

**VICTORIAN
INSPECTORATE**

Inspection Report:

Surveillance Devices Act 1999 (Vic)

Report by the Victorian Inspectorate on surveillance device records inspected during the period 1 July 2020 to 31 December 2020

Contents

Overview	3
Introduction	5
OUR ROLE.....	5
HOW WE ASSESS COMPLIANCE	5
HOW WE REPORT ON COMPLIANCE	6
Department of Environment Land Water and Planning	7
Game Management Authority.....	8
Independent Broad-based Anti-corruption Commission	9
FINDINGS WARRANTS	9
FINDINGS - RECORDS	10
FINDINGS - REPORTS	11
FINDINGS - TRANSPARENCY AND COOPERATION	12
Victorian Fisheries Authority	13
Victoria Police.....	14
FINDINGS WARRANTS	14
FINDINGS - RECORDS	15
FINDINGS - REPORTS	16
FINDINGS - TRANSPARENCY AND COOPERATION	17

Overview

This report presents the results of the inspections conducted by the Victorian Inspectorate ('the VI') from 1 July to 31 December 2020 of records belonging to the following five Victorian agencies authorised to use surveillance devices:

- Department of Environment, Land, Water and Planning (DELWP)
- Game Management Authority (GMA)
- Independent Broad-based Anti-corruption Commission (IBAC)
- Victorian Fisheries Authority (VFA)
- Victoria Police

The *Surveillance Devices Act 1999 (Vic)* ('the SD Act') provides the legislative framework for these agencies to use surveillance devices to investigate, or obtain evidence of the commission of, an offence that has been, is being, is about to be, or is likely to be, committed. Law enforcement officers of these agencies can apply to the Supreme Court for a surveillance device warrant with respect to the following types of devices: data; listening; optical; and tracking. For tracking devices only, an application may also be made to the Magistrates' Court. Victoria's Public Interest Monitor (PIM) is entitled to make submissions on warrant applications. In addition to court-issued warrants, senior officers of Victoria Police and IBAC can, in certain emergency situations, authorise the use of surveillance devices.

The role of the VI is established by the SD Act, and ensures independent oversight of the above agencies with respect to compliance with the Act. The VI is required to inspect from time to time the records of each agency, and report on the results of its inspections at 6-monthly intervals to each House of Parliament as well as the Attorney-General. The use of surveillance devices by Victorian government agencies is highly intrusive of individuals' privacy, and therefore the VI's role is designed to assure the public that the lawfulness of agency actions is subject to independent checks.

From 1 January to 30 June 2020, the VI did not conduct an inspection of records belonging to Victorian agencies authorised to use surveillance devices. Although the VI had scheduled an inspection at each agency during this period, workplace restrictions made in response to the COVID-19 pandemic caused the VI to postpone its inspection program. This report gives the inspection results for warrants that ceased in the 6-monthly period ending 31 December 2019, as well as destructions activity taken and evidentiary certificates issued during the same period.

Temporary regulations made under the *COVID-19 Omnibus (Emergency Measures) Act 2020*: the *COVID-19 Omnibus (Emergency Measures) (Integrity Entities) Regulations 2020* ('the COVID-19 Omnibus Regs'), were amended on 4 November 2020 to modify the application of the SD Act so that "for the financial year ending on 30 June 2021, the Victorian Inspectorate is not required under this section to inspect all records of the law enforcement agency and may determine which records to inspect."

Due to the significant volume of records within our remit and the backlog of inspections caused by the COVID-19 pandemic, the VI inspected a representative sample of records at Victoria Police's

Special Projects Unit (SPU) in October 2020. In addition to the volume of records and VI resource constraints, consideration for sampling also took into account the SPU's historically low error rate and absence of any serious breaches of compliance. Inspection findings for 59% of all available warrant records for the period with the SPU are included in this report, along with 100% of all other relevant records made available. By selecting a representative sample of records, the VI is able to draw conclusions about the entire population of relevant records and report on compliance with all legislative provisions.

