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# Inspection Report:

## *Surveillance Devices Act 1999 (Vic)*

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Report by the Victorian Inspectorate on its regular inspection of surveillance device records during the period 1 January 2023 to 30 June 2023

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# Overview

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This report presents the results of regular inspections conducted by the Victorian Inspectorate (the VI) from 1 January to 30 June 2023 for records belonging to Victorian agencies authorised to use surveillance devices. The following seven agencies were authorised to exercise surveillance device powers during this period:

- Department of Energy, Environment and Climate Action (DEECA)
- Environment Protection Authority (EPA)
- Game Management Authority (GMA)
- Independent Broad-based Anti-corruption Commission (IBAC)
- Office of the Special Investigator (OSI)<sup>1</sup>
- Victorian Fisheries Authority (VFA)
- Victoria Police

IBAC and Victoria Police were the only agencies that exercised their powers under the *Surveillance Devices Act 1999* (Vic) (the SD Act) during this period.

The SD Act provides the legislative framework for relevant 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 authorising use of the following types of devices: data, listening, optical, and tracking. For tracking devices only, an application may be made to the Magistrates' Court. In addition to court-issued warrants, senior officers of Victoria Police and IBAC can, in certain emergency situations, authorise the use of surveillance devices.<sup>2</sup>

Victoria's Public Interest Monitor (PIM) is entitled to make submissions on warrant applications.

The role of the VI is established by the SD Act, and it ensures independent oversight of agencies' compliance with the SD 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 six-monthly intervals to each House of Parliament as well as the responsible Minister (Attorney-General). The inspections conducted at these six-monthly intervals constitute our regular inspection framework. The use of surveillance devices by Victorian government agencies is highly intrusive, and therefore the VI's role is designed to independently assess the extent to which agency actions comply with the SD Act.

This report gives the results from our regular inspection of warrants at IBAC and Victoria Police that ceased in the six-month period ending 31 December 2022, as well as any warrant applications refused, destruction activity undertaken, and evidentiary certificates issued during the same period.

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<sup>1</sup> The VI was advised by the Special Investigator that all OSI investigative and analytical functions ceased on 27 June 2023.

<sup>2</sup> During the report period, the OSI could also authorise the use of surveillance devices in certain emergency situations.

The VI inspected 100% of the records available for inspection by these two agencies.

With respect to all other agencies authorised to exercise powers under the SD Act, the VI received confirmation from each that they had no ceased warrants or other surveillance device records for the reporting period. As a result, the VI did not conduct an inspection of records at these agencies on this occasion.

While some compliance errors were disclosed to the VI during the inspection period, this report does not identify any compliance issues nor make any recommendations as a result of our regular inspections of surveillance device records during the 1 January to 30 June 2023 period.

# Introduction

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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. It also imposes reporting obligations, and requirements for the secure storage and destruction of records and reports containing information obtained by the use of surveillance devices.

## OUR ROLE

The VI performs an independent oversight function by inspecting the records of law enforcement agencies to determine the extent of their compliance with the SD Act.

To fulfil our requirement to report to Parliament at six-monthly intervals, the VI conducts biannual inspections of the following which ceased during the preceding six-month period:

- surveillance device warrants
- emergency authorisations
- retrieval warrants.

## HOW WE ASSESS COMPLIANCE

Hard-copy and electronic documents are inspected 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 properly kept. The VI also confirms that each law enforcement agency has met its prescribed reporting obligations. We assess compliance based on the records made available to us at the time of inspection, our discussions with the agency, as well as the action they take in response to any issues we have raised.

## 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.

The report provides detail where there is a finding of non-compliance. The VI may, at 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 during the period 1 January to 30 June 2023. Inspection results are separately reported for each Victorian law enforcement agency which exercised powers under the SD Act relevant to the period covered by this report.

# Independent Broad-based Anti-corruption Commission

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IBAC's Internal Compliance team administers surveillance device warrants issued to IBAC. On 3-4 May 2023, the VI conducted a regular inspection of two surveillance device warrants issued to IBAC. These represented all eligible surveillance device records for the six-month period ending 31 December 2022.

## FINDINGS - WARRANTS

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

The VI found that the two applications made for a surveillance device warrant by IBAC complied with the requirements of section 15 of the SD Act.

Specifically, the VI found the following requirements were met:

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

For the inspected records, IBAC did not apply to extend or vary a warrant under section 20 of the SD Act.

### ***Were warrants, including retrieval warrants, and emergency authorisations in the proper form, and were revocations properly made?***

Issued surveillance device warrants must specify the following matters in accordance with section 18 of the SD Act:

- the name of the applicant and alleged offence
- the date the warrant was issued, and the kind of surveillance device authorised
- the premises, object or class of object, or the name of the person (if known) in respect of which the device will be used, as applicable
- the duration of the warrant (not more than 90 days)
- the name of the law enforcement officer primarily responsible for executing the warrant
- any conditions for the installation or use of the device
- when the report under section 30K of the SD Act must be made
- the name and signature of the issuing authority (magistrate or judge).

