

# ACT POLICING SURVEILLANCE DEVICES

Annual Report  
2016-17



**AFP**  
AUSTRALIAN FEDERAL POLICE

POLICING FOR  
A SAFER AUSTRALIA



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Information about ACT Policing can be found at the ACT Policing website [www.police.act.gov.au](http://www.police.act.gov.au) where an electronic version of this report can be found.

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3 | August 2017

Minister for Police and Emergency Services  
Legislative Assembly  
London Circuit Canberra  
ACT 2601

Dear Minister

I am pleased to submit ACT Policing's Surveillance Devices Annual Report for the financial year 1 July 2016 to 30 June 2017.

The report has been prepared in accordance with Division 5.2, s. 38 of the *Crimes (Surveillance Devices) Act 2010 (ACT)*.

I hereby certify that the attached Annual Report is an honest and accurate account and that all operations regarding surveillance devices undertaken in the ACT for the period 1 July 2016 to 30 June 2017 have been included.

In line with Division 5.2 s. 38, ss. (h) Part 4 of the Act, I understand that a copy of this report will be tabled before the ACT Legislative Assembly within 15 sitting days from the day you receive this report.

Yours sincerely

A handwritten signature in blue ink, appearing to read 'Justine', is written above the name 'Justine Saunders' which is printed in a blue sans-serif font.

Justine Saunders

## THE LEGISLATION

In July 2010 the ACT Legislative Assembly passed the *Crimes (Surveillance Devices) Act 2010* (ACT).

The objectives of the Act are to:

- a. - establish procedures for law enforcement officers to obtain warrants or emergency authorisations for the installation, use, maintenance and retrieval of surveillance devices in criminal investigations, including investigations extending beyond the ACT
- b. - allow for warrants and emergency authorisations issued in other jurisdictions to be recognised in the Territory
- c. - restrict the use, communications and publication of information obtained through the use of surveillance devices or otherwise connected with surveillance device operations
- d. - impose requirements for the secure storage and destruction of records, and the making of reports to the Legislative Assembly, in connection with surveillance device operations.

The use of surveillance devices can be undertaken with respect to any relevant offence. A relevant offence, as defined by the Act means:

- a. - an offence against an ACT law punishable by imprisonment of three years or more
- b. - an offence against an ACT law prescribed by regulation.

The kinds of warrants that may be issued under the legislation are:

- a. - a surveillance device warrant
- b. - a retrieval warrant.

A warrant may be issued in relation to one or more kinds of surveillance devices. The powers provided by this legislation are available for use by a law enforcement agency, meaning:

- a. - The Australian Federal Police (AFP)
- b. - The Australian Criminal Intelligence Commission (ACIC).

This report contains only information relating to the use of this legislation by the AFP.

## WHAT A SURVEILLANCE DEVICE WARRANT AUTHORISES

In simple terms a surveillance device warrant provides lawful authority for a law enforcement officer to use one or more categories of surveillance devices to covertly monitor and/or record the conversations or actions of a suspect or group of suspects. This monitoring and/or recording can be of the suspect/s within both private and public premises.

A surveillance device warrant may authorise one or more of the following:

- a. - the use of a surveillance device on stated premises
- b. - the use of a surveillance device in or on a stated object or class of objects
- c. - the use of a surveillance device in relation to the conversations, activities or geographical location of a stated person or a person whose identity is unknown.

A surveillance device warrant authorises:

- a. - the installation, use and maintenance of a surveillance device of the kind stated in the warrant on the stated premises; or stated object or object of the stated class; or on a premises where the person is believed on reasonable ground to be or likely to be
- b. - the entry, by force if necessary, onto the above premises, onto any premises where the object or class of objects is believed to be, or other stated premises adjoining or providing access to these premises.

