



VICTORIAN INSPECTORATE

**Report of the Victorian Inspectorate to the Parliament of
Victoria in respect of Victoria Police Pursuant to the
*Surveillance Devices Act 1999***

Report No. 2 of 2012 - 2013

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List of Abbreviations

CCP	Chief Commissioner of Police
PI	Protected Information
PIM	Public Interest Monitor
PIR	Protected Information Register
PSC	Professional Standards Command
SD Act	<i>Surveillance Devices Act 1999 (Vic)</i>
SIM	Special Investigations Monitor
SPU	Special Projects Unit (Intelligence and Covert Operations Support)
TPU	Technical Projects Unit (within Professional Standards Command)
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 authorisations permitting the installation, use, maintenance and recovery of surveillance devices by four State law enforcement agencies.¹ Use of surveillance devices in relation to private activity and private conversation is otherwise generally unlawful in Victoria.²

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 report³, 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),⁴ 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

¹ The *Surveillance Devices Act 1999* (SD 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).

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

³ Report of the Victorian Inspectorate pursuant to the *Surveillance Devices Act 1999* – Report No. 1 of 2012-2013.

⁴ *Ibid.*

report of 2012-2013, individual reports for each agency have been prepared. This report includes the results of inspections of Victoria Police records conducted between 1 July 2012 and 30 June 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 for 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 *Surveillance 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, are now available on the VI's webpage.⁵

Purposes of the SD Act

The purposes of the SD Act include:⁶

- 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.

Agencies permitted to use surveillance devices

- Victoria Police

⁵ At <http://www.vicinspectorate.vic.gov.au>.

⁶ SD Act s 1.

- 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

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 and emergency authorisations

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 (**SD**) warrant if the officer on reasonable grounds suspects or believes that:

- an offence has been, is being, is about to, or is likely, to be committed; and
- use of an SD 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 the 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,⁷ or an authorised police officer (being a person appointed by the Chief Commissioner of Police).⁸

Section 15(3) of the SD Act provides that an application for a SD 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 other means of communication, in circumstances where it is impractical for an application to be made in person.⁹

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 SD warrant. An SD warrant authorises installation and retrieval within the period of the warrant, so a retrieval warrant is usually necessary only when a device was not retrieved before the SD warrant ceased to be in effect. In such a case 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.

EMERGENCY AUTHORISATIONS

The SD Act makes provision for an emergency authorisation to be granted by a ‘senior officer’¹⁰ for use of surveillance devices, where there is an imminent threat of serious violence to a person or of substantial damage to property¹¹ or where the intended use of a device relates to a serious drug offence.¹² These emergency authorisation provisions may be used only in specified circumstances, where the

⁷ Defined in SD Act s 3(1).

⁸ Ibid ss 3(1) and 3(2).

⁹ Ibid s 16.

¹⁰ Ibid s 3(1).

¹¹ Ibid s 26.

¹² Ibid s 27.

seriousness and urgency of the situation justify the use of a surveillance device and it is not practicable in the circumstances to apply for a warrant. Emergency authorisation may be given only if the senior officer is satisfied that there are reasonable grounds for the officer's suspicion or belief founding the application.

Where emergency authorisation is granted, a senior officer (or another person acting on his or her behalf) must apply within two business days to a Supreme Court judge for approval of the exercise of powers under that authorisation.¹³ Emergency authorisations are available only to Victoria Police and IBAC.¹⁴

Revocation

The provisions of the SD Act include a requirement for an agency chief officer to revoke an SD 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 before the warrant expires. Typically agencies in possession of a retrieval warrant will revoke it pursuant to s. 20(3) once the retrieval of any SDs under the authority of the warrant has occurred.

Exercise of Powers

Certain powers under the SD Act may be exercised by either 'senior officers' of the agency concerned or, in the case of the police, by certain 'authorised' police officers.¹⁵

The definition in s. 3 of the SD Act of 'senior officer' as it relates to Victoria Police includes officers of the rank of Assistant Commissioner and above. Section 3 also provides for officers of the rank of Inspector and above, but below Assistant Commissioner, to be appointed in writing by the Chief Commissioner to be

¹³ Ibid s 28.

¹⁴ Section 25 of the SD Act specifically excludes the Department of Primary Industries and the Department of Sustainability and Environment from the emergency authorisation provisions. Emergency authorisation provisions were also available to OPI.

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

‘authorised officers’.¹⁶ ‘Authorised officers’ may approve applications for warrants and authorise the use of surveillance devices. An ‘authorised officers’ may be appointed in writing by the CCP to be a ‘senior officer’ (as defined) if the special nature of their responsibilities requires that appointment. There are, therefore, a number of persons of varying rank within Victoria Police who may exercise delegated authority for the purpose of the SD Act.

In addition to the delegations provided for in the SD Act, the Chief Commissioner of Police (CCP) has a general power of delegation pursuant to s. 6A of the *Police Regulation Act 1958*, whereby he or she may delegate (subject to stated exceptions) the exercise of any power, discretion, function, authority or duty of the CCP, by instrument in writing. The CCP has, however, relied only on the specific SD Act provisions for delegation of authority in relation to SDs. Such written delegations as have been issued are filed at SPU and TPU and are available for inspection.

