



VICTORIAN INSPECTORATE

**Report of the Victorian Inspectorate to the Parliament of
Victoria in respect of the Department of Sustainability and
Environment Pursuant to the *Surveillance Devices Act 1999***

Report No. 2 of 2012 - 2013

11 OCTOBER 2013

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List of Abbreviations

DEPI	Department of Environment and Primary Industries
DPI	Department of Primary Industries
DSE	Department of Sustainability and Environment
PI	Protected Information
PIM	Public Interest Monitor
SD Act	<i>Surveillance Devices Act 1999</i> (Vic)
SIM	Special Investigations Monitor
VI	Victorian Inspectorate

INTRODUCTION

The *Surveillance Devices Act 1999* (Vic) (the SD Act) regulates the use of surveillance devices in the State of Victoria. The Act makes provision for warrants and emergency authorisations¹ permitting the installation, use, maintenance and recovery of surveillance devices by four State law enforcement agencies.² Use of surveillance devices in relation to private activity and private conversation is otherwise generally unlawful in Victoria.³

The SD Act imposes a regime of strict controls relating to the use of surveillance devices, including a requirement for agencies to make and keep records and documents and to destroy certain material when it is not likely to be further required for an authorised purpose. It also provides for independent inspection of agency records and documents by an independent officer who is responsible directly to the Victorian Parliament. From 1 July 2006 to 9 February 2013 the inspection function was the responsibility of the Special Investigations Monitor (SIM), a statutory officer whose responsibilities included inspecting agency records, assessing statutory compliance with the SD Act and reporting to the Parliament.

As discussed in the Victorian Inspectorate's (VI) previous report⁴ on 10 February 2013 the functions previously performed by the SIM were transferred, with minor modifications, to the newly established VI.

As with the VI's previous 'mid-year' report (which covered the first half of the 2012-2013 year),⁵ this second and final report for 2012-2013 is submitted to the Parliament of Victoria, with a copy provided to the Minister responsible for the SD Act (the Attorney-General) in accordance with the VI's obligation under s. 30Q. In previous years, a single report covering the inspections of the four authorised State law enforcement agencies, was prepared and submitted to the Parliament. For the second report of 2012-2013, individual reports for each agency have been prepared. This report details the results of inspections of the Department of Sustainability and Environment (DSE) records conducted between 1 July 2012 and 30 June

¹ Emergency authorisations may be obtained by Victoria Police, the Independent Broad-based Anti-Corruption Commission, and the Australian Crime Commission only. Section 25 of the *Surveillance Devices Act 1999* (SD Act) expressly states that Emergency Authorisations are not available to the Department of Sustainability and Environment (DSE) or law enforcement officers of the DSE.

² The Act also permits the Australian Crime Commission (ACC) to use the provisions of the SD Act. Inspection of resulting ACC records and documents is conducted by the Commonwealth Ombudsman pursuant to s 55(2) of the *Surveillance Devices Act 2004* (Cth).

³ The Act provides for certain exceptions at ss 5, 6(2), 7(2), 8(2), 9(2), 9B(2)(b) and (c), 9C(2).

⁴ Report of the Victorian Inspectorate pursuant to the *Surveillance Devices Act 1999* – Report No. 1 of 2012-2013.

⁵ *Ibid.*

2013 and other matters considered by the VI to be relevant to compliance with the SD Act by that agency.

KEY PROVISIONS OF THE SD ACT

Background to the current legislation

Background to the SD Act was set out in the SIM's 'Report of the Special Investigations Monitor to the Parliament of Victoria Pursuant to the *Surveillances Devices Act 1999* - Report No. 2 of 2008-2009' (dated 30 September 2009). This report, and all other SIM reports made in accordance with the SD Act, is now available on the VI's webpage.⁶

Purposes of the SD Act

The purposes of the SD Act include:⁷

- the regulation of the installation, use, maintenance and retrieval of surveillance devices
- the establishment of procedures for law enforcement officers to obtain warrants or emergency authorisations for the installation, use, maintenance and retrieval of surveillance devices
- the imposition of requirements for the secure storage and destruction of records and for the making of reports to judges, magistrates and the Parliament in connection with surveillance device operations
- the recognition (subject to the *Surveillance Devices Regulations 2006*) of warrants and emergency authorisations issued in another jurisdiction authorising the installation and use of surveillance devices.