Each surveillance device warrant also authorises:

- a. - retrieval of the surveillance device
- b. - installation, use, maintenance and retrieval of any enhancement equipment in relation to the surveillance device
- c. - temporary removal of an object or vehicle from premises for the purpose of the installation, maintenance or retrieval of the surveillance device or enhancement equipment and the return of the object or vehicle to the premises
- d. - breaking open of anything for the purpose of the installation, maintenance or retrieval of the surveillance device or enhancement equipment
- e. - connection of the surveillance device or enhancement equipment to an electricity supply system and the use of electricity from that system to operate the surveillance device or enhancement equipment
- f. - connection of the surveillance device or enhancement equipment to any object or system that may be used to transmit information in any form and the use of that object or system in connection with the operation of the surveillance device or enhancement equipment
- g. - the provision of assistance or technical expertise to the law enforcement officer primarily responsible for executing the warrant in the installation, use, maintenance or retrieval of the surveillance device or enhancement equipment.

A surveillance device warrant may also authorise the doing of anything reasonably necessary to conceal the fact that anything has been done in relation to the installation, use, maintenance or retrieval of a surveillance device or enhancement equipment under the warrant.

A law enforcement officer may use a surveillance device under a warrant only if the officer is acting in the performance of the officer's duty.

## **TYPES OF SURVEILLANCE DEVICES**

Under the Act the term 'surveillance device' means:

- a. - a data surveillance device, a listening device, an optical surveillance device or a tracking device
- b. - a device that is a combination of any two or more of the devices mentioned in paragraph (a)
- c. - a device of a kind prescribed by regulation.

The warrant scheme contained in this Act covers four categories of surveillance devices:

1. - Data surveillance devices – those devices, equipment or programs that are capable of being used to record or monitor data entered into or received by a computer.
2. - Listening devices – those devices capable of being used to overhear, record, monitor or listen to a conversation or words spoken to or by any person in conversation.
3. - Optical surveillance devices – those devices capable of being used to record visually or observe an activity.
4. - Tracking devices – those electronic devices that are capable of being used to work out or monitor the location of a person or an object or the status of an object.

### **APPLICATIONS FOR SURVEILLANCE DEVICE WARRANTS**

A law enforcement officer (or another person on the officer's behalf) may apply for the issue of a surveillance device warrant if the law enforcement officer suspects or believes on reasonable grounds that:

- a. - a relevant offence has been, is being, is about to be or is likely to be committed
- b. - an investigation into that offence is being, will be or is likely to be conducted in the ACT, in the ACT and in one or more participating jurisdictions or in one or more participating jurisdictions
- c. - the use of a surveillance device in the ACT, in the ACT and in one or more participating jurisdictions or in one or more participating jurisdictions is or will be necessary in the course of that investigation for the purpose of enabling evidence or information to be obtained of the commission of the relevant offence or the identity or location of the offender.

The application may be made to:

- a. - a Justice, or
- b. - for an application for a surveillance device warrant authorising the use of a tracking device only: a magistrate.

The application must:

- a. - state the name of the applicant
- b. - state the nature and duration of the warrant sought, including the type of - surveillance device sought to be authorised -
- c. - be supported by an affidavit setting out the grounds on which the warrant is sought.

The application may be made before an affidavit is prepared or sworn if:

- a. - the immediate use of the surveillance device is necessary for a purpose - mentioned above -
- b. - it is impracticable for an affidavit to be prepared or sworn before the application for a warrant is made.

If the application is made without the support of an affidavit the applicant must:

- a. - give as much information as the Justice or magistrate considers reasonably practicable in the circumstances
- b. - send a sworn affidavit, no later than 72 hours after making the application, to the Justice or magistrate, whether or not the warrant has been issued.

An application for a surveillance device warrant may be made by telephone, fax, email or any other means of communication, if an application in person is not practicable.

A separate retrieval warrant may be necessary where the surveillance device warrant has expired before a law enforcement officer was able to remove the device, or where the device was installed on an object which has been relocated to different premises from those to which the initial warrant authorised access.

The application process for a retrieval warrant mirrors the process for a surveillance device warrant.

## **DECIDING THE APPLICATIONS**

In deciding an application for the issue of a surveillance device warrant, a Justice or magistrate may issue a surveillance device warrant if satisfied that:

- a. - there are reasonable grounds for the suspicion or belief founding the application for the warrant
- b. - for an unsworn application – it would have been impracticable for an affidavit to have been prepared or sworn before the application was made
- c. - for a remote application – it would have been impracticable for the application to have been made in person.

