

An Overview of Coercive and Intrusive Powers in Victoria

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Introduction

Police and other investigative agencies in Victoria have access to a wide range of covert investigative powers, coercive powers and intrusive powers.

Mainly used for detection or prevention of serious criminal activity

Parliament and Courts seek to balance:

- Need for secrecy and speed in applications;
- Public interest in detection/ prevention of crime; and
- Need to protect rights of individuals subject to these powers.

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Presentation overview

Discussion of coercive and intrusive powers under:

- Surveillance Devices Act 1999
- Telecommunications (Interception and Access) Act 1979 (Cth)
- Major Crime (Investigative Powers) Act 2004
- Terrorism (Community Protection) Act 2003

Role of the Public Interest Monitor

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Surveillance Devices Act 1999

- Regulates the installation use maintenance and retrieval of surveillance devices (SDs)
- Restricts the communication/publication of info obtained via SDs
- Establishes procedures for law enforcement to obtain warrants or emergency authorisations for the installation, use, maintenance and retrieval of SDs
- Creates offences for improper use of SDs

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'Surveillance Device'

Includes:

- a data surveillance device
- a listening device
- an optical surveillance device
- a tracking device
- a combination of any 2 or devices

Applications for tracking devices may be heard in MC.

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Surveillance Devices Act 1999

Authorised agencies:

- (a) Victoria Police;
- (b) the Australian Crime Commission;
- (c) the Department of Environment, Land, Water and Planning;
- (d) the Victorian Fisheries Authority;
- (da) the IBAC;
- (e) the Game Management Authority;

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Surveillance Devices Act 1999

Court must be satisfied

- that there are reasonable grounds for the suspicion or belief that the use of a surveillance device is/ will be necessary for the purpose of
 - an investigation into an offence or
 - enabling evidence or information to be obtained of the commission of that offence or the identity or location of the offender.
- Unsworn/ remote applications if swearing an affidavit/ appearing in person would have been impracticable

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Surveillance Devices Act 1999

Matters Court must have regard to:

- The nature and gravity of the alleged offence
- Impact on privacy of any person
- Any alternative means of obtaining the evidence / information and the extent to which those means may assist or prejudice the investigation
- the evidentiary or intelligence value
- any previous warrant sought or issued in connection with the same offence; and
- any submissions made by a Public Interest Monitor.

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Surveillance Devices Act 1999

“Surveillance Device Warrant” authorises –

- Use of an SD in a specified premises/ object/ in respect of the conversations, activities or location of a specified person
- Installation, use and maintenance of the SD
- Entry – by force if necessary - into premises (or an adjoining premises), to install the SD
- Installation of enhancement equipment
- Breaking open of a thing, removal of objects, connection to electricity or transmission device

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Surveillance Devices Act 1999

- Anything necessary for concealment of the SD
- Retrieval of the SD

Maximum of 90 days. Can be extended any number of times.

Law Enforcement Officer MUST discontinue use and revoked warrant if use of SD is no longer necessary.

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Surveillance Devices Act 1999

Emergency authorisations

Only officers of VicPol, ACC, IBAC can apply

Must apply to a senior officer of the agency

Serious violent crime/substantial property damage or serious drug offences

Senior officer can grant an "authorisation" for a SD to be installed and used immediately

Officer Must apply to court within 2 days for approval of authorisation

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Telecommunications (Interception and Access) Act 1979 (Cth)

Applications for:

- Service warrant (single phone number):
- Named person warrant (any phone being used):
- Stored communications warrants
- In rare cases can apply to intercept a 3rd party
- Police and IBAC.
- Applications usually determined by nominated AAT members

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Telecommunications (Interception and Access) Act 1979 (Cth)

- Application must be supported by sworn affidavit
- Must be a 'serious offence' as defined under s5D (very convoluted)
- Remote telephone applications for urgent matters
- Maximum of 90 days (can be extended)

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Telecommunications (Interception and Access) Act 1979 (Cth)

Matters to take into account

- Impact on privacy
- Gravity of the conduct
- How much the information obtained is likely to assist the investigation
- What extend other methods of investigating available
- How much other methods likely to assist/prejudice the investigation
- Submissions of the PIM
- Number of previous warrants relating to the service/person
- Particulars of the use made of the information obtained

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Major Crime (Investigative Powers) Act 2004

Enhanced powers to allow for the investigation of organised criminal networks and "organised crime offences"

Designed to:

- Break the "code of silence" in organised crime
- Put pressure on members of criminal networks to report on people further up the hierarchy
- Provide sanctions for people who don't comply with orders to provide evidence

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'Organised crime offence'

(1) Means an indictable offence against the law of Victoria that—

- A. is punishable by level 5 imprisonment (10 years maximum) or more; and
- B. involves 2 or more offenders; and
- C. satisfies subsection (2) or (3).