Recent changes

As noted earlier in this report, and in the VI’s previous report,¹⁷ the VI took over the inspecting and reporting obligations of the SIM on 10 February 2013. On that date, amendments to the SD Act¹⁸ 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.

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 by the agency and its law enforcement officers.

¹⁶ Definitions of senior officer and authorised police officer are included in s 3 of the SD Act.

¹⁷ Above n 3.

¹⁸ Amendments made by Part 6 of the *Public Interest Monitor Act 2011*.

The SD Act requires that inspections by the VI be carried out ‘from time to time’¹⁹ 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:²⁰

- 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.

INSPECTION METHODOLOGY

Introduction

This report addresses the results of inspections undertaken of Victoria Police and records the level of compliance with the SD Act, as assessed by the VI. The VI continues the methodology adopted by the SIM of inspecting Victoria Police warrant file records three times each year and Protected Information Registers (PIR) twice each 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. This makes it necessary that inspections occur at least bi-annually.

Inspection of warrant files and other records

The VI has continued to inspect Victoria Police warrant files on the basis detailed in the SIM’s first report for 2009-2010.²¹ Accordingly, a warrant file is inspected only

¹⁹ Ibid s 30P(1).

²⁰ Ibid s 30P(2).

after all statutory reporting requirements referable to that warrant have been completed. Such reporting is invariably completed within three months of the warrant ceasing to be in effect. This method has worked well and has negated the need to return to warrant files to address matters not finalised on a previous occasion. All warrant files are inspected. To date, sampling has not been necessary.

Understanding ‘protected information’

Before reporting inspection results, it is useful to note that under the SD Act ‘protected information’ (PI) includes:²²

- information obtained through use of a surveillance device as authorised by a warrant or an emergency authorisation
- information about an application for a warrant or emergency authorisation, made by a law enforcement officer
- 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,²³ including both ‘local PI’²⁴ and ‘corresponding PI’.²⁵ In summary:

- ‘local PI’ means information obtained from or relating to a warrant or emergency authorisation issued under the SD Act²⁶
- ‘corresponding PI’ means information obtained from or relating to a warrant or emergency authorisation issued under a ‘corresponding law’²⁷ of another jurisdiction.²⁸

²¹ Report of the Special Investigations Monitor to the Parliament of Victoria Pursuant to the *Surveillance Devices Act 1999*. Report No. 1 of 2009-2010.

²² Section 30D of the SD Act.

²³ *Ibid* s 30E.

²⁴ *Ibid* s 30F.

²⁵ *Ibid* s 30G.

²⁶ *Ibid* s 30F(4).

²⁷ Defined in s 3 of the SD Act.

²⁸ *Ibid* s 30G(4).

The SD Act requires that records or reports obtained by use of a surveillance device are kept secure and are not accessible to unauthorised persons.²⁹ 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 to 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.

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.

Reconciling VI’ data and Chief Officer annual reports.

This report makes reference to the number of warrant files inspected during the year. For the reasons outlined below, these numbers will not necessarily correlate with warrant numbers provided in Victoria Police reports made to the Minister by the CCP and subsequently tabled in the Parliament pursuant to s. 30L of the SD Act.

²⁹ Ibid s 30H.

Reports under s. 30L include statistical data concerning SD warrants. That data covers warrants issued in the period 1 July to 30 June next. However, the VI's inspection of Victoria Police warrant records does not include warrants still extant at the time of inspection or those for which reporting on expired warrants under s. 30K of the SD Act is not complete. Further, inspection of active PI registers by the VI can involve warrants which, because of the protracted nature of the investigation and/or of the court proceedings, may have already expired a year or more beforehand.

It is, therefore, not possible to reconcile warrant statistics in s. 30L reports with those reported by the VI.

INSPECTION RESULTS

Introduction

Victoria Police continues to have two units administering SD warrants. The Special Projects Unit (SPU) manages the majority of warrants for the Crime Department, Regional Criminal Investigation and other operational units. The Technical Projects Unit (TPU) of Professional Standards Command (PSC) (formerly the Ethical Standards Department) administers warrants for PSC investigations, but from time to time for other units also. The VI understands there is a need for PSC investigations to be quarantined, as persons of interest in PSC investigations are likely to be serving police officers.

While warrant administration is centralised at SPU and TPU, the operational management of surveillance devices and the storage, use and destruction of information obtained from use of devices is managed by investigators in conjunction with storage arrangements established by Police Regions.

Records inspected

WARRANT FILES

A total of 149 warrant files were inspected during 2012-2013. These comprised all 143 SD warrants which ceased to be in force in the period of 1 January 2012 to 31

December 2012, four emergency authorisations for use of surveillances devices in circumstances provided for in s. 26 of the SD Act and two retrieval warrants.

The warrant files were inspected progressively through the year, in August and December 2012 and late March 2013.

The data in Table 1 (below) refers to warrants that ceased to be in effect through expiry or revocation and for which all reporting requirements had been completed at the time of inspection.

