



Memorandum Report

ANAO Report No. 39 of 2016-17: Execution of Search Warrants

November 2017

Background

The Australian National Audit Office (ANAO) assessed the Department of Immigration and Border Protection's (the Department) application, approval and use of s251 search warrants during a performance audit undertaken over 2016-17 – *The Australian Border Force's Use of Statutory Powers*. The ANAO published its audit report detailing its findings and recommendations on 27 February 2017¹. The ANAO included the following statements within its audit report:

- “A number of searches of premises under the Migration Act potentially exceeded the authority of the warrant which authorised them, and officers routinely questioned people without documenting their legal authority to do so.” – Page 8
- “In the 50 warrants that the ANAO examined, there were 12 searches where a total of 20 people who were not nominated in the warrant application or approval were detained². In each case, people were detained either after the person named in the warrant had been located or after a search had confirmed that the person was not at the premises.” – Page 32

In response to the ANAO, the Department noted the ruling in *Ruddock v Taylor* (2005), which considers detaining an unlawful non-citizen (UNC) as lawful provided that there is reasonable suspicion or knowledge that a person is a UNC. This response, in relation to s188 and s189 of the *Migration Act 1958* (the Migration Act), was included in the ANAO's audit report on page 32.

The Department has implemented Mandatory Control Points (MCP) for the application and reporting on the execution of s251 search warrants. The *Application for Search Warrant* (MCP1) documents the results of pre-field compliance activities undertaken to determine reasonable suspicion or knowledge in relation to the person or persons of interest (POI), including their status as a UNC and their current location within the community. The MCP1 is approved by a delegate and confirms there is reasonable cause to execute the search warrant. If a search warrant is executed, its authority for ABF officers to continue searching and remain on the premises ceases when the Department has made a determination regarding the presence of the POI(s) at the warrant location or the stated objective has been achieved.

The execution of a search warrant and its outcomes are documented in the *Report on the Use of Search Warrant* (MCP2). Compliance Client Interview (CCI) forms are also completed by interviewing officers to document the responses of people interviewed and the steps undertaken to confirm the immigration status and identity of a person being questioned. Notes by ABF officers are also documented in Officer Notebooks and contribute towards evidence collated by the Department to support detention-related decision making.

¹ https://www.anao.gov.au/sites/g/files/net2766/f/ANAO_Report_2016-2017_39.pdf

² The ANAO provided evidence to the Department on 27 September 2016 of the 12 search warrants referred to in the audit report. At the time that the ANAO provided the evidence to the Department, there were 13 search warrants and 26 detained people (who were not the person of interest in the warrant application) that were included in the evidence from the ANAO.

Objective and Scope

The objective of this review was to identify opportunities for improvement in relation to the Department's processes for the application and execution of search warrants. In delivering on this objective, Internal Audit considered the ANAO's findings in relation to the potentially unlawful execution of 13 search warrants.

The scope of this review included:

- Examining relevant policies and procedures relating to the application and execution of search warrants;
- Obtaining and reviewing the documentation assessed by the ANAO and used as the basis for their findings (ie. MCP1, MCP2 and Action Detail Reports);
- Obtaining and reviewing other documentation (ie. CCIs and officer notebooks) relevant to the 13 search warrants where there may be documented evidence of reasonable suspicion or knowledge to question (to establish an identity) and detain the UNCs; and
- Undertaking interviews with officers involved in the 13 search warrants to corroborate the execution of the search warrants with supporting documentary evidence.

Overall Assessment

Internal Audit's assessment against each of the ANAO's statements is provided below.

“A number of searches of premises under the Migration Act potentially exceeded the authority of the warrant which authorised them, and officers routinely questioned people without documenting their legal authority to do so.”

The review of documentation prepared by the Department in relation to the 13 search warrants found that there was sufficient legal authority to question the UNCs for eight of the 13 search warrants based on the reasonable suspicion or knowledge documented by the Department. In these eight instances, the Department had documented reasonable suspicion, in accordance with s188 of the Migration Act, that there were other UNCs in addition to the POI on the premises.

“In the 50 warrants that the ANAO examined, there were [13] searches where a total of [26] people who were not nominated in the warrant application or approval were detained³. In each case, people were detained either after the person named in the warrant had been located or after a search had confirmed that the person was not at the premises.”

The eight search warrants identified above indicate that the Department had legal authority to undertake questioning, in accordance with s188 of the Migration Act, based on the reasonable suspicion that had been established and documented in the MCP1. The eight search warrants consisted of 15 of the 26 people identified by the ANAO.

