



**Victorian Inspectorate Report to the Parliament of Victoria on
the Department of Environment, Land, Water and Planning
pursuant to s. 30Q of the *Surveillance Devices Act* 1999**

Report No. 2 for 2015-2016

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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
GMA	Game Management Authority
IBAC	Independent Broad-based Anti-corruption Commission
PI	Protected information
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 involvement of the Public Interest Monitor³ in the warrant application process has added another level of scrutiny to the control and oversight regimes.

During the period under review, five state law enforcement agencies⁴ 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)
- Department of Economic Development, Jobs, Transport and Resources (DEDJTR) - from 1 January 2015
- Game Management Authority (GMA)

In accordance with statutory obligations⁵ 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 CSG. The report comments on the level of statutory compliance achieved by the CSG and its law enforcement officers for the 2015-2016 reporting period.

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 Law enforcement agency is defined in s. 3.

⁵ SD Act s. 30Q.

FEATURES OF THE LEGISLATION

OBJECTIVES OF THE SD ACT

The primary purposes of the SD Act⁶ 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
- 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.

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.

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

⁶ SD Act s. 1.

⁷ Surveillance device is defined in s. 3.

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.

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 (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.

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.

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 by the VI from 1 July 2015 to 30 June 2016. Each inspection included examination of the various documents,²³ records,²⁴ reports,²⁵ registers²⁶ and other relevant material held by the CSG division within DELWP. All records relating to all warrants were inspected; there was no sampling of records.

The VI has an established process for inspections at DELWP whereby a warrant file and registers are inspected even if the warrant remains extant or reports have not been completed, this is because DELWP makes only occasional use of the provisions of the SD Act.

In 2015-2016 DELWP's warrant files and related investigator records were scheduled to be inspected on a bi-annual basis. However, in as no use was made of the provisions of the SD Act in the second half of the year, only one inspection was conducted during the 2015-2016 year.

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

COMPLIANCE SUPPORT GROUP

The Compliance Support Group (CSG) is the division within DELWP that uses the powers under the SD Act.

WARRANT FILE RECORDS

The inspection of two warrant files was conducted in the first round of inspections for 2015-16 in November 2015. This inspection did not identify any issues of non-compliance. All documents were present on the files and no deficiencies were noted.

There were no warrant files requiring inspection in the second round and as such no inspection was conducted during the second round as scheduled in May 2016.

REPORT TO JUDGE OR MAGISTRATE

Section 30K of the SD Act 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 section 30K reports for each warrant inspected in November 2015 had been completed on the day of the inspection with the report to the issuing Magistrate to be made shortly thereafter. The inspection was carried out prior to the dates on which the reports were required to be submitted to the issuing Magistrates, and at the time of the inspection the reports in relation to both warrants had been completed but not yet submitted.

A section 30K report must contain certain prescribed information, and its accuracy is important in providing judges and magistrates with evidence of the value of the use of surveillance devices. One of the requirements is that the report should contain details of the use made or to be made of PI obtained by use of the surveillance device, and the reports relating to the two warrants did not contain those details. CSG advised that the reports would be amended before being submitted to the issuing Magistrates. The reports as provided to the issuing Magistrates will be inspected at the next inspection in November 2016, as a second round inspection was not conducted in the 2015-16 year.

INVESTIGATOR RECORDS (PI REGISTERS)

Section 30N(c)-(e) requires a record to be kept containing the details of each use, communication and giving in evidence of PI obtained by use of a surveillance device. In respect of both warrants there was a failure to include the details of a use that had occurred. CSG has been advised to update the register.

REGISTER OF WARRANTS AND EMERGENCY AUTHORISATIONS

DELWP maintains a register to meet the requirements of section 30O. This register also incorporates prescribed information required under sections 30N (a) and 30N (b). The register included all required information and no compliance matters were detected at inspection.

ANNUAL REPORT TO THE MINISTER

DWELP is required by section 30L of the SD Act to provide an annual report to the Minister by 30 September 2016. As the time for providing the report has not yet expired, the VI is unable to report on compliance with this section.

COMMENT

In regards to the issues identified, the Inspectorate officers conducting the inspection impressed upon the responsible DELWP officers the importance of strict compliance with the applicable requirements. The comments of the Inspectorate officers were well received, and the Inspectorate is confident that appropriate care will be taken in the future.

RECOMMENDATIONS

No formal recommendations were made in the previous report.

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

ACKNOWLEDGEMENT

The VI acknowledges the full cooperation of DELWP. Particular note is made of the ready assistance given to the VI by CSG staff who made records available for inspection and assisted VI staff when necessary during the inspection process.

NEXT REPORT

As required under the SD Act the next report on DELWP using the provisions of the SD Act will be made after 1 January 2017.

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