TABLE 1: VICTORIA POLICE WARRANT FILES INSPECTED 2012-2013

Victoria Police – Warrant files inspected 2012 - 2013				
	Period 1 Warrants ceasing January – April 2012	Period 2 Warrants ceasing May – August 2012	Period 3 Warrants ceasing September to December 2012	TOTAL
SD Warrants	38	63	42	143
Retrieval warrants	1	1	0	2
Emergency Authorisations	0	2	2	4
			TOTAL	149

REGISTERS ISSUED TO INVESTIGATORS

Victoria Police investigators are issued with a Protected Information Register (PIR) for each surveillance device installed, in which they must make the records required to be kept by s. 30N(c), (d) and (e) of the SD Act. These are records of each use and each external communication of information obtained by means of a surveillance device and a record of each occasion when, to the knowledge of a law enforcement officer of the agency, information obtained by use of a device was given in evidence in a relevant proceeding (within the meaning of the SD Act).

In addition, and as a matter of Police practice, all items of documentary material (including electronic media) containing information obtained by a surveillance device is recorded in the PIR when created. Where such material is later distributed to others (e.g. in relation to a prosecution) the details of each disposition are recorded against the item and a receipt is obtained for it. The VI's primary inspection responsibility in relation to PIRs is to inspect the records kept pursuant to s. 30N(c), (d) and (e). A section of the PIR that is used to record and manage documentary material often provides inspecting officers with information that may indicate that certain records of the use and/or communication of PI should have been made in a second section of the PIR which is dedicated to recording such matters for the purpose of compliance with s. 30N(c), (d) and (e).

When any record or report is destroyed pursuant to s. 30H(1)(b), each PIR also conveniently records, by endorsement, the destruction details of that surveillance device material. This record is in addition to formal destruction certificates issued and which, together, constitute the records required by s. 30N(f).

An inspection of investigator registers was undertaken in each half of 2012 - 2013. In the first inspection period (October - November 2012), 59 PIRs were inspected. These were held by 19 police units. In the second inspection period (May 2013), 88 PIRs were inspected, these being held by 26 Police units. The collective data is tabulated in Table 2 (below).

TABLE 2: VICTORIA POLICE INVESTIGATOR REGISTERS INSPECTED 2012-2013

Victoria Police Investigator registers inspected 2012 - 2013		
Inspection Period	Registers inspected	Police Units visited
Oct-Nov 2012	59	19
May 2013	88	26
Total registers	147	45

* This total includes some units visited in both the first and the second inspection rounds

A small number of PIRs are inspected more than once, within the same or a subsequent reporting year. Reinspection may occur when:

- court material is still to be produced and recorded, with consequential use and communication entries likely to also be required under s. 30N
- the register is inspected very soon after issue of the warrant and while few compliance records have been needed to the date of inspection, it is expected more will be required
- compliance concerns are identified upon inspection or missing records need to be entered
- any combination of the above circumstances exists.

Matters concerning reinspected PIRs are discussed later in this report.

Some SD warrants are obtained but never executed because, for example:

- circumstances may change, making successful covert installation impossible
- developments in the investigation may render the use of the authorised device(s) unnecessary
- developments may nullify the grounds upon which the warrant was sought and issued.

Registers are not issued to an investigator until a warrant is executed. If a warrant authorises the use of more than one device, a PIR is issued for each device deployed. Registers are not issued for retrieval warrants. The number of PIRs inspected on behalf of the VI therefore has no correlation with the number of warrants obtained by Victoria Police.

Keeping documents connected with warrants: Section 30M

Section 30M of the SD Act provides that the CCP must cause certain warrant documentation to be kept in the records of the agency.

As summarised in Table 3 (next page), the level of compliance achieved by Victoria Police with s. 30M reflects the VI's considered assessment of the statistical data and

other findings made by his inspecting officers following their detailed inspection of agency records and like documentation.

All compliance requirements for the keeping of documents under s. 30M were met.

TABLE 3: COMPLIANCE WITH THE SD ACT – DOCUMENTS TO BE KEPT: SECTION 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 revocations of this type occurred.
Each emergency authorisation. s. 30M(c)	Compliant	
Each application for emergency authorisation. s. 30M(d)	Compliant	
A copy of each application for a warrant, extension, variation or revocation of a warrant, or for approval of the exercise of powers under an emergency authorisation. s. 30M(e)	Compliant	
A copy of each report to a judge or magistrate under s. 30K. s. 30M(f)	Compliant	
A copy of each certificate issued under s. 36. s. 30M(g)	Compliant	These are evidential certificates admissible as formal proof of the matters therein.

EACH NOTICE OF REVOCATION: SECTION 30M(b)

Since the SIM assumed inspection responsibilities under the SD Act on 1 July 2006, no judge or magistrate has revoked a SD warrant issued to Victoria Police. The CCP (or his authorised delegate) can, however, revoke warrants by an instrument in writing pursuant to the provisions of ss. 20A(2) and 20H(3) of the Act. Although not required by s. 30M, a copy of each instrument of revocation issued by the CCP or his authorised delegate is retained on the warrant file. The VI considers it appropriate to do so, as this instrument is evidence of compliance with the requirement that, in specified circumstances, the CCP must take steps to ensure that the use of any

surveillance device authorised by the warrant is discontinued as soon as practicable and that the warrant is revoked.³⁰

