



**Victorian Inspectorate Report to the Parliament of Victoria in
respect of the Independent Broad-based Anti-corruption
Commission pursuant to s. 30Q of the *Surveillance Devices Act*
1999**

Report No. 2 for 2014-2015

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List of Abbreviations

CSG	Compliance Support Group (within DELWP)
DEDJTR	Department of Economic Development, Jobs, Transport and Resources
DELWP	Department of Environment, Land, Water and Planning
DEPI	Department of Environment and Primary Industries
GMA	Game Management Authority
IBAC	Independent Broad-based Anti-corruption Commission
PI	Protected information
PIM	Public Interest Monitor
PI register	Protected information register
SD Act	<i>Surveillance Devices Act 1999</i> (Vic)
VI	Victorian Inspectorate

INTRODUCTION

The *Surveillance Devices Act 1999* (SD Act) regulates the use of surveillance devices in the State of Victoria. The SD Act makes provision for warrants and emergency authorisations permitting the installation, use, maintenance and retrieval of surveillance devices by five State law enforcement agencies.¹ Use of surveillance devices in relation to private activity and private conversations is otherwise generally unlawful in Victoria.²

The SD Act imposes a regime of strict controls relating to the use of surveillance devices, including requirements 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 the independent inspection of agency records and documents by the Victorian Inspectorate (VI). The VI inspects agency records, assessing statutory compliance and reporting compliance results to Parliament bi-annually. The Public Interest Monitor³ (PIM) involvement in the warrant application process has added another level of scrutiny to the control and oversight regimes.

In accordance with statutory obligations⁴ set out in the SD Act, this report is submitted to the Parliament of Victoria with a copy provided to the Minister responsible for the SD Act, the Attorney-General. This report outlines the results of VI inspections conducted of the records of the Independent Broad-based Anti-corruption Commission (the IBAC) between 1 July 2014 and 30 June 2015. The report comments on the level of statutory compliance achieved by the IBAC and its law enforcement officers for the 2014-2015 reporting period.

The VI has implemented a new reporting regime and a separate report for each agency is now produced. In previous years a combined report was compiled.

FEATURES OF THE LEGISLATION

OBJECTIVES OF THE SD ACT

The primary purposes of the SD Act⁵ are to:

- regulate the installation, use, maintenance and retrieval of surveillance devices
- restrict the use, communication and publication of information obtained through the use of surveillance devices or otherwise connected with surveillance device operations

¹ The *Surveillance Devices Act 1999* (SD Act) also permits the Australian Crime Commission (ACC) to use the provisions of the Act. Inspection of ACC records and documents is conducted by the Commonwealth Ombudsman pursuant to s. 55(2) of the *Surveillance Devices Act 2004* (Cth).

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

³ Established by the *Public Interest Monitor Act 2011*.

⁴ SD Act s. 30Q.

⁵ SD Act s. 1.

- establish procedures for law enforcement officers to obtain warrants or emergency authorisations for the installation, use, maintenance and retrieval of surveillance devices
- create offences relating to the improper installation or use of surveillance devices
- impose requirements for the secure storage and destruction of records and for the making of reports to judges, magistrates and to Parliament in connection with surveillance device operations
- recognise (subject to the *Surveillance Devices Regulations 2006*) warrants and emergency authorisations issued in other jurisdictions authorising the installation, use and retrieval of surveillance devices.

AGENCIES PERMITTED TO USE SURVEILLANCE DEVICES

During the period under review, six state law enforcement agencies⁶ were permitted to use surveillance devices under the SD Act:

- Victoria Police
- Independent Broad-based Anti-corruption Commission (IBAC)
- Department of Environment, Land, Water and Planning (DELWP) - from 1 January 2015
- Department of Economic Development, Jobs, Transport and Resources (DEDJTR) - from 1 January 2015
- Department of Environment and Primary Industries (DEPI) - to 31 December 2014
- Game Management Authority (GMA)

During the period under report government departmental changes have occurred. On 1 January 2015, DEPI ceased to exist, and two new departments were created and took over the functions of DEPI. As a result of this, the two divisions within the former DEPI which use the powers under the SD Act (Fisheries Victoria and Compliance Support Group (CSG)) are now located in separate departments. Fisheries Victoria now forms part of the DEDJTR; while CSG comes within the DELWP.