An element of sampling risk is acknowledged with findings based on a representative sample since it may produce a different result from a 100% inspection of records. The VI however maintains a low appetite for sampling risk by selecting a sample size that ensures sufficient evidence can be obtained to support inspection objectives and findings. The number of inspected warrant records at the SPU kept the sampling error rate at 11%. This rate represents the maximum deviation for error identification from conducting a 100% inspection of records.

The VI notes in this report the cooperative and transparent engagement by the officers of each agency whose records were subject to our inspection. Whilst the VI reports on some errors in record keeping, no significant compliance issues were identified. The VI commends the remedial actions taken by agencies to address the identified errors.

The VI has not made any recommendations as a result of its inspections of surveillance device records for the 1 July to 31 December 2020 reporting period.

Introduction

The SD Act imposes strict controls on the use of surveillance devices by Victorian law enforcement agencies, including the use and communication of information obtained by the use of such devices, and reporting obligations. It also imposes requirements for the secure storage and destruction of records or reports containing information obtained by the use of surveillance devices.

OUR ROLE

The VI performs an independent oversight function to determine the extent of compliance achieved by law enforcement agencies that have exercised their powers under the SD Act.

The VI is required to inspect the records of these agencies from time to time to determine the extent of compliance with the SD Act. In order to fulfil our requirement to report to Parliament at 6-monthly intervals, the VI conducts biannual inspections of:

- surveillance device warrants;
- emergency authorisations; and
- retrieval warrants;

which ceased during the preceding 6-monthly period.

The VI inspects hard copy documents and electronic registers with the primary purpose of ensuring that records connected with the issue of surveillance device warrants, and other records connected with the use of devices, are being kept. The VI will also confirm that each law enforcement agency has met its prescribed reporting obligations.

HOW WE ASSESS COMPLIANCE

The objective of our inspections is to determine the extent of compliance with the SD Act by each Victorian law enforcement agency authorised to use surveillance devices, and that of their officers. We assess compliance based on the records made available to us at the time of inspection, our discussions with the relevant agencies, as well as the action they take in response to any issues we have raised.

In this report, we also assess compliance with the reporting requirements of s 30L of the SD Act. Each agency able to make applications to use a surveillance device is required to make an annual report to the responsible Minister (Attorney-General) that is also tabled in Parliament. The VI assesses these reports against various criteria, including the requirement they be submitted to the Attorney-General by 30 September each year.

HOW WE REPORT ON COMPLIANCE

To ensure procedural fairness, each agency is given an opportunity to comment on the VI's findings from our inspections, and to furnish additional records that might assist our assessment. Following this process, the inspection results are considered finalised.

Included in this report are findings resulting from our inspection and assessment of records and documents relating to the issue and use of surveillance device warrants and authorisations by Victorian law enforcement agencies. We provide more detail where there is a finding of non-compliance. The VI may, in its discretion, not report on administrative issues (such as typographical or transposition errors) or instances of non-compliance where the consequences are negligible.

The following sections of this report provide the results of the VI's inspection of surveillance records from 1 July to 31 December 2020. Inspection results are reported on separately for each Victorian law enforcement agency with the authority to exercise powers under the SD Act.

Department of Environment Land Water and Planning

The Department of Environment Land Water and Planning (DELWP)'s 'Intelligence and Investigations Unit' administers surveillance device warrants issued to the agency.

Since DELWP made no application for a surveillance device warrant during the period covered by this report (i.e. 1 July to 31 December 2019), the VI did not inspect any DELWP records on this occasion.

In this report, the VI's assessment of DELWP's extent of compliance is limited to whether the reporting requirements of s 30L of the SD Act were met. The VI found that the annual report made by the Secretary for the 2019-2020 financial year met all reporting criteria and was submitted to the Attorney-General by 30 September 2020.