State agencies permitted to use surveillance devices

- Victoria Police
- Office of Police Integrity – to 9 February 2013
- Independent Broad-based Anti-Corruption Commission – from 10 February 2013
- Department of Primary Industries
- Department of Sustainability and Environment

⁶ At <http://www.vicinspectorate.vic.gov.au>.

⁷ SD Act s 1.

Types of surveillance devices

The SD Act allows for the use of the following surveillance devices:

- data surveillance devices
- listening devices
- optical devices
- tracking devices.

Subject to obtaining appropriate authorisation, the use of devices for multiple functions is permitted.

Warrants

SURVEILLANCE DEVICE WARRANTS

The SD Act provides at s. 15(1) that a law enforcement officer may apply for the issue of a surveillance device warrant if the officer on reasonable grounds suspects or believes that:

- an offence has been, is being, is about to be or is likely to be committed; and
- use of a surveillance device is or will be necessary for the purpose of an investigation into that offence or of enabling evidence or information to be obtained of the commission of that offence or the identity or location of the offender.

The justification for use of surveillance devices for the purpose of furthering investigations depends very much on the nature and circumstances of each case and evaluating whether the use of devices might be expected to further the investigation.

An application may be made only with the approval of either a senior officer of the agency,⁸ or an authorised police officer (being a person appointed by the Chief Commissioner of Police).⁹

Section 15(3) of the SD Act provides that an application for a surveillance device warrant may be made only to a judge of the Supreme Court of Victoria, except in the case of a tracking device, in which case the application may be made to a magistrate. There is provision for a 'remote application', that is, an application made by telephone, fax, email or

⁸ As defined in SD Act s 3(1).

⁹ Ibid ss 3(1) and 3(2).

other means of communication, in circumstances where it is impractical for an application to be made in person.¹⁰

RETRIEVAL WARRANTS

There is provision in the SD Act for issue of a retrieval warrant to authorise the recovery of a surveillance device where the device was lawfully installed on premises, or in or on an object under a surveillance device warrant. A surveillance device warrant authorises installation and retrieval within the period of the warrant. Therefore, a retrieval warrant is usually necessary only when a device was not retrieved before the warrant ceased to be in effect and retrieval without the authority of a warrant might constitute a trespass or other offence. Sections 20C to 20H of the SD Act govern the procedure for application, issue and revocation of retrieval warrants, with s. 20G detailing what is authorised by such a warrant.

Revocation

The provisions of the SD Act include a requirement for an agency chief officer to revoke a surveillance device warrant when the need for use of devices authorised by the warrant to obtain evidence of the commission of an offence, or to establish the identity or location of an offender, no longer exists. There is a similar provision requiring revocation of a retrieval warrant if the grounds for the application for the warrant cease to exist during the period of the warrant.

Exercise of powers

Certain powers under the SD Act may be exercised by either senior officers of the agency concerned or authorised police officers.¹¹ For the DSE, ‘senior officer’ is defined as meaning the Secretary of the Department, who is therefore the only person (other than an authorised police officer) who may exercise those powers.

Recent changes

As noted earlier in this report and in the VI’s previous report,¹² the VI took over the inspection and reporting obligations of the SIM on 10 February 2013. On that date

¹⁰ Ibid s 16.

¹¹ For example, see SD Act ss 15(2) and 20C(2).

¹² Above n 4.

amendments to the SD Act¹³ came into effect which introduced the Public Interest Monitor (PIM) into the process for making applications for surveillance device and retrieval warrants under the SD Act and placed additional notification and reporting obligations on law enforcement agencies in respect of the PIM.

On 1 July 2013, the DSE and Department of Primary Industries (DPI) merged to form the Department of Environment and Primary Industries (DEPI). For this reason, while this report concerns the compliance of the DSE (as it was), any recommendations are directed to the Secretary of the DEPI.

The role of the Victorian Inspectorate

The VI is required by s. 30P of the SD Act to inspect the records of Victorian law enforcement agencies using surveillance devices under a warrant or emergency authorisation in order to determine the level of statutory compliance with the Act by the agency and its law enforcement officers.

