



**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 2015-2016**

September 2016



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## List of Abbreviations

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
PIM	Public Interest Monitor
PI register	Protected information register
SD Act	<i>Surveillance Devices Act 1999 (Vic)</i>
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.<sup>1</sup> Use of surveillance devices in relation to private activity and private conversations is otherwise generally unlawful in Victoria.<sup>2</sup>

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 Monitor<sup>3</sup> (PIM) involvement in the warrant application process has added another level of scrutiny to the control and oversight regimes.

In accordance with statutory obligations<sup>4</sup> 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 2015 and 30 June 2016. The report comments on the level of statutory compliance achieved by the IBAC and its law enforcement officers for the 2015-2016 reporting period.

## FEATURES OF THE LEGISLATION

### OBJECTIVES OF THE SD ACT

The primary purposes of the SD Act<sup>5</sup> 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

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<sup>1</sup> 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).

<sup>2</sup> 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).

<sup>3</sup> Established by the *Public Interest Monitor Act 2011*.

<sup>4</sup> SD Act s. 30Q.

<sup>5</sup> 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 agencies<sup>6</sup> 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:<sup>7</sup>

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

## WARRANTS AND EMERGENCY AUTHORISATIONS

The SD Act provides for the issue of surveillance device warrants<sup>8</sup> and retrieval warrants<sup>9</sup> and in a limited range of circumstances for emergency authorisation<sup>10</sup> 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.<sup>11</sup>

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<sup>6</sup> Law enforcement agency is defined in s. 3.

<sup>7</sup> Surveillance device is defined in s. 3.

<sup>8</sup> SD Act ss. 15 to 20.

<sup>9</sup> Ibid ss. 20C to 20G.

<sup>10</sup> Ibid ss. 25 to 30.

<sup>11</sup> 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.<sup>12</sup>

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.<sup>13</sup> The chief officer of each agency is also required to report annually to the Minister<sup>14</sup> 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 secure<sup>15</sup> and to undertake the destruction of such information<sup>16</sup> when it is unlikely to be required for a permitted purpose.<sup>17</sup>

## 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.<sup>18</sup> The SD Act limits and regulates the use, communication and publication of PI.<sup>19</sup>

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.

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<sup>12</sup> Ibid ss. 30M, 30N and 30O.

<sup>13</sup> Ibid s. 30K.

<sup>14</sup> Ibid s. 30L.

<sup>15</sup> Ibid s. 30H(1)(a).

<sup>16</sup> Ibid s. 30H(1)(b).

<sup>17</sup> Defined in SD Act ss. 30F and 30G.

<sup>18</sup> SD Act s. 30D.

<sup>19</sup> 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.<sup>20</sup> 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.<sup>21</sup>

## 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 powers<sup>22</sup> 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 2015 to 30 June 2016. Each inspection included examination of the various documents,<sup>23</sup> records,<sup>24</sup> reports,<sup>25</sup> registers<sup>26</sup> 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.

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<sup>20</sup> Ibid s. 30P (1).

<sup>21</sup> Ibid s. 30Q.

<sup>22</sup> Ibid s. 30P (2).

<sup>23</sup> Ibid s. 30M.

<sup>24</sup> Ibid s. 30N.

<sup>25</sup> Ibid s. 30K.

<sup>26</sup> 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 2015, when nine surveillance device warrant files were inspected, and in May 2016, when eight 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 five surveillance device warrants were also inspected during the reporting period.

### WARRANT FILE RECORDS TO BE KEPT: SECTION 30M

The inspection of 16 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. One warrant application was refused. The IBAC maintains a well organised process for maintaining warrant files, ensuring that they contain all the required documents and records.

Table 1: Documents to be kept pursuant to s 30M

Documents to be kept under s. 30M	No. of warrant files compliant	No. of warrant files not compliant
Each warrant s. 30M(a)	16	0
Each notice of revocation by a judge or magistrate under s. 20A(3) s. 30M(b)	0	0
A copy of each application for a warrant, extension, variation or revocation of a warrant or for approval of the exercise of powers under an emergency authorisation s. 30M(e)	17	0
A copy of each report to a judge or magistrate under s. 30K s. 30M(f)	16	0

### OTHER RECORDS TO KEPT: SECTION 30N

Section 30N of the SD Act provides that the IBAC Commissioner must cause certain records in connection to surveillance devices to be kept in the records of the agency. A summary of the level of compliance achieved by the IBAC with S.30N is set out in Tables 2(a) and 2 (b) below. The data in Table 2(a) is obtained during warrant file inspections. The data presented in Table 2(b) relating to use, communication and giving of evidence of PI<sup>27</sup> is drawn from the four PI registers inspected and cross checked with any relevant information contained in the corresponding warrant files.

Table 2(a): Records to be kept pursuant to s. 30N (a)-(b)

Records to be kept: s. 30N	No. of warrant files compliant	No. of warrant files not compliant
Statement as to whether each application for a warrant, extension, variation or revocation was granted, refused or withdrawn s. 30N(a)	17	0
Statement as to whether each application for an emergency authorisation or for approval of powers exercised under an emergency authorisation was granted, refused or withdrawn s. 30N(b)	0	0

<sup>27</sup> ibid S.30N(c)

Table 2(b): Records to be kept pursuant to s. 30N(c)-(e)

Records to be kept: s. 30N	No. PI registers compliant	No. PI registers not compliant
Details of each use of information obtained by use of a surveillance device under a warrant s. 30N(c)	1	3
Details of each communication to a person other than a law enforcement officer of the agency, of information obtained by the use of a surveillance device s. 30N(d)	4	0
Details of each occasion when, to the knowledge of a law enforcement officer of the agency, information obtained by a surveillance device was given in evidence in a 'relevant' proceeding s. 30N(e)	4	0

The VI inspection revealed:

- Three PI registers required more detailed information relating to record 'particulars' and 'details' in order to satisfy the requirements of S.30N(c). The IBAC has now amended the three PI registers and taken measures to ensure that future entries will be more detailed so that S.30N(c) requirements are met,
- The same three PI registers grouped the date range for the Operation's warrants over the entire warrant period. For one of these warrants a device was installed for a much shorter period than was covered by the date range. The VI view is that the date range should be as specific as possible to ensure that accurate records are being kept for each warrant. The IBAC has agreed to discontinue the practice of grouping the date range for multiple warrants within an Operation.