Game Management Authority

The Game Management Authority (GMA) has yet to make an application under the SD Act, and as a result no files were inspected by the VI for the period.

The VI found the GMA made an annual report for the 2019-2020 financial year under s 30L of the SD Act that met all reporting criteria and was submitted to the Attorney-General by 30 September 2020.

Independent Broad-based Anti-corruption Commission

The Independent Broad-based Anti-corruption Commission (IBAC)'s 'Legal Compliance Unit' administers surveillance device warrants issued to IBAC. The VI inspected 5 surveillance device files at IBAC on 8 October 2020, this being all relevant records associated with warrants that ceased between 1 July and 31 December 2019.

FINDINGS WARRANTS

Were applications for warrants (including extensions and variations) properly made?

The VI found that the 4 applications made for a surveillance device warrant and one (1) application for a retrieval warrant by IBAC complied with the requirements of ss 15 and 20C of the SD Act, respectively.

Specifically, the VI found the following requirements were met:

- Approval was provided by a senior officer.
- The applicant was a law enforcement officer.
- The applicant's name as well as the nature and duration of the warrant were specified, including the type of device sought (in the case of a surveillance device warrant).
- A sworn affidavit was provided in support.
- The application was made to a Supreme Court judge or magistrate, as appropriate.

IBAC made no applications for a warrant to be extended or varied during the period.

Were warrants, including retrieval warrants, and emergency authorisations in proper form and revocations properly made?

Issued warrants must specify the following matters in accordance with s 18 of the SD Act:

- The name of the applicant and alleged offence.
- Date warrant was issued, and the kind of surveillance device authorised.
- The permitted premises, object or class of object for the device, as applicable.
- Name of person whose conversations or movements will be subject to the device, if known.
- Duration for the warrant (up to 90 days).
- Name of primary law enforcement officer responsible for executing the warrant.
- Any conditions for the installation or use of the device.
- When the report under s 30K of the SD Act must be made.
- The name and signature of the issuing authority (magistrate or judge).

All issued surveillance device warrants were found to have met the above-mentioned requirements.

The one (1) issued retrieval warrant complied with s 20F of the SD Act by specifying the following:

- The name of the applicant and date warrant was issued.
- Kind of surveillance device authorised for retrieval and premises or object from which it is to be retrieved.
- Duration for the warrant (up to 90 days).
- Name of primary law enforcement officer responsible for executing the warrant.
- Any conditions for entry of premises.
- When the report made under s 30K of the SD Act must be made.
- The name and signature of the issuing authority (magistrate or judge).

IBAC did not make an application for an emergency authorisation for the use of a surveillance device, nor did it exercise the provisions under ss 20A and 20B of the SD Act to discontinue and revoke any warrant inspected.

FINDINGS - RECORDS

Did IBAC keep all records connected with warrants and emergency authorisations?

IBAC is required to keep records connected with surveillance device warrants in accordance with s 30M of the SD Act, including:

- Each warrant issued.
- Each emergency authorisation, and application made for such.
- A copy of each warrant application, and any application for its extension, variation or revocation.
- A copy of each application for approval to exercise powers under an emergency authorisation.
- A copy of each report made under s 30K of the SD Act to a magistrate or judge.
- Copies of any evidentiary certificates issued under s 36 of the SD Act.

IBAC complied with these record-keeping requirements, noting no application was made for an emergency authorisation.

Did IBAC keep all other necessary records?

IBAC is also required to keep other records in accordance with s 30N of the SD Act, including details of:

- Each use made of information obtained by the use of a surveillance device.
- Each communication of information obtained by the use of a surveillance device to a person other than an IBAC law enforcement officer.

- Each occasion information obtained by the use of a surveillance device was given in evidence in a relevant proceeding.
- The destruction of records or reports obtained by the use of surveillance devices.

The VI found that IBAC complied with these requirements.

