occurs first. The report must comply with the terms of the prescribed form.

The Inspector is required to inspect the records of the NSW Police Force to check for compliance with Part 5 of the Act. Pursuant to 242(4) of the Act those inspections must take place every 2 years.

Each individual criminal organisation search warrant file held at the NSW Police Force Covert Applications Unit (CAU) was inspected (the CAU is the “clearing house” for all applications for covert warrants made on behalf of the NSW Police Force). Inspections were conducted in May, June and August 2018 and May and August 2019. Each inspection involved checking to ensure that the relevant statutory requirements had been complied with. The inspections involved an examination of the application, the warrant itself, the occupier’s notice, the report to the issuing judicial officer and any other information contained on the file.

Other records which were held by the NSW Police Force relating to the execution of criminal organisation search warrants were also examined in a further endeavour to ensure that the statutory requirements had been complied with.

Pursuant to s242(6) of the Act the Inspector must, as soon as practicable after 7 August 2017 and as soon as practicable after the expiration of each subsequent 2-year period, prepare a report of the Inspector’s work and activities under subsection (4) and furnish a copy of the report to the Attorney General and the Minister for Police. The Attorney General is required, pursuant to s242(7) of the Act to lay the report, or cause the report to be laid, before both Houses of Parliament as soon as practicable after receiving the report.

Reports detailing results of inspections conducted for the period between 7 August 2017 and 6 August 2019 were sent to the Attorney General and the Minister for Police respectively on 10 September 2019.

3.2.5 LAW ENFORCEMENT (CONTROLLED OPERATIONS) ACT 1997

The *Law Enforcement (Controlled Operations) Act 1997* (the Act) enables a 'controlled operation' to be authorised in certain circumstances. It also regulates their use as well as providing for immunities to be granted to participants involved in them.

Section 3(1) of the Act defines a 'controlled operation' as being an operation which is conducted for the purpose of:

- (a) obtaining evidence of criminal activity or corrupt conduct, or
- (b) arresting any person involved in criminal activity or corrupt conduct, or
- (c) frustrating criminal activity or corrupt conduct, or
- (d) carrying out an activity that is reasonably necessary to facilitate the achievement of any purpose referred to in paragraph (a), (b) or (c),

That section also provides that each of the following is a 'law enforcement agency':

- (a) the NSW Police Force,
- (b) the Independent Commission Against Corruption,
- (c) the New South Wales Crime Commission,
- (d) the Law Enforcement Conduct Commission,
- (e) such of the following agencies as may be prescribed by the regulations as law enforcement agencies for the purposes of this Act:
 - (i) the Australian Federal Police,
 - (ii) the Australian Crime Commission,
 - (iii) the Commonwealth Department of Immigration and Border Protection.

Section 5(1) enables a law enforcement officer to apply to the 'chief executive officer' (which is defined in s3(1) of the Act) of the law enforcement agency to conduct a controlled operation on behalf of the agency. Provision is made in s5(2)

for the making of an urgent application. Section 5(2A) of the Act requires that every application must include certain specified particulars of the operation.

Section 6(1) provides that the chief executive officer may either authorise or refuse the application. Section 6(2) provides that an authority may not be granted unless a code of conduct is prescribed by the regulations in relation to that agency. A comprehensive code of conduct is contained in Schedule 2 to the Regulation and casts a number of obligations upon applicants. Section 6(3) states that an authority to conduct a controlled operation may not be granted unless the chief executive officer is satisfied about a number of matters which are identified, including that there are reasonable grounds to suspect that criminal activity or corrupt conduct has been, is being or is about to be conducted in relation to matters within the administrative responsibility of the agency.

Section 7 identifies situations in which an authority must not be granted.

Section 8(2) provides that an authority to conduct a controlled operation (even if it is urgent) must also identify a number of other matters which are set out.

Section 13 of the Act provides that an authority for a controlled operation authorises each law enforcement participant and civilian participant (if any) to engage in the particular controlled activities specified in the authority in respect of that participant.

Section 14 of the Act provides that the chief executive officer may grant a retrospective authority in certain limited circumstances.

Section 16 of the Act provides that an activity that is engaged in by a participant in an authorised operation in the course of, and for the purposes, of the operation is not unlawful so long as it is authorised by, and is engaged in in accordance with, the authority for the operation.

Section 19 of the Act provides that persons involved in an authorised operation are excluded from civil liability so long as their conduct was in good faith and was for the purpose of executing the Act.

Part 3A of the Act makes provision for cross-border controlled operations.

