

South Australia

## Surveillance Devices Act 2016

An Act to make provision relating to the use of surveillance devices; to provide for cross-border recognition of warrants relating to surveillance devices; to repeal the *Listening and Surveillance Devices Act 1972*; to make related amendments to the *Criminal Investigation (Covert Operations) Act 2009* and the *Director of Public Prosecutions Act 1991*; and for other purposes.

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## Legislative history

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## The Parliament of South Australia enacts as follows:

## Part 1—Preliminary

### 1—Short title

This Act may be cited as the *Surveillance Devices Act 2016*.

### 2—Commencement

This Act will come into operation on a day to be fixed by proclamation.

### 3—Interpretation

- (1) In this Act, unless the contrary intention appears—

**ACC** means the Australian Crime Commission;

**associated equipment**, in relation to a surveillance device, means equipment or things used for, or in connection with, the operation of the device;

**business day** means any day other than a Saturday, Sunday or public holiday;

**chief officer** of an investigating agency means—

- (a) in the case of SA Police—the Commissioner of Police; or
- (b) in the case of the Independent Commissioner Against Corruption—the Independent Commissioner Against Corruption; or
- (c) in the case of the ACC—the Chief Executive Officer of the ACC; or
- (d) in the case of any other investigating agency—the person responsible under the legislation establishing the agency for the control and management of the agency;

**code name**—see subsection (2) and sections 19(3) and 21(3);

**corresponding emergency authority** means an authority in the nature of a surveillance device (emergency) authority under this Act issued under a corresponding law of a participating jurisdiction in relation to an offence against the law of that jurisdiction corresponding to a serious offence;

**corresponding law** means a law of another jurisdiction declared by the regulations to correspond to this Act;

**corresponding warrant** means a warrant in the nature of a surveillance device warrant under this Act issued under a corresponding law of a participating jurisdiction in relation to an offence against the law of that jurisdiction corresponding to a serious offence;

***data surveillance device*** means—

- (a) a program or device capable of being used to access, track, monitor or record the input of information into, or the output of information from, a computer; and
- (b) associated equipment (if any),

but does not include a device, or device of a class or kind, excluded from the ambit of this definition by the regulations;

***declared surveillance device*** means a surveillance device or a surveillance device of a class or kind to which for the time being section 36 applies;

***duplicate surveillance device (general) warrant***—see section 18(2)(e);

***investigating agency*** means—

- (a) SA Police; or
- (b) the Independent Commissioner Against Corruption; or
- (c) the ACC; or
- (d) an enforcement agency within the meaning of the *Telecommunications (Interception and Access) Act 1979* of the Commonwealth (an ***enforcement agency***); or
- (e) a police force of a participating jurisdiction;

***judge*** means a judge of the Supreme Court of South Australia;

***jurisdiction*** means the Commonwealth or a State or Territory of the Commonwealth;

***listening device*** means—

- (a) a device capable of being used to listen to or record a private conversation or words spoken to or by any person in private conversation (whether or not the device is also capable of operating as some other kind of surveillance device); and
- (b) associated equipment (if any),

but does not include—

- (c) a device being used to assist a person with impaired hearing to hear sounds ordinarily audible to the human ear; or
- (d) a device, or device of a class or kind, excluded from the ambit of this definition by the regulations;

***maintain***, in relation to a surveillance device, includes—

- (a) adjust, relocate, repair or service the device; and
- (b) replace a faulty device;

***media organisation*** means an organisation whose activities consist of or include the collection, preparation for dissemination or dissemination of the following material for the purpose of making it available to the public:

- (a) material having the character of news, current affairs, information or a documentary;

- (b) material consisting of commentary or opinion on, or analysis of, news, current affairs, information or a documentary;

***member of the staff of the ACC*** has the same meaning as in the *Australian Crime Commission Act 2002* of the Commonwealth;

***officer of an investigating agency*** or ***officer*** means—

- (a) in the case of SA Police—a police officer or a police officer (however described) of another jurisdiction seconded to SA Police; or
- (b) in the case of the Independent Commissioner Against Corruption—an investigator under the *Independent Commissioner Against Corruption Act 2012*; or
- (c) in the case of the ACC—a member of the Board of the ACC or a member of the staff of the ACC who is a member of the Australian Federal Police or the police force of a State or Territory of the Commonwealth; or
- (d) in the case of a police force of a participating jurisdiction—a police officer (however described) who is a member of that police force or a police officer (however described) of another jurisdiction seconded to that police force; or
- (e) in the case of an enforcement agency—a person authorised under the *Telecommunications (Interception and Access) Act 1979* of the Commonwealth to apply for a warrant under that Act;

***optical surveillance device*** means—

- (a) a device capable of being used to observe or record visually (whether for still or moving pictures) a person, place or activity; and
- (b) associated equipment (if any),

but does not include—

- (c) spectacles, contact lenses or a similar device used by a person with impaired vision to lessen or overcome that impairment; or
- (d) telescopes, binoculars or similar devices; or
- (e) a device, or device of a class or kind, excluded from the ambit of this definition by the regulations;

***participating jurisdiction*** means a jurisdiction in which a corresponding law is in force;

***premises*** includes—

- (a) land; and
- (b) a building; and
- (c) a part of a building; and
- (d) any place, whether built on or not,

whether in or outside this State;

***principal party***, in relation to a private conversation, means a person by or to whom words are spoken in the course of the conversation;

**private activity** means—

- (a) an activity carried on by only 1 person in circumstances that may reasonably be taken to indicate that the person does not desire it to be observed by any other person, but does not include—
  - (i) an activity carried on in a public place; or
  - (ii) an activity carried on or in premises or a vehicle if the activity can be readily observed from a public place; or
  - (iii) an activity carried on in any other circumstances in which the person ought reasonably to expect that it may be observed by some other person; or
- (b) an activity carried on by more than 1 person in circumstances that may reasonably be taken to indicate that at least 1 party to the activity desires it to be observed only by the other parties to the activity, but does not include—
  - (i) an activity carried on in a public place; or
  - (ii) an activity carried on or in premises or a vehicle if the activity can be readily observed from a public place; or
  - (iii) an activity carried on in any other circumstances in which a party to the activity ought reasonably to expect that it may be observed by a person who is not a party to the activity;

**private conversation** means a conversation carried on in circumstances that may reasonably be taken to indicate that at least 1 party to the conversation desires it to be heard only by the other parties to the conversation (but does not include a conversation made in circumstances in which all parties to the conversation ought reasonably to expect that it may be heard by a person who is not a party to the conversation);

**public place** includes—

- (a) a place to which free access is permitted to the public, with the express or tacit consent of the owner or occupier of that place; and
- (b) a place to which the public are admitted on payment of money, the test of admittance being the payment of money only; and
- (c) a road, street, footway, court, alley or thoroughfare which the public are allowed to use, even though that road, street, footway, court, alley or thoroughfare is on private property;

**relevant investigation** means any of the following investigations:

- (a) an investigation of an offence (whether under the law of this State or another jurisdiction);
- (b) an investigation for the purposes of the *Serious and Organised Crime (Control) Act 2008*;
- (c) an investigation for the purposes of the *Serious and Organised Crime (Unexplained Wealth) Act 2009*;
- (d) an investigation for the purposes of a proceeding for the confiscation or forfeiture of property or for the imposition of a pecuniary penalty;

- (e) an investigation of alleged misbehaviour or improper conduct of a member of a police force or an officer or employee of the State or another jurisdiction;

**relevant action or proceeding** means any of the following actions or proceedings (whether under the law of this State or another jurisdiction):

- (a) a prosecution of an offence;
- (b) an application for bail;
- (c) an application for a warrant or authority under this Act or any other Act or law;
- (d) the making, variation or revocation of a public safety order under the *Serious and Organised Crime (Control) Act 2008*;
- (e) an application for a declaration or order under the *Serious and Organised Crime (Control) Act 2008* (or an Act of another jurisdiction prescribed for the purposes of this paragraph);
- (f) the giving of an authorisation by the DPP under the *Serious and Organised Crime (Unexplained Wealth) Act 2009*;
- (g) an application under the *Serious and Organised Crime (Unexplained Wealth) Act 2009*;
- (h) the confiscation or forfeiture of property or the imposition of a pecuniary penalty;
- (i) the taking of evidence on commission for use in criminal proceedings originating in Australia;
- (j) the extradition or transfer of a person to or from Australia or a State or Territory of the Commonwealth;
- (k) a police disciplinary proceeding;
- (l) a proceeding relating to alleged misbehaviour, or alleged improper conduct, of a police officer (however described), or an officer or employee, of the State or another jurisdiction;

**responsible officer**—

- (a) in relation to a surveillance device warrant—means the officer primarily responsible for executing the warrant; and
- (b) in relation to a surveillance device (emergency) authority—means the officer primarily responsible for exercising the powers under the authority;

**review agency** for an investigating agency means—

- (a) for SA Police—the reviewer under Schedule 4 of the *Independent Commissioner Against Corruption Act 2012*; or
- (b) for the Independent Commissioner Against Corruption—a person who is independent of the Commissioner and is appointed by the Governor as the review agency;

