



**Victorian Inspectorate Report to the Parliament of Victoria
pursuant to section 30Q of the *Surveillance Devices Act 1999***

Report No. 1 for 2015-2016

11 February 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
OPI	Office of Police Integrity
PI	Protected information
PI register	Protected information register
PSC	Professional Standards Command (Victoria Police)
SD Act	<i>Surveillance Devices Act 1999</i> (Vic)
SPU	Special Projects Unit (within Intelligence and Covert Operations Support at Victoria Police)
TPU	Technical Projects Unit (within Professional Standards Command at Victoria Police)

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 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 the independent inspection of agency records and documents by the Victorian Inspectorate. The Inspectorate inspects agency records, assesses statutory compliance and reports 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.

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 the Inspectorate's inspections conducted of agency records between 1 July 2015 and 31 December 2015. The report comments on the level of statutory compliance achieved by each agency and its law enforcement officers for the first half of the 2015-2016 reporting period.

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
- 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

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.

- 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, five 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)
- Department of Economic Development, Jobs, Transport and Resources (DEDJTR)
- Game Management Authority (GMA)

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 Law enforcement agency is defined in s. 3.

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 the obligations of an agency to keep information obtained by means of a surveillance device secure¹⁵ and to destroy 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 section 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 section 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.

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THE VICTORIAN INSPECTORATE

ROLE OF THE VI

The Inspectorate 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 Inspectorate to report to Parliament at six-monthly intervals (after 1 January and 1 July each year) on the results of each inspection under section 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 Inspectorate 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 Inspectorate considers necessary and relevant to the inspection.

INSPECTION OF AGENCY RECORDS

METHODOLOGY

This report addresses the results of inspections undertaken by the Inspectorate from 1 July 2015 to 31 December 2015. Each inspection included examination of the various documents,²³ records,²⁴ reports,²⁵ registers²⁶ and other relevant material held by Victoria Police, the IBAC, DELWP, DEDJTR and GMA. All records relating to all warrants were inspected; there was no sampling of records.

The Inspectorate has an established process for inspections whereby a warrant file relating to Victoria Police or the IBAC is not inspected until reporting requirements under section 30K of the SD Act for the warrant have been completed. This practice means that there is no need for the Inspectorate's 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. DELWP, DEDJTR and GMA records, on the other hand, are inspected even if the warrant remains extant or reports have not been completed, as these agencies make only the occasional use of the provisions of the SD Act.

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.

In 2015-2016 each agency will have their warrant files and related investigator records inspected on a bi-annual basis.

ASSESSING COMPLIANCE

Section 30P(1) of the SD Act requires the Inspectorate 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 following sections of this report cover the results of the inspections carried out by the Inspectorate. Each agency is reported on separately.

DEPARTMENT OF ENVIRONMENT, LAND, WATER AND PLANNING

COMPLIANCE SUPPORT GROUP

The Compliance Support Group (CSG) is the division within DELWP that uses the powers under the SD Act. During the period under report two completed warrant files were inspected at the CSG. This was the first inspection of these files.

WARRANT FILE RECORDS

The inspection of two warrant files did not identify any issues of non-compliance. All documents were present on the files and no deficiencies were noted.

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 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, and the reports as provided to the issuing Magistrates will be inspected during the Inspectorate's second inspection of 2015-2016.

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

The Inspectorate established that DELWP was compliant with section 30L of the SD Act, with an annual report by the Secretary to the Minister covering the 2014-2015 year having been made within the specified time.

COMMENT

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.

DEPARTMENT OF ECONOMIC DEVELOPMENT, JOBS, TRANSPORT AND RESOURCES

FISHERIES VICTORIA

Fisheries Victoria is the division within DEDJTR that uses the powers under the SD Act.

Prior to the scheduled inspection, the Inspectorate's officers were advised by Fisheries Victoria that for the period under review no surveillance device warrants had been applied for. The Inspectorate therefore did not proceed with the inspection at Fisheries Victoria for this period. The second inspection is due to be undertaken in the first half on 2016.