EMERGENCY AUTHORISATION DOCUMENTS: SECTIONS 30M(c), (d), (e)

In certain circumstances, emergency authorisations may be granted under s. 26 (risk of serious personal violence or substantial property damage) or s. 27 (serious drug offences) of the SD Act. In such a case, a senior officer (as defined) of the agency may authorise the use of a surveillance device. A senior officer (or another person on his/her behalf) must then apply within two business days to a Supreme Court judge for the approval of the exercise of powers under the emergency authorisation.³¹

Whether or not approval is granted, the judge may make orders directing how information obtained by use of a device is to be dealt with.³² If judicial approval is not given, the information obtained by the use of such a device cannot be used, *inter alia*, in a proceeding.³³

Generally, only one or two emergency authorisations are issued by Victoria Police annually. These are usually in connection with protecting the safety of a person who is at risk of serious personal violence. Since 2006 (when the SIM assumed responsibility for inspections), all but two emergency authorisations for the use of a surveillance device have been subsequently approved by a Supreme Court judge upon application. This indicates conservative use of the emergency provisions by Victoria Police.

In the year under report, four emergency authorisations were issued pursuant to s. 26 of the SD Act. Three of the authorisations were subsequently approved by a Supreme Court judge upon application, in accordance with s. 28. In respect of the fourth, the application for approval of the exercise of emergency powers under the emergency authority was made in respect of two separate dwelling houses in which SDs had been installed. At the direction of the judge this application was split into two. The judge then approved the exercise of powers in respect of one dwelling house, but declined to

³⁰ Section 20B(2).

³¹ Section 28(1).

³² Section 30(5).

³³ Sections 30F(2) and 30G(2).

grant approval in respect of the other. In the event no surveillance data or information had been obtained at the address for which approval was declined. Had any been obtained it could not have been used as evidence.³⁴

As required by s. 30M(c), (d), and (e), the CCP caused the following to be kept:

- the emergency authorisation
- the application for the emergency authorisation
- a copy of the application for approval of the exercise of powers under the emergency authorisation.

Each of the emergency authorisations granted in the 2012-2013 year pursuant to the provisions of s. 26 of the SD Act involved circumstances where the risk of serious violence to a person was immediate, involving suspected criminal offences including attempted murder, false imprisonment, kidnapping, conduct endangering life and causing injury to a person. Although the emergency authorisation under s. 26 to use surveillance devices was not subsequently approved in one instance (described above), the VI inspection of records for that matter did not identify any concern regarding the propriety of the operational decision made insofar as it concerned the provisions of s. 26; nor did the judge who declined to approve the emergency authorisation of that warrant express any concern about or disapproval of the conduct of the police personnel concerned.

Other records to be kept: Section 30N

Section 30N of the SD Act provides that the CCP must cause certain records in connection with surveillance devices to be kept by the agency.

A summary of the level of compliance achieved by Victoria Police with s. 30N is set out in Table 4 (next page).

³⁴ Section 30A SD Act.

TABLE 4: COMPLIANCE WITH THE SD ACT – RECORDS TO BE KEPT: SECTION 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)	Compliant	
Statement as to whether each application for an emergency authorisation or for approval of powers exercised under an emergency authorisation, was granted, refused or withdrawn. s. 30N(b)	Compliant	
Details of each use of information obtained by use of an SD. s. 30N(c)	Substantially compliant	Refer to comment below in the body of the report.
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)	Substantially compliant	Refer to comment below in the body of the report.
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)	Compliant	To the extent that can be determined from records available to the SIM, all required records were made.
Details of the destruction of records or reports under s. 30H(1)(b). s. 30N(f)	Compliant	The records provided detail considered appropriate for compliance.

RECORDING EACH USE AND COMMUNICATION OF PI: SECTION 30N(c) AND (d)

The SIM's last two reports under the SD Act³⁵ reported concern with the failure of investigators to record in the PIR a number of uses and external communications of PI. The SIM indicated in earlier reports that a record which included details of both the use of PI and any associated communication of PI to an identified party external to Victoria Police would meet the requirements of both s. 30N(c) and (d), provided particulars of both the use and of the communication were included in the record. The VI notes that the PIR is formatted to facilitate this approach. Despite this, a small number of records fail to record communications associated with a use. Several investigators explained that they had thought that recording the communication was covered by an entry in a separate section of the register in which PI material prepared as part of a brief of evidence was recorded, together with details of service (communication) of that material on the various parties to the relevant proceeding.

³⁵ Report No 2 of 2010-2011 and Report No 1 of 2011-2012.

As in previous years, omissions and errors continued to be found in records inspected during the 2012-2013 year. Further, some omissions previously identified at inspection and reported to the agency by the SIM's inspecting officers were not remedied at the time of reinspection approximately six months later.

When investigators omit records required under the SD Act, it directly affects compliance with not only with s. 30N(c) and (d), but possibly with s. 30K also. Section 30K requires a report to the judge or magistrate who issued the SD warrant. The report must include certain information, much of which is drawn from the investigator's register.

Inspection results relevant to compliance with s. 30N(c), (d) and (e) are provided in Table 5 below. Data relating to the paragraph (e) provision (which requires a record to be made when SD information is presented as evidence in certain proceedings) have been included here as a matter of convenience; it being preferable to include all omission/error data in one table. However, comment regarding paragraph (e) is dealt with later in this report.