In deciding whether a surveillance device warrant should be issued, the Justice or magistrate must have regard to the following:

- a. - the nature and gravity of the alleged offence in relation to which the warrant is sought
- b. - the extent to which the privacy of any person is likely to be affected
- c. - the existence of any alternative means of obtaining the evidence or information sought to be obtained and the extent to which those means may assist or prejudice the investigation
- d. - the evidentiary or intelligence value of any information sought to be obtained
- e. - any previous warrant sought or issued under this division or a corresponding law (if known) in connection with the same offence.

## **WHAT A SURVEILLANCE DEVICE MUST CONTAIN**

A surveillance device warrant must state that the authorising Justice or magistrate is satisfied that s. 13 of the Act was complied with; and must state the following:

- a. - the name of the applicant
- b. - the alleged offence in relation to which the warrant is issued
- c. - the date the warrant is issued
- d. - the kind of surveillance device authorised to be used
- e. - if the warrant authorises the use of a surveillance device on premises, the - premises where the use of the surveillance device is authorised -
- f. - if the warrant authorises the use of surveillance device in or on an object or class of object, the object or class of object in or on which the use of the surveillance device is authorised
- g. - if the warrant authorises the use of a surveillance device in relation to the conversations, activities or geographical location of a person, the name of the person (if known)
- h. - the period (not more than 90 days) during which the warrant is in force
- i. - the name of the law enforcement officer primarily responsible for executing the warrant
- j. - any conditions subject to which premises may be entered or a surveillance device may be used, under the warrant.

For a warrant where the identification of the person is unknown, the warrant must state the fact.

The warrant must be signed by the person authorising the warrant, and include the authorising person's name.

If the Justice or magistrate issues a warrant on a remote application, the Justice or magistrate must:

- a. - tell the applicant the terms of the warrant
- b. - tell the applicant the date and time the warrant was issued
- c. - enter the terms and date mentioned in a register kept by the Justice or - magistrate for the purpose -
- d. - give the applicant a copy of the warrant as soon as practicable.

The information required in a retrieval warrant is consistent with what is required in a surveillance device warrant.

## **REVOCACTION OF SURVEILLANCE DEVICE WARRANT**

A surveillance device warrant or a retrieval warrant may be revoked at any time before the end of the period of validity stated in it by a Justice, if a Justice issued the warrant; or a magistrate, if a magistrate issued the warrant.

A Justice or magistrate may revoke a surveillance device warrant on application by or on behalf of a law enforcement officer.

A Justice or magistrate who revokes a warrant must give notice of the revocation to the chief officer of the law enforcement agency of which the law enforcement officer to whom the warrant was issued is a member.

If the Justice or magistrate revokes the warrant on the application of a law enforcement officer, the Justice or magistrate is taken to have notified the chief officer under ss. 3 when the Justice or magistrate revokes the warrant.

A retrieval warrant can be revoked in the same way as a surveillance device warrant under Clause 17.

### **DISCONTINUANCE OF USE OF SURVEILLANCE DEVICE UNDER WARRANT**

If the law enforcement officer to whom the warrant is issued, or who is primarily responsible for executing the warrant, believes that use of a surveillance device under the warrant is no longer necessary for the purpose of enabling evidence to be obtained of the commission of the relevant offence or the identity or location of the offender, the officer must immediately tell the chief officer of the law enforcement agency.

If the chief officer of the law enforcement agency is satisfied that the use of a surveillance device under the warrant is no longer necessary for the purpose of enabling evidence to be obtained of the commission of the relevant offence or the identity or location of the offender, the chief officer must:

- a. - take the steps necessary to ensure that use of the surveillance device authorised by the warrant is discontinued as soon as practicable
- b. - ensure an application is made for the revocation of the warrant under s. 17.

If the chief officer is notified that the warrant has been revoked under s. 17, the chief officer must take the steps necessary to ensure that use of the surveillance device authorised by the warrant is discontinued immediately.

The intention of this clause is to ensure that devices are not used for purposes other than those for which the warrant was granted.