Part 4 of the Act provides for the monitoring of controlled operations which are authorised by the chief executive officer of an agency. This is in contrast to other covert investigative methods, such as the use of surveillance devices and telecommunication interceptions, which are authorised externally by means of a warrant which is issued by a judicial officer. The public interest therefore requires adherence to the highest standards of compliance. Accordingly, inspections are designed to carefully scrutinise the documentation which is relied upon at all stages of the authorisation process as well as the reporting obligations which are placed on agency personnel. All authorities and variations to authorities granted during the reporting period are inspected as is the supporting documentation. A sample of records held by the principal law enforcement officers responsible for the conduct of the operation may also be examined in order to ascertain how those officers have accounted for the controlled activities which have been conducted.

Section 21 of the Act provides that the Inspector must be notified of each authority that is granted under the Act, of all variations to an authority, and of each report on a controlled operation that is received by the chief executive officer of an agency. Notices must be provided by the chief executive officer to the Inspector within 21 days of the event to which it relates. In the case of a retrospective authority having been granted, the required details must be provided no later than 7 days after it was granted. Requirements as to the content of those notices are set out in the Regulation to the Act.

Section 22(1) of the Act requires the Inspector to conduct inspections of the records of each of the law enforcement agencies in order to assess whether or not the requirements of the Act are being complied with. Inspections of the law enforcement agencies records must be conducted at least once every twelve months although they may be inspected at any time.

Section 22(2) of this Act provides that the provisions of the *Telecommunications (Interception) (New South Wales) Act 1987* (the State Act) apply to an inspection conducted under this section in the same way as they apply to an inspection conducted under that Act. Accordingly, inspecting officers are also provided with specific powers to enable them to obtain relevant information from an eligible authority: s13 and 14 of the State Act.

The Inspector is required, pursuant to s23(1) of the Act to report to Parliament on the Inspector's work and activities under the Act for the 12-month period ending on 30 June each year and to do so as soon as practicable after that date.

Section 23(2) of the Act requires that the report must include, for each law enforcement agency, certain particulars including the number of formal authorities that have been granted or varied by the chief executive officer of that agency, the number of urgent authorities granted and the nature of the criminal activity against which the controlled operations conducted under those authorities were directed.

The report for the 12-month period ending 30 June 2018 was presented on 2 November 2018.

3.3 THE COMPLAINT HANDLING FUNCTION

Reference was made earlier to s122(2)(b) of the LECC Act which concerns the Inspector's functions to deal with complaints about the conduct of LECC and/or its officers.

It is important to observe that the Inspector's functions are very specific. For example, there is no power for the Inspector to deal with complaints against any other bodies. Furthermore, the Inspector has no power to compel LECC to either investigate or not to investigate a particular complaint. Nor is there power to direct LECC as to how an investigation should be conducted.

A substantial number of complaints involve matters in respect of which LECC has declined to take any further action. In many instances the complainant seeks to, in effect, have OILECC merely review the decision made by LECC without any apparent appreciation of the scope of the Inspector's jurisdiction. The Inspector is, of course, required when assessing such complaints to determine whether the conduct of LECC and/or its officers amounts to agency and/or officer maladministration or officer misconduct. Accordingly, the conduct of the person(s) who was the subject of the initial complaint to LECC is considered but only in the context of whether LECC's handling of that complaint constitutes conduct of a kind which falls within the legislation.

Each complaint which is received is initially assessed to determine whether it attracts the jurisdiction of OILECC. If it does, then a decision is made as to whether there is any basis upon which further investigation of the complaint is warranted.

ANALYSIS OF COMPLAINTS RECEIVED

Before embarking upon that analysis, some preliminary observations are called for. Clearly enough, this is a vitally important part of OILECC's work as it is for any agency charged with oversight responsibilities. That said, the performance of that function can present significant challenges. On the one hand, an oversight agency has responsibility to ensure that the body whose activities it is required to monitor, are held accountable for their actions. It is equally important to ensure that its role is performed in a transparent manner. On the other hand, the body which is making the initial decision is often provided with information that is of a confidential nature and/or that is particularly sensitive. The agency being monitored, and indeed the oversight agency itself, need to be mindful of those various considerations and must seek to achieve an appropriate balance between them. Complaints which are made anonymously or, in respect of which a claim is made that it is a public interest disclosure, may well serve to further highlight how difficult it can be to achieve that balance. Suffice it to say, that there were several occasions during the reporting period in which issues of this kind arose. Although they were relatively few in number, they nevertheless occupied a significant amount of OILECC's time and resources because of the particular challenges which they presented.

