



New South Wales

Surveillance Devices Amendment (Statutory Review) Bill 2018

Explanatory note

This explanatory note relates to this Bill as introduced into Parliament.

The following Bills are cognate with this Bill:

Road Transport Amendment (National Facial Biometric Matching Capability) Bill 2018,

Terrorism (Police Powers) Amendment (Statutory Review) Bill 2018.

Overview of Bill

The objects of this Bill are as follows:

- (a) to provide for the appointment of a Surveillance Devices Commissioner,
- (b) to include an objects provision in the *Surveillance Devices Act 2007*,
- (c) to permit the use of an optical surveillance device without a warrant if the use is as part of a controlled operation,
- (d) to make consistent the information that is required to be in a **warrant** (being either a surveillance device warrant or a retrieval warrant), the information that is required to be in the application for the warrant and the information that is required to be provided to the Attorney General about the application for the warrant,
- (e) to remove a requirement for an application to revoke a warrant that is no longer needed if the warrant will cease to be in force within 5 days,
- (f) to require an applicant for a warrant to include in the application any information known to the applicant that may be adverse to the warrant application,
- (g) to require an applicant for a surveillance device warrant to identify persons who may be incidentally recorded by the surveillance device,

- (h) to require the annual report of the Department of Justice to include information about applications for warrants,
- (i) to require an application for an authority to conduct a controlled operation to include details of the proposed use of a listening device or optical surveillance device without a warrant.

Outline of provisions

Clause 1 sets out the name (also called the short title) of the proposed Act.

Clause 2 provides for the commencement of the proposed Act on a day or days to be appointed by proclamation.

Schedule 1 Amendment of Surveillance Devices Act 2007 No 64

Schedule 1 [1] sets out the objects of the *Surveillance Devices Act 2007* (the *principal Act*).

Schedule 1 [19] provides for the appointment of a Surveillance Devices Commissioner. The person appointed must be an Australian legal practitioner with at least 7 years experience who is, has been (or is eligible to be) a Judge or judicial officer. **Schedule 1 [19]** also permits the Attorney General to delegate functions under Part 3 (Warrants) or 5 (Compliance and monitoring) of the principal Act to the Surveillance Devices Commissioner, the Solicitor General, the Crown Advocate or a person authorised by the regulations under the principal Act. **Schedule 1 [2]** includes a definition of *Surveillance Devices Commissioner* for the purposes of the principal Act.

Schedule 1 [3] permits the use of an optical surveillance device without a warrant if the use is as part of a controlled operation. This is currently permitted in relation to listening devices. **Schedule 1 [4], [16] and [17]** make consequential amendments.

Schedule 1 [5]–[8] and [10]–[13] make consistent the information that is required to be in a warrant (being either a surveillance device warrant or a retrieval warrant), the information that is required to be in the application for the warrant and the information that is required to be provided to the Attorney General about the application for the warrant. An application for a warrant must now include any information known to the applicant that may be adverse to the warrant application or, if no adverse information is known, a statement to that effect. In addition, an application for a surveillance device warrant must now also identify persons who may be incidentally recorded by the surveillance device. **Schedule 1 [20]** makes a consequential amendment.

Schedule 1 [9] provides that the chief officer of a law enforcement agency who is satisfied that the use of a surveillance device under a surveillance device warrant is no longer necessary is not required to apply for the revocation of the warrant if the warrant will cease to be in force within 5 days after the day on which the chief officer became satisfied.

Schedule 1 [14] and [15] clarify that an application for the retrospective approval of an emergency authorisation to use a surveillance device may also be accompanied by an application for a surveillance device warrant (to permit the continued use of the surveillance device). Both applications may be determined at the same time. However, the application for the warrant is to be made in the same way as any other application for a surveillance device warrant.

Schedule 1 [18] provides that the annual report of the Department of Justice must include certain information about applications for warrants.

Schedule 1 [21] permits the regulations made under the principal Act to prescribe the form in which an application for a warrant is to be made.

Schedule 1 [22] contains savings and transitional provisions consequent on the other amendments made by Schedule 1.