**SA Police** means South Australia Police;

***serious drug offence*** means—

- (a) an offence against Part 5 Division 2 or 3 of the *Controlled Substances Act 1984* or a substantially similar offence against a corresponding previous enactment; or
- (b) an offence against a law of the Commonwealth dealing with the unlawful importation of drugs into Australia; or
- (c) a conspiracy to commit, or an attempt to commit, such an offence;

***serious offence*** means—

- (a) a serious drug offence; or
- (b) any of the following offences:
  - (i) an offence for which a maximum penalty prescribed is, or includes, imprisonment for at least 3 years;
  - (ii) a conspiracy to commit, or an attempt to commit, such an offence; or
  - (iii) an offence—
    - (A) of aiding or abetting, counselling or procuring any such offence; or
    - (B) of being an accessory after the fact to any such offence; or
- (c) an offence against the law of another jurisdiction corresponding to an offence referred to in a preceding paragraph;

***surveillance device*** means—

- (a) a listening device; or
- (b) an optical surveillance device; or
- (c) a tracking device; or
- (d) a data surveillance device; or
- (e) a device that is a combination of any of the devices referred to in a preceding paragraph; or
- (f) a device of a class or kind prescribed by the regulations;

***surveillance device (emergency) authority*** means a surveillance device (emergency) authority granted under Part 3 Division 3;

***surveillance device warrant*** means—

- (a) a surveillance device (tracking) warrant; or
- (b) a surveillance device (general) warrant;

***surveillance device (general) warrant*** means a warrant issued under Part 3 Division 2;

***surveillance device (tracking) warrant*** means a warrant issued under Part 3 Division 1;

***telephone*** includes any telecommunication device;



*tracking device* means—

- (a) a device capable of being used to determine the geographical location of a person, vehicle or thing; and
- (b) associated equipment (if any),

but does not include a device, or device of a class or kind, excluded from the ambit of this definition by the regulations;

*vehicle* includes any vessel or aircraft.

- (2) For the purposes of this Act, a *code name* for an officer in respect of a surveillance device warrant or surveillance device (emergency) authority means a unique identifier specified in the warrant or authority (as the case may be) instead of the officer's name.

## **Part 2—Regulation of installation, use and maintenance of surveillance devices**

### **Division 1—Installation, use and maintenance of surveillance devices**

#### **4—Listening devices**

- (1) Subject to this section and section 6, a person must not knowingly install, use or cause to be used, or maintain, a listening device—
  - (a) to overhear, record, monitor or listen to a private conversation to which the person is not a party; or
  - (b) to record a private conversation to which the person is a party.

Maximum penalty:

- (a) in the case of a body corporate—\$75 000;
  - (b) in the case of a natural person—\$15 000 or imprisonment for 3 years.
- (2) Subsection (1) does not apply—
    - (a) to the use of a listening device by a party to a private conversation to record the conversation if—
      - (i) all principal parties to the conversation consent, expressly or impliedly, to the device being so used; or
      - (ii) the use of the device is reasonably necessary for the protection of the lawful interests of that person; or
    - (b) to the installation, use or maintenance of a listening device if—
      - (i) the installation, use or maintenance is authorised under this Act or any other Act or a corresponding law; or
      - (ii) the installation, use or maintenance is authorised under the *Telecommunications (Interception and Access) Act 1979*, or another law, of the Commonwealth, or

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- (iii) the device is installed, used or maintained for the purposes of an approved undercover operation under Part 2 of the *Criminal Investigation (Covert Operations) Act 2009* by, or on behalf of, a person who is an authorised participant in the approved undercover operation; or
- (iv) the device is installed, used or maintained by a person who holds an investigation agent's licence under the *Security and Investigation Industry Act 1995* that authorises the holder of the licence to perform the functions of inquiry work and—
  - (A) the device is used by the licensee in the course of his or her functions as an investigation agent; and
  - (B) the use is reasonably necessary for the protection of the lawful interests of a person; or
- (v) the device is installed, used or maintained by a loss adjuster to whom the *Security and Investigation Industry Act 1995* does not apply and—
  - (A) the device is used by the loss adjuster in the course of his or her functions as a loss adjuster; and
  - (B) the use is reasonably necessary for the protection of the lawful interests of a person; or
- (c) to the installation, use or maintenance of a listening device on or within premises or a vehicle if—
  - (i) an owner or occupier of the premises or vehicle agrees to the installation, use or maintenance of the device; and
  - (ii) the installation, use or maintenance of the device is reasonably necessary for the protection of the lawful interests of the owner or occupier of the premises or vehicle, or some other person; or
- (d) to the use of a listening device to record any words spoken in connection with the execution of a surveillance device warrant or surveillance device (emergency) authority under this Act, or a warrant or other authority under any other Act or law; or
- (e) to the use of a listening device by an officer for the purpose of recording any words spoken by or to, or within the hearing of, the officer during activities carried out in the course of the officer's duties; or
- (f) to the unintentional hearing of a private conversation by means of a listening device; or
- (g) to the use of a listening device solely for the purposes of the location and retrieval of the device; or
- (h) to the installation, use or maintenance of a listening device in prescribed circumstances.

- (3) An exemption from subsection (1) that applies under subsection (2) or section 6 to a person in relation to the installation, use or maintenance of a listening device for the purposes of the investigation of a matter by an investigating agency extends to any other person who, for the purposes of the investigation—
- (a) installs, uses or maintains that device; or
  - (b) overhears, records, monitors or listens to the private conversation by means of that device.

## 5—Optical surveillance devices

- (1) Subject to this section and section 6, a person must not knowingly install, use or maintain an optical surveillance device on or in premises, a vehicle or any other thing, (whether or not the person has lawful possession or lawful control of the premises, vehicle or thing) to record visually or observe the carrying on of a private activity without the express or implied consent of each party to the activity.

Maximum penalty:

- (a) in the case of a body corporate—\$75 000;
  - (b) in the case of a natural person—\$15 000 or imprisonment for 3 years.
- (2) Subject to this section and section 6, a person must not knowingly install, use or maintain an optical surveillance device on or in premises, a vehicle or any other thing, to record visually or observe the carrying on of a private activity without the express or implied consent of each party to the activity and, if the installation, use or maintenance of the device involves entry onto or into the premises or vehicle, without the express or implied consent of the owner or occupier of the premises or vehicle.

Maximum penalty:

- (a) in the case of a body corporate—\$75 000;
  - (b) in the case of a natural person—\$15 000 or imprisonment for 3 years.
- (3) Subject to this section and section 6, a person must not knowingly install, use or maintain an optical surveillance device on or in premises, a vehicle or any other thing, to record visually or observe the carrying on of a private activity without the express or implied consent of each party to the activity and, if the installation, use or maintenance of the device involves interference with the premises, vehicle or thing, without the express or implied consent of the person having lawful possession or lawful control of the premises, vehicle or thing.

Maximum penalty:

- (a) in the case of a body corporate—\$75 000;
  - (b) in the case of a natural person—\$15 000 or imprisonment for 3 years.
- (4) Subsections (1) to (3) (inclusive) do not apply—
- (a) to the installation, use or maintenance of an optical surveillance device if—
    - (i) the installation, use or maintenance of the device is authorised under this Act or any other Act or a corresponding law; or
    - (ii) the installation, use or maintenance of the device is authorised under a law of the Commonwealth; or

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- (iii) the device is installed, used or maintained for the purposes of an approved undercover operation under Part 2 of the *Criminal Investigation (Covert Operations) Act 2009* by, or on behalf of, a person who is an authorised participant in the approved undercover operation; or
  - (iv) the device is installed, used or maintained by a person who holds an investigation agent's licence under the *Security and Investigation Industry Act 1995* that authorises the holder of the licence to perform the functions of inquiry work and—
    - (A) the device is used by the licensee in the course of his or her functions as an investigation agent; and
    - (B) the use is reasonably necessary for the protection of the lawful interests of a person; or
  - (v) the device is installed, used or maintained by a loss adjuster to whom the *Security and Investigation Industry Act 1995* does not apply and—
    - (A) the device is used by the loss adjuster in the course of his or her functions as a loss adjuster; and
    - (B) the use is reasonably necessary for the protection of the lawful interests of a person; or
  - (b) to the installation, use or maintenance of an optical surveillance device on premises by a person if the use of the device is reasonably necessary for the protection of the lawful interests of that person; or
  - (c) to the use of an optical surveillance device to record any activity in connection with the execution of a surveillance device warrant or surveillance device (emergency) authority under this Act, or a warrant or other authority under any other Act or law; or
  - (d) to the installation, use or maintenance of an optical surveillance device by an officer to record any activity carried out in a public place in the course of the officer's duties; or
  - (e) to the use of an optical surveillance device solely for the purpose of the location and retrieval of the device; or
  - (f) to the installation, use or maintenance of an optical surveillance device in prescribed circumstances.
- (5) An exemption from subsection (1) that applies under subsection (4) or section 6 to a person in relation to the installation, use or maintenance of an optical surveillance device for the purposes of the investigation of a matter by an investigating agency extends to any other person who, for the purposes of the investigation—
- (a) installs, uses or maintains that device; or
  - (b) records or monitors an activity by means of that device.