Internal Audit was unable to identify documented evidence of reasonable suspicion or knowledge to undertake questioning for the 11 people in the remaining five search warrants. Interviews with ABF officers involved in the execution of the five search warrants were sought to identify if reasonable suspicion or knowledge had been established for lawful questioning but had not been documented. The results of the interviews in relation to the 11 people in the remaining five search warrants were:

- ABF officers were unavailable during the period of this review (or did not respond to the request) for an interview in relation to six of the 11 UNCs. Internal Audit is therefore unable to provide a determination in relation to these UNCs;
- ABF officers advised that questioning was lawful in relation to three of the 11 UNCs as the questioning was undertaken on a voluntary basis and consent was sought from the UNCs (however this was not documented by the ABF officers); and

³ The ANAO provided evidence to the Department on 27 September 2016 of the 12 search warrants referred to in the audit report. At the time that the ANAO provided the evidence to the Department, there were 13 search warrants and 26 detained people (who were not the person of interest in the warrant application) that were included in the evidence from the ANAO.

- ABF officers advised that they were unsure if questioning was lawful in relation to two of the 11 UNCs as they were unable to recollect whether questioning was undertaken on a voluntary basis.

In relation to the detention of the 26 UNCs, the Department had documented reasonable suspicion or knowledge in all instances to lawfully detain them in accordance with s189 of the Migration Act.

Limitations of Assessment

The assessment is based on the documentation provided by the Department that has been made available for assessment (i.e. email correspondence, MCP1, MCP2, CCIs, officer notebooks and Action Detail Reports), and the interviews held with ABF officers involved in executing the 13 search warrants. The results of this assessment are not intended to constitute legal advice and is only a determination as to whether there was documented evidence of reasonable suspicion or knowledge in relation to s188 and s189 of the Migration Act.

Opportunities for Improvement

The following issues were noted during the course of this review that present opportunities for improvement in relation to the Department's processes for the application and execution of search warrants:

- **Limited documentation had been prepared to document the basis for lawfully questioning people that were not the POI:** The Department's position for undertaking questioning, when reasonable suspicion or knowledge has not been established under s188 of the Migration Act, is that it can occur when the questioning is performed on a voluntarily basis so the people questioned are not compelled to respond. This occurred in three instances of the 11 people that were detained, where there was no documented basis for questioning under s188 of the Migration Act, but the Department had not documented that the people responded to the questions voluntarily. The Department should document this basis for lawfully questioning people as part of the MCP2.
- **No evidence of ABF officers documenting the consent to remain on the premises:** ABF officers are required to seek consent to remain on premises and continue questioning if the authority of a search warrant ceases after the objective and scope of it has been reached (or reasonable cause to believe no longer exists). Internal Audit identified one instance from the 13 search warrants where there was no documented evidence that the Department had sought consent after the authority of the search warrant had ceased. Internal Audit's interviews with ABF officers in this circumstance could not confirm if consent had been obtained so the lawfulness of this instance could not be determined. This highlights the importance of ABF officers documenting when consent has been obtained so that there is evidence of lawful practices maintained by the Department.

Summary of Results

The following table provides a summary of the assessment for each UNC detained in the 13 search warrants.

| No. | Warrant | Date of execution | UNC Identification No. | Basis for questioning the UNC | Basis for detaining the UNC |
|-----|-------------|-------------------|------------------------|--|---|
| 1 | s. 37(2)(b) | | s. 47F(1) | Voluntary - undocumented | Migration Act (s189) – documented in the MCP2 |
| 2 | | | | No determination – undocumented and officers unavailable for this review | |
| 3 | | | | Undocumented and officer unable to recall | |
| 4 | | | | Voluntary - undocumented | |
| 5 | | | | No determination – undocumented and officers unavailable for this review | |
| 6 | | | | Voluntary - undocumented | |
| 7 | | | | | |
| 8 | | | | | |
| 9 | | | | Migration Act (s188) – documented in the MCP1 | |
| 10 | | | | | |
| 11 | | | | | |
| 12 | | | | | |
| 13 | | | | | |

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The services are being undertaken at the request of the Department of Immigration and Border Protection Service to examine the adequacy of internal controls outlined in the scope and approach sections of this document.

The Department of Immigration and Border Protection is fully and solely responsible for making implementation decisions, if any, and to determine further course of action with respect to any matters addressed in any advice, recommendations, services, reports or other work product or deliverables provided by us.

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