Schedule 2 Amendment of Law Enforcement (Controlled Operations) Act 1997 No 136

Schedule 2 requires an application for an authority to conduct a controlled operation to include details of the proposed use of a listening device or optical surveillance device as part of that operation if the use will be carried out other than in accordance with a surveillance device warrant.



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New South Wales

Surveillance Devices Amendment (Statutory Review) Bill 2018

No. , 2018

A Bill for

An Act to make miscellaneous amendments to the *Surveillance Devices Act 2007* following the statutory review of that Act; and to amend the *Law Enforcement (Controlled Operations) Act 1997* with respect to applications for authorities to conduct a controlled operation involving the use, without a warrant, of a surveillance device.

See also the *Road Transport Amendment (National Facial Biometric Matching Capability) Bill 2018* and the *Terrorism (Police Powers) Amendment (Statutory Review) Bill 2018*.

The Legislature of New South Wales enacts:

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1 Name of Act

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This Act is the *Surveillance Devices Amendment (Statutory Review) Act 2018*.

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2 Commencement

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This Act commences on a day or days to be appointed by proclamation.

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| Schedule 1 | Amendment of Surveillance Devices Act 2007 | 1 |
| | No 64 | 2 |
| [1] Section 2A | | 3 |
| Insert after section 2: | | 4 |
| 2A Objects of Act | | 5 |
| The objects of this Act are: | | 6 |
| (a) to provide law enforcement agencies with a comprehensive framework for the use of surveillance devices in criminal investigations, and | | 7 |
| (b) to enable law enforcement agencies to covertly gather evidence for the purposes of criminal prosecutions, and | | 8 |
| (c) to ensure that the privacy of individuals is not unnecessarily impinged upon by providing strict requirements around the installation, use and maintenance of surveillance devices. | | 9 |
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| [2] Section 4 Definitions | | 14 |
| Insert in alphabetical order in section 4 (1): | | 15 |
| <i>Surveillance Devices Commissioner</i> means the Surveillance Devices Commissioner appointed under section 51A. | | 16 |
| | | 17 |
| [3] Section 8 Installation, use and maintenance of optical surveillance devices without consent | | 18 |
| Insert after section 8 (2): | | 19 |
| (2A) Subsection (1) does not apply to the use of an optical surveillance device to record visually or observe the carrying on of an activity if: | | 20 |
| (a) a party to the activity is a participant in an authorised operation and, if the participant is a law enforcement officer, the participant is using an assumed name or assumed identity, and | | 21 |
| (b) the person using the optical surveillance device is that participant or another participant in that authorised operation. | | 22 |
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| | | 27 |
| [4] Section 8 (3) | | 28 |
| Insert in alphabetical order: | | 29 |
| <i>authorised operation</i> and <i>participant</i> in an authorised operation have the same meanings as in the <i>Law Enforcement (Controlled Operations) Act 1997</i> . | | 30 |
| Note. The definition of <i>participant</i> in an authorised operation includes a <i>civilian participant</i> within the meaning of the <i>Law Enforcement (Controlled Operations) Act 1997</i> . | | 31 |
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| [5] Section 17 Application for a surveillance device warrant | | 35 |
| Omit section 17 (3). Insert instead: | | 36 |
| (3) An application must include the following information: | | 37 |
| (a) the information required (having regard to the warrant being sought) to complete the surveillance device warrant particulars set out in section 20 (1), | | 38 |
| (b) details of any other alternative means of obtaining the evidence or information sought under the warrant and the extent to which those means may assist or prejudice the investigation, | | 39 |
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| (c) | whether an attempt has been made to use an alternative means and, if so, the result of the attempts, | 1 2 |
| (d) | details of any previous warrant or emergency authorisation sought or issued under this Act in connection with the same relevant offence. | 3 4 |
| (3A) | Subject to this section, an application must be accompanied by an affidavit that: | 5 6 |
| (a) | supports the application and sets out the grounds on which the warrant is sought, and | 7 8 |
| (b) | as far as reasonably practicable identifies persons who may be incidentally recorded by the surveillance device, and | 9 10 |
| (c) | includes any information known to the applicant that may be adverse to the warrant application or, if no adverse information is known, a statement to that effect. | 11 12 13 |
| [6] | Section 17 (5A) | 14 |
| | Insert after section 17 (5): | 15 |
| (5A) | A notice containing the information in subsections (3) and (3A) (b) and (c) must also be served on the Attorney General. | 16 17 |
| [7] | Section 19 Determining an application | 18 |
| | Insert at the end of section 19 (1) (c): | 19 |
| | , and | 20 |
| (d) | except in the case of a remote application—the notice referred to in section 17 (5A) has been served on the Attorney General, and | 21 22 |
| (e) | in the case of a remote application—the Attorney General has been notified of the application and been given as much of the information required to be included in the notice referred to in section 17 (5A) as it is reasonable to provide in the circumstances, and | 23 24 25 26 |
| (f) | the Attorney General has had an opportunity to be heard in relation to the granting of the warrant. | 27 28 |
| [8] | Section 20 Contents of surveillance device warrants | 29 |
| | Omit section 20 (1) and (2). Insert instead: | 30 |
| (1) | A surveillance device warrant must specify the following (the <i>surveillance device warrant particulars</i>): | 31 32 |
| (a) | the name of the applicant, | 33 |
| (b) | the alleged relevant offence in respect of which the warrant is issued, | 34 |
| (c) | the kind of surveillance device authorised to be used, | 35 |
| (d) | if the warrant authorises the use of a surveillance device on or in premises or a vehicle—the premises or vehicle on or in which the use of the surveillance device is authorised, | 36 37 38 |
| (e) | if the warrant authorises the use of a 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, | 39 40 41 |
| (f) | if the warrant authorises the use of a surveillance device on or about the body of a person—the name of the person (or, if the identity of the person is unknown, that fact), | 42 43 44 |