The SD Act requires that inspections by the VI be carried out ‘from time to time’¹⁴ and that the VI report at six-monthly intervals to the Parliament as soon as practicable after 1 January and 1 July of each year. The VI is also required to provide a copy of each report to the Minister (Attorney-General).

The powers of the VI under the SD Act

For the purpose of an inspection under s. 30P the VI:¹⁵

- after notifying the chief officer of the agency, may enter at any reasonable time the premises occupied by the agency
- is entitled to have full and free access at all reasonable times to all records of the agency that are relevant to the inspection
- may require a member of staff of the agency to give any information that the VI considers necessary, being information that is in the member’s possession, or to which the member has access, and is relevant to the inspection.

¹³ Amendments made by Part 6 of the *Public Interest Monitor Act 2011*.

¹⁴ SD Act s 30P(1).

¹⁵ Ibid s 30P(2).

INSPECTION METHODOLOGY

Introduction

This report addresses the results of inspections undertaken of the DSE and records the level of compliance with the SD Act, as assessed by the VI. The VI continues the practice adopted by the SIM by conducting two inspections of DSE records each financial year. Although the statutory requirement is for inspections to be conducted ‘from time to time’, the VI is required to report to Parliament every six months making it necessary that inspections occur at least bi-annually.

Inspection of warrant files and other records

Inspection of DSE records by the SIM since that agency assumed responsibilities under the SD Act in 2006 were conducted such that all available records (if any) were subject to inspection. This methodology is different from that employed in respect of Victoria Police and the Office of Police Integrity (and subsequently the Independent Broad-based Anti-Corruption Commission) where a warrant file was inspected only after all statutory reporting requirements referable to that warrant had been completed and arose primarily due to the significant difference in the number of warrants being sought and issued to each agency. The VI has adopted the SIM’s methodology for inspecting files across all agencies.

Between the time the SIM assumed inspection and reporting responsibilities under the SD Act and the VI taking over these obligations, the DSE had not sought nor obtained a warrant under the SD Act. Since that time, the VI conducted an inspection of records pertaining to one surveillance device warrant issued to the DSE which was still in force at the time of inspection.

Understanding ‘protected information’

Before reporting inspection results, it is useful to note that under the SD Act ‘protected information’ (PI) includes:¹⁶

- information obtained through use of devices authorised by a warrant or an emergency authorisation
- information about an application for a warrant or emergency authorisation, made by a law enforcement officer

¹⁶ Ibid s 30D.

- information about a warrant issued (including a retrieval warrant), or an emergency authorisation granted by a ‘senior officer’ (within the meaning of the Act) of the agency
- information about an application to a judge for approval of the use of emergency powers.

SD Act provisions limit the use, communication or publication of PI,¹⁷ including both ‘local PI’¹⁸ and ‘corresponding PI’.¹⁹ In summary:

- ‘local PI’ means information obtained from or relating to a warrant or emergency authorisation issued under the SD Act²⁰
- ‘corresponding PI’ means information obtained from or relating to a warrant or emergency authorisation issued under a ‘corresponding law’²¹ of another jurisdiction.²²

The SD Act requires that records or reports obtained by use of a surveillance device are kept secure and are not accessible by unauthorised persons.²³ Such records and reports fall within the definition of PI. Further, because there are statutory restrictions on the use, communication and publication of PI, the practical effect is that an agency must keep all PI secure; not only the reports and records obtained by the use of a surveillance device, but also associated information and documents connected with the warrant or emergency authorisation.

For the purpose of this report, the term ‘PI’ is used when referring to information obtained by means of a surveillance device, although as noted above its statutory definition is much wider.

Defining compliance

Three categories are used in this report to describe the level of statutory compliance.

Compliant – the agency was either fully compliant, or any degree of non-compliance was relatively trivial and in the nature of an occasional mistake or an oversight.

¹⁷ Ibid s 30E.

¹⁸ Ibid s 30F.

¹⁹ Ibid s 30G.

²⁰ Ibid s 30F(4).

²¹ Defined in SD Act s 3.

²² Ibid s 30G(4).