### **EMERGENCY AUTHORISATION OF A SURVEILLANCE DEVICE WARRANT**

A law enforcement officer of a law enforcement agency may apply to the chief officer of the agency for an emergency authorisation for the use of a surveillance device if, in the course of an investigation, the law enforcement officer suspects or believes on reasonable grounds that:

- a. - an imminent threat of serious violence to a person or substantial damage to property exists
- b. - the use of a surveillance device is immediately necessary for the purpose of dealing with that threat
- c. - the circumstances are so serious and the matter is of such urgency that the use of a surveillance device is warranted
- d. - it is not practicable in the circumstances to apply for a surveillance device - warrant. -

An application may be made orally, in writing or by telephone, fax, email or any other means of communication.

The chief officer may give an emergency authorisation for the use of a surveillance device on an application if satisfied that there are reasonable grounds for the suspicion or belief founding the application.

An emergency authorisation given under this section may authorise the law enforcement officer to whom it is given to do anything that a surveillance device warrant may authorise the officer to do.

Within two working days after giving an emergency authorisation, the chief officer (or another person on the officer's behalf) must apply to a Justice for approval of the exercise of powers under the emergency authorisation.

An application must state the name of the applicant; and the kind of surveillance device sought to be approved and, if a warrant is sought, the nature and duration of the warrant. It must be supported by an affidavit setting out the grounds on which the approval (and warrant, if any) is sought.

The Justice may refuse to consider the application until the applicant gives the Justice all the information the Justice requires about the application in the way the Justice requires.

An application must not be heard in open court.

### **RESTRICTIONS ON USE, COMMUNICATION AND PUBLICATION OF INFORMATION OBTAINED FROM A SURVEILLANCE DEVICE**

Under the Act 'protected information' means:

- a. - any information obtained from the use of a surveillance device under a warrant, emergency authorisation, corresponding warrant or corresponding emergency authorisation
- b. - any information relating to:
  - i. - an application for, issue of, existence of or expiry of a warrant, emergency authorisation, corresponding warrant or corresponding emergency authorisation
  - ii. - an application for approval of powers exercised under an emergency authorisation
  - iii. - an application under a corresponding law for approval of powers exercised under a corresponding emergency authorisation.

The Act provides that there be strict regulation on who may have access to information obtained from surveillance devices and for what purposes such information may be used. The Act provides a range of offences punishable by imprisonment from two to 10 years for any intentional or reckless improper use, communication or publication of protected information.

The Act also provides for the safe storage and destruction requirements for records of information and reports obtained using surveillance devices. The intention of the clause is to ensure that this information is not accessible to unauthorised persons.

## REPORTING REQUIREMENTS

The chief officer of a law enforcement agency must give a written report to the Minister that includes the following information in relation to each financial year:

- a. - the number of applications for warrants by and the number of warrants issued to law enforcement officers of the agency during the year
- b. - the number of applications for emergency authorisations by and the number of emergency authorisations given to law enforcement officers of the agency during the year
- c. - the number of remote applications for warrants by law enforcement officers of the agency during the year
- d. - the number of applications for warrants or emergency authorisations by law enforcement officers of the agency that were refused during the year, and the reasons for refusal
- e. - the number of applications for extensions of warrants by law enforcement officers of the agency during the year, the number of extensions granted or refused and the reasons why the extensions were granted or refused
- f. - the number of arrests made by law enforcement officers of the agency during the year on the basis (wholly or partly) of information obtained by the use of a surveillance device under a warrant or emergency authorisation
- g. - the number of prosecutions that were commenced in the ACT during the year in which information obtained by the use of a surveillance device under a warrant or emergency authorisation was given in evidence and the number of those prosecutions in which a person was found guilty
- h. - any other information relating to the use of surveillance devices and the administration of this Act that the minister considers appropriate. -

The information mentioned in a. and b. above, must be presented in a way that identifies the number of warrants issued and emergency authorisations given in relation to each different kind of surveillance device.

The report must be given to the Minister as soon as practicable after the end of each financial year, and in any event within three months after the end of the financial year.

The Minister must present a copy of the report to the Legislative Assembly within 15 sitting days after the day the Minister receives it.

## MONITORING BY THE OMBUDSMAN

The Ombudsman may inspect the records of a law enforcement agency to determine the extent of compliance with this Act by the agency and law enforcement officers of the agency.