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| (g) | if the warrant authorises the use of a surveillance device in respect of the conversations, activities or geographical location of a person—the name of the person (if known), | 1 2 3 |
| (h) | the name of the law enforcement officer primarily responsible for executing the warrant, | 4 5 |
| (i) | the period during which the warrant is to be in force, being a period not exceeding 90 days. | 6 7 |
| (2) | A warrant must also include the following: | 8 |
| (a) | a statement that the eligible Judge or eligible Magistrate is satisfied of the matters referred to in section 19 (1) and has had regard to the matters referred to in section 19 (2), | 9 10 11 |
| (b) | the date the warrant is issued, | 12 |
| (c) | the date on which the warrant commences, being not more than 10 days after the date on which the warrant is issued, | 13 14 |
| (d) | details of any conditions subject to which premises or a vehicle may be entered, or a surveillance device used, under the warrant, | 15 16 |
| (e) | the period within which a report about the use of the surveillance device authorised by the warrant must be furnished to the eligible Judge or eligible Magistrate under section 44 (1), being a period that expires not less than 60 days after the expiry of the warrant. | 17 18 19 20 |
| [9] | Section 24 Discontinuance of use of surveillance device under warrant | 21 |
| | Insert after section 24 (2): | 22 |
| (2A) | The chief officer of the law enforcement agency is not required to cause an application to be made for the revocation of a warrant under section 23 if the warrant will cease to be in force within 5 days after the day on which the chief officer became satisfied the use of a surveillance device under the warrant was no longer necessary. | 23 24 25 26 27 |
| [10] | Section 25 Application for a retrieval warrant | 28 |
| | Omit section 25 (3). Insert instead: | 29 |
| (3) | An application must include the information required (having regard to the warrant being sought) to complete the retrieval warrant particulars set out in section 28 (1). | 30 31 32 |
| (3A) | Subject to this section, an application must be accompanied by an affidavit that: | 33 34 |
| (a) | supports the application and sets out the grounds on which the warrant is sought, and | 35 36 |
| (b) | includes any information known to the applicant that may be adverse to the warrant application or, if no adverse information is known, a statement to that effect. | 37 38 39 |
| [11] | Section 25 (5A) | 40 |
| | Insert after section 25 (5): | 41 |
| (5A) | A notice containing the information in subsections (3) and (3A) (b) must also be served on the Attorney General. | 42 43 |