What follows is a summary of complaints dealt with during the reporting period:

- 7 complaints remained outstanding from the previous reporting period, 5 of which were finalised during this reporting period. The 2 remaining complaints within this category are still to be finalised as they remain under investigation by LECC.
- 57 new complaints, all but 2 of which were in writing, were received during the reporting period. Of those 30 were finalised, 2 of which however were

reopened when new material came to light. One of the finalised matters was an anonymous complaint. A further anonymous complaint about a LECC employee which was received by OILECC was referred back to LECC for investigation.

- One matter which attracted considerable publicity was a complaint made by the then Minister of Police, the Hon Troy Grant MP, about the conduct of the Chief Commissioner, The Hon Michael Adams QC. It concerned the decision of the Chief Commissioner to approve the expenditure by LECC of expenses associated with the attendance by a senior officer at an overseas conference. In due course, the matter was investigated by the NSW Audit Office which resulted in a report that was tabled in Parliament on 21 February 2019. A copy of the report can be found at: <https://www.audit.nsw.gov.au/sites/default/files/pdf-downloads/Law%20Enforcement%20Conduct%20Commission%20-%20Compliance%20of%20expenditure%20with%20section%2012A%20of%20the%20Public%20Finance%20and%20Audit%20Act.pdf>
- A further complaint which was of considerable seriousness could not be properly addressed because the complainant requested that the details of the complaint be kept confidential from the individuals about whom the complaint was made. The information contained in the complaint has nevertheless been retained on file.
- Of the finalised matters, a number were found not to fall within the jurisdiction of OILECC. This was due to the fact that those complaints related solely to the conduct of civilians or of members of the NSW Police Force and not, as the legislation requires, the conduct of LECC and/or its officers. In many of those cases, complainants were advised that they may wish to direct their complaints to LECC or to some other appropriate agency whose details were provided to them.
- Of the remaining matters which were finalised, in a number of instances the complaint had either lapsed or had not been proceeded with (often after

lengthy correspondence with OILECC). That was usually because the complainant had been unable, despite a number of requests to do so, to provide material of a kind which would enable OILECC to assess the complaint in accordance with the Inspector's statutory functions.

- On 2 other occasions, after having sought more detailed information from LECC, the Inspector provided the complainant with a rather more comprehensive set of reasons for a decision made by LECC than LECC had provided in the first instance to the complainant.
- There were also a number of complaints which did attract the jurisdiction of OILECC. Although there were no instances in which such a complaint was sustained, there were several occasions on which one or more deficiencies were revealed in the approach taken by LECC and/or its officers. Those deficiencies were highlighted in correspondence with the Chief Commissioner of LECC. In each of those instances LECC accepted responsibility for having committed what were essentially internal errors of process. There were also occasions on which LECC had delayed in responding to complaints, and in a few isolated instances, occasions on which LECC had not initially acknowledged receipt of a complaint. I am informed that LECC has subsequently been in contact with each of those complainants.
- A number of complainants raised concerns that LECC had not kept them informed as to the progress of their matter and, in particular, where LECC had referred the matter back to the NSW Police Force. I am advised that LECC is taking steps to address the various issues to which I have just referred.
- Whilst it is to be acknowledged that LECC's workload has substantially increased during the reporting period, it is nevertheless of some concern that, on a couple of occasions, requests made by OILECC as to the current status of matters being handled by LECC have gone unanswered for considerable periods of time.

As had occurred during the previous reporting period, OILECC provided the Chief Commissioner of LECC at 6 monthly intervals on a confidential basis with a schedule of information concerning the resolution of complaints which it had received about the conduct of LECC and/or its officers.

3.4 THE REMAINING FUNCTIONS – AUDITING THE OPERATIONS OF THE COMMISSION AND ASSESSING ITS POLICIES AND PROCEDURES

There is considerable overlap between the two functions which are contained in s122(2)(a) and (c) of the LECC Act respectively. Accordingly, it is convenient to deal with them at the same time. Furthermore, material derived from complaints about the conduct of LECC and/or its officers which the Inspector receives pursuant to his complaint handling function also provides useful background information so far as the performance of those two functions are concerned.

The Inspector is clearly required to perform a critical role in the oversight of LECC and its operations. Accordingly, it is highly desirable that an appropriate working relationship should exist between the two agencies to enable the required monitoring function to operate at an optimum level. Considerable efforts have been made by both agencies to achieve that objective. The result, in my view, is that the relationship between the two agencies has been at all times both professional and productive.

