



Australian Government
Attorney-General's Department

**National Security Law
& Policy Division**

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Chair
House of Representatives Standing Committee on Social Policy and Legal Affairs
PO Box 6100
Parliament House
CANBERRA ACT 2600

Dear Chair

Roundtable on Drones and Privacy – 20 March 2014

During the Attorney-General's Department's appearance at the roundtable of 20 March 2014, the Department agreed to provide the Committee with responses to a number of questions in regards to the Department's administration of the *Surveillance Devices Act 2004* and the *Privacy Act 1988*.

1. Link to the most recent annual report under the Surveillance Devices Act

The Attorney-General, as Minister for the Surveillance Devices Act, tables a report in Parliament on the use of surveillance devices under the Act for each financial year.

These reports are published on the Attorney-General's Department's website following the tabling of the report in Parliament. Links to these reports can be found at the following address:
<http://www.ag.gov.au/NationalSecurity/TelecommunicationsSurveillance/Pages/Annualreports.aspx>

The previous report under the Surveillance Devices Act for the 2012-13 financial year was tabled in Parliament on 12 December 2013.

2. Study on consistency of surveillance device laws between State and Commonwealth agencies

In November 2003, the 'Joint Working Group on National Investigation Powers' of the Standing Committee of Attorneys-General and Australasian Police Ministers Council issued a report entitled *Cross-border investigative powers for law enforcement* (ISBN 0642211388). The report made recommendations on a number of model laws for Commonwealth and State agencies' use in cross-border investigations, including surveillance devices legislation.

The Surveillance Devices Act was broadly based upon these model laws for surveillance devices developed by the Joint Working Group, and the provisions of the Surveillance Devices Act are similarly focused on the investigative capabilities of law enforcement agencies.

The Department does not currently have a copy of the report in our library. However, our library has contacted the Parliamentary Library to confirm that a copy of the report is available in the Parliamentary Library's Reference Collection. We are advised that the Committee can access the report on request from the Parliamentary Library by contacting Mr Leo Terstra via the Parliament House extension number 2787.

3. Surveillance device legislation of the Commonwealth, States and Territories

The Commonwealth Surveillance Devices Act does not contain any prohibitions on the use of surveillance devices – these prohibitions are found in the surveillance device laws of the States and Territories. The Commonwealth Act authorises the use of surveillance devices where the use would ordinarily be prohibited under a State or Territory law.

While the surveillance devices legislation of the States and Territories vary in their dealings with the use and regulation of surveillance devices, they share similar core provisions:

- The laws of the States and Territories regulate, with variations, the use of listening devices, optical surveillance devices, tracking devices and data surveillance devices.
- Where the legislation of a State or Territory does not expressly prohibit one of the above surveillance devices, other laws of that State or Territory may act to prohibit the use of that surveillance device when it is used to breach a person's privacy.
- The legislation of New South Wales, Victoria and the Australian Capital Territory regulates the use of surveillance devices in the workplace.

Legislative provisions for the use of surveillance devices under legislation of the States and Territories are noted in brief in **Attachment A** to this letter. In addition, the Department notes that the Australian Law Reform Commission has released a Discussion Paper entitled *Serious Invasions of Privacy in the Digital Era*, which has reviewed the surveillance device legislation of the States and Territories in respect of privacy matters.

4. Extraterritorial application of the Privacy Act 1988

The starting point is that Australian laws are presumed not to apply extraterritorially, that is, beyond Australian territory, unless otherwise indicated. In this case, section 5B of the Privacy Act contains an express provision which applies its provisions 'outside Australia and the external Territories' in certain circumstances. Subsection 5B(1A) provides that the Privacy Act operates extraterritorially in relation to organisations and small businesses that have an 'Australian link', which is defined in subsection 5B(2) of the Privacy Act. Accordingly, where the circumstances provided in section 5B of the Privacy Act exist, the Privacy Act will apply extraterritorially, including in the Exclusive Economic Zone.