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| [12] Section 27 Determining an application | 1 |
| Insert at the end of section 27 (1) (c): | 2 |
| , and | 3 |
| (d) except in the case of a remote application—the notice referred to in section 25 (5A) has been served on the Attorney General, and | 4 |
| (e) in the case of a remote application—the Attorney General has been notified of the application and been given as much of the information required to be included in the notice referred to in section 25 (5A) as it is reasonable to provide in the circumstances, and | 5 |
| (f) the Attorney General has had an opportunity to be heard in relation to the granting of the warrant. | 6 |
| [13] Section 28 Contents of retrieval warrants | 7 |
| Omit section 28 (1). Insert instead: | 8 |
| (1) A retrieval warrant must specify the following (the <i>retrieval warrant particulars</i>): | 9 |
| (a) the name of the applicant, | 10 |
| (b) the kind of surveillance device authorised to be retrieved, | 11 |
| (c) the premises, vehicle or other object from which the surveillance device is to be retrieved, | 12 |
| (d) the name of the law enforcement officer primarily responsible for executing the warrant, | 13 |
| (e) the period during which the warrant is to be in force, being a period not exceeding 90 days. | 14 |
| (1A) A warrant must also include the following: | 15 |
| (a) a statement that the eligible Judge or eligible Magistrate is satisfied of the matters referred to in section 27 (1) and has had regard to the matters referred to in section 27 (2), | 16 |
| (b) the date the warrant is issued, | 17 |
| (c) the date on which the warrant commences, being not more than 10 days after the date on which the warrant is issued, | 18 |
| (d) details of any conditions subject to which premises or a vehicle may be entered under the warrant, | 19 |
| (e) the period within which a report about the use of the surveillance device authorised by the warrant must be furnished to the eligible Judge or eligible Magistrate under section 44 (1), being a period that expires not less than 60 days after the expiry of the warrant. | 20 |
| [14] Section 33 Application for approval after use of surveillance device without warrant or under emergency authorisation | 21 |
| Omit section 33 (3). Insert instead: | 22 |
| (3) An application for approval must: | 23 |
| (a) include the name of the applicant, and | 24 |
| (b) specify the kind of surveillance device sought to be approved, and | 25 |
| (c) be supported by an affidavit setting out the grounds on which the approval is sought. | 26 |

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| (3A) | An application for approval may also be accompanied by an application for a surveillance device warrant made in accordance with Division 2. | 1 2 |
| [15] | Section 35 Eligible Judge may approve emergency use of powers | 3 |
| | Omit section 35 (3). Insert instead: | 4 |
| (3) | If the application under section 33 is accompanied by an application for a surveillance device warrant, the application for the warrant may be determined at the same time as the application for approval but is to be determined in accordance with Division 2. | 5 6 7 8 |
| [16] | Section 39 What is protected information? | 9 |
| | Insert “or 8 (2A)” after “section 7 (4)” in paragraph (c) of the definition of <i>protected information</i> . | 10 11 |
| [17] | Section 41 Dealing with records obtained by use of surveillance devices | 12 |
| | Insert “or as referred to in section 7 (4) or 8 (2A)” after “in an emergency” in section 41 (1) (a). | 13 14 |
| [18] | Section 45A | 15 |
| | Insert after section 45: | 16 |
| 45A | Annual report of Department | 17 |
| (1) | The annual report of the Department of Justice must set out the following in relation to surveillance device warrants and retrieval warrants for the period to which the report relates: | 18 19 20 |
| (a) | the number of matters in which the advice of the Attorney General has been sought in respect of a prospective application for a warrant, | 21 22 |
| (b) | the number of applications for a warrant that have been made, | 23 |
| (c) | the number of applications in which the Attorney General was heard before the Judge or Magistrate in the determination of the application, | 24 25 |
| (d) | the number of applications that were withdrawn before being determined, | 26 27 |
| (e) | the number of applications that were refused, | 28 |
| (f) | the number of warrants in respect of which a direction was given under section 52 (1) to supply information to a person about the warrant or use of a surveillance device (or both). | 29 30 31 |
| | Note. References to the Attorney General in this subsection include persons acting under delegation from the Attorney General. See section 49 (6) of the <i>Interpretation Act 1987</i> . | 32 33 34 |
| (2) | The Attorney General is to ensure that, as far as reasonably practicable, information is provided for the purposes of subsection (1). | 35 36 |
| [19] | Sections 51A and 51B | 37 |
| | Omit section 51. Insert instead: | 38 |
| 51A | Surveillance Devices Commissioner | 39 |
| (1) | The Secretary of the Department of Justice, in consultation with the Minister, must appoint a Surveillance Devices Commissioner. | 40 41 |
| (2) | The Surveillance Devices Commissioner is to be employed in the Public Service. | 42 43 |