Did IBAC maintain an accurate register of warrants and emergency authorisations?

The VI found that IBAC kept a register of warrants, as required by s 300 of the SD Act.

The register specified, with respect to each warrant file inspected, the following particulars:

- Date the warrant was issued.
- Name of magistrate or judge who issued the warrant, as well as the name of the primary law enforcement officer responsible for its execution.
- The offence in relation to which the warrant was issued.
- The period during which the warrant was in force.
- Any variation or extension of the warrant.

Since IBAC did not exercise its emergency authorisation powers with respect to the inspected files there were no further matters to be specified in the register.

FINDINGS - REPORTS

Were reports to the magistrate and judge properly made?

Under s 30K of the SD Act, IBAC is required, within the time specified in the warrant, to make a report to the magistrate or judge who issued the surveillance device warrant. These reports must state whether the warrant was executed; and if it was, to give the following details for its use:

- Name of each person involved in the execution of the warrant.
- Kind of surveillance device used.
- Period the device was used.
- Name of any person whose movements or conversations were captured by use of the device or whose geographic location was determined by the use of a tracking device, if known.
- Premises for installation of the device or the location for its use, as applicable.
- Object in or on which the device was installed or the premises for such object, as applicable.
- The benefit to the investigation as well as the general use made or to be made of the information derived from its use.
- Compliance with any warrant conditions, as applicable.
- If the warrant was extended or varied, the number of such occurrences and the reasons for them.
- If the warrant was revoked by the chief officer under s 20A(2), whether the Public Interest Monitor was notified of this and the reasons the device was no longer required.

The 5 reports made by IBAC for warrants that ceased between 1 January and 30 June 2020 were made within the requisite timeframe and complied with the above-mentioned requirements.

Was the annual report to the Minister properly made?

The VI found that IBAC was compliant with the reporting requirements of s 30L of the SD Act. The annual report made by the Commissioner for the 2019-2020 financial year met all reporting criteria and was submitted to the Attorney-General by 30 September 2020.

FINDINGS - TRANSPARENCY AND COOPERATION

The VI considers an agency's transparency, its cooperation during inspection, and its responsiveness to suggestions and issues to be a measure of its compliance culture.

Did IBAC self-disclose compliance issues?

IBAC did not make any self-disclosures relevant to the warrant files inspected from 1 July to 31 December 2020. IBAC did however inform the VI of some procedural changes it made in response to challenges brought about by COVID-19 workplace restrictions during the period including the electronic delivery of draft applications to the Public Interest Monitor. IBAC also provided the VI with updated procedures for surveillance device warrants and the destruction of records, as well as amended delegation instruments.

Were issues identified at previous inspections addressed?

Since no issues with IBAC files were identified from the VI's previous inspection of surveillance device records, there were no historical issues to be addressed on this occasion.

Victorian Fisheries Authority

Since the VFA made no application for a surveillance device warrant during the period covered by this report, the VI did not inspect any VFA files between 1 July and 31 December 2020.

In this report, the VI's assessment of the VFA's extent of compliance is limited to whether the reporting requirements of s 30L of the SD Act were met. The VI found that the annual report made by the CEO for the 2019-2020 financial year met all reporting criteria and was submitted to the Attorney-General by 30 September 2020.

Victoria Police

There are two units within Victoria Police that administer surveillance device warrants and emergency authorisations:

- The Special Projects Unit (SPU), the major user of surveillance device warrants; and
- The Technical Projects Unit (TPU), within Professional Standards Command (PSC).

In addition to these units, the Technical Surveillance Unit (TSU) within Victoria Police is responsible for the installation, maintenance and retrieval of surveillance devices under the authority of warrants or emergency authorisations. Due to the impact of the COVID-19 pandemic, during the period of this report the VI did not inspect TSU records to cross-check against the records held by the SPU and TPU.