TYPES OF SURVEILLANCE DEVICES

The SD Act provides for the use of the following surveillance devices:⁷

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

⁶ Law enforcement agency is defined in s. 3.

⁷ Surveillance device is defined in s. 3.

WARRANTS AND EMERGENCY AUTHORISATIONS

The SD Act provides for the issue of surveillance device warrants⁸ and retrieval warrants⁹ and in a limited range of circumstances for emergency authorisation¹⁰ of the use of surveillance devices. A warrant must be sought from a Supreme Court Judge, except in the case of an application for a tracking device only, where the application may be made to a magistrate. An emergency authorisation may only be granted by a senior officer of Victoria Police or the IBAC.¹¹

RECORDS, DOCUMENTS AND REPORTS REQUIRED BY THE SD ACT

The SD Act requires each agency to retain certain documents and to make certain records in connection with the use of surveillance devices. These requirements are set out fully in the Act.¹²

Each agency is required to report to the judge or magistrate who issued a warrant under the Act by a date specified in the warrant. The SD Act prescribes a number of matters that must be included in such reports.¹³ The chief officer of each agency is also required to report annually to the Minister¹⁴ in relation to the agency's use of surveillance devices.

SECURITY AND DESTRUCTION OF INFORMATION OBTAINED

The SD Act prescribes agency obligations to keep information obtained by means of a surveillance device secure¹⁵ and to undertake the destruction of such information¹⁶ when it is unlikely to be required for a permitted purpose.¹⁷

PROTECTED INFORMATION REGISTERS

For the purpose of this report, the term 'protected information' (PI) will (unless otherwise specified) be used to refer only to information obtained by means of a surveillance device, although the SD Act gives the term a wider definition.¹⁸ The SD Act limits and regulates the use, communication and publication of PI.¹⁹

Section 30N of the SD Act requires records to be kept of a number of matters relating to the use and communication of PI. Somewhat confusingly, the term 'register' is used by all agencies for the records

⁸ SD Act ss. 15 to 20.

⁹ Ibid ss. 20C to 20G.

¹⁰ Ibid ss. 25 to 30.

¹¹ Ibid ss. 25 and 26.

¹² Ibid ss. 30M, 30N and 30O.

¹³ Ibid s. 30K.

¹⁴ Ibid s. 30L.

¹⁵ Ibid s. 30H(1)(a).

¹⁶ Ibid s. 30H(1)(b).

¹⁷ Defined in SD Act ss. 30F and 30G.

¹⁸ SD Act s. 30D.

¹⁹ Ibid s. 30E.

(PI registers) kept by them for the purpose of s. 30N(c) - (e), although that section does not itself require a 'register'. The agency PI registers referred to in this report should not be confused with the required register of warrants and emergency authorisations maintained by each agency pursuant to s. 30O. The two are quite different documents.

THE VICTORIAN INSPECTORATE

ROLE OF THE VI

The VI must, from time to time, inspect the records of Victorian law enforcement agencies with authority to use surveillance devices under a warrant or emergency authorisation to determine the extent of compliance with the Act.²⁰ The SD Act requires the VI report to Parliament at six-monthly intervals (after 1 January and 1 July each year) on the results of each inspection under s. 30P and to give a copy of each report to the Minister at the same time as it is transmitted to the Parliament.²¹

THE POWERS OF THE VI UNDER THE SD ACT

For the purpose of an inspection pursuant to the SD Act the VI is provided with certain powers²² to access agency premises, records and information and to require members of staff of the agency to provide information in their possession that the VI considers necessary and relevant to the inspection.