(2) An offence satisfies this subsection if the offence—

- A. Involves substantial planning and organisation; and
- B. forms part of systemic and continuing criminal activity; and has a purpose of obtaining profit, gain, power or influence or of sexual gratification where the victim is a child.

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'Organised crime offence' cont

(3) An offence satisfies this subsection if 2 or more of the offenders involved in the offence are, at anytime, either declared individuals or a declared organisation members.

No declared organisations yet.

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Major Crime (Investigative Powers) Act 2004

Authorised police officer can apply to VSC for a CPO

- Grants coercive powers to the Chief Examiners Office, including:
 - Witness summons or Custody orders
 - Answer questions/produce documents or both
 - CPO in force for 12 months and can extend on application.

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Major Crime (Investigative Powers) Act 2004

Test applied by the Court:

- Reasonable suspicion of organised crime offence
- Public interest (nature/gravity of offence vs impact of powers on rights)
- Matters heard in closed court

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Major Crime (Investigative Powers) Act 2004

Legal issues that may arise with coercive power orders

- Abrogation of right against self-incrimination
- Offence to give false or misleading evidence
- Contempt for refusal to answer questions or produce document.
- LPP protection
- Limited immunity from prosecution – no derivative use immunity
- Confidentiality and non-publication requirements on persons summonsed
- VicPol can apply to rescind non-publication orders after hearings are concluded to commence prosecution
- Oversight by Victorian Inspectorate

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Terrorism (Community Protection) Act 2003

Provide powers and obligations relating to the prevention of, and the response to terrorist acts. Includes:

- Covert search warrants
- Preventative detention orders
- Police detention decisions
- Protects counter-terrorism methods from being disclosed in legal proceedings

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Terrorist Act defined: s4

Means an action or threat of action where—

- (a) the action falls within subsection (2) and does not fall within subsection (3); and
- (b) the action is done or the threat is made with the intention of advancing a political, religious or ideological cause; and
- (c) the action is done or the threat is made with the intention of—
 - (i) coercing, or influencing by intimidation, the government of the Commonwealth or a State, Territory or foreign country, or of part of a State, Territory or foreign country; or
 - (ii) intimidating the public or a section of the public.

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Terrorist Act defined: s4

- (2) Action falls within this subsection if it—
 - (a) causes serious harm that is physical harm to a person; or
 - (b) causes serious damage to property; or
 - (c) causes a person's death; or
 - (d) endangers a person's life, other than the life of the person taking the action; or
 - (e) creates a serious risk to the health or safety of the public or a section of the public; or

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Terrorist Act defined: cont

- (f) seriously interferes with, seriously disrupts, or destroys, an electronic system including, but not limited to—
 - (i) an information system; or
 - (ii) a telecommunications system; or
 - (iii) a financial system; or
 - (iv) a system used for the delivery of essential government services by any entity (whether publicly or privately owned); or

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Terrorist Act defined: cont

- (v) a system used for, or by, an essential public utility (whether publicly or privately owned); or
- (vi) a system used for, or by, a transport system.

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Terrorist Act defined: cont

- (3) Action falls within this subsection if it—
 - (a) is advocacy, protest, dissent or industrial action; and
 - (b) **is not intended—**
 - (i) to cause serious harm that is physical harm to a person; or
 - (ii) to cause a person's death; or
 - (iii) to endanger the life of a person, other than the person taking action; or
 - (iv) to create a serious risk to the health or safety of the public or a section of the public.

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Terrorism (Community Protection) Act 2003

Covert search warrants:

- Police officer (with approval of CCP, DC or AC) may apply if reasonable grounds to believe;
 - Terrorist act as been, is being, or is likely to be committed and a person who resides at or visits premises
 - Has done an act in preparation for or planning a terrorist act or
 - Has provided or received training in connection with ...a terrorist act or
 - Activity on the premises connected to above.