## 6—Listening devices and optical surveillance devices—public interest exception

- (1) Section 4 does not apply—
  - (a) to the use of a listening device to overhear, record, monitor or listen to a private conversation if the use of the device is in the public interest; or
  - (b) to the installation, use or maintenance of a listening device under subsection (2)(b)(iv) or (v) of that section if the use of the device is in the public interest.
- (2) Section 5 does not apply—
  - (a) to the use of an optical surveillance device to record visually or observe the carrying on of a private activity if the use of the device is in the public interest; or
  - (b) to the installation, use or maintenance of an optical surveillance device under subsection (4)(a)(iv) or (v), or subsection (4)(b), of that section if the use of the device is in the public interest.

## 7—Tracking devices

- (1) Subject to this section, a person must not knowingly install, use or maintain a tracking device to determine the geographical location of—
  - (a) a person without the express or implied consent of that person; or
  - (b) a vehicle or thing without the express or implied consent of the owner, or a person in lawful possession or lawful control, of that vehicle or thing.

Maximum penalty:

- (a) in the case of a body corporate—\$75 000;
  - (b) in the case of a natural person—\$15 000 or imprisonment for 3 years.
- (2) Subsection (1) does not apply—
    - (a) to the installation, use or maintenance of a tracking device if—
      - (i) the installation, use or maintenance of the device is authorised under this Act or any other Act or a corresponding law; or
      - (ii) the installation, use or maintenance of the device is authorised under a law of the Commonwealth; or
      - (iii) the device is installed, used or maintained for the purposes of an approved undercover operation under Part 2 of the *Criminal Investigation (Covert Operations) Act 2009* by, or on behalf of, a person who is an authorised participant in the approved undercover operation; or
    - (b) to the use of a tracking device solely for the purpose of the location and retrieval of the device; or
    - (c) to the installation, use or maintenance of a tracking device in prescribed circumstances.

## **8—Data surveillance devices**

- (1) Subject to this section, a person must not knowingly install, use or maintain a data surveillance device to access, track, monitor or record the input of information into, the output of information from, or information stored in, a computer without the express or implied consent of the owner, or person with lawful control or management, of the computer.

Maximum penalty:

- (a) in the case of a body corporate—\$75 000;
  - (b) in the case of a natural person—\$15 000 or imprisonment for 3 years.
- (2) Subsection (1) does not apply—
- (a) to the installation, use or maintenance of a data surveillance device if the installation, use or maintenance of the device is authorised—
    - (i) under this Act or any other Act or a corresponding law; or
    - (ii) under a law of the Commonwealth; or
  - (b) to the installation, use or maintenance of a data surveillance device in prescribed circumstances.

## **Division 2—Regulation of communication or publication of information or material derived from use of surveillance devices**

### **9—Communication or publication of information or material—lawful interest**

- (1) A person must not knowingly use, communicate or publish information or material derived from the use of a listening device or an optical surveillance device in circumstances where the device was used to protect the lawful interests of that person except—
- (a) to a person who was a party to the conversation or activity to which the information or material relates; or
  - (b) with the consent of each party to the conversation or activity to which the information or material relates; or
  - (c) to an officer of an investigating agency for the purposes of a relevant investigation or relevant action or proceeding; or
  - (d) in the course, or for the purposes, of a relevant action or proceedings; or
  - (e) in relation to a situation where—
    - (i) a person is being subjected to violence; or
    - (ii) there is an imminent threat of violence to a person; or
  - (f) to a media organisation; or
  - (g) in accordance with an order of a judge under this Division; or
  - (h) otherwise in the course of duty or as required or authorised by law.

Maximum penalty:

- (a) in the case of a body corporate—\$50 000;

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(b) in the case of a natural person—\$10 000.

- (2) A person who is a licensed investigation agent under the *Security and Investigation Industry Act 1995* must not knowingly use, communicate or publish information or material derived from the use of a listening device under section 4(2)(b)(iv), or an optical surveillance device under section 5(4)(a)(iv) except—

- (a) to a prescribed person or class of persons; or
- (b) in prescribed circumstances; or
- (c) as authorised by or under this Act or any other Act or law.

Maximum penalty:

- (a) in the case of a body corporate—\$50 000;
- (b) in the case of a natural person—\$10 000.

- (3) A loss adjuster to whom the *Security and Investigation Industry Act 1995* does not apply must not knowingly use, communicate or publish information or material derived from the use of a listening device under section 4(2)(b)(v), or an optical surveillance device under section 5(4)(a)(v) except—

- (a) to a prescribed person or class of persons; or
- (b) in prescribed circumstances; or
- (c) as authorised by or under this Act or any other Act or law.

Maximum penalty:

- (a) in the case of a body corporate—\$50 000;
- (b) in the case of a natural person—\$10 000.

## **10—Communication or publication of information or material—public interest**

- (1) A person must not knowingly use, communicate or publish information or material derived from the use of a listening device or an optical surveillance device in circumstances where the device was used in the public interest except in accordance with an order of a judge under this Division.

Maximum penalty:

- (a) in the case of a body corporate—\$50 000;
- (b) in the case of a natural person—\$10 000.

- (2) Subsection (1) does not apply to the use, communication or publication of information or material derived from the use of a listening device or an optical surveillance device in circumstances where the device was used in the public interest if—

- (a) the use, communication or publication of the information or material is made to a media organisation; or
- (b) the use, communication or publication of the information or material is made by a media organisation and the information or material is in the public interest.

### **11—Orders authorising use, communication or publication of certain information or material**

- (1) For the purposes of sections 9 and 10, a person may, in accordance with the rules of court, apply to a judge for an order authorising the use, communication or publication of information or material derived from the use of a listening device or an optical surveillance device.
- (2) An order under this section may—
  - (a) specify the information or material the subject of the order; and
  - (b) specify the manner in which, and to whom, the specified information or material may be used, communicated or published; and
  - (c) contain—
    - (i) conditions and limitations; and
    - (ii) any other matter as the judge thinks fit.

### **12—Prohibition on communication or publication derived from use of surveillance device in contravention of Part 2**

- (1) A person must not knowingly use, communicate or publish information or material derived from the use (whether by that person or another person) of a surveillance device in contravention of this Part.  
Maximum penalty:
  - (a) in the case of a body corporate—\$75 000;
  - (b) in the case of a natural person—\$15 000 or imprisonment for 3 years.
- (2) This section does not prevent the use, communication or publication of information or material derived from the use of a surveillance device in contravention of this Part—
  - (a) to a person who was a party to the conversation or activity to which the information or material relates; or
  - (b) with the consent of each party to the conversation or activity to which the information or material relates; or
  - (c) for the purposes of a relevant investigation or relevant action or proceeding relating to that contravention of this Part or a contravention of this section involving the communication or publication of that information or material; or
  - (d) in the course of proceedings for an offence against this Act; or
  - (e) otherwise in the course of duty or as required by law.
- (3) A person who obtains knowledge of information or material in a manner that does not involve a contravention of this Part is not prevented from communicating or publishing the knowledge so obtained even if the same knowledge was also obtained in a manner that contravened this Part.



## **Part 3—Surveillance device warrants and surveillance device (emergency) authorities**

### **Division 1—Surveillance device (tracking) warrants**

#### **13—Application of Division**

This Division applies if, for the purposes of the investigation of a matter by an investigating agency, the agency requires the authority—

- (a) to install on a vehicle or thing situated in a public place, or in the lawful custody of the agency, 1 or more tracking devices; and
- (b) to use those devices.

**Note—**

See also Division 2 and Division 3 in relation to the procedures to be followed if an investigating agency requires the authority of a surveillance device (general) warrant in order to install, use, maintain or retrieve surveillance devices, including tracking devices.

#### **14—Application procedure**

- (1) An officer of an investigating agency may, for the purposes of an investigation by the agency, apply to the chief officer of the agency for a surveillance device (tracking) warrant authorising—
  - (a) the use (in a public place or elsewhere) of 1 or more tracking devices; and
  - (b) such interference as is reasonably required with any vehicle or thing situated in a public place, or in the lawful custody of the agency, to install, maintain or retrieve 1 or more tracking devices.
- (2) An officer of an investigating agency may, for the purposes of an investigation by the agency, apply to the chief officer of the agency for the variation or renewal of a surveillance device (tracking) warrant.
- (3) An application for a surveillance device (tracking) warrant, or the variation or renewal of a surveillance device (tracking) warrant, may be made in person, in writing, or by fax, email, telephone or any other means of communication.
- (4) If an application is made by means other than by written application—
  - (a) the applicant must inform the chief officer of the relevant investigating agency of—
    - (i) his or her name; and
    - (ii) his or her rank or position in the investigating agency; and
    - (iii) if he or she is not to be the officer primarily responsible for executing the warrant—the name of the responsible officer; and
    - (iv) the nature and duration of the warrant sought, including the kind of tracking device to which the warrant relates; and
    - (v) the grounds on which the warrant is sought; and

- (b) the chief officer must make a contemporaneous written record of the details of the application; and
  - (c) the applicant must, within 24 hours of making the application, give to the chief officer written confirmation of the application.
- (5) If a written application is made, the application must specify—
- (a) the name of the applicant; and
  - (b) the applicant's rank or position in the investigating agency; and
  - (c) if the applicant is not to be the officer primarily responsible for executing the warrant—the name of the responsible officer; and
  - (d) the nature and duration of the warrant sought, including the kind of tracking device to which the warrant relates; and
  - (e) the grounds on which the warrant, or variation or renewal of the warrant, is sought.
- (6) The chief officer of the investigating agency to whom an application is made may require further information to be given in relation to the application.