INSPECTION OF AGENCY RECORDS

METHODOLOGY

This report addresses the results of inspections undertaken at the IBAC by the VI from 1 July 2014 to 30 June 2015. Each inspection included examination of the various documents,²³ records,²⁴ reports,²⁵ registers²⁶ and other relevant material held by the IBAC. All records relating to all warrants were inspected; there was no sampling of records.

The VI has an established process for undertaking inspections at the IBAC whereby a warrant file is not inspected until reporting requirements under s. 30K of the SD Act for the warrant have been completed. This practice obviates the need for VI officers to return to warrant files on multiple occasions and enables a better assessment to be made of the level of statutory compliance achieved in respect of each warrant.

²⁰ Ibid s. 30P(1).

²¹ Ibid s. 30Q.

²² Ibid s. 30P(2).

²³ Ibid s. 30M.

²⁴ Ibid s. 30N.

²⁵ Ibid s. 30K.

²⁶ Ibid ss. 30N and 30O.

ASSESSING COMPLIANCE

Section 30P(1) of the SD Act requires the VI to inspect the records of each law enforcement agency to determine the extent of the agency's compliance with the Act. Where appropriate, further information may be sought from relevant law enforcement officers. The records and documents inspected for each warrant are considered against all of the agency's statutory obligations to the extent relevant to the particular warrant.

Compliance obligations include requirements relating to:

- the process for obtaining warrants
- the use of authorised surveillance devices
- the keeping of required records and documents
- restrictions on the use, communication and publication of PI
- restrictions on reporting information obtained by a surveillance device warrant
- the reports that must be made
- the security and destruction of PI obtained by means of a surveillance device.

In reporting the results of each inspection in the following sections of this report, it is not practicable to include comment on every compliance requirement under the SD Act. Comment is made, however, when a compliance issue has been identified or when there is some other particular reason to include it.

INSPECTION RESULTS

The VI inspected the records of the IBAC twice during the reporting period. The first inspection was undertaken in October 2014, when five surveillance device warrant files were inspected, and in May 2015, when two surveillance device warrant files were inspected. The register of Warrants and Emergency Authorisations as well as the documentation relating to the destruction of material from 11 surveillance device warrants were also inspected during the reporting period.

WARRANT FILE RECORDS

The inspection of seven files in respect of surveillance device warrants which ceased to be in force during the period under review did not identify any issues relating to compliance with the SD Act. The IBAC maintains a well organised process for warrant files, ensuring that all contain the required documents and records.

The VI raised a practice matter in its Surveillance Devices Report No. 1 for 2014-2015 regarding warrant extensions including an endorsement from the judge or magistrate granting the extension.²⁷ While there

²⁷ Victorian Inspectorate Report to the Parliament of Victoria pursuant to s. 30Q of the *Surveillance Devices Act* 1999, Report No. 1 for 2014-2015, p.9.

is no explicit requirement within the SD Act to include this information, the VI believes it to be good practice to include such details. During the second inspection of IBAC records, it was observed that one surveillance device warrant was extended twice. The VI noted that on both occasions the extension had been endorsed with the date and name of the Judge.

SECTION 30K - REPORT TO JUDGE OR MAGISTRATE

Section 30K requires the law enforcement officer to whom a warrant is issued, or who is primarily responsible for the execution of a warrant, to make a report to the issuing judge or magistrate before a date specified in the warrant. The report must contain certain prescribed information; the accuracy of this information is important in providing judges and magistrates with evidence of the value of the use of surveillance devices.

Seven s. 30K reports were reviewed during the reporting period and two were identified as containing an error (29%). The errors were identified during the first inspection, and consisted of omitting or mis-reporting prescribed information. The errors were self-identified by IBAC prior to the VI inspection and explanatory file notes had been attached to the files.

The VI is of the view that where errors are identified in respect of reports made under s. 30K, the issuing judge or magistrate should be advised accordingly.