DEDJTR REPORT TO THE MINISTER

The Inspectorate established that DEDJTR was compliant with section 30L of the SD Act, with an annual report by the Secretary to the Minister covering the 2014-2015 year having been made within the specified time.

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GAME MANAGEMENT AUTHORITY

Prior to the scheduled inspection, the Inspectorate's officers were advised by the GMA that for the period under review no surveillance device warrants had been applied for. The Inspectorate therefore did not proceed with the inspection at GMA for this period. The next inspection at GMA is scheduled for the first half of 2016.

GMA REPORT TO THE MINISTER

The Inspectorate established that GMA was compliant with section 30L of the SD Act, with an annual report by the CEO to the Minister covering the 2014-2015 year having been made within the specified time.

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INDEPENDENT BROAD-BASED ANTI-CORRUPTION COMMISSION

The first inspection of IBAC records for the 2015-2016 year took place in October 2015. Inspection was made of warrant files for surveillance device warrants and retrieval warrants that had ceased to be in force in the period 1 January to 30 June 2015. The Register of Warrants and Emergency Authorisations, and documentation pertaining to the destruction of warrants issued to the former Office of Police Integrity (OPI), were also inspected.

INSPECTION RESULTS

WARRANT FILE RECORDS

Section 30M of the SD Act requires that certain documents connected with warrants and emergency authorisations are kept on the warrant file. The files of six surveillance device warrants and two retrieval warrants that ceased to be in force in the period under review were inspected in October 2015. Two of the six surveillance device warrants were extended during the reporting period. The file of one refused surveillance device warrant application was also sighted.

No matters of non-compliance were noted in respect of the warrant files with all documentation required to be kept, being held on file for each warrant.

OPERATIONAL REGISTERS

The SD Act prescribes the circumstances in which PI can be used, communicated or published²⁷ and particular additional circumstances in which it is not an offence to use, communicate or publish PI.²⁸ Section 30N(c)-(e) requires the details of each use and communication of PI and each occasion on which PI is given in evidence to be recorded and kept. The IBAC maintains a register for each operation and during this inspection period three operational registers were inspected covering the six surveillance device warrants ceasing during the reporting period.

Although section 30N(c)-(e) of the SD Act requires “details” to be kept, it does not specify the particular details. The Inspectorate’s view is that each entry needs to contain a sufficient level of information to satisfy a reader of the register as to what has occurred with information obtained under the authority of a warrant.

Two issues were raised with IBAC by Inspectorate officers regarding the level of detail contained in the registers. One was that in three cases the nature of the use that had been made of the protected information was described in general rather than specific terms. The other, which applied to all warrants, was that the method used for recording the dates of the use of PI meant that the actual dates could not be clearly identified. Both these issues were discussed with IBAC officers, who indicated that

²⁷ Ibid ss. 30F(1) and 30G(1).

²⁸ Ibid s. 30E(4).

procedures will be amended to ensure that the level of detail recorded in Operational Registers is more specific.

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.

Of the eight reports inspected, all were assessed as compliant, with each report made on time and containing the prescribed information. In respect of one report, a supplementary report had been made to the issuing judge prior to the inspection. The IBAC had self-identified an error in the original report and submitted an amended report rectifying this error. It is pleasing to see that the IBAC has effective internal auditing processes and are rectifying errors prior to the Inspectorate's inspection.

DESTRUCTION OF PI

Inspection of IBAC records concerning the destruction of surveillance device material for one former OPI operation was undertaken and no matters of non-compliance were identified. The IBAC continues to undertake destructions of material no longer required and has advised that a significant amount of material from the OPI has now been destroyed.

REGISTER OF WARRANTS AND EMERGENCY AUTHORISATIONS

The IBAC maintains a register to capture the information required by section 30O. This register also incorporates the requirements under sections 30N(a) and 30N(b). The register includes all required information and no compliance matters were detected.