Recording each use and communication of PI: ss. 30N(c) and (d)The IBAC creates a PI register for each operation in respect of which a SD warrant is obtained. The VI inspects these records to ensure records are made pursuant to ss. 30N(c)-(d). When the VI detects any errors (including omissions), the IBAC is informed and provided with the relevant details. The VI assess an 'error' as:

- a failure to make a required record
- an entry made that is wrong in content
- an entry recorded against the wrong warrant.

As noted in Table 2(b) three PI registers had a use error<sup>28</sup>. Table 3 provides information relating to each of inspection. The three errors from the first inspection are those errors previously discussed after Table 2(b) relating to S. 30(c).

Table 3: Investigator Record-keeping Errors

	Inspection Round 1	Inspection Round 2	Total
<b>Number Registers inspected for the first time</b>	3	1	4
Registers where entries required	3	1	4
Registers with one or more errors	3	0	3

## OTHER COMPLIANCE REQUIREMENTS

In addition to the requirements to keep certain documents and records, the IBAC is required to comply with a number of other obligations imposed by the IBAC Act. These requirements relate to various sections of the SD Act and include those listed in Tables 4 and 5 below.

Table 4: Other compliance requirements under the SD Act

Other compliance requirements	No. of warrant files compliant	No. of warrant files not compliant
Discontinue use of a surveillance device. Revoke the warrant in certain circumstances. s. 20B	4	0
Revocation of retrieval warrants by chief officer. s. 20H(3)	0	0
Law enforcement officer to inform chief officer if use of a surveillance device is no longer necessary or grounds for retrieval warrant cease to exist. s. 20B(4) & s. 20H(4)	4	0
Report to judge or magistrate under s. 30K made on time and includes required information. s. 30K(1)	16	0
Applications to be made only with the approval of a 'senior' or 'authorised' officer. s. 15(2)	17	0

<sup>28</sup> Ibid 30N(c).

Table 5 Further (general) compliance requirements

Other compliance requirements	Level of Compliance Complete/Satisfactory/Unsatisfactory
Maintain a register of warrants and emergency authorisations with required details. s. 30O	Satisfactory
Records and reports obtained by use of a surveillance device under warrant kept secure from unauthorised persons. s. 30H(1)(a)	Complete
Destruction of records and reports. s. 30H(1)(b)	Complete
Annual report to Minister by chief officer of the agency. s. 30L	Complete
A copy of each evidential certificate issued under s. 36. s. 30M(g)	Complete
Details of the destruction of records or reports under s. 30H (1) (b). s. 30N(f)	Complete

## SECTION 30K - REPORT TO JUDGE OR MAGISTRATE

Table 6: Reporting Errors - 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.

Sixteen S30K reports were reviewed during the reporting period. Two were identified as containing an error (12.5%), down from 29% for the previous year:

- During the first inspection a reporting error was identified due to the omission of prescribed information that should have been reported. The error was self-identified by IBAC prior to the VI inspection and a supplementary report had already been submitted to the Judge prior to the VI Inspection.
- During the second inspection, the enforcement officer failed to inform the Judge via the report the reason(s) why the Surveillance Devices was no longer required. After receiving VI feedback on this omission, the IBAC has issued a supplementary report to the Judge.

	First Inspection	Second Inspection	Total
Number of warrant files inspected	9	8	17
Errors Detected	1	1	2

## EVIDENTIARY CERTIFICATES

Section 30M(g) of the SD Act prescribes that a copy of each certificate issued by a senior officer of an agency must be kept. During the reporting period, there were no evidentiary certificates issued by a senior officer of the IBAC.

## SECTION 30O 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 five surveillance device warrants. There were records relating to material obtained by the former Office of Police Integrity relating to 24 warrants; in addition to six warrants obtained by IBAC.. A review of the IBACs documentation for the destructions did not identify any compliance or practice issues with details of each destruction being kept.<sup>29</sup> It is clear 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.<sup>30</sup>

## RECOMMENDATIONS

No formal recommendations were made in the previous report.

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

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<sup>29</sup> Ibid. S30N(f)

<sup>30</sup> Section 30H(1)(b)



## SUMMARY

In 2015-2016 the IBAC updated their processes and procedures relating to SD Warrants and compliance with the SD Act. It is both pleasing and positive to see that there is ongoing continuous improvement of the IBAC systems that are already in place ensure compliance with the SD Act. The VI is confident that as further warrants are obtained the IBAC is well placed to manage the compliance requirements which will arise under the SD Act.

It should further be noted the IBAC continue to maintain a comprehensive documentation retention process that enables identifying the material destroyed and certifying the witnessed destruction of information obtained by means of a surveillance device that has been retained once it has been identified by the Commissioner to no longer be required. It is understood by the VI that the last of the records held by the former Office of Police Integrity have now been destroyed under the requirements of S. 30H (1)(b).


The IBAC's level of compliance with the provisions of the SD Act for the 2015-2016 reporting year has been assessed by the VI as very high.

## 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 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