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| (3) | A person cannot be employed as the Surveillance Devices Commissioner unless the person is: | 1 |
| | | 2 |
| (a) | an Australian legal practitioner with at least 7 years legal practice experience, and | 3 |
| | | 4 |
| (b) | either: | 5 |
| (i) | a Judge or other judicial officer, or a former Judge or judicial officer, of a superior court of record of the State or of any other State or Territory or of Australia, or | 6 |
| | | 7 |
| | | 8 |
| (ii) | qualified to be appointed as a Judge or other judicial officer of a court referred to in subparagraph (i). | 9 |
| | | 10 |
| (4) | The Surveillance Devices Commissioner has the functions conferred or imposed on the Commissioner by or under this Act or any other Act. | 11 |
| | | 12 |
| 51B | Delegation | 13 |
| | The Attorney General may delegate the exercise of any function of the Attorney General under Part 3 or 5 of this Act (other than this power of delegation) to: | 14 |
| | | 15 |
| | | 16 |
| (a) | the Surveillance Devices Commissioner, or | 17 |
| (b) | the Solicitor General, or | 18 |
| (c) | the Crown Advocate, or | 19 |
| (d) | a person, or a class of persons, authorised for the purposes of this section by the regulations. | 20 |
| | | 21 |
| [20] | Section 53 Use of assumed names or code-names in warrant | 22 |
| | Omit “under section 51” from section 53 (2). | 23 |
| | Insert instead “served on the Attorney General”. | 24 |
| [21] | Section 59 Regulations | 25 |
| | Insert after section 59 (1): | 26 |
| (1A) | The regulations may prescribe the form in which an application under this Act is to be made. | 27 |
| | | 28 |
| [22] | Schedule 1 Savings, transitional and other provisions | 29 |
| | Insert after Part 3: | 30 |
| Part 4 | Provisions consequent on enactment of Surveillance Devices Amendment (Statutory Review) Act 2018 | 31 |
| | | 32 |
| | | 33 |
| 8 | Definitions | 34 |
| | In this Part: | 35 |
| | <i>amending Act</i> means the <i>Surveillance Devices Amendment (Statutory Review) Act 2018</i> . | 36 |
| | | 37 |
| | <i>commencement day</i> means the day on which the amending Act commences. | 38 |
| 9 | Applications made before commencement day | 39 |
| | An application for a warrant made but not decided before the commencement day is to be determined as if the amending Act had not commenced. | 40 |
| | | 41 |

10 Application for revocation of warrant

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Section 24 (2A) extends to a warrant issued before the commencement day.

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| Schedule 2 | Amendment of Law Enforcement (Controlled Operations) Act 1997 No 136 | 1 |
| | | 2 |
| Section 5 Applications for authorities | | 3 |
| Insert after section 5 (2A) (e): | | 4 |
| (f) | details of the proposed use of a listening device or optical surveillance device (within the meaning of the <i>Surveillance Devices Act 2007</i>) if the use will be carried out other than in accordance with a surveillance device warrant under that Act. | 5 |
| | | 6 |
| | | 7 |
| | | 8 |