

# technology v privacy

## – the Surveillance Devices Act 1999

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### Introduction

The Victorian parliament last year passed the *Surveillance Devices Act* ("SDA") which came into operation on 1 January 2000. The *SDA* supersedes the now repealed *Listening Devices Act* (1969) which only regulated the usage of listening devices.

The intention of the *SDA* is to take into account both developments in technology and community attitudes towards privacy issues. The *SDA* regulates the use of various types of surveillance devices for both private and law enforcement purposes. In general terms, it prohibits the use of surveillance devices by any person without the express or implied consent of each person against whom that device is intended to be used.

### Types of Devices

The term "surveillance device" is defined widely in the *SDA* to include:

- Listening devices - devices that are used to listen to or record a private conversation, eg. tape recorders, hidden microphones.
- Optical surveillance devices - devices used to record visually or observe a private activity, eg. some security cameras.
- Data surveillance devices - any device capable of being used to record or monitor the input of information into a computer or the output of information from a computer. This would cover computer scanning type devices. The *SDA* only regulates the use of data surveillance devices by law enforcement officers. Private usage does not appear to be covered.
- Tracking devices - refers to an electronic device which has the primary purpose of determining the geographic location of a person or an object.

### Extent of regulation

Under the *SDA*, only "private conversations or activities" are regulated. A private conversation or activity is defined as a conversation or activity that may be reasonably intended by the parties to be heard or observed only by themselves. Interestingly, private activities do not include those carried on outside a building or where the parties ought reasonably expect that the activity will be observed by someone else. This raises some intriguing questions. Are surveillance tapes of patrons at a casino lawfully able to be used under the *SDA*? Proprietors of gaming establishments may argue that patrons have given their implied consent because in that environment, it might reasonably be expected that the activities of patrons would be monitored. What about tapes of shoppers in department stores? Store owners would probably rely on the existence of signage which indicates that surveillance may be occurring. It really becomes a matter of fact and degree as to what circumstances might result in a person giving their implied consent.

There is a specific exemption under the *SDA* for police to visually monitor a person's activities without consent being provided by the person or persons being observed. All that is required is the consent of the occupier of the premises where the optical surveillance is taking place and that the installation of the device must be reasonably necessary to protect "any person's lawful interests".

The exclusion of the activities carried on outside a building from the definition of "private activity" is also of interest. This means that anyone can, for example, videotape the activities of others, in a public setting without there being a requirement to obtain

any form of consent. Building is defined widely to mean "any structure". Does this cover activities carried out in boats or cars? Further, there is no exception under the *SDA* for transmitting or recording private conversations outside a building. That is, consent is still required to be obtained when the conversation is recorded in a public setting. This could create an anomaly in that it appears that one can lawfully videotape someone else's activities, but it would be unlawful to record any conversations they may be having.

The maximum penalties provided under the *SDA* are 2 years imprisonment and a fine of \$40,000 per offence for individuals. Corporations are liable to receive fines of up to \$100,000 for the first offence and \$200,000 for each subsequent offence. It is noted that the maximum jail term and fine is lower for offences concerning data surveillance devices.

### Warrants

The *SDA* provides for the issuing of warrants which authorise the use by law enforcement officers of one or more surveillance devices. In determining whether a warrant should be issued, a Court must have regard to factors such as:

- the nature and gravity of the alleged offence in respect of which the warrant is sought;
- the extent to which the privacy of any person is likely to be affected;
- alternative means of obtaining the evidence or information sought to be obtained; and
- the evidentiary value of any evidence sought to be obtained.

A warrant gives the law enforcement officers wide powers to install, maintain and retrieve the device. For example: officers may temporarily

remove a vehicle from a person's premises to enable the installation of a device. It is a requirement for the person who has obtained the warrant to furnish a report to the Court within a specified time.

Another aspect of the SDA is that law enforcement officers may apply for what is known as an "assistance order" to compel another person to provide assistance to execute a warrant. This may, for example, relate to the usage of a neighbor's premises to set up surveillance. Interestingly, it is not necessary to give notice to the person who must provide assistance before an assistance order is obtained. The failure to comply with an assistance order may result in imprisonment of up to 2 years and a fine of up to \$24,000. Further, a person who is the subject of an assistance order must not knowingly disclose the existence or operation of that order to any person other than the relevant law enforcement officer or a lawyer for the purpose of obtaining legal advice.

An "emergency authorisation" to use a surveillance device may be applied for where a law enforcement officer suspects or believes that there is an imminent threat of serious violence to a person or substantial damage to property.

### **Prohibition on publication**

There is a separate prohibition under the SDA for communicating or publishing private conversations or activities (as opposed to recording them) without the express or implied consent of each party to the conversation or activity. There are a number of exceptions to this, such as where the communication or publication is "no more than is reasonably necessary" in the public interest or for the protection of the lawful interests of the author of the communication or publication. The Australian Press Council has expressed concern that the media will be required to show that a relevant

publication is in the public interest whereas there is no such requirement for transmitting or recording a private conversation or activity.

### **Conclusion**

The SDA is a piece of legislation which seeks to balance a number of different interests. It seeks to give law enforcement officers the power to use specific surveillance devices to aid law enforcement activities. It also seeks to give private individuals some protection against the use of surveillance devices by others and the publishing of material derived from them. The main "grey area" seems to be the way in which the term "implied consent" will be interpreted by the Courts. There are also some interesting aspects of the process by which assistance orders are obtained. There is no consultation stage or right of appeal prescribed by the legislation.

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