### **15—Surveillance device (tracking) warrant**

- (1) The chief officer of an investigating agency to whom an application is made may issue a surveillance device (tracking) warrant if satisfied that there are, in the circumstances of the case, reasonable grounds for issuing the warrant, taking into account—
- (a) the nature and gravity of the criminal conduct to which the investigation relates; and
  - (b) the availability of alternative means of obtaining the information; and
  - (c) any other surveillance device warrant under this Act applied for or issued in relation to the same matter; and
  - (d) any other matter the chief officer considers relevant.
- (2) A surveillance device (tracking) warrant—
- (a) must specify—
    - (i) the name of the applicant; and
    - (ii) if the applicant is not to be the officer primarily responsible for executing the warrant—the name of the responsible officer; and
    - (iii) the name of the issuing officer; and
    - (iv) the kind of tracking device authorised to be used under the warrant; and
    - (v) if the warrant authorises the use of a tracking device in respect of the geographical location of a person—
      - (A) the name of the person (if known); or
      - (B) if the name of the person is unknown—that fact and a general description of the person; and

- (vi) the period for which the warrant will be in force (being a period not longer than 90 days); and
- (b) may contain—
  - (i) conditions and limitations; and
  - (ii) any other matter,
 as the issuing officer thinks fit.
- (3) Subject to any conditions or limitations specified in the surveillance device (tracking) warrant—
  - (a) a warrant authorising the use (in a public place or elsewhere) of a tracking device in respect of the geographical location of a specified person or a person whose specific identity is unknown who, according to the terms of the warrant, is suspected on reasonable grounds of having committed, or being likely to commit, a serious offence will be taken to authorise interference with any vehicle or thing situated in a public place, or in the lawful custody of the relevant investigating agency, as reasonably required to install, use, maintain or retrieve the device for that purpose; and
  - (b) a warrant authorising (whether under the terms of the warrant or by force of paragraph (a)) interference with any vehicle or thing in a public place, or in the lawful custody of the relevant investigating agency, will be taken to authorise the use of reasonable force or subterfuge for that purpose; and
  - (c) the powers conferred by the warrant may be exercised by the responsible officer or under the authority of the responsible officer at any time and with such assistance as is necessary.
- (4) If the chief officer of the investigating agency is satisfied that the grounds on which a surveillance device (tracking) warrant was issued have ceased to exist, the chief officer must, if the warrant is still in force, cancel the warrant by instrument in writing.
- (5) A surveillance device (tracking) warrant may, at any time, be cancelled by instrument in writing by the chief officer of the investigating agency.

## **Division 2—Surveillance device (general) warrants**

### **16—Application of Division**

This Division applies if, for the purposes of the investigation of a matter by an investigating agency, the agency requires the authority to do any or all of the following:

- (a) to use 1 or more types of surveillance device (including a tracking device);
- (b) to enter or interfere with any premises for the purposes of installing, using, maintaining or retrieving 1 or more surveillance devices;
- (c) to interfere with any vehicle or thing for the purposes of installing, using, maintaining or retrieving 1 or more surveillance devices.

## **17—Usual application procedure**

- (1) An officer of an investigating agency may, for the purposes of an investigation by the agency, apply to a judge for a surveillance device (general) warrant authorising 1 or more of the following:
  - (a) the use of 1 or more surveillance devices (including a tracking device);
  - (b) entry to or interference with any premises as reasonably required for the purposes of installing, using, maintaining or retrieving 1 or more surveillance devices;
  - (c) interference with any vehicle or thing as reasonably required for the purposes of installing, using, maintaining or retrieving 1 or more surveillance devices.
- (2) An officer of an investigating agency may, for the purposes of an investigation by the agency, apply to a judge for the variation or renewal of a surveillance device (general) warrant.
- (3) Subject to section 18, an application must be made by—
  - (a) providing a judge with an application in writing; and
  - (b) appearing personally before the judge.
- (4) A written application—
  - (a) must specify—
    - (i) the name of the applicant and the investigating agency to which the applicant belongs; and
    - (ii) the applicant's rank or position in that agency; and
    - (iii) if the applicant is not to be the officer primarily responsible for executing the warrant—the name of the responsible officer; and
    - (iv) whether the applicant or responsible officer (or both) are to be identified in the warrant under a code name; and
    - (v) the nature and duration of the warrant sought, including the kind of surveillance device to which the warrant relates; and
    - (vi) the grounds on which the warrant, or variation or renewal of the warrant, is sought; and
  - (b) must be accompanied by an affidavit verifying the application.
- (5) The judge to whom an application is made may require further information to be given in relation to the application.

## **18—Remote application procedure**

- (1) An officer of an investigating agency may, if the officer believes that it is impracticable in the circumstances to make an application in accordance with section 17, apply for the issue, variation or renewal of a surveillance device (general) warrant by fax, email, telephone or other electronic means.
- (2) If an application is made by telephone, the following provisions apply:
  - (a) the applicant must inform the judge—

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- (i) of—
    - (A) the name of the applicant and the investigating agency to which the applicant belongs; and
    - (B) the applicant's rank or position in that agency; and
    - (C) if the applicant is not to be the officer primarily responsible for executing the warrant—the name of the responsible officer; and
    - (D) whether the applicant or responsible officer (or both) are to be identified in the warrant under a code name,
 and the judge, on receiving that information, is entitled to assume its accuracy without further inquiry; and
  - (ii) of the nature and duration of the warrant sought, including the kind of surveillance device to which the warrant relates; and
  - (iii) of the circumstances giving rise to the necessity for the application to be made by telephone; and
  - (iv) of the grounds on which the warrant, or variation or renewal of the warrant, is sought;
- (b) the judge may, on being satisfied as to the circumstances giving rise to the necessity for the application being made by telephone and the grounds for the issue of a warrant, and on the applicant giving an undertaking to make an affidavit verifying the application, make out and sign a surveillance device (general) warrant;
  - (c) the warrant is to be taken to have been issued, and comes into force, when signed by the judge;
  - (d) the judge must inform the applicant of the terms of the warrant;
  - (e) the applicant must fill out and sign a warrant form (the *duplicate surveillance device (general) warrant*) that—
    - (i) sets out the name of the judge who issued the original warrant and the terms of the warrant; and
    - (ii) complies with any other requirements prescribed by regulation;
  - (f) the applicant must, as soon as practicable after the issue of the warrant, forward to the judge an affidavit verifying the application and a copy of the duplicate surveillance device (general) warrant.
- (3) If an application is made by any other means under this section, the following provisions apply:
- (a) the application must specify—
    - (i) the name of the applicant and the investigating agency to which the applicant belongs; and
    - (ii) the applicant's rank or position in that agency; and
    - (iii) if the applicant is not to be the officer primarily responsible for executing the warrant—the name of the responsible officer; and

- (iv) whether the applicant or responsible officer (or both) are to be identified in the warrant under a code name; and
  - (v) the nature and duration of the warrant sought, including the kind of surveillance device to which the warrant relates; and
  - (vi) the circumstances giving rise to the necessity for the application to be made by the particular means; and
  - (vii) the grounds on which the warrant, or variation or renewal of the warrant, is sought;
- (b) the application must be accompanied (through fax, email or other electronic means) by an affidavit made by the applicant verifying the application;
  - (c) the applicant must be available to speak to the judge by telephone;
  - (d) the judge is entitled to assume, without further inquiry, that a person who identifies himself or herself as the applicant during a telephone conversation with the judge is indeed the applicant;
  - (e) the judge may, on being satisfied as to the circumstances giving rise to the necessity for the application being made by fax, email or other electronic means and the grounds for the issue of a warrant, make out and sign a surveillance device (general) warrant;
  - (f) the warrant is to be taken to have been issued, and comes into force, when signed by the judge;
  - (g) the judge must forward the warrant to the applicant by fax, email or other electronic means.
- (4) The judge to whom an application is made may require further information to be given in relation to the application.

### **19—Surveillance device (general) warrant**

- (1) A judge to whom an application is made may issue a surveillance device (general) warrant if satisfied that there are, in the circumstances of the case, reasonable grounds for issuing the warrant, taking into account—
- (a) the extent to which the privacy of any person would be likely to be interfered with by use of the kind of device to which the warrant relates; and
  - (b) the gravity of the criminal conduct to which the investigation relates; and
  - (c) the significance to the investigation of the information sought to be obtained; and
  - (d) the likely effectiveness of the use of the surveillance device in obtaining the information sought; and
  - (e) the availability of alternative means of obtaining the information; and
  - (f) any other warrant under this Act applied for or issued in relation to the same matter; and
  - (g) any other matter the judge considers relevant.