Table 5 records (in **bold** type) the omission/error rate in the registers inspected in each half of 2012-2013. Corresponding data for the preceding (2011-2012) year are listed (in normal type) immediately above the corresponding 2012-2013 figures.

In determining the omission/error rate, reinspected registers with no new records are excluded from the analysis. The omission/error rate is therefore calculated with reference to 'new registers' only, that is, the total of those registers not previously inspected by the SIM's inspection officers (34) and those registers previously inspected but containing new entries added (11) after the previous inspection.

Data in Table 5 (next page) identifies the number of registers containing an error or omission relating to 'use' of PI, or to 'communication' of PI, or to both. It does not reveal that in some cases more than one error or omission of a particular type occurred. For example, if two 'use' errors are identified in the one register, the Table indicates simply that the register contains a 'use' error).

For the purpose of the analysis, ‘error’ includes a failure to make a required record or an entry made that is wrong in content, or omits basic particulars, or which is recorded against the wrong warrant.

TABLE 5: VICTORIA POLICE - REGISTER ERRORS 2011-2012 AND 2012-2013

		Round 1		Round 2		% of ‘new’ registers with errors over full year
		No. of registers	% of ‘new’ registers	No. of registers	% of ‘new’ registers	
Total registers Inspected	2011-2012	34	-	61	-	-
	2012-2013	59		88	-	-
Reinspected registers	2011-2012	6	-	10	-	-
	2012-2013	17	-	18	-	-
‘New’ registers	2011-2012	28	-	51	-	-
	2012-2013	45	-	72	-	-
‘New’ Registers with no errors	2011-2012	11	39%	19	37%	38%
	2012-2013	12	27%	50	69%	53%
‘New’ Registers with ‘use’ errors	2011-2012	13	46%	26	51%	49%
	2012-2013	23	51%	19	26%	36%
‘New’ Registers with ‘communications’ errors	2011-2012	8	29%	14	27%	28%
	2012-2013	14	31%	15	21%	25%
‘New’ registers with both ‘use’ and ‘communication errors’	2011-2012	8	29%	10	20%	23%
	2012-2013	14	31%	15	21%	25%
‘New’ registers with ‘given in evidence’ record omitted	2011-2012	0	0%	0	0%	0%
	2012-2013	6	13%	0	0%	5%

Comparison of the Table 5 data for the two halves of 2012-2013 identifies that:

- the percentage of registers with neither a ‘use’ nor ‘communication’ error was 27% for the first half and 69% for the second half of the year
- registers with a ‘use’ error reduced from 51% in the first half to 26% in the second half of the year

- registers with a ‘communication’ error reduced from 31% in the first half to 21% in the second half of the year
- the number of registers with both a ‘use’ and a ‘communication’ error dropped from 31% in the first half of the year to 21% in the second half.

These figures indicate a general reduction in errors in the second half of the year. This correlates with the timing of internal steps taken by SPU to improve the standard of record keeping by investigators.

The data provided in the right hand column of Table 5 is the error rate across the whole 2012-13 year. Comparison of this with the corresponding figures for the 2011-2012 year identifies an improvement in the level of compliance with s. 30N(c) and (d) in the year under report, compared to the previous year. There was also an improvement in the second half of 2012. In summary, comparing 2012-2013 with 2011-2012:

- 53% of ‘new’ registers were free from error, compared with 38% in 2011-2012
- 36% of ‘new registers had a ‘use’ error, compared with 49% in 2011-2012
- 25% of ‘new’ registers demonstrated a ‘communication’ error, compared with 28% in 2011-2012
- 25% of ‘new’ registers had both a ‘use’ error and ‘communication’ error, compared with 23% in 2011-2012).

In assessing the level of statutory compliance in relation to records of the use and external communication of PI, the SIM has taken into account the large number of individual records correctly made, the number of register omissions/errors detected, and any explanations provided by the relevant investigators. Overall, the SIM considers the agency to have been substantially compliant with s. 30N(c) and (d).

RECORDING EACH OCCASION PI IS GIVEN IN EVIDENCE: SECTION 30N(e)

Table 5 (above) records the number of occasions (if any) when the agency failed to record, as required by s. 30N(e), the use of SD information when presented in evidence in various ‘relevant proceedings’ (as defined).

Although one required record was omitted in 2011-2012, no omissions were identified³⁶ in 2012-2013. This is a positive result when one considers only the number of relevant proceedings conducted in any year, but also that a separate record is required for each occasion PI is given in evidence within a proceeding. In the case of criminal prosecutions this may require separate records to be made in relation to bail hearings, committal hearings and trials. Further entries can also be required if PI is presented in evidence in, for example, an application for the confiscation of assets, or for the purpose of a forfeiture or restraint of property determination.

The VI's assessment is that the agency was compliant with s. 30N(e) and performed well to achieve no identified omission of required records, in 2012-2013.