²³ Ibid s 30H.

Substantially Compliant – the agency had appropriate forms and procedures in place to meet compliance requirements, but there was a compliance problem, for example, with the forms or with the content of completed documents and records, or with procedures.

Not Compliant – a substantial or complete failure to comply with statutory requirements.

INSPECTION RESULTS

Introduction

In 2012-2013, the DSE sought and obtained one surveillance device warrant. This warrant was obtained in connection with the investigation of suspected offences under the *Forests Act 1958*. An extension of that warrant was also sought and obtained; this extension being such that the warrant was still in force when inspection of DSE records was undertaken in June 2013.

Tables 1 to 3 below summarise statutory compliance requirements relevant to the VI's inspection of DSE records and documents concerning the warrant. The tables also record whether or not compliance was achieved by the agency in each of those categories. When appropriate, additional comment is made in the body of the report.

Certain compliance requirements are marked in the tables as not assessed (N/A) because they do not apply in relation to the warrant records inspected.

Keeping documents connected with warrants: Section 30M

Section 30M of the SD Act provides that the Secretary of the DSE as chief officer of the agency, must cause certain surveillance device warrant documents to be kept in the records of the agency.

A summary of the level of compliance achieved by the DSE with s. 30M is set out in Table 1 below. To the extent relevant, the agency was compliant with s. 30M of the SD Act.

TABLE 1 COMPLIANCE WITH THE SD ACT - DOCUMENTS TO BE KEPT: S. 30M

Documents to be kept under s30M	Level of Compliance	Comment
Each warrant. s. 30M(a)	Compliant	
Each notice of revocation by a judge or magistrate under s. 20A(3). s. 30M(b)	N/A	No warrants revoked under s. 20A.
A copy of each application for a warrant, extension, variation or revocation of a warrant. s. 30M(e)	Compliant	
A copy of each report to a judge or magistrate under s. 30K. s. 30M(f)	N/A	Warrant still in force at time of inspection.
A copy of each evidential certificate issued under s. 36. s. 30M(g)	N/A	No data used evidentially to date of inspection.

Other records to be kept: Section 30N

Section 30N of the SD Act provides that the Secretary of the DSE must cause certain records in connection with surveillance devices to be kept in the records of the agency. A summary of the level of compliance achieved by the DSE with s. 30N is set out in Table 2 below.

TABLE 2 COMPLIANCE WITH THE SD ACT - RECORDS TO BE KEPT: S. 30N

Records to be kept under s30N	Level of Compliance	Comment
Statement as to whether each application for a warrant, extension, variation or revocation was granted, refused or withdrawn. s. 30N(a)	Not assessed	See comments below.
Details of each use of information obtained by use of an SD under a warrant. s. 30N(c)	Not assessed	See comments below.
Details of each communication to a person other than a law enforcement officer of the agency, of information obtained by the use of an SD. s. 30N(d)	Not assessed	See comments below.
Details of each occasion when, to the knowledge of a law enforcement officer of the agency, information obtained by an SD was given in evidence in a 'relevant' proceeding. s. 30N(e)	N/A	Investigation ongoing. No evidential use of PI to date of inspection.
Details of the destruction of records or reports under s. 30H(1)(b). s. 30N(f)	N/A	None undertaken.

STATEMENT AS TO OUTCOME OF EACH APPLICATION – S. 30N(A)

It was evident from the documentation held by the DSE that a single SD warrant had been applied for and granted during the 2012-2013 year. However, there was no formal record made of this fact as required by s. 30N(a) of the SD Act. While the Act is silent in respect of the manner in which this record is to be made, practice among other law enforcement agencies is for this statement to be included in the Register of Warrants required to be kept in compliance with s. 30O.

The VI considers that the Register under s. 30O should be amended to include a statement concerning the outcome of an application for a warrant, extension, variation or revocation, in satisfaction of s. 30N(a) of the SD Act.

DETAILS OF EACH USE AND COMMUNICATION OF INFORMATION OBTAINED BY USE OF A DEVICE – S. 30N(C)-(D)

Documentation on file, including an application for an extension of a surveillance device warrant and enquiries made with DSE staff, indicated there had been use made and communication of PI obtained by use of a device under the authority of a surveillance device warrant. These uses and communications had yet to be recorded.