For the purpose of an inspection the Ombudsman may, after notifying the chief officer of the law enforcement agency, enter at any reasonable time premises occupied by the agency; and is entitled to have full and free access at all reasonable times to all records of the agency that are relevant to the inspection.

The Ombudsman may require a member of staff of the agency to give him or her any information that he or she considers necessary, being information that is in the member's possession, or to which the member has access, and that is relevant to the inspection.

The Ombudsman must give a written report prepared under the *Annual Reports (Government Agencies) Act 2004*, on the results of each inspection under this section in the preceding financial year. The report must include a report on the comprehensiveness and adequacy of the records of the agency and the cooperation given by the agency in facilitating the inspection by the Ombudsman of those records.

## **RECENT CHANGES**

In late 2015, an issue was identified in relation to the New South Wales (NSW) *Surveillance Devices Amendment (Corresponding Law) Regulation 2017*, where the *Crimes Surveillance Devices Act 2010 (ACT)*, was not recognised. This meant that any ACT Surveillance Devices could not lawfully be installed, monitored or retrieved within NSW.

On 23 June 2017, the above issue was rectified when the NSW *Surveillance Devices Amendment (Corresponding Law) Regulation 2017* was amended to include the *Crimes Surveillance Devices Act 2010*.

**OVERVIEW OF ACT POLICING SURVEILLANCE DEVICE RECORDS 2016-17**

Number of surveillance device applications for Data Surveillance Devices	0
Number of surveillance device warrants issued for Data Surveillance Devices	0
Number of surveillance device emergency authorisations for Data Surveillance Devices	0
Number of surveillance device applications for Listening Devices	2
Number of surveillance device warrants issued for Listening Devices	2
Number of surveillance device emergency authorisations for Listening Devices	0
Number of surveillance device applications for Optical Surveillance Devices	0
Number of surveillance device warrants issued for Optical Surveillance Devices	0
Number of surveillance device emergency authorisations for Optical Surveillance Devices	0
Number of surveillance device applications for Tracking Devices	0
Number of surveillance device warrants issued for Tracking Devices	0
Number of surveillance device emergency authorisations for Tracking Devices	0
Total number of surveillance device applications – Remote	0
Total number of surveillance device applications – Rejected	0
Total number of emergency authorisations – Rejected	0
Total number of surveillance device applications for extension	0
Total number of surveillance device applications for extension – Rejected	0
Total number of arrests linked to use of surveillance devices	0
Total number of prosecutions commenced linked to use of surveillance devices	0
Total number of guilty convictions which used evidence collected by use of surveillance devices	0

**SURVEILLANCE DEVICE OPERATION NUMBER: A/SD136**

Surveillance Device
<b>Type of surveillance device</b>
Listening device
<b>Application type</b>
Standard
<b>Application authorised or refused</b>
Authorised
<b>Authorising officer</b>
Justice Richard Refshauge
<b>Date of warrant issue</b>
3 January 2017
<b>Warrant executed</b>
Yes
<b>Relevant offence being investigated by use of surveillance device warrant</b>
Murder s 12 and Accessory after the fact s717
<b>Extension or amendment of warrant</b>
No
<b>Revocation or expiry date of warrant</b>
2 February 2017
<b>Period in force</b>
30 days
<b>Outcome of warrant</b>
The information obtained from the device was assessed as being of limited use, as the offence was not discussed. The information obtained from the device has not been used.

**SURVEILLANCE DEVICE OPERATION NUMBER: A/SD137**

Surveillance Device
<b>Type of surveillance device</b>
Listening device
<b>Application type</b>
Standard
<b>Application authorised or refused</b>
Authorised
<b>Authorising officer</b>
Justice Richard Refshauge
<b>Date of warrant issue</b>
3 January 2017
<b>Warrant executed</b>
Yes
<b>Relevant offence being investigated by use of surveillance device warrant</b>
Murder s 12
<b>Extension or amendment of warrant</b>
No
<b>Revocation or expiry date of warrant</b>
2 February 2017
<b>Period in force</b>
30 days
<b>Outcome of warrant</b>
The information obtained from the device was assessed as being of limited use, as the offence was not discussed. The information obtained from the device has not been used.



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