We trust that the above has been of assistance.

Yours sincerely

Catherine Smith
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Telecommunications and Surveillance Law Branch

Attachment A – Legislation of the States and Territories involving surveillance devices

- *New South Wales:* The *Surveillance Devices Act 2007* (NSW) contains general prohibitions on the use of listening devices, optical surveillance devices, tracking devices and data surveillance devices, and contains a warrants regime for these surveillance devices.
The *Workplace Surveillance Devices Act 2005* (NSW) also regulates the use of surveillance devices in the workplace (excluding listening devices).
- *Victoria:* The *Surveillance Devices Act 1999* (Vic) contains general prohibitions on the use of listening devices, optical surveillance devices and tracking devices, a prohibition on unlawful use of data surveillance devices by law enforcement officers (excluding under consent, under a warrant or emergency authorisation, or a law of the Commonwealth), and a warrants regime for the use of these surveillance devices. This Act also contains prohibitions on the use of optical surveillance devices and listening devices in the workplace in certain circumstances.
- *Queensland:* The *Invasion of Privacy Act 1971* (Qld) contains general prohibitions on the use of listening devices and section 227A of the *Criminal Code Act 1899* (Qld) contains a general prohibition on observing or recording a person in breach of privacy.
The *Police Powers and Responsibilities Act 2000* (Qld) and *Crime and Misconduct Act 2001* (Qld) contain a warrants regime for listening devices, optical surveillance devices, tracking devices and data surveillance devices.
- *South Australia:* The *Listening and Surveillance Devices Act 1972* (SA) contains general prohibitions on the use of listening devices, and a warrants regime for listening devices, visual surveillance devices or tracking devices. Section 26D of the *Summary Offences Act 1953* (SA) contains prohibitions on indecent filming. In addition, section 19AA of the *Criminal Law Consolidation Act 1935* (SA) also contains prohibitions on stalking involving persons kept under surveillance on at least two separate occasions with the intention to cause serious harm or fear.
- *Tasmania:* The *Listening Devices Act 1991* (Tas) contains general prohibitions and a warrants regime for the use of listening devices and section 13A of the *Police Offences Act 1935* (Tas) contains a general prohibition on observing or recording a person in breach of privacy.
The *Police Powers (Surveillance Devices) Act 2006* (Tas) contains a warrants regime for listening devices, optical surveillance devices, tracking devices and data surveillance devices. In addition, section 192 of the *Criminal Code Act 1924* (Tas) also contains prohibitions on stalking involving persons kept under surveillance on at least two separate occasions with the intention to cause serious harm or fear.
- *Western Australia:* The *Surveillance Devices Act 1998* (WA) contains general prohibitions on the use of listening devices, optical surveillance devices, tracking devices, and a warrants regime for these surveillance devices. The *Criminal Investigation Act 2006* (WA) contains a ‘data access order’ regime for police officers in order to obtain computer data and records.

- *Australian Capital Territory*: The *Listening Devices Act 1992* (ACT) contains general prohibitions on the use of listening devices, and the *Crimes (Surveillance Devices) Act 2010* (ACT) contains a warrants regime for listening devices, optical surveillance devices, tracking devices and data surveillance devices. The *Workplace Privacy Act 2011* (ACT) also regulates the use of optical surveillance devices, data surveillance devices and tracking devices in the workplace. In addition, section 35 of the *Crimes Act 1900* (ACT) also contains prohibitions on stalking involving persons kept under surveillance on at least two separate occasions with the intention to cause serious harm or fear.
- *Northern Territory*: The *Surveillance Devices Act* (NT) contains general prohibitions on the use of listening devices, optical surveillance devices, tracking devices, a prohibition on unlawful use of data surveillance devices by law enforcement officers (excluding under consent, under a warrant or emergency authorisation, or a law of the Commonwealth), and a warrants regime for the use of these surveillance devices. Section 47(f) of the *Summary Offences Act* (NT) contains a prohibition on unreasonably disrupting the privacy of another person.