DETAILS OF THE DESTRUCTION OF INFORMATION OBTAINED BY A SURVEILLANCE DEVICE: SECTION 30N(f)

When information obtained by means of a SD was destroyed, registers kept by investigators were endorsed to record details of when and by whom reports and records containing PI were destroyed. A formal (witnessed) destruction of such material was certified in writing and this document was filed with the permanent residual records. The VI considers the records kept were compliant with s. 30N(f) which requires that details of the destruction of records or reports under s. 30H (1)(b) are kept.

Records reinspected

Registers inspected and found to have errors were reported to the relevant officer or police unit together with details of the default or inaccuracy. When practical, such registers are re-inspected by the VI in the next scheduled round of inspections, to check whether or not the records have subsequently been remedied. While it is not logistically practicable to reinspect every deficient register, as many as possible are reinspected. This provides an insight into how well such matters are remedied by investigators.

³⁶ The VI inspects limited records and documentation. It is possible that not every use of PI in a proceeding is identified thereby. However, information from the records inspected is supplemented by questioning appropriate staff, whenever possible.

Table 6 (below) provides data on registers reinspected during 2012-2013 and 2011-2012. The registers referred to in the table are those in which errors (including omissions) were identified during a previous inspection and were subsequently re-inspected.

TABLE 6: REMEDY OF PREVIOUSLY DETECTED REGISTER ERRORS

Year	2012 – 2013		2011 – 2012	
Month inspected	May 2013	Oct-Nov 2012	May 2012	Oct-Nov 2011
Number of Registers reinspected	17	18	6	10
Number of Registers with records remedied	13 (76%)	14 (78%)	5 (83%)	9 (90%)
Number of Registers with records not remedied	4 (24%)	4 (22%)	1 (17%)	1 (10%)

Failure to remedy the errors previously identified by the SIM was found in 10% of the registers reinspected in October/November 2011 and 17% in May 2012, (the 2011-2012 inspection year). In comparison, the corresponding figures for October/November 2012 and May 2013 (the 2012-2013 year) are 22% and 24% respectively. Comparison between the two years is difficult because of the small sample size, especially for 2011-2012. What is apparent, however, is that of those registers reinspected in 2012-2013, more than 20% had not been remedied.

Other compliance requirements

In addition to the requirement to keep certain documents and records, the CCP has a number of other compliance responsibilities under the SD Act. These include:

- causing a register of warrants to be kept in compliance with s. 30O
- ensuring that use of a device is discontinued and the warrant 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 an SD under the SD Act is secure from unauthorised access, in compliance with s. 30H(1)(a)

- destroying or causing to be destroyed, any record or report obtained by use of an SD when satisfied it is not likely to be required for a purpose referred to in ss. 30E(4), 30F(1) or 30G(1) of the SD Act, in compliance with s. 30H(1)(b)
- submitting an annual report to the Minister, pursuant to s. 30L.

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 inform the CCP immediately if he/she believes that:
 - the use of an SD under an SD warrant is no longer necessary for obtaining evidence of the commission of an offence or establishing the identity or location of the offender, or
 - grounds for issue of a retrieval warrant no longer exist (usually once the device(s) has been recovered)
- to make a report in accordance with s. 30K to the judge or magistrate who issued the warrant by the date stated in the warrant.

In addition, two general compliance requirements of the SD Act fall to the agency, namely:

- s. 15(2) provides that an application for an SD warrant may be made only with the approval of a ‘senior officer’ (within the meaning of the SD Act), or ‘an authorised police officer’ (within the meaning of the SD Act)
- s. 20C(2) provides that an application for a retrieval warrant may be made only with the approval of a ‘senior officer’ or an ‘authorised police officer’.

A summary of the level of Victoria Police compliance with these provisions, as set out above, is provided in Table 7 (next page). When appropriate, additional comment is made in the report narrative. The VI notes that save for an occasional error or oversight, these compliance requirements were all met.

TABLE 7: 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	Compliant	
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)	Compliant	
Discontinue use of SD and revoke SD warrant in certain circumstances. s. 20B	Compliant	
Revocation of retrieval warrants by chief officer. s. 20H(3)	Compliant	
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)	Compliant	
Annual report to Minister by chief officer of the agency. s. 30L	Compliant	
Report to judge or magistrate under s. 30K made on time and including required information. s. 30K(1)	Compliant	Reports on time but see comment below regarding accuracy of reports.
Applications made with the approval of a 'senior' or 'authorised' officer. s. 15(2)	Compliant	

REGISTER OF WARRANTS AND EMERGENCY AUTHORISATIONS: SECTION 30O

A register for warrants and emergency authorisations was maintained by SPU and recorded all necessary information for compliance with s. 30O. A separate register for TMU warrants was maintained in electronic form and was also compliant with s. 30O. It was noted that SPU has commenced an electronic register also.

REVOCAION OF WARRANTS AND DISCONTINUATION OF THE USE OF DEVICES: SECTIONS 20B AND 20H

The VI notes that when statutory discontinuance of the use of an SD or retrieval warrant was required, Victoria Police was active in ceasing the use of any SDs authorised by that warrant and promptly revoked the warrant. Of the 149 'warrant

files' inspected during 2012-2013, four were emergency authorisations (outside the revocation provisions for warrants).³⁷ Of the remaining 145 warrants, 82 (57%) were revoked before expiry.