Section 30N of the SD Act is silent as to how soon after the event a record must be made of each use and/or communication of PI obtained under authority of an SD warrant. The practice of other State agencies has been to record such matters within a 'reasonable time' of the event. This approach to recording such events was encouraged by the SIM as undue delay in making a record may result in it not being made at all.

The VI is of the view that delay in recording the use and communication of PI was due to a lack of experience on the part of DSE staff, with this being the first surveillance device warrant the agency had obtained for many years. In these circumstances and with the warrant to which these records belong still extant at the time of inspection, the VI has delayed assessment of compliance with s. 30N(c)-(d). In the event, DSE staff undertook to bring the records up to date and to introduce more contemporaneous recording of future use or communication of PI.

The VI considers the DEPI should develop a specific document (hard-copy or electronic), for the purpose of recording those details required by s. 30N(c) - (e).

Other compliance requirements

Additional to the requirement to keep certain documents and records, the Secretary of the DSE is required to comply with a number of other obligations imposed by the SD Act. These include:

- causing a register of warrants to be kept, in compliance with s. 30O
- ensuring the use of a device is discontinued and the warrant is revoked, in compliance with s. 20B(2) and (3)
- revocation of a retrieval warrant, in compliance with s. 20H
- ensuring every record or report obtained by use of a device under the SD Act is secure from unauthorised access, in compliance with s. 30H(1)(a)
- destroying or causing any record to be destroyed, in compliance with s. 30H(1)(b), when satisfied it is not likely to be required for a purpose referred to in s. 30E(4), 30F(1) or 30G(1) of the SD Act
- providing an annual report to the Minister covering information prescribed in s. 30L of the SD Act.

Law enforcement officers to whom a warrant is issued, or who are primarily responsible for the execution of a warrant, also have particular compliance responsibilities, namely:

- to immediately inform the Secretary of the DSE if he/she believes –
 - the use of a device under a surveillance device warrant is no longer necessary for obtaining evidence of the commission of an offence or to establish the identity or location of the offender,²⁴ or
 - grounds for issue of a retrieval warrant no longer exist (usually once the device(s) has been recovered)²⁵
- to make a report in accordance with s. 30K to the judge or magistrate who issued the warrant, within the time specified in the warrant.

Two general compliance requirements of the SD Act are required of the DSE, namely:

- an application for a warrant may be made only with the approval of a ‘senior officer’²⁶
- an application for a retrieval warrant may be made only with the approval of a ‘senior officer’.²⁷

²⁴ Ibid s 20B(4).

²⁵ Ibid s 20H(4).

²⁶ Ibid s 15(2).

A summary of the level of compliance achieved by the DSE with all of these provisions is set out in Table 3 below.

TABLE 3 COMPLIANCE WITH THE SD ACT – OTHER REQUIREMENTS

Other Compliance Requirements	Level of Compliance	Comment
Maintain a register of warrants and emergency authorisations with required details. s. 30O	Not compliant	See comments below.
Discontinue use of SD and revoke SD warrant in certain circumstances. s. 20B	N/A	
Revocation of retrieval warrants by chief officer. s. 20H(3)	N/A	No retrieval warrants had been obtained or sought.
Records and reports obtained by use of an SD under warrant kept secure from unauthorised persons. s. 30H(1)(a)	Compliant	
Destruction of records and reports. s. 30H(1)(b)	N/A	None undertaken.
Annual report to Minister by chief officer of the agency. s. 30L	Compliant	The report on 2011-2012 was made by the date required.
Law enforcement officer to inform chief officer if use of SD no longer necessary or grounds for retrieval warrant cease to exist. s. 20B(4) & s. 20H(4)	N/A	
Report to judge or magistrate under s. 30K made on time and includes required information. s. 30K(1)	N/A	No reports yet required to be completed.
Applications made only with the approval of a 'senior' or 'authorised' officer. s. 15(2)	Compliant	

REGISTER OF WARRANTS – S. 30O

Section 30O of the SD Act prescribes those details that must be included in a Register of Warrants that the Secretary (as Chief Officer) must cause to be kept. As DSE may not obtain emergency authorisations, the Register need only include the details outlined in s. 30O(2).