- (2) A surveillance device (general) warrant—
- (a) subject to subsection (3), must specify—
    - (i) the name of the applicant; and
    - (ii) if the applicant is not to be the officer primarily responsible for executing the warrant—the name of the responsible officer; and
  - (b) must specify—
    - (i) the kind of surveillance device to which the warrant relates; and
    - (ii) if the warrant authorises the use of a surveillance device on or in premises or a vehicle—the premises or vehicle; and
    - (iii) if the warrant authorises the use of a surveillance device in or on a thing or a thing of a class—the thing or class of thing; and
    - (iv) if the warrant authorises the use of a surveillance device in respect of the conversations, activities or geographical location of a person—
      - (A) the name of the person (if known); or
      - (B) if the name of the person is unknown—that fact and a general description of the person; and
    - (v) the period for which the warrant will be in force (being a period not longer than 90 days); and
  - (c) may contain—
    - (i) conditions and limitations; and
    - (ii) any other matter as the judge thinks fit.
- (3) If the judge is satisfied that the disclosure in the surveillance device (general) warrant of the name of the applicant or the responsible officer may endanger the safety of the applicant, the responsible officer or some other person, the warrant may, instead, specify in respect of either or both of them a unique code approved by the judge (a *code name*).
- (4) Subject to any conditions or limitations specified in the surveillance device (general) warrant—
- (a) a warrant authorising the use of a surveillance device in respect of the conversations, activities or geographical location of a specified person, or a person whose identity is unknown, who, according to the terms of the warrant, is suspected on reasonable grounds of having committed, or being likely to commit, a serious offence will be taken to authorise—
    - (i) entry to or interference with any premises, vehicle or thing as reasonably required to install, use, maintain or retrieve the device for that purpose; and
    - (ii) the use of the device on or about the body of the person; and
  - (b) a warrant authorising (whether under the terms of the warrant or by force of paragraph (a)(i)) entry to or interference with any premises, vehicle or thing will be taken to authorise—
    - (i) the use of reasonable force or subterfuge for that purpose; and

- (ii) any action reasonably required to be taken in respect of a vehicle or thing for the purpose of installing, using, maintaining or retrieving a surveillance device to which the warrant relates; and
    - (iii) the extraction and use of electricity for that purpose or for the use of the surveillance device to which the warrant relates; and
  - (c) a warrant authorising entry to specified premises will be taken to authorise non-forcible passage through adjoining or nearby premises (but not through the interior of any building or structure) as reasonably required for the purpose of gaining entry to those specified premises; and
  - (d) the powers conferred by the warrant may be exercised by the responsible officer or under the authority of the responsible officer at any time and with such assistance as is necessary.
- (5) If the chief officer of the investigating agency is satisfied that the grounds on which a surveillance device (general) warrant was issued have ceased to exist, the chief officer must, if the warrant is still in force, cancel the warrant by instrument in writing.
- (6) A surveillance device (general) warrant may, at any time, be cancelled by instrument in writing by the chief officer of the investigating agency.

### **Division 3—Surveillance device (emergency) authorities**

#### **20—Application procedure**

- (1) An officer of an investigating agency may apply to the chief officer of the agency for a surveillance device (emergency) authority authorising 1 or more of the following:
- (a) the use of 1 or more types of surveillance device;
  - (b) entry to or interference with any premises as reasonably required for the purposes of installing, using, maintaining or retrieving 1 or more surveillance devices;
  - (c) interference with any vehicle or thing as reasonably required for the purposes of installing, using, maintaining or retrieving 1 or more surveillance devices.
- (2) An application for a surveillance device (emergency) authority may be made if the officer suspects on reasonable grounds that—
- (a) an imminent threat of serious violence to a person or substantial damage to property exists and the officer is of the opinion that—
    - (i) the use of a surveillance device is immediately necessary for the purpose of dealing with that threat; and
    - (ii) the circumstances are so serious and the matter is of such urgency that the use of a surveillance device is warranted; and
    - (iii) it is not practicable in the circumstances to apply for a surveillance device (general) warrant; or
  - (b) a serious drug offence or an offence against a law of another jurisdiction that corresponds to a serious drug offence has been, is being, or is likely to be, committed and the officer is of the opinion that—



- (i) the use of a surveillance device is immediately necessary for the purpose of an investigation into that offence, or enabling evidence or information to be obtained of the commission of that offence, or identifying or locating the offender; and
  - (ii) the circumstances are so serious and the matter is of such urgency that the use of a surveillance device is warranted; and
  - (iii) it is not practicable in the circumstances to apply for a surveillance device (general) warrant.
- (3) An application for a surveillance device (emergency) authority may be made in person, in writing, or by fax, email, telephone or any other means of communication.

## 21—Surveillance device (emergency) authority

- (1) The chief officer of an investigating agency to whom an application is made may grant a surveillance device (emergency) authority authorising anything that could be authorised under a surveillance device (general) warrant if satisfied that there are, in the circumstances of the case, reasonable grounds for granting the authority, taking into account—
- (a) if it is in relation to an imminent threat of serious violence to a person or substantial damage to property—
    - (i) the nature of the threat of serious violence or substantial damage; and
    - (ii) the extent to which the issue of a surveillance device (emergency) authority would help reduce or avoid the threat; and
    - (iii) the extent to which alternative methods of investigation could be used to help reduce or avoid the threat; and
    - (iv) how much the use of alternative methods of investigation could help reduce or avoid the threat; and
    - (v) the likelihood that the use of alternative methods of investigation would prejudice the safety of the person or property because of delay or for some other reason; and
    - (vi) whether or not it is practicable in the circumstances to apply for a surveillance device (general) warrant; and
    - (vii) any other matter the chief officer considers relevant; or
  - (b) if it is in relation to the commission of a serious drug offence or an offence against a law of another jurisdiction that corresponds to a serious drug offence—
    - (i) the nature of the serious and urgent circumstances in respect of which the surveillance device (emergency) authority is sought; and
    - (ii) the extent to which alternative methods of investigation could be used to investigate the offence; and
    - (iii) whether or not it is practicable in the circumstances to apply for a surveillance device (general) warrant; and
    - (iv) any other matter the chief officer considers relevant.

- (2) A surveillance device (emergency) authority—
- (a) subject to subsection (3), must specify—
    - (i) the name of the applicant; and
    - (ii) if the applicant is not to be the officer primarily responsible for exercising the powers under the authority—the name of the responsible officer; and
  - (b) must specify—
    - (i) the kind of surveillance device to which the authority relates; and
    - (ii) if it authorises the use of a surveillance device on or in premises or a vehicle—the premises or vehicle; and
    - (iii) if it authorises the use of a surveillance device in or on a thing or a thing of a class—the thing or class of thing; and
    - (iv) if it authorises the use of a surveillance device in respect of the conversations, activities or geographical location of a person—
      - (A) the name of the person (if known); or
      - (B) if the name of the person is unknown—that fact and a general description of the person; and
    - (v) the period for which the authority will be in force (being a period not longer than 7 days); and
  - (c) may contain—
    - (i) conditions and limitations; and
    - (ii) any other matter,as the issuing officer thinks fit.
- (3) If the chief officer of the investigating agency is of the opinion that the disclosure in the surveillance device (emergency) authority of the name of the applicant or the responsible officer is likely to endanger the safety of the applicant, the responsible officer or some other person, the authority may, instead, specify in respect of either or both of them a unique code approved by the chief officer (a *code name*).
- (4) Subject to subsection (5) and any conditions or limitations specified in the surveillance device (emergency) authority—
- (a) an authority authorising the use of a surveillance device in respect of the conversations, activities or geographical location of a specified person, or a person whose identity is unknown, who, according to the terms of the authority, is suspected on reasonable grounds of having committed, or being likely to commit, a serious offence, will be taken to authorise—
    - (i) entry to or interference with any premises, vehicle or thing as reasonably required to install, use, maintain or retrieve the device for that purpose; and
    - (ii) the use of the device on or about the body of the person; and

- (b) an authority authorising (whether under the terms of the authority or by force of paragraph (a)(i)) entry to or interference with any premises, vehicle or thing will be taken to authorise—
    - (i) the use of reasonable force or subterfuge for that purpose; and
    - (ii) any action reasonably required to be taken in respect of a vehicle or thing for the purpose of installing, using, maintaining or retrieving a surveillance device to which the warrant relates; and
    - (iii) the extraction and use of electricity for that purpose or for the use of the surveillance device to which the authority relates; and
  - (c) an authority authorising entry to specified premises will be taken to authorise non-forcible passage through adjoining or nearby premises (but not through the interior of any building or structure) as reasonably required for the purpose of gaining entry to those specified premises; and
  - (d) the powers conferred by the authority may be exercised by the responsible officer or under the authority of the responsible officer at any time and with such assistance as is necessary.
- (5) A surveillance device (emergency) authority may not authorise the installation or use of a surveillance device outside this jurisdiction.
  - (6) If the chief officer of the investigating agency is satisfied that the grounds on which a surveillance device (emergency) authority was granted have ceased to exist, the chief officer must, if the authority is still in force, cancel the authority by instrument in writing.
  - (7) A surveillance device (emergency) authority may, at any time, be cancelled by instrument in writing by the chief officer of the investigating agency.