ANNUAL REPORT TO THE MINISTER

The Inspectorate established that the IBAC was compliant with section 30L of the SD Act, with an annual report by the Commissioner to the Minister covering the 2014-2015 year having been made within the specified time.

SUMMARY

The IBAC has a clear understanding of its obligations under the SD Act and maintains a very good process for managing surveillance device warrants files and operational registers. That no errors were detected in the warrant files or section 30K reports highlights the effectiveness of the process IBAC has established.

While compliance concerns were identified in the operational registers, the IBAC has been receptive to the feedback provided by the Inspectorate and indicated that their record keeping processes will be amended to ensure that the operational register entries contain a sufficient level of detail.

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VICTORIA POLICE

Two units within Victoria Police administer surveillance device and retrieval warrants and emergency authorisations granted under the SD Act. The Special Projects Unit (SPU) manages the majority of warrants for Victoria Police, while a small number of warrants are administered by the Technical Projects Unit (TPU) within Professional Standards Command (PSC), mainly for PSC investigations. These units operate independently of each other.

INSPECTIONS CONDUCTED

In 2015-2016 the Inspectorate is undertaking two inspections of Victoria Police surveillance device warrant files at SPU and TPU, and two field inspections of PI Registers. This report discusses statutory compliance issues identified during the first round of warrant file inspections conducted in September 2015 and the PI Register inspections conducted in October and November 2015. The second inspection of warrant files and PI Registers will be conducted in the first half of 2016. The Inspectorate's final report pursuant to the SD Act for the 2015-2016 year, due after 1 July 2016, will include a more detailed analysis of compliance covering the entire 2015-2016 year.

INSPECTION RESULTS

Thirty surveillance device warrant files and two emergency authorisation files were assessed during the inspections undertaken at SPU and TPU in September 2015. No retrieval warrants ceased to be in force during the period under inspection. The files inspected relate to warrants that ceased to be in force between 1 January and 30 June 2015.

Thirty-two PI Registers were inspected during the field inspections conducted in October and November 2015. Of the 32, eight were PI Registers that had previously been inspected, seven of which contained errors at the previous inspection. The purpose of the reinspections was primarily to check that the errors had been rectified, however any subsequent entries were also inspected. Inspections of PI Registers for warrants administered by SPU were conducted on-site at investigation unit locations throughout metropolitan Melbourne and regional Victoria. As TPU has implemented electronic PI Registers for warrants administered by that unit, inspection of the PI Registers took place at TPU. Compliance issues identified during warrant file and PI Register inspections are reported below.

WARRANT FILE RECORDS

Inspection of warrant files for the surveillance device warrants and emergency authorisations that ceased to be in force in the period under review revealed no matters of non-compliance. Victoria Police has an effective process to manage warrant files, with all required documents kept.

REPORT TO JUDGE OR MAGISTRATE

Section 30K requires the law enforcement officer to whom a surveillance device or retrieval 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.²⁹ 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.

Thirty section 30K reports were inspected, eight of which were deficient due to a failure to include the prescribed content. The following errors were identified:

- a failure to include details of the extension and variation of a warrant - one report
- the report contained information that was not relevant for inclusion in a report - one report
- a failure to provide details of a surveillance device installed under the warrant - one report
- omitting the name of a person who was involved in the execution of the warrant - one report
- including names of persons who were not involved in the execution of the warrant - three reports
- dates stated incorrectly in the report including revocation date and dates that devices were used - two reports
- a failure to include the name of the person whose conversations were overheard - one report
- a failure to sufficiently answer how the conditions of the warrant were complied with - one report.

Victoria Police has implemented the practice of submitting an amended report to the issuing judge or magistrate when an error is identified in the original report. The Inspectorate is advised that an amended report will be submitted for the eight reports identified above.

The error rate for the first half of the reporting year is just under 27% and when compared to the rate for the whole of 2014-2015 year (87 reports, nine of which were erroneous, error rate of 10%) the error rate has increased. The errors identified have been raised with the Victoria Police registries. While a higher rate of errors was detected for the first six months of this reporting period, Victoria Police has established an effective reporting process and is receptive to feedback provided by the Inspectorate.