The starting point is a mutual expectation on the part of the Inspector of LECC and the Chief Commissioner of LECC that each will comply with their statutory functions. To that end, a Memorandum of Understanding was developed between the Inspector and the Commission which was formally entered into on 17 May 2018. It clearly sets out arrangements for communication and information exchange between the Inspector and the Commission concerning referral of matters such as complaints, access to information and points of contact between both agencies. A copy of the MOU appears on the OILECC website.

The primary point of liaison is between the Inspector and the Chief Commissioner. Such contact includes the exchange of formal correspondence as well as periodic

meetings at which issues concerning the Inspector's functions and the conduct, operations and governance of the Commission are regularly discussed.

During the reporting period, those issues have included my being informed about the restructure of key positions within LECC and associated personnel changes, financial matters including various budgetary and staffing issues, as well as the consideration of various of LECC's policies and procedures.

Furthermore LECC, through its Chief Commissioner, has on an ongoing basis provided copies of its policies, protocols and guidelines in all areas of its operations. It has also continued to provide copies of MOUs entered into with other agencies as well as enabling access, where possible, to its databases and information systems.

Although s124 of the LECC Act and the MOU between the two agencies require certain information to be provided, it is to be observed that LECC has nonetheless routinely either volunteered such information or provided it upon request.

LECC also continues to provide OILECC on a regular basis with the agenda, the background papers and, in due course, the minutes for a number of its most important committee meetings. Those Committees are listed below:

- Strategic Operations Committee
- Executive Committee
- Audit and Risk Committee
- Complaints Action Panel

Where additional information or clarification about matters arising from that material is sought, it is provided in a timely fashion. The Principal Legal Officer has on occasions attended the meetings of the Audit and Risk Committee but only in the capacity as an observer.

LECC also provides, on a confidential basis, an audit schedule which sets out details about the performance of its various statutory powers during the preceding month. The items included in the schedule have been expanded during the

reporting period. The schedule now contains information about the following matters:

- Section 19(2) - determinations made by the Chief Commissioner and at least one other Commissioner
- Section 32 reports
- Section 54 notices – power to obtain information
- Section 55 notices – power to obtain documents or other things
- Section 58 notices – power to enter public premises
- Section 63 examinations - private and public hearings conducted
- Section 69 summons – power to summon witnesses and take evidence
- Section 79 – search warrants
- Section 84 – surveillance device warrants
- Sections 114 and 115 – monitoring of critical incident investigations
- Section 132 reports
- Section 135(3) reports
- GIPA requests
- PID reviews
- Acquisition and use of assumed identities

Also included is information about applications granted under the *Law Enforcement (Controlled Operations) Act 1997* and warrants issued under the *Telecommunications (Interception and Access) Act 1979 (Cth)*.

It is to be observed that the issue as to what needs to be included in the audit schedule is being constantly reviewed. OILECC has requested, in addition to the present arrangements, that LECC in future provide annual figures for each of the items that appear in the schedule.

In a further endeavour to gain an understanding of LECC and its operational activities, the Inspector and the Principal Legal Advisor conducted meetings with the following senior members of LECC staff (some meetings with staff occurred on more than one occasion):

- Commissioner for Integrity

- Commissioner for Oversight
- Chief Executive Officer
- Solicitor to the Commission
- Director Investigations
- Director Investigations - Oversight
- Team Leader, Assessments Team
- Director IT
- HR Manager
- Finance Manager

Liaison meetings were also held between members of the Inspector's staff and members of LECC's staff in order to gain a better appreciation of each other's roles.

In order to obtain insights into how the role of the Inspector might most usefully be performed, both the Inspector and the Principal Legal Officer attended a number of conferences. To the same end, a number of meetings were also conducted by them with external agencies. Details of those occasions appear below:

Date	With Whom	Where	Purpose
8 August 2018	Dan Howard SC – Former President MHRT	Sydney	Discussion of critical incidents where mentally ill persons involved
21 August 2018	National Integrity symposium	Canberra	Conference discussing Federal ICAC
7 September 2018	Centium - Phil O'Toole (Senior Partner) & Penny Corkhill (Associate)	OILECC	Discussion of the development of LECC's Risk Management framework & Strategic Internal Audit plan
19 September 2018	Peter Hall QC, Chief Commissioner ICAC	Sydney	Discussion of ICAC's internal processes in relation to complaint handling