## **22—Application for confirmation of surveillance device (emergency) authority etc**

- (1) An officer who has been granted a surveillance device (emergency) authority must, within 2 business days after the authority is granted, if the authority is still in force, apply to a judge for confirmation of—
  - (a) the authority; and
  - (b) the exercise of powers under the authority.
- (2) An application under subsection (1) must be made by—
  - (a) providing a judge with an application in writing; and
  - (b) appearing personally before the judge.
- (3) The written application—
  - (a) must specify—
    - (i) the name of the applicant and the investigating agency to which the applicant belongs; and
    - (ii) the applicant's rank or position in that agency; and
    - (iii) the kind of surveillance device to which the surveillance device (emergency) authority relates; and

- (iv) if a surveillance device (general) warrant in relation to the surveillance device is sought, the following matters:
    - (A) if the applicant is not to be the officer primarily responsible for executing the warrant—the name of the responsible officer;
    - (B) whether the applicant or responsible officer (or both) are to be identified in the warrant under a code name;
    - (C) the nature and duration of the warrant sought, including the kind of surveillance device to which the warrant relates; and
  - (v) the grounds on which confirmation and the warrant (if any) is sought; and
  - (b) must be accompanied by an affidavit verifying the application.
- (4) The judge to whom an application is made may require further information to be given in relation to the application.

### **23—Confirmation of surveillance device (emergency) authority etc**

- (1) On hearing an application under section 22, the judge—
- (a) must—
    - (i) if satisfied that the granting of the surveillance device (emergency) authority, and the exercise of powers under the authority, was justified in the circumstances—
      - (A) confirm the authority and the exercise of those powers; and
      - (B) cancel the surveillance device (emergency) authority; and
    - (ii) if a surveillance device (general) warrant is sought and the judge is satisfied that there are reasonable grounds to issue a warrant in the circumstances—issue a surveillance device (general) warrant in accordance with section 19; and
  - (b) may, if not satisfied that the circumstances justified the granting of the surveillance device (emergency) authority, make 1 or more of the following orders:
    - (i) an order that the use of the surveillance device cease;
    - (ii) an order that, subject to any conditions the judge thinks fit, the device be retrieved;
    - (iii) an order that any information obtained from or relating to the exercise of powers under the authority, or any record of that information, be dealt with in the way specified in the order;
    - (iv) any other order as the judge thinks fit.
- (2) If a judge confirms a surveillance device (emergency) authority, and the exercise of powers under the authority, evidence obtained through the exercise of those powers is not inadmissible in any proceedings merely because the evidence was obtained before the authority was confirmed.

## **Division 4—Recognition of corresponding warrants and authorities**

### **24—Corresponding warrants**

- (1) A corresponding warrant may be executed in this State in accordance with its terms as if it were a surveillance device (tracking) warrant or a surveillance device (general) warrant (as the case may be) issued under this Part.
- (2) Subsection (1) does not apply at any time after a corresponding warrant has been cancelled.

### **25—Corresponding emergency authorities**

- (1) A corresponding surveillance device (emergency) authority authorises the use of a surveillance device in accordance with its terms in this State, as if it were a surveillance device (emergency) authority granted under this Part.
- (2) Subsection (1) does not apply at any time after a judge orders, under a provision of a corresponding law, that the use of a surveillance device under the corresponding surveillance device (emergency) authority cease.

## **Division 5—Miscellaneous**

### **26—Management of records relating to surveillance device warrants etc**

- (1) The chief officer of an investigating agency by whom a surveillance device (tracking) warrant is issued, varied or renewed must cause the application and the warrant (and any copy of the warrant) as issued, varied or renewed to be managed in accordance with the regulations.
- (2) The chief officer of an investigating agency by whom a surveillance device (emergency) authority is granted must cause the application and the authority (and any copy of the authority) to be managed in accordance with the regulations.
- (3) A judge by whom a surveillance device (general) warrant is issued, varied or renewed must cause each of the following to be managed in accordance with the rules of the Supreme Court:
  - (a) the application;
  - (b) the warrant (and any duplicate or copy of the warrant) as issued, varied or renewed;
  - (c) any code name specified in the warrant;
  - (d) the affidavit verifying the application.

### **27—Limitations on use of information or material derived under this Part**

- (1) A person must not knowingly communicate or publish information or material derived from the use (whether by that person or another person) of a surveillance device under an authority under this Part except—
  - (a) to a person who was a party to the conversation or activity to which the information or material relates; or

- (b) with the consent of each party to the conversation or activity to which the information or material relates; or
- (c) for the purposes of a relevant investigation; or
- (d) for the purposes of a relevant action or proceeding; or
- (e) otherwise in the course of duty or as required by law; or
- (f) if the information or material has been taken or received in public as evidence in a relevant action or proceeding.

Maximum penalty:

- (a) in the case of a body corporate—\$75 000;
  - (b) in the case of a natural person—\$15 000 or imprisonment for 3 years.
- (2) In this section, a reference to *an authority under this Part* is a reference to—
- (a) a surveillance device warrant; or
  - (b) a surveillance device (emergency) authority; or
  - (c) a corresponding warrant; or
  - (d) a corresponding surveillance device (emergency) authority.

## **Part 4—Register, reports and records**

### **28—Interpretation**

In this Part, a reference to a *person to whom this Part applies* is a reference to—

- (a) in relation to SA Police—
  - (i) a police officer; and
  - (ii) any staff of an administrative unit of the Public Service in respect of whom the Commissioner of Police has an arrangement with the Minister administering that unit to make use of their services; and
- (b) in relation to the Independent Commissioner Against Corruption—
  - (i) an employee engaged, or an investigator appointed, by the Commissioner under the *Independent Commissioner Against Corruption Act 2012*; and
  - (ii) any staff of an administrative unit of the Public Service in respect of whom the Commissioner has an arrangement with the Minister administering that unit to make use of their services; and
- (c) an employee of the administrative unit of the Public Service that is, under the Minister, responsible for the administration of this Act.

### **29—Register**

- (1) The chief officer of an investigating agency (other than the ACC) must keep a register of warrants and authorities issued to the agency under this Act.

- (2) The register must contain the following information in relation to each surveillance device warrant issued to the investigating agency (other than a warrant issued to an officer of the agency during a period of secondment to a position outside the agency):
- (a) in the case of a surveillance device (general) warrant—
    - (i) the date of issue of the warrant and the period for which the warrant is to be in force; and
    - (ii) the name of the judge who issued the warrant; and
    - (iii) the name of the applicant for the warrant or, if the warrant specified a code name in respect of the applicant, that code name; and
    - (iv) the rank of the applicant for the warrant; and
    - (v) the name or, if the name is unknown, a general description of the person subject to the investigation in relation to which the warrant was issued; and
    - (vi) if the application for the warrant was by telephone under section 18—the date on which the applicant forwarded an affidavit and copy of the duplicate surveillance device (general) warrant to the judge as required under that section; and
    - (vii) if the warrant was issued following confirmation by a judge of a surveillance device (emergency) authority and the exercise of powers under the authority under section 23—that fact; and
    - (viii) if an application for variation of the warrant was made—the date of the application and details of the variation (if any) granted; and
    - (ix) the date of any renewal of the warrant and the period for which the renewed warrant is to be in force; and
    - (x) the period for which the warrant was actually in force (including any periods for which it was in force following renewal) and the date on which the warrant ceased to be in force;
  - (b) in the case of a surveillance device (tracking) warrant—
    - (i) the date of issue of the warrant and the period for which the warrant is to be in force; and
    - (ii) the name of the applicant for the warrant or, if the warrant specified a code name in respect of the applicant, that code name; and
    - (iii) the rank of the applicant for the warrant; and
    - (iv) the name or, if the name is unknown, a general description of the person subject to the investigation in relation to which the warrant was issued; and
    - (v) if an application for variation of the warrant was made—the date of the application and details of the variation (if any) granted; and
    - (vi) the date of any renewal of the warrant and the period for which the renewed warrant is to be in force; and

- (vii) the period for which the warrant was actually in force (including any periods for which it was in force following renewal) and the date on which the warrant ceased to be in force;
- (c) in any case—
  - (i) the dates of any arrests made on the basis or partly on the basis of information obtained by use of the surveillance device to which the warrant relates; and
  - (ii) the dates on which any prosecutions were instituted in which information obtained by use of the surveillance device formed part of the basis of the decision to prosecute; and
  - (iii) the dates on which any persons were found guilty of offences in consequence of those prosecutions; and
  - (iv) the dates on which any persons pleaded guilty to the charge of an offence in consequence of those prosecutions; and
  - (v) such other matters as may be prescribed by regulation.
- (3) The register must contain the following information in relation to each surveillance device (emergency) authority granted to an officer of the investigating agency under this Act in respect of a matter:
  - (a) the date on which the surveillance device (emergency) authority was granted;
  - (b) the name of the applicant for the surveillance device (emergency) authority or, if the authority specified a code name in respect of the applicant, that code name;
  - (c) the rank of the applicant;
  - (d) the kind of surveillance device to which the surveillance device (emergency) authority related;
  - (e) if an application was made to a judge under section 23—whether the judge did either or both of the following:
    - (i) confirmed the surveillance device (emergency) authority and the exercise of powers under the authority;
    - (ii) issued a surveillance device (general) warrant in respect of the matter.