This high level of revocation prior to expiry of the warrants demonstrates active management of warrants and deployed SDs. The VI considers Victoria Police to have been compliant with ss. 20B and 20H of the SD Act.

DESTRUCTION OF REPORTS AND RECORDS: SECTION 30H(1)(b)

Section 30H of the SD Act requires that records and reports obtained by use of a surveillance device be kept secure and destroyed when the CCP, as chief officer of the agency, is satisfied they are not likely to be required for a purpose specified in s. 30H(1)(b). However, certain documents and records must be retained. These have already been referred to above in relation to ss 30M and 30N of the SD Act. For the purpose of this report, it is convenient to refer to records required to be retained after other material has been destroyed, as the 'residual records'.

The VI inspected a number of residual SD records in respect of which certain records and reports had been destroyed in compliance with s. 30H(1)(b) of the SD Act. As noted above and concerning compliance with s. 30N(f), the records of destructions were compliant with the requirements of s. 30N(f). These records established that Victoria Police conducts ongoing regular reviews of the need to obtain SD material obtained under a warrant and actively destroys material no longer required.

The VI considers the agency to be compliant with s. 30H(1)(b).

ANNUAL REPORT TO MINISTER BY CCP: SECTION 30L

The CCP is required to submit to the Minister within three months after the end of the financial year an annual report containing information specified in s. 30L of the SD Act. The SIM has confirmed that a report containing the necessary information and

³⁷ Section 30(3) provides that if a judge approves an application for the emergency use of a surveillance device, the judge may issue a surveillance device warrant for continued use of the device(s). The emergency authorisation ceases once the approval application has been decided.

covering 2011-2012 was submitted within 3 months of the close of that year. Accordingly, the agency was compliant with s. 30L.

REPORTING UNDER SECTION 30K

Section 30K of the SD Act requires that the law enforcement officer principally responsible for the execution of a surveillance device or retrieval warrant make a written report to the judge or magistrate who issued the warrant, by a date set in the warrant. The report must contain all the information required by s. 30K.

The great majority of Victoria Police reports under s. 30K are prepared at the SPU registry from information provided by investigators. Agreed standards for s. 30K reports have been in place since February 2010 following a consultative process undertaken between the SIM's office and relevant staff of Victoria Police and other agencies. The standard sought to simplify the process of reporting, whilst achieving compliance through a consistent reporting standard and an acceptable level of report detail.

Victoria Police has, for some time, strived to improve the accuracy of s. 30K reports and reduce the risk of failing to report all relevant reportable information. The efforts of SPU registry staff, in particular, have contributed significantly to the improvements achieved. In monitoring compliance by the agency with the provisions of s. 30K the SIM reported statistical information concerning errors in, and omissions from, s. 30K reports. The VI continues to do so in this report.

The error rate in s. 30K reports inspected in 2011-2012 and 2012-2013 is reported in Tables 8 and 9 (pages 31 and 32). Each report under s. 30K must contain the information prescribed by s. 30K(2) of the SD Act, including that specified in s. 30K(2)(b)(viii), relating to details of the benefit to the investigation of the use of the SD and of the general use made or to be made of the information obtained by its use. The last row in each Table summarises the result of the three inspections undertaken by the SIM and/or VI. The data refers to the number of s. 30K reports containing an error in any one or more of the following categories:

- reporting the use of PI
- reporting the benefit to the investigation of the use of the SD(s)
- reporting any other matters required to be reported.

It is considered that the error level in 2011-2012 was primarily due to investigators providing incomplete and/or inaccurate information concerning the use made of PI and the benefit to the investigation of the SD(s) used. Attempting to overcome this problem, the SPU registry staff preparing s. 30K reports in 2012-2013 began to routinely make contact with investigators to clarify information provided by investigators about the use made of PI and the benefit of the surveillance device(s) to the investigation. Inspection results indicate this has proved beneficial to accurate reporting.

Comparison of Tables 8 and 9 shows that for the 2012-2013 year, errors in reporting use of PI obtained from an SD ('use error') occurred in 4% of reports, compared to 6% in 2011-2012. Errors in reporting benefit (referred to as 'benefit error' in the table), occurred in 6% of reports in 2012-2013 compared to 9% in 2011-2012. Other errors occurred in 21% of reports in 2012-2013 compared to 28% in the earlier 2011-2012 year. In each category there were fewer errors made in 2012-2013 than were made in 2011-2012. This is a positive achievement. The challenge now is to reduce all types of error to low single figure percentages.

TABLE 8: ERRORS AND OMISSIONS IN SECTION 30K REPORTS 2011-2012

REPORTS TO JUDGE OR MAGISTRATE 2011 - 2012									
Inspection of reports/warrant files in month of -	No. of reports	Use error		Benefit error		Other error		Report on Time	
August 2011	36	4	11%	4	11%	5	14%	36	100%
December 2011	44	0	0%	3	7%	1	2%	45	100%
March 2012	25	3	12%	3	12%	1	4%	27	100%
Total	105	7	6%	10	9%	30	28%	108	100%

TABLE 9: ERRORS AND OMISSIONS IN SECTION 30K REPORTS 2012-2013

REPORTS TO JUDGE OR MAGISTRATE 2012 - 2013									
Inspection of reports/warrant files in month of -	No. of reports	Use error		Benefit error		Other error		Report on Time	
August 2012	39	1	3%	8	21%	12	31%	39	100%
November 2012	64	3	5%	0	0%	15	23%	64	100%
March 2013	42	2	5%	1	2%	4	10%	42	100%
Total	145	6	4%	9	6%	31	21%	145	100%

Reports under s. 30K were all provided by the date specified in the warrant. This was evidenced by receipts obtained for those documents. The agency's performance in respect of reports being made within time is consistently exemplary.