Practice matters concerning three s. 30K reports were also identified and these have been raised with the IBAC. It is a requirement that s. 30K reports describe the use made or use to be made of PI obtained by use of a surveillance device. In three reports the use made or to be made was implied but not clearly stated. While individual warrants will have different types of uses for PI, the VI believes a more informative statement addressing this requirement would be beneficial. One report referred to above also contained two further practice issues. Firstly, the report contained conflicting information regarding the installation of a surveillance device. Secondly, while it is not a requirement to include the date of execution of a warrant in the s. 30K report,²⁸ a date was given but was incorrect. It is essential that these reports accurately reflect activity that occurred under the authority of the warrant. The IBAC has noted these practice matters.

In response to the draft of this report, the IBAC advised that its current practice is that where a substantive error in a s. 30K report is identified, an additional or amended report will be submitted to the issuing judge or magistrate.

REVOCATION OF SURVEILLANCE DEVICE WARRANT

A surveillance device warrant can be revoked at any time by a Supreme Court Judge or a Magistrate.²⁹ It can also be revoked by the chief officer of an agency if the chief officer is satisfied that the surveillance

²⁸ It is only a requirement to state if the warrant was executed, see s. 30K(2)(a).

²⁹ Section 20A(1).

device is no longer required.³⁰ Four surveillance device warrants were revoked during the reporting period, three by the IBAC Commissioner and one by a Supreme Court Judge. All documentation relating to the revocation of the warrants was held on the warrant files and available for inspection.³¹ No matters of a compliance nature were identified during the inspection of these records.

PROTECTED INFORMATION REGISTERS

The SD Act requires an agency to record the details of each time PI is used, communicated or given in evidence at a relevant proceeding.³² The IBAC record such details in PI registers with one register being created for each operation in respect of which SD warrants are obtained. The PI registers for each operation were inspected and found to contain all required details pertaining to each use and communication. No entries were required to be made in relation to giving PI in evidence at a relevant proceeding.

EVIDENTIARY CERTIFICATES

Section 30M(g) of the SD Act prescribes that a copy of each certificate issued³³ by a senior officer of an agency must be kept. During the reporting period, one evidentiary certificate was issued by a senior officer of the IBAC and a copy of the certificate was sighted at the inspection. The IBAC is fully compliant with this requirement of the SD Act.

SECTION 30 REGISTER OF WARRANTS AND EMERGENCY AUTHORISATIONS

The s. 30O register for warrants and emergency authorisations was inspected twice during the period under review. The register contained all the required information and no matters of compliance were identified.

DESTRUCTION OF PI

During the reporting period the VI reviewed destruction documentation for 11 surveillance device warrants. Ten records related to material obtained by the former Office of Police Integrity and one record related to material obtained by the IBAC. A review of the IBACs documentation for the destructions did not identify any compliance or practice matters with details of each destruction being kept.³⁴ It is clear

³⁰ Section 20B(2).

³¹ Section 30M(b) and s. 30N(a).

³² Section 30N(c)-(e).

³³ Section 36.

³⁴ Section 30N(f)

that the IBAC has a well-established destructions process and continues to regularly review surveillance device material to determine if a record or report is no longer required.³⁵

RECOMMENDATIONS

No formal recommendations were made in the previous report.

The VI does not make any formal recommendations within this report.

SUMMARY

The IBAC has an effective process in place for managing surveillance device warrant files and ensuring that required records, documents and details are kept. The IBAC's level of compliance with the provisions of the SD Act for the 2014-2015 reporting year has been assessed by the VI as very good.

ACKNOWLEDGEMENT

The VI acknowledges the full cooperation of the IBAC Commissioner and other staff of the IBAC. Particular note is made of the ready assistance given to the VI by staff within the Legal Compliance Unit who made records available for inspection and provided the answers to questions asked.

NEXT REPORT

As required under the SD Act the next report on IBAC's use of the provisions of the SD Act will be made after 1 January 2016.

A handwritten signature in black ink that reads "Robin Brett". The signature is written in a cursive style with a large initial 'R' and 'B'.

Robin Brett QC
Inspector
Victorian Inspectorate

³⁵ Section 30H(1)(b)