3 October 2018	National Inspectors Conference	Brisbane	Meeting of Inspectors to discuss issues of mutual interest
25 October 2018	Greyhound Welfare and Integrity Commission – Judy Lind CEO & Matthew Tutt, Director Legal	OILECC	Discussion of oversight of functions of GWIC
14-15 November 2018	National Investigations Symposium	Sydney	Conference with investigators, internal auditors, lawyers, senior police and complaint handlers sharing knowledge, skills and techniques
16 November 2018	Dan Howard SC	Sydney	To discuss role and scope of Special Commission of Inquiry into Ice
13 December 2018	Andrew Tink AM	LECC	Discussions about the Tink Report and the establishment of LECC together with his address to staff
19 December 2018	Wayne Kelly, Manager, Covert Applications Unit (CAU) and other members of his staff with SMU Unit	Sydney	Discussion about inspection reports and correspondence with the Commissioner of Police. Discussion about the implications of amendments to the Surveillance Devices legislation and the creation of the Office of the Surveillance Device Commissioner

5 March 2019	The Hon. Graham Barr QC, former Inspector of NSW Crime Commission	Sydney	Discussion about the role of an Inspector of integrity agencies
27 March 2019	Seminar on role of Covert Policing	UNSW	Particular emphasis placed on UK experience

In addition to the meetings referred to above, there has been considerable ongoing correspondence and liaison with a number of external agencies.

PART 4: CONCLUSION

There is one aspect of LECC's work that has remained of very considerable interest to OILECC. It involves a critical aspect of LECC's activities and concerns the manner in which LECC conducts its complaint handling processes. It has resulted in there being regular correspondence between the Inspector and the Chief Commissioner about various aspects of that issue. LECC is to be commended for engaging the services of Centium in order to conduct a comprehensive audit of LECC's Complaint Assessment Process. Its initial report was delivered in June 2019. Suffice it to say that the report canvasses many of the issues which LECC has, for a considerable period of time, identified as matters that needed to be addressed by LECC. I am advised that LECC has now accepted the recommendations contained in the report and am further advised that the process of implementing them is now well advanced. Although it is apparent to OILECC that there still remains some room for improvement in this area, it is gratifying to note that the Assessments Team has made some very positive enhancements to its practices during the reporting period.

During next year's reporting period, it is proposed that there should be a continuation of the type of work upon which the Office embarked in its first two years of operations. To that end, it is proposed that meetings will be conducted with those teams or units within LECC which could not be arranged during the current reporting period. It is also envisaged that there will be follow up meetings and further liaison with other teams, and in particular, the Assessment Team. Indeed, the issue of the manner in which LECC conducts its complaint handling processes will remain a primary focus of the Office.

However, now that the enhancement of LECC's complaint handling process is well underway, it is appropriate that OILECC should direct its attention to other areas of LECC's operations. A logical area to examine is the Oversight Division and in particular, LECC's powers to monitor critical incident investigations. A critical incident is an incident involving a police operation that results in death or serious injury to a person. It is timely to do so as this is an area for which LECC only acquired responsibility after its creation in 2017. Sufficient time has now passed to enable LECC to implement and embed its policies, practices and procedures in this area.

As I observed in last year's Annual Report, it is a matter of public record that, on occasions, a civilian who is involved in a critical incident often has issues affecting their mental health. They may also be facing other challenges including drug dependency, intellectual and/or developmental disabilities, domestic abuse and/or non-compliance with medication and homelessness. A real and ongoing challenge for the criminal justice system arises when police in the course of their duty are required to interact with a person in such a condition, especially if that person is in a highly agitated state and in possession of a weapon. Needless to say, the challenge is even greater should a death or serious injury occur in those circumstances.

As I also observed in last year's Annual Report, clearly much useful work has been undertaken over many years, and in particular by the various agencies which have an interest in the area, in an attempt to address the challenges which I have identified. This Office will continue to observe how they are addressed in the future. No doubt given the complexity of the issues involved, any meaningful response will require a concerted and cooperative multi-agency approach.

As LECC is dependent upon public funding, it can be safely assumed that its budgetary situation will continue to present it with challenges. That in turn will require it to carefully determine its priorities in allocating its resources. In that context I am pleased that LECC is, and remains, determined to focus its attention upon systemic issues within the agencies for which it has oversight responsibility. Although it is readily apparent that all parts of LECC are committed to achieving that objective, particular credit should be paid in the present circumstances to the projects undertaken by the Prevention and Education Team as well as the outreach work performed by the Community Engagement Team.

The Hon. Terry Buddin SC
Inspector LECC
28 October 2019