In the case of one warrant, IBAC disclosed an error with the form of the warrant. Although the warrant was signed and dated by the issuing authority, no period of validity was specified. Having identified this error, IBAC did not execute the warrant and instead sought to have it revoked under section 20A of the SD Act. However, since the issuing authority found the warrant to be invalid as a result of the omitted information, there was effectively no warrant to revoke.

IBAC did not make an application for a retrieval warrant or for an emergency authorisation to use a surveillance device during the period. For the inspected warrants, and noting the invalid warrant described above, IBAC did not revoke a warrant via a written instrument signed by a delegate of the IBAC Commissioner.

## FINDINGS - RECORDS

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

IBAC is required to keep records connected with warrants and emergency authorisations in accordance with section 30M of the SD Act, including:

- each warrant issued
- each notice given under section 20A(3) for the revocation of a warrant
- 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 section 30K of the SD Act to a magistrate or judge
- a copy of each evidentiary certificate issued under section 36 of the SD Act.

IBAC complied with these record-keeping requirements with respect to the two warrants for the period. The VI was informed that IBAC did not make any evidentiary certificates connected to a surveillance device warrant during the six-monthly period ending 31 December 2022.

### ***Did IBAC keep all other necessary records?***

IBAC is also required to keep other records in accordance with section 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 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, noting no records or reports were destroyed during the period. At the inspection, IBAC informed the VI that it would shortly conduct

an annual review of all records to determine those not likely to be required which can be destroyed in accordance with section 30H(1)(b) of the SD Act.

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

The VI found that IBAC kept a register of warrants, as required by section 30O of the SD Act.

The register specified the following particulars for each inspected surveillance device warrant:

- the date the warrant was issued
- the name of the magistrate or judge who issued the warrant, as well as the name of the law enforcement officer primarily 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 during the relevant period, there were no matters to be specified in the register in relation to section 30O(3) of the SD Act.

## FINDINGS - REPORTS

***Were reports to the magistrate or judge properly made?***

Under section 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 warrant. These reports must state whether the warrant was executed and, if it was, give the following details for its use:

- the name of each person involved in the execution of the warrant
- the kind of surveillance device used
- the period the device was used
- the name of any person whose activities or conversations were captured by use of the device or whose geographic location was determined by the use of a tracking device, if known
- the premises at which the device was installed or the location of its use, as applicable
- the object in or on which the device was installed or the premises at which the object was located when the device was installed, as applicable
- the benefit to the investigation of the use of the device 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 section 20A(2) of the SD Act, the reason the device was no longer required and whether the PIM was notified of the revocation.



While the reports made by IBAC for the two inspected warrants were made within the requisite timeframe, IBAC disclosed that one report omitted multiple uses made of the information obtained by a device installed under the warrant. In post-inspection discussions, IBAC agreed to correct this error by making a supplementary report to the relevant judge. The VI subsequently confirmed this report was made at the next inspection of IBAC records.

## FINDINGS - TRANSPARENCY AND COOPERATION

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

### ***Did IBAC self-disclose compliance issues?***

In addition to the self-disclosures mentioned earlier in the report in connection to the form of a warrant and one report made under section 30K of the SD Act, IBAC also disclosed during the inspection an error related to a warrant that will form part of the records made available for inspection in the July to December 2023 period. In this case, an assistance order issued by the Supreme Court was not in the correct form since it was not endorsed on the relevant warrant under section 22(4) of the SD Act. The VI subsequently confirmed at the next inspection that IBAC reported on this irregularity in the report made to the issuing authority under section 30K of the SD Act.

In addition to the self-disclosures made at the May 2023 inspection, IBAC also disclosed a further compliance matter during the period for this report. On 8 February 2023, IBAC disclosed to the VI an issue connected to the kinds of devices authorised in a warrant and a type of device that was installed and used. Although the warrant authorised the following devices: optical or listening, or a combination of these two, and a tracking device, IBAC used a composite listening and tracking device – noting the warrant did not specify a composite device that included tracking capabilities. IBAC further informed the VI that it disclosed this matter to the relevant judge in a supplementary report made under section 30K of the SD Act.

### ***Were issues identified at previous inspections addressed?***

The VI previously reported that IBAC made a supplementary report under section 30K of the SD Act to correct the date from which a number of surveillance devices were used. The VI inspected this supplementary report during the May 2023 inspection.

# Victoria Police

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

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

In addition, 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. Records held by the TSU in relation to these matters are inspected annually and cross-checked against records held by the SPU and TPU. On 6 June 2023, the VI inspected TSU records connected to warrants that ceased during 2022 and then cross-checked its findings against records from the same period that were inspected at the SPU and TPU. Additionally, the VI reviewed and provided feedback on an updated template the TSU will use to give details connected to the execution of surveillance device warrants.

From our regular inspections made under the SD Act, the VI inspected all 37 surveillance device warrants administered by Victoria Police's SPU and TPU that ceased in the six-month period ending 31 December 2022. In addition to records connected to the destruction of 60 surveillance device warrants, the VI also inspected 27 evidentiary certificates. Altogether, these represent all relevant surveillance device records for the period.