### **30—Reports and records**

- (1) The chief officer of an investigation agency (other than the ACC) must, in relation to surveillance device warrants issued to officers of the agency under this Act give to the Minister—
  - (a) as soon as practicable after the issue, variation or cancellation of a warrant, a copy of the warrant, the warrant as varied or the instrument of cancellation (as the case may be); and
  - (b) within 3 months after a warrant ceases to be in force, a written report of—
    - (i) the use made of information obtained by use of a surveillance device to which the warrant related; and



- (ii) the communication of that information to persons other than officers of the agency; and
- (c) as soon as practicable (but not later than 2 months) after each 30 June, the following information relating to the year ending on that 30 June:
  - (i) in relation to—
    - (A) applications for surveillance device (tracking) warrants; and
    - (B) applications for surveillance device (general) warrants; and
    - (C) applications for surveillance device (general) warrants by telephone under section 18; and
    - (D) applications for variation of warrants; and
    - (E) renewal applications for warrants; and
    - (F) applications for warrants that included authorisation to enter or interfere with any premises, vehicle or thing,  
  
how many such applications were made, how many were withdrawn or refused, and how many were successful;
  - (ii) in relation to surveillance device (emergency) authorities—
    - (A) how many applications for surveillance device (emergency) authorities were made, how many were withdrawn or refused, and how many were successful; and
    - (B) how many applications for confirmation of the surveillance device (emergency) authority and the exercise of powers under the authority were made, and how many were successful;
  - (iii) the average of the respective periods specified in original warrants issued on applications made during that year as the periods for which the warrants were to be in force;
  - (iv) the average of the respective periods for which those warrants were actually in force;
  - (v) the average of the respective periods specified in renewal warrants issued on applications made during that year as the periods for which the renewals were to be in force;
  - (vi) a general description of—
    - (A) the uses made during that year of information obtained by use of surveillance devices to which a warrant related; and
    - (B) the communication of that information to persons other than officers of the agency;
  - (vii) the number of arrests made during that year on the basis or partly on the basis of information obtained by use of a surveillance device to which a warrant related;

- (viii) the number of prosecutions instituted during that period in which information obtained by such use of a surveillance device formed part of the basis of the decision to prosecute;
    - (ix) the number of occasions during that period on which information obtained by such use of a surveillance device was given in evidence in the course of a prosecution;
    - (x) the number of persons found guilty of an offence in consequence of those prosecutions during that period;
    - (xi) the number of persons who pleaded guilty to the charge of an offence in consequence of those prosecutions during that period; and
  - (d) a report on any other matter specified by the Minister at a time specified by the Minister.
- (2) The reports and information required to be given to the Minister under subsection (1) must distinguish between surveillance device (general) warrants authorising the use of listening devices and other surveillance device (general) warrants.
- (3) Subject to the regulations and any determinations of the Minister, the chief officer of an investigating agency must include in each report to the Minister under subsection (1)(c) the following information:
  - (a) the number of occasions on which a police officer or a person authorised by an officer of the agency acting in the course of his or her duty used a listening device under section 4(2)(b)(iii) (an ***approved undercover operation exemption***) during the period to which the report relates;
  - (b) the number of occasions on which, in prescribed circumstances, an officer of the agency—
    - (i) used a listening device otherwise than under an approved undercover operation exemption, surveillance device (general) warrant or surveillance device (emergency) authority; or
    - (ii) used some other surveillance device that was not installed through the exercise of powers under a surveillance device (general) warrant, surveillance device (tracking) warrant or surveillance device (emergency) authority,during the period to which the report relates;
  - (c) a general description of—
    - (i) the uses made during that period of information obtained by such use of a surveillance device; and
    - (ii) the communication of that information to persons other than officers of the agency;
  - (d) the number of arrests made during that period on the basis or partly on the basis of information obtained by such use of a surveillance device;
  - (e) the number of prosecutions instituted during that period in which information obtained by such use of a surveillance device formed part of the basis of the decision to prosecute;

- (f) the number of occasions during that period on which information obtained by such use of a surveillance device was given in evidence in the course of a prosecution;
  - (g) the number of persons found guilty of an offence in consequence of those prosecutions during that period;
  - (h) the number of persons who pleaded guilty to the charge of an offence in consequence of those prosecutions during that period;
  - (i) any other information prescribed by regulation or specified by the Minister.
- (4) The chief officer of an investigating agency must keep such records as are necessary to enable compliance with this section, including records of the persons (other than police officers) to whom that information has been communicated.
- (5) The Minister must cause a report to be prepared on or before 31 October in each year containing—
- (a) the information furnished to the Minister under subsection (1)(c) in relation to the year ending on the previous 30 June; and
  - (b) any similar information relating to warrants issued to members of the Board of the ACC or members of the staff of the ACC furnished to the Minister by the ACC in relation to the year ending on the previous 30 June; and
  - (c) from reports made to the Minister by the ACC, a general description of—
    - (i) the uses made during that year of information obtained by use of surveillance devices; and
    - (ii) the communication of that information to persons other than members of the Board of the ACC or members of the staff of the ACC.
- (6) The Minister must, within 12 sitting days of receiving a report prepared under subsection (5), have copies of the report laid before both Houses of Parliament.

### **31—Control by investigating agencies of certain records, information and material**

The chief investigating officer of an investigating agency must, in accordance with the regulations—

- (a) keep as records a copy of—
  - (i) each application for a surveillance device warrant under this Act; and
  - (ii) each surveillance device warrant issued under this Act; and
  - (iii) each application for a surveillance device (emergency) authority under this Act; and
- (b) keep any information or material derived from the use of a surveillance device under a warrant; and
- (c) control, manage access to, and destroy, any such records, information and material.

### 32—Inspection of records

A review agency for an investigating agency—

- (a) may, at any time, and must, at least once in each period of 6 months, inspect the records of the agency for the purpose of ascertaining the extent of compliance with this Act; and
- (b) must, not later than 2 months after completion of each such inspection, report in writing to the Minister on the results of the inspection.

**Note—**

Under section 55 of the *Surveillance Devices Act 2004* of the Commonwealth, the Commonwealth Ombudsman is required to inspect the records of the ACC to determine the extent of the ACC's compliance with this Act. Under section 61 of that Act, the Commonwealth Ombudsman is required to report the results of the inspection to the Commonwealth Minister, lay the report before the Commonwealth Parliament and send a copy of the report to the Minister administering this Act.

### 33—Powers of review agency

- (1) For the purposes of carrying out an inspection under this Part, the review agency for an investigating agency, or a person authorised for the purpose by the review agency for an investigating agency—
  - (a) may, after notifying the chief officer of the agency, enter at any reasonable time premises occupied by the agency; and
  - (b) is entitled to have full and free access at all reasonable times to all records of the agency; and
  - (c) is, despite any other law, entitled to make copies of, and to take extracts from, records of the agency; and
  - (d) may require a person to whom this Part applies to give the review agency or authorised person such information as the review agency considers necessary, being information that is in the person's possession, or to which the person has access, and that is relevant to the inspection.
- (2) If the review agency for an investigating agency has reason to believe that a person to whom this Part applies is able to give information relevant to an inspection under this Part, the review agency may, by written notice to the person, require the person to do either or both of the following:
  - (a) give the information, in writing, signed by the person, at a specified place and within a specified period;
  - (b) attend before a specified person at a specified place and within a specified period or at a specified time on a specified day, in order to answer questions relevant to the inspection.
- (3) If the review agency for an investigating agency has reason to believe that a person to whom this Part applies is able to give information relevant to an inspection under this Part but does not know the person's identity, the review agency may, by written notice to the chief officer of the investigating agency, require the chief officer or a person nominated by the chief officer to attend before a specified person at a specified place and within a specified period or at a specified time on a specified day, in order to answer questions relevant to the inspection.

- (4) Despite any other law, a person is not excused from giving information, answering a question, or giving access to a document, as and when required by or under this section, on the ground that it would contravene a law, would be contrary to the public interest or might tend to incriminate the person or make the person liable to a penalty.
- (5) The following are not admissible in evidence against a person except in prosecution proceedings for an offence against this Act or for perjury, or in police disciplinary proceedings:
- (a) information or an answer given by the person under this section;
  - (b) the fact that the person has given access to a document under this section;
  - (c) any information or thing (including a document) obtained in consequence of the person having given information or an answer, or access to a document, under this section.
- (6) The chief officer of an investigating agency must ensure that a person to whom this Part applies provides the review agency for the investigating agency with such assistance in relation to an inspection under this Part as the review agency reasonably requires.
- (7) A person who is required under this section—
- (a) to attend before a person; or
  - (b) to provide information; or
  - (c) to answer a question,

and who, without reasonable excuse, refuses or fails to comply with that requirement is guilty of an offence.

Maximum penalty: \$15 000 or imprisonment for 3 years.

- (8) A person who—
- (a) without reasonable excuse, hinders a person exercising powers under this section; or
  - (b) gives to a person exercising powers under this section information knowing it to be false or misleading in a material particular,

is guilty of an offence.

Maximum penalty: \$15 000 or imprisonment for 3 years.