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Covert search warrants:

- Entry would substantially assist in preventinga terrorist act
- It is necessary to search to be conducted without occupiers knowledge
- Applications to the Supreme Court (must be closed court)
 - Supported by affidavit
- Must be heard in closed court

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- SC may issue warrant having regard to:
 - The nature and gravity of the terrorist act (or suspected terrorist act)
 - The extent ...the warrant would assist the prevention of or response to a terrorist act (or suspected terrorist act)
 - Impact on privacy of persons likely to be affected
 - PIM submissions

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Covert search warrants:

Warrant Authorises:

- Entry by force or impersonation..
- Search and seize anything named in the warrant
- Place anything in substitution for thing seized
- Copying, photographing or recording a description of anything on the premises

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Covert search warrants:

- Operate any electronic equipment on the premises
- Operate by remote entry any electronic equipment on the premises
- (if authorised) testing, taking a sample of a kind of thing.

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Covert search warrants:

- Telephone applications in urgent circumstances.
- PIM must be notified.
- Oversight by the Victorian Inspectorate
- No publication order. Criminal sanctions apply

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Police Detention Decisions

- Part 2AA. Relatively new provisions (introduced in 2018)
- Police may take person into custody and detention in order to:
 - Prevent a terrorist act that is capable of being carried out, and could occur, within the next 14 days or
 - Preserve evidence of, or relating to, a recent terrorist act
- Adult for up to 4 days
- Child for up to 36 hours. Must be kept separate.
 - Cannot detain child under 14
 - Police may request child be detained in YJ facility

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Police Detention Decisions

- Power to enter premises to search or take into custody
 - Can use reasonable force
 - No entry to residential premises between 9pm and 6am (unless not practicable or necessary to prevent loss or destruction of evidence)
- Search powers available
- Review of decision every 12 hours by a senior officer.
- PIM involved in review decisions

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Police Detention Decisions

- Person must be informed of matters after taken into custody. s13AW
- PIM must be notified after decision is made.
- Person must be treated with humanity etc
- Person must not be subjected to cruel, inhuman or degrading treatment
- Person entitled to contact certain people

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PDD Questioning

- Person can be questioned about terrorist act but must be given caution and rights. (Rights may be restricted where risks (s13AZH)
 - Time limitations on questioning without breaks
 - Person may arrange for a lawyer to be present
 - Child must have parent or guardian present (and lawyer)
 - Lawyer cannot unreasonably interfere with police questioning
 - Any questioning must be recorded (audio and visual for children) and copy given
 - Offence for others to possess recording

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Preventative Detention Orders

- Applications in writing to the VSC
- Similar grounds to PDDs
 - The 'terrorist act' must be capable of being carried out, and could occur, within the next 14 days.
 - Can get PDO for past conduct to preserve evidence.
- Must specify period applicant is seeking (max 14 days, can apply for extension)
- Must outline any previous PDOs
- SC may make conditions prohibiting or limiting questioning
- Power to make an Interim PDO pending a full hearing (48hrs max)
 - Notice must be given to the person and (if applicant aware) their lawyer. (VSC may direct VLA to provide representation)

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Preventative Detention Orders

- No Order if under 14 years.
- PIM must be notified and entitled to appear and make submissions
- Oversight by Ombudsman and IBAC

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Public Interest Monitor

- Commenced operations 13 February 2013.
- Set up in the wake of Ombudsman George Brower's report into OPI & VP phone tapping.
 - "represent the public interest and provide greater accountability in the collection of evidence from warrants and orders that intrude on the privacy and civil liberties of Victorian citizens"
- PIM entitled to appear at any hearing of a *relevant application* to test the content and sufficiency of the information relied on and the circumstances of the application.
 - Entitled to ask questions and make submissions
 - Must receive all documents
 - Offence to withhold information that is adverse to an application

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Public Interest Monitor

- Brendan Murphy QC appointed Principal PIM until his resignation and return to the Bar in July 2018.
- Janine Gleeson and Joanne Smith appointed Deputy Public Interest Monitors.
 - Joanne Smith resigned in 2015. Victoria Elliott appointed
- Michael Strong appointed PPIM in January 2019.
- Most applications by VP & IBAC
 - 2018 Annual Report shows 387 applications
 - 338 by VP
 - 44 by IBAC
 - 7 applications refused
 - 12 application withdrawn