In assessing compliance with s. 30K overall, the VI is required to take into account all aspects of the provisions of this section, not just the errors discussed above. While 'other errors' still occur in 21% of reports it must be said that some of these errors are quite trivial in nature. Errors relating to reporting the use of PI and the benefit of the use of SDs are markedly lower. Further, whether or not some matters are included in a report sometimes requires an element of subjective judgement. That same judgement may also have to be exercised by VI inspection staff. The VI considers, therefore, that an inspection assessment establishing a report error rate of around 5% across 145 reports is a good result for any agency. Accordingly, the VI has assessed Victoria Police as compliant with s. 30K.

Cross-border use of surveillance devices

The SD Act contains provisions for recognising 'corresponding law' of another State or Territory to ensure that investigations crossing jurisdictional boundaries are not hampered.

Some, but not all, Australian jurisdictions have followed Victoria by enacting surveillance device laws based on national model legislation. However, of those jurisdictions, not all have taken the necessary steps to recognise as ‘corresponding law’ the law of other States and Territories. In the result, cross-border investigations by Victoria Police may still be hindered because SD and retrieval warrants issued in Victoria are not yet recognised by all Australian State and Territorial jurisdictions.

Victoria Police continues to make occasional use of the corresponding law provisions, most often in the context of a joint investigation with the police force of another State or Territory. In all cases Victoria Police remains responsible for all SD warrants it obtains and for the required records that must be kept and made available to the VI for inspection. The use of the corresponding warrant provisions has been at all times compliant with the provisions of the SD Act in relation to SD warrants inspected during 2012-2013.

Previous recommendations

No formal recommendations were made by the VI in the last report.³⁸

Recommendations for Victoria Police

No formal recommendations are made in this report.

In making no formal recommendations, the VI acknowledges the effort made by Victoria Police to improve not only its statutory record-keeping obligations concerning PI obtained under a SD warrant, but also the content of its s. 30K reports. These matters have previously detracted from what has otherwise been excellent overall compliance with the SD Act and while they are still subject to comment in the year under report, the level of compliance has improved significantly.

The VI encourages continued effort and implementation of further initiatives that will assist investigators to positively address matters of compliance. Efforts being implemented through SPU to improve the accurate identification and careful

³⁸ Report No. 1 for 2012-2013.

recording by investigators of each use and each external communication of PI should see even further improved compliance with s. 30N(c), (d) and (e) in 2013-2014.

The VI reaffirms the SIM's view that there is a need for a single register which provides information as to where PIRs and residual records are held and filed. It is noted that residual records for TMU warrants are returned to the warrant file and have been for some years. It is further noted that SPU is undertaking the recovery of residual records previously filed at various locations across the State, with the intention of refiling these on the relevant warrant file. The VI considers that this is a most appropriate move. The matter of reliably tracking PIRs put into secure Regional storage while legal proceedings, or transferred from one investigation unit to another, is still open for resolution.

Two registries – common practice

It was noted earlier in this report that for operational reasons there are two Victoria Police registries responsible for the administration of surveillance device and retrieval warrants, being SPU and PSC. The VI notes there is some variation between the two registries as to processes and documentation used in connection with the administration of SD warrants. Although agency-wide uniformity of practice is not a statutory compliance matter, practice differences between the registries significantly increases the risk that practice failures may occur with adverse compliance consequences. The VI would therefore support Victoria Police in any steps taken toward achieving common practice and documentation across the two registries managing the use of SDs.

Summary

Victoria Police has achieved a very good standard of statutory compliance in 2012-2013, with the only identified concern being the number of recording errors or omissions that still occur in PIRs in connection with the use and external communication of PI. Utilisation detailed PIR inspection results provided by the VI (and previously by the SIM) as a means of improving the records made by investigators has, in conjunction with various other initiatives, produced a significant

level of improvement in compliance with ss. 30N(c) and (d) and s. 30K(1) of the SD Act.

There is evidence of active management of the use of surveillance devices under warrant. Use of a device is stopped immediately and the warrant revoked, when the need for use of the device, or the grounds for the warrant, no longer exist. In this context, the approach taken by Victoria Police to compliance with the SD Act is commendable.

The VI is pleased to report ongoing, constructive dialogue between members of Victoria Police and the SIM and later, the VI staff. It is considered that this contributes positively to the high level of statutory compliance Victoria Police achieves overall.

In acknowledging the full cooperation of the CCP and the staff of Victoria Police generally, the VI notes the ready assistance given to VI officers by SPU and PSC registry staff, in particular.

NEXT REPORT

As required by s. 30Q of the SD Act, the VI will next report as soon as practicable after 1 January 2014.



Robin Brett QC
Inspector