## **Part 5—Miscellaneous**

### **34—Offence to wrongfully disclose information**

A person must not knowingly communicate or publish information or material about a surveillance device warrant or a surveillance device (emergency) authority except—

- (a) as required to do so under this Act; or
- (b) for the purposes of a relevant investigation; or
- (c) for the purposes of a relevant action or proceeding; or
- (d) in the course of proceedings for an offence against this Act; or

- (e) otherwise in the course of duty or as required by law.

Maximum penalty:

- (a) in the case of a body corporate—\$50 000;
- (b) in the case of a natural person—\$10 000 or imprisonment for 2 years.

### 35—Delegation

- (1) Despite any other Act or law to the contrary, the functions of a chief officer of an investigating agency under this Act may not be delegated to any other person except as provided by this section.
- (2) A chief officer of an investigating agency may delegate to a senior officer of the agency any of the chief officer's functions under this Act.
- (3) In this section—

*senior officer* means—

- (a) in relation to SA Police—a police officer of or above the rank of Superintendent;
- (b) in relation to the Independent Commissioner Against Corruption—an officer or an employee of the Commissioner of a prescribed class;
- (c) in relation to the ACC—
  - (i) the Director National Operations; or
  - (ii) a Director; or
  - (iii) the General Manager National Operations; or
  - (iv) a member of staff of the ACC who is an SES employee or acting SES employee (within the meaning of the *Australian Crime Commission Act 2002* of the Commonwealth) and who holds a position that is prescribed by the regulations for the purposes of this definition.

### 36—Possession etc of declared surveillance device

- (1) The Minister may, by notice in the Gazette, declare that this section applies to a surveillance device or a surveillance device of a class or kind specified in the notice.
- (2) The Minister may, by further notice in the Gazette, revoke or amend a declaration under subsection (1).
- (3) A person must not, without the consent of the Minister, have in his or her possession, custody or control any declared surveillance device.

Maximum penalty:

- (a) in the case of a body corporate—\$50 000;
  - (b) in the case of a natural person—\$10 000 or imprisonment for 2 years.
- (4) The consent of the Minister under this section—
    - (a) must be given by notice in the Gazette; and
    - (b) may be expressed to relate to the possession, custody or control of a surveillance device or to any surveillance device of a class or kind; and

- (c) may be expressed to apply to persons of a specified class; and
  - (d) may be expressed to be subject to such conditions, limitations or restrictions as the Minister considers necessary or expedient; and
  - (e) may be revoked at any time by the Minister by further notice in the Gazette (and, on revocation, the consent ceases to have effect).
- (5) For the purposes of this section, having the possession, custody or control of a surveillance device in contravention of a condition, limitation or restriction imposed by the Minister will be taken to be having the possession, custody or control of that device without the consent of the Minister.
- (6) The Minister may delegate any of his or her powers under this section to the chief executive of an administrative unit of the Public Service.
- (7) A delegation under this section—
- (a) must be in writing; and
  - (b) may be conditional or unconditional; and
  - (c) is revocable at will; and
  - (d) does not prevent the delegator from acting in any manner.

### **37—Power to seize surveillance devices etc**

- (1) If an officer of an investigating agency suspects on reasonable grounds that—
- (a) a person has possession, custody or control of a declared surveillance device without the consent of the Minister; or
  - (b) any other offence against this Act has been, is being or is about to be committed with respect to a surveillance device or information derived from the use of a surveillance device,
- the officer may seize the device or a record of the information.
- (2) An officer referred to in subsection (1) may—
- (a) break into, enter and search any premises in which the officer suspects on reasonable grounds there is a device or record liable to seizure under this section; and
  - (b) stop, detain and search, or detain and search, any vehicle that the officer suspects on reasonable grounds contains a device or record liable to seizure under this section; and
  - (c) detain and search any person who the officer suspects on reasonable grounds has possession of a device or record liable to seizure under this section.
- (3) If a device or record has been seized under this section, the device or record must, subject to any order of a court, be returned to its owner—
- (a) if no proceedings are instituted for an offence against this Act involving the device or record of information—at the expiration of 2 months from the date of seizure; or
  - (b) if such proceedings are instituted—when those proceedings are finally determined.

### **38—Imputing conduct to bodies corporate**

- (1) For the purposes of this Act, any conduct engaged in on behalf of a body corporate by an employee, agent or officer of the body corporate acting within the actual or apparent scope of his or her employment, or within his or her actual or apparent authority, is conduct also engaged in by the body corporate.
- (2) If an offence under this Act requires proof of knowledge, intention or recklessness, it is sufficient in proceedings against a body corporate for that offence to prove that the person referred to in subsection (1) had the relevant knowledge, intention or recklessness.
- (3) If, for an offence against this Act, mistake of fact is relevant to determining liability, it is sufficient in proceedings against a body corporate for that offence if the person referred to in subsection (1) made that mistake of fact.

### **39—Evidence**

- (1) In any proceedings for an offence, an apparently genuine document purporting to be signed by the chief officer of an investigating agency certifying that specified action was taken in connection with executing a specified warrant issued under this Act will, in the absence of evidence to the contrary, be accepted as proof of the matters so certified.
- (2) In any proceedings for an offence, an apparently genuine document purporting to be signed by the chief officer of an investigating agency certifying that specified action was taken in connection with the exercise of powers under a surveillance device (emergency) authority granted under this Act will, in the absence of evidence to the contrary, be accepted as proof of the matters so certified.

### **40—Forfeiture of surveillance devices**

- (1) If a person is convicted of an offence against this Act, the court before which that person was so convicted may in addition to imposing any other penalty order that a surveillance device or record of any information or material in connection with which the offence was committed is forfeited to the Crown.
- (2) A surveillance device or record of information or material forfeited to the Crown pursuant to an order under subsection (1) may be retained, destroyed or otherwise disposed of in a manner directed by the Minister.

### **41—Regulations**

- (1) The Governor may make such regulations as are contemplated by, or as are necessary or expedient for the purposes of, this Act.
- (2) Without limiting the effect of subsection (1), the regulations may—
  - (a) make provision relating to warrants, their form and proceedings in connection with warrants; and
  - (b) make provision relating to the control and management of information or material derived from the use of surveillance devices, including access to and the destruction of such information or material; and
  - (c) fix fines, not exceeding \$5 000, for offences against the regulations.



## **Schedule 1—Related amendments, repeal and transitional provisions**

### **Part 1—Preliminary**

#### **1—Amendment provisions**

In this Schedule, a provision under a heading referring to the amendment of a specified Act amends the Act so specified.

### **Part 2—Amendment of *Criminal Investigation (Covert Operations) Act 2009***

#### **2—Amendment of section 3—Interpretation**

Section 3(1), definition of *undercover operations*—delete "engaging or" and substitute:

who have engaged, are engaging or are

### **Part 3—Amendment of *Director of Public Prosecutions Act 1991***

#### **3—Amendment of section 12—Annual reports**

Section 12(1)—delete ", including the number of applications for warrants under the *Listening and Surveillance Devices Act 1972* considered, and the number approved, by the Director"

### **Part 4—Repeal and transitional provisions**

#### **4—Repeal and transitional provisions**

- (1) The *Listening and Surveillance Devices Act 1972* is repealed (the *repealed Act*).
- (2) A warrant issued under the repealed Act in force immediately before the commencement of this Part will continue in force in accordance with its terms for the period for which it was issued under the repealed Act until it expires or is cancelled (whichever occurs earlier).
- (3) Despite any other provision of this Act, if, immediately before the commencement of this Part, an investigating agency is lawfully using a tracking device to determine the geographical location of a person, vehicle or thing in relation to the investigation of a matter by the agency, section 7 will be taken not to apply in relation to the use of the device for a period of 6 months after the commencement of this Part.
- (4) Any evidence obtained directly or indirectly as a result of the use of a tracking device in circumstances referred to in subclause (3) is not inadmissible in any proceedings merely because the evidence was obtained before the commencement of this Part.
- (5) Any evidence obtained directly or indirectly as a result of the use of a listening or surveillance device in accordance with the repealed Act is not inadmissible in any proceedings merely because the evidence was obtained before the commencement of this Part.

- (6) A notice under section 8 of the repealed Act in force immediately before the commencement of this Part will be taken to be a notice under section 36 of this Act and will have effect according to its terms.
- (7) The consent of the Minister given under section 8 of the repealed Act in force immediately before the commencement of this Part will be taken to be consent of the Minister given under section 36 of this Act and will have effect according to its terms.

## Legislative history

### Notes

- For further information relating to the Act and subordinate legislation made under the Act see the Index of South Australian Statutes or [www.legislation.sa.gov.au](http://www.legislation.sa.gov.au).

### Principal Act and amendments

New entries appear in bold.

Year	No	Title	Assent	Commencement
2016	2	<i>Surveillance Devices Act 2016</i>	18.2.2016	18.12.2017 ( <i>Gazette 12.12.2017 p4961</i> )
2017	41	<i>Statutes Amendment (Attorney-General's Portfolio) (No 2) Act 2017</i>	24.10.2017	Pt 9 (s 16)—24.10.2017

### Provisions amended

New entries appear in bold.

Provision	How varied	Commencement
s 3		
s 3(1)		
review agency	amended by 41/2017 s 16	24.10.2017