INVESTIGATOR RECORDS (PI REGISTERS)

The SD Act prescribes the circumstances in which PI can be used, communicated or published³⁰ and particular additional circumstances in which it is not an offence to use, communicate or publish PI.³¹ The details of each use and communication of PI and each occasion on which PI is given in evidence must be recorded and kept by Victoria Police pursuant to section 30N(c)-(e). Investigators are issued with PI Registers in which all uses and communications of PI are recorded, and it is the investigator's

²⁹ There is no corresponding reporting requirement for emergency authorisations.

³⁰ Ibid ss. 30F(1) and 30G(1).

³¹ Ibid s. 30E(4).

responsibility to ensure the PI Register is updated and completed. The Inspectorate undertakes two inspections of PI Registers in each financial year to determine compliance with these requirements.

Table 1 below provides data on the first inspection of PI Registers undertaken for the 2015-2016 reporting period.

Table 1: PI Register inspection results

New PI registers inspected	24
PI registers reinspected due to previous errors	7 ³²
Total number of PI registers inspected	32
Number of PI registers containing an error at this inspection	3

Table 1 shows that of the 32 PI registers inspected three contained at least one error. This is a pleasing result for Victoria Police and, consistent with the previous years, the error rate continues a downward trend. The errors identified at the inspection include:

- omitting uses of PI in applications for search warrants and to manage covert aspects of the investigation
- entry lacking detail as to the dates PI was used
- Discrepancy between the PI register and section 30K report to the judge.

Victoria Police has been advised of these errors.

It is pleasing to report that of the seven registers reinspected due to previous errors, all had been rectified and no further issues were identified in respect of these registers.

Victoria Police has implemented an effective process, including liaison with investigators, to ensure that the PI registers contain the necessary information. The effectiveness of this process is demonstrated by the inspection results.

REGISTER OF WARRANTS AND EMERGENCY AUTHORISATIONS

Victoria Police maintains a register to capture the information required by section 30O and this register also incorporates the requirements under sections 30N(a) and 30N(b). The register is well maintained and contains all of the prescribed information. While very minor errors were identified (such as a date discrepancy) these are not considered significant. Given the volume of information that Victoria Police must record in this register, the Inspectorate anticipates that a level of human error will occur. Victoria

³² The total number of re-inspected PI registers is eight but only seven were re-inspected due to a previous error. Therefore the eighth PI register is only included in the total number of PI registers inspected for this period.

Police was advised of these matters following the inspection. Victoria Police personnel clearly understand their obligations in relation to recording the required information.

EVIDENTIARY CERTIFICATES

The SD Act requires that a copy of each evidentiary certificate issued pursuant to the provisions of section 36 be kept. For the period under review the Inspectorate requested the certificates pertaining to six warrants (for five different operations). A copy of the certificate was available on each requested file.

ANNUAL REPORT TO THE MINISTER

The Inspectorate established that Victoria Police was compliant with section 30L of the SD Act, with an annual report by the Chief Commissioner of Police to the Minister covering the 2014-2015 year being made within the time allowed.

SUMMARY

Victoria Police has a well-established process for warrant file administration. That no matters of concern were identified during the warrant file inspection highlights this.

During the course of the last 18 to 24 months Victoria Police has had an increased focus on PI register compliance. The effectiveness of the processes implemented is reflected in the inspection results where few errors were detected for the first half of the reporting period.

Reporting errors have increased for the first six months of the reporting year. Victoria Police has been advised of these compliance errors and are receptive to the feedback that the Inspectorate provides. The Inspectorate is confident that these errors will be rectified.

Overall Victoria Police demonstrates a very good level of compliance with the SD Act. Victoria Police personnel demonstrate a clear understanding of their obligations under the Act and readily address areas of non-compliance.

NEXT REPORT ON ALL AGENCIES

As required under the SD Act the next report covering all agencies using the provisions of the SD Act will be made after 1 July 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