As a result of workplace restrictions made in response to the COVID-19 pandemic, the VI inspected a sample of records at the SPU, as allowed by the COVID-19 Omnibus Regs. The below table details the type and number of records inspected across the SPU and TPU during the period.

TYPE OF RECORD	RECORDS INSPECTED
Surveillance device warrants	36 (60%)
Refused or withdrawn applications	1 (100%)
Destruction of records obtained by a device	39 (100%)
Evidentiary certificates	46 (100%)
TOTAL	122 (84%)

The 37 surveillance device files with Victoria Police inspected from 1 July to 31 December 2020 included 8 occasions an issued warrant was extended, and one (1) application for a surveillance device warrant that was refused by the Supreme Court of Victoria. No emergency authorisations were made during the period. There were 3 surveillance device files at the TPU inspected on 15 July 2020 and 16 September 2020, and 34 files at the SPU inspected from 14 – 15 October 2020.

FINDINGS WARRANTS

Were applications for warrants (including extensions and variations) properly made?

The VI found that all applications made for a surveillance device warrant, including a variation to a warrant, complied with the requirements of ss 15 and 20 of the SD Act.

Specifically, the VI found the following requirements were met:

- Approval was provided by an authorised police officer.
- The applicant was a law enforcement officer.
- The applicant's name as well as the nature and duration of the warrant were specified, including the type of device sought.

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- A sworn affidavit was provided in support.
- The application was made to a Supreme Court judge or magistrate, as appropriate.

In addition to meeting the above-mentioned requirements, the 8 applications to extend a warrant were made to a magistrate or judge, as required.

Were warrants, including retrieval warrants, and emergency authorisations in proper form and revocations properly made?

Issued warrants must specify the following matters in accordance with s 18 of the SD Act:

- The name of the applicant and alleged offence.
- Date warrant was issued, and the kind of surveillance device authorised.
- The permitted premises, object or class of object for the device, as applicable.
- Name of person whose conversations or movements will be subject to the device, if known.
- Duration for the warrant (up to 90 days).
- Name of primary law enforcement officer responsible for executing the warrant.
- Any conditions for the installation or use of the device.
- When the report under s 30K of the SD Act must be made.
- The name and signature of the issuing authority (magistrate or judge).

The 36 warrants issued to Victoria Police complied with these requirements. One (1) application made by Victoria Police for a surveillance device warrant was refused.

For the inspected warrants, Victoria Police discontinued the use of surveillance devices and subsequently revoked the associated warrants on 22 occasions via written instruments signed by a delegate of the Chief Commissioner of Police, in accordance with ss 20A and 20B of the SD Act.

Victoria Police did not make any emergency authorisations for the use of a surveillance device in the period.

FINDINGS - RECORDS

Did Victoria Police keep all records connected with warrants and emergency authorisations?

Victoria Police is required to keep records connected with surveillance device warrants in accordance with s 30M of the SD Act, including:

- Each warrant issued.
- Each emergency authorisation, and application made for such.
- A copy of each warrant application, and any application for its extension, variation or revocation.
- A copy of each application for approval to exercise powers under an emergency authorisation.
- A copy of each report made under s 30K of the SD Act to a magistrate or judge.

- Copies of any evidentiary certificates issued under s 36 of the SD Act.

Victoria Police complied with these record-keeping requirements, noting no application was made for an emergency authorisation.

Did Victoria Police keep all other necessary records?

Victoria Police is also required to keep other records in accordance with s 30N of the SD Act, including details of:

- Each use made of information obtained by the use of a surveillance device.
- Each communication of information obtained by the use of a surveillance device to a person other than a Victoria Police law enforcement officer.
- Each occasion information obtained by the use of a surveillance device was given in evidence in a relevant proceeding.
- The destruction of records or reports obtained by the use of surveillance devices.

The VI found that Victoria Police complied with these requirements.

Victoria Police kept details on the destruction of records and reports related to 39 surveillance device warrants in accordance with s 30N(f) of the SD Act.