While the DSE did have a Register that included some details in respect of the SD warrant, it did not include a number of the details required by s. 30O(2) to be kept. Inspection of the

²⁷ Ibid s 20C(2).

register revealed that a very old register had been utilised which pre-dated significant amendments to the SD Act that came into effect on 1 July 2006. These included the insertion of s. 30O. It was apparent that the requirements of s. 30O had not been considered. The VI considers that the agency was therefore not compliant with s.30O.

The VI considers the DSE should review its documentation and devise a new Register, either hard-copy or electronic, which includes all of those details required to be recorded in satisfaction of s. 30O(2) of the SD Act.

Practice Matters

There is one practice matter that arose as a result of inspection of documentation held by DSE for the single warrant obtained by the agency in the 2012-2013 year and which may impact on the obligation to report to the issuing magistrate in satisfaction of s. 30K of the SD Act.

One matter that must be included in that report is the period during which the device(s) was used under the authority of the warrant.²⁸ To address this requirement properly, the dates on which a device(s) was installed and subsequently retrieved (or deactivated) must be known to the agency, and should be recorded in the documentation kept. While it was clear from documentation inspected that devices had been deployed under the authority of a surveillance device warrant, the date(s) of installation were not recorded. Further, the report under s. 30K must include the names of persons involved in the execution of the warrant.²⁹ These details were also not kept in the warrant file documentation.

The VI considers this information is most easily and accurately captured by the officers performing the installation, maintenance and retrieval of a device(s) making a report after each activity, and this report being placed on the warrant file. Such a practice is used by other State agencies using SDs.

Recommendations

As a result of the inspection of the records held by the DSE in relation to the activities undertaken under the authority of the SD Act, the VI makes four recommendations for consideration of the new DEPI. These recommendations are intended to assist the agency achieve full compliance with the Act.

²⁸ Ibid s 30K(2)(b)(iii).

²⁹ Ibid s 30K(2)(b)(i).

Recommendation 1: That the DEPI ensures the Register required to be kept under s. 30O includes a statement as to the outcome of an application for a warrant, extension, variation or revocation to ensure compliance with s. 30N(a) of the SD Act.

Recommendation 2: That the DEPI develops a specific document, either hard-copy or electronic, for the purpose of recording the details of each use made and each communication of information obtained by use of a device, and each occasion on which information obtained by use of a device is given in evidence, in satisfaction of s. 30N(c) - (e).

Recommendation 3: That the DEPI develops a new Register, either hard-copy or electronic, which includes all details required to be recorded in satisfaction of s. 30O(2) of the SD Act.

Recommendation 4: That the DEPI reviews the internal management of SD administration, in recognition of the merger of the former DSE and DPI which has brought two investigation units using surveillance devices (Fisheries investigation from DPI and Wildlife investigation from DSE) under the common administration of the new agency.

Inspection summary

In 2012-2013 the DSE used the provisions of the SD Act to obtain a SD warrant for the first time following major changes to the SD Act which occurred in 2006. While the agency managed the application process well, including the involvement of the recently introduced PIM in the application process, unfamiliarity with subsequent record keeping requirements was evident with an old register of warrants utilised that was not compliant (as to the information recorded) with the SD Act and required records of the use and communication of information obtained by a SD not yet recorded. These are matters which are easily remedied for the future and the VI is confident that this will occur.

The VI acknowledges the positive approach of agency staff to the role of the VI and their continued helpful and open communication with VI officers. In particular post-inspection discussion of results with DSE staff was particularly positive to achieving an understanding by DSE staff of the statutory compliance requirements associated with the use of SDs.

NEXT REPORT

As required by s. 30Q of the SD Act, the VI will next report as soon as practicable after 1 January 2014. Due to the merging of DSE and DPI from 1 July 2013, the next inspection and report will be in relation to the use of SDs by the new DEPI.

A handwritten signature in blue ink that reads "Robin Brett". The signature is written in a cursive style and is placed on a light-colored, slightly textured rectangular background.

Robin Brett QC
Inspector
Victorian Inspectorate