Three surveillance device files at the TPU were inspected on 26-27 April 2023, and 34 files at the SPU were inspected from 15-17 May 2023.

For the total number of warrants granted to Victoria Police for the period, 7 were not executed—this represents 19% of all issued warrants. It is noted that Victoria Police revoked all warrants that were not executed.

A warrant may not be executed for a number of reasons. Generally, this is due to the operation concluding before there was an opportunity to install a surveillance device.

## FINDINGS - WARRANTS

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

The VI found that all applications made for a surveillance device warrant complied with the requirements of section 15 of the SD Act.

Specifically, the VI found the following requirements were met:

- the applicant was a law enforcement officer
- approval was provided by an authorised police officer
- the applicant's name as well as the nature and duration of the warrant were specified including the type of device sought
- a sworn affidavit was provided in support

- the PIM was notified of the application
- the application was made to a Supreme Court judge or magistrate, as appropriate.

For the inspected records, Victoria Police did not make an application to extend or vary a warrant under section 20 of the SD Act.

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

All surveillance device warrants issued to Victoria Police complied with section 18 of the SD Act by specifying the following:

- the name of the applicant and alleged offence
- the date the warrant was issued, and the kind of surveillance device authorised
- the premises, object or class of object, or the name of the person (if known) in respect of which the device will be used, as applicable
- the duration of the warrant (not more than 90 days)
- the name of the law enforcement officer primarily responsible for executing the warrant
- any conditions for the installation or use of the device
- when the report under section 30K of the SD Act must be made
- the name and signature of the issuing authority (magistrate or judge).

Victoria Police did not make an application for a retrieval warrant or for an emergency authorisation to use a surveillance device during the period.

For the inspected warrants, Victoria Police revoked a warrant on 33 occasions via written instrument signed by a delegate of the Chief Commissioner of Police, in accordance with section 20A of the SD Act. Victoria Police revoked warrants in cases where it decided the use of a surveillance device was no longer necessary for the purpose of enabling evidence to be obtained of the commission of the offence or the identity or location of the offender.

Victoria Police's close monitoring of whether the grounds to keep each warrant active still exist is evidenced by the high rate of revocations (89%). For each revoked warrant where a surveillance device had been installed, Victoria Police first discontinued the use of the device pursuant to section 20B of the SD Act.

## 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 section 30M of the SD Act, including:

- each warrant issued
- each notice given under section 20A(3) for the revocation of a warrant
- each emergency authorisation, and the 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 section 30K of the SD Act to a magistrate or judge
- a copy of each evidentiary certificate issued under section 36 of the SD Act.

Victoria Police complied with these requirements for the records inspected during the period.

***Did Victoria Police keep all other necessary records?***

Victoria Police is also required to keep other records in accordance with section 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 60 surveillance device warrants in accordance with section 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 an accurate register of warrants, as required by section 30O of the SD Act.

The register specified for each warrant file inspected the following particulars:

- the date the warrant was issued
- the name of magistrate or judge who issued the warrant, as well as the name of the law enforcement officer primarily 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 did not exercise its emergency authorisation powers during the relevant period, there were no matters to be specified in the register in relation to section 30O(3) of the SD Act.

### ***Were reports to the magistrate or judge properly made?***

Under section 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 warrant.

With respect to a surveillance device warrant, the report must state whether the warrant was executed and, if it was, give the following details for its use:

- the name of each person involved in the execution of the warrant
- the kind of surveillance device used
- the period the device was used
- the name of any person whose activities or conversations were captured by the use of the device or whose geographic location was determined by the use of a tracking device, if known
- the premises for installation of the device or the location for its use, as applicable
- the object in or on which the device was installed or the premises at which the object was located when the device was installed, as applicable
- the benefit to the investigation of the use of the device 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 section 20A(2), the reason the device was no longer required and whether the PIM was notified of the revocation.

All reports made by Victoria Police under section 30K of the SD Act for warrants that ceased between 1 July and 31 December 2022 were made within the requisite timeframe. However, the SPU disclosed at inspection that two reports omitted a use of information obtained by the device(s) installed under the respective warrant. In each case, the SPU made a supplementary report to the relevant judge to correct the initial error.

## 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.

As noted in the previous inspection report, the VI has engaged in discussions with Victoria Police on its use of a particular type of data surveillance device. While these discussions have progressed, the VI's enquiries in relation to this issue remain ongoing. The VI will provide further updates in this matter in the next inspection report.

***Did Victoria Police self-disclose compliance issues?***

Victoria Police's SPU made a self-disclosure at the inspection in relation to two reports made under section 30K of the SD Act (referred to on page 13 of this report). Having identified the errors from its quality assurance checks, the SPU subsequently made a supplementary report for each warrant to the relevant judge to give an additional use of information that was obtained from the installed device(s).

***Were issues identified at previous inspections addressed?***

The VI re-inspected one warrant file during the period to confirm a correction was made for an error identified at a previous inspection of Victoria Police records. The VI confirmed the TPU made a supplementary section 30K report to the judge who issued the warrant to report additional uses for the information obtained by the installed surveillance device.