Did Victoria Police maintain an accurate register of warrants and emergency authorisations?

The VI found that Victoria Police kept a register of warrants, as required by s 30O of the SD Act.

The register specified, with respect to each warrant file inspected, the following particulars:

- Date the warrant was issued.
- Name of magistrate or judge who issued the warrant, as well as the name of the primary law enforcement officer responsible for its execution.
- The offence in relation to which the warrant was issued.
- The period during which the warrant was in force.
- Any variation or extension of the warrant.

Since Victoria Police did not exercise its emergency authorisation powers with respect to the inspected files there were no further matters to be specified in the register.

FINDINGS - REPORTS

Were reports to the magistrate and judge properly made?

Under s 30K of the SD Act, Victoria Police is required, within the time specified in the warrant, to make a report to the magistrate or judge who issued the surveillance device warrant. These reports must state whether the warrant was executed; and if it was, to give the following details for its use:

- Name of each person involved in the execution of the warrant.
- Kind of surveillance device used.
- Period the device was used.
- Name of any person whose movements or conversations were captured by use of the device or whose geographic location was determined by the use of a tracking device, if known.
- Premises for installation of the device or the location for its use, as applicable.
- Object in or on which the device was installed or the premises for such object, as applicable.
- The benefit to the investigation as well as the general use made or to be made of the information derived from its use.
- Compliance with any warrant conditions, as applicable.
- If the warrant was extended or varied, the number of such occurrences and the reasons for them.
- If the warrant was revoked by the chief officer under s 20A(2), whether the Public Interest Monitor was notified of this and the reasons the device was no longer required.

All reports made by Victoria Police in accordance with s 30K of the SD Act for warrants that ceased between 1 July and 31 December 2019 were made within the requisite timeframe, however one (1) report was identified with an error.

Finding 1 – Report was made to the incorrect magistrate.

In one (1) warrant file the VI found the report made under s 30K of the SD Act was incorrectly made to the magistrate who granted an extension for the warrant rather than the magistrate who issued the warrant.

Victoria Police's SPU explained the error was caused by software used to draft the report and on this occasion the discrepancy eluded its quality assurance processes. In response, the unit provided an undertaking to ensure a copy of the report would be made to the magistrate who issued the warrant, in accordance with s 30K(1) of the SD Act. The VI will re-inspect this warrant file at the next scheduled inspection of surveillance device records.

Was the annual report to the Minister properly made?

The VI found that Victoria Police was compliant with the reporting requirements of s 30L of the SD Act. The annual report made by the Chief Commissioner for the 2019-2020 financial year met all reporting criteria and was submitted to the Attorney-General by 30 September 2020.

FINDINGS - TRANSPARENCY AND COOPERATION

The VI considers an agency's transparency, its cooperation during inspection, and its responsiveness to suggestions and issues to be a measure of its compliance culture.

Did Victoria Police self-disclose compliance issues?

Victoria Police made one (1) self-disclosure at inspection during the period. In the case of a warrant that had been revoked on 30 July 2019, investigators applied for a variation of the warrant at the Supreme Court of Victoria (SCV) on 28 August 2019 under the mistaken belief the warrant was still current. The error was identified shortly after the application to vary the warrant was approved by the SCV, and prior to the installation of any device. In response to this error, the Evidence Preparation Section (EPS) within SPU amended its procedures to ensure an EPS staff member checks the relevant file prior to releasing material to be used in support of making any application at court.

Were issues identified at previous inspections addressed?

The VI re-inspected 2 surveillance device warrant files to confirm issues identified during the preceding inspection period were appropriately addressed. One (1) file each at the TPU and SPU was re-inspected to ensure a corrected report was made under s 30K of the SD Act to the judge and magistrate, respectively. Victoria Police demonstrated an eagerness to correct the earlier identified errors by making a timely supplementary report in each case.