NSW Council for Civil Liberties Inc.

Postal address: PO BOX A1386 SYDNEY SOUTH NSW 1235
Office address: suite 203, 105 Pitt Street SYDNEY NSW 2000
Phone: 02 8090 2952 Fax: 02 8580 4633
Email: office@nswccl.org.au Website: www.nswccl.org.au

27 September 2013

Ms Penny Musgrave
Justice Policy
NSW Department of Attorney-General and Justice
**By email: lpclrd@agd.nsw.gov.au; jonathan_lee@agd.nsw.gov.au**

Dear Ms Musgrave,

**Re: Statutory review of the *Surveillance Devices Act 2007***

The New South Wales Council for Civil Liberties (**CCL**) writes this submission in response to your letter dated 5 June 2013. We are grateful for this opportunity.

The power to use surveillance devices in the prosecution of crime has been rightly described by the New South Wales Law Reform Commission as a *"power of a highly intrusive nature."*[1] It is important to monitor such a power carefully to ensure it strikes the correct balance between the public interest in prosecuting crime and the public interest in protecting personal privacy.

In recognition of this the Act itself authorises a statutory review.

The CCL recognises the importance of this review, as it is one of the last chances for the New South Wales Parliament to examine and assess New South Wales's regulation of that public interest balance. This review is the only review mandated by the Act.

Section 63 of the *Surveillance Devices Act 2007* (**the SDA or the Act**) states that the five-year review of the Act is designed to *"determine whether the policy objectives remain valid and whether the terms of the Act remain appropriate for securing those objectives."* The objectives of the Act are *"to regulate the installation, use, maintenance and retrieval of surveillance devices...and for other purposes."* These other purposes include how New South Wales law enforcement agencies obtain warrants to use such surveillance devices.

We consider the review is timely because surveillance devices are becoming more common-place as technology improves. For example, drones are being used for private and public purposes in ways they were not being used even as recently as 2007. The use of Closed Circuit Television (**CCTV**) cameras is increasing. Such recordings are able to be connected to the Internet, and the availability

[1] New South Wales Law Reform Commission Report 91 'Surveillance: An Interim Report', 5.72.

of tools such as facial recognition technology make surveillance and tracking people increasingly easy and inexpensive. This review takes place against this background.

## 1. Executive summary

The key recommendations of this report are:

**KEY RECOMMENDATION 1 (see page 4):** Given the lack of information that can be used to monitor the Act's effectiveness, the Council for Civil Liberties urges that as part of this review the Attorney-General recommends to Parliament that it amends the Act. The Council recommends that the Act be amended so as to ensure that New South Wales law enforcement agencies include in their reports to the Attorney-General, and the Ombudsman and the Attorney-General include in their reports to Parliament, the following:

(a) Whether the information gathered by surveillance was used to prosecute (i) the suspected crime which lead to the warrant being issued; (ii) an incidental offence; or (iii) some other offence;
(b) The length of a warrant;
(c) Whether a warrant was (i) not used; or (ii) withdrawn;
(d) How many devices were (i) sought to be; and (ii) actually used under a warrant;
(e) The time period for which a device was actively being used under a warrant;
(f) If a device was not able to be activated, why;
(g) Given that 43% of warrants result in no 'relevant information' being obtained, why in the agency's view there was no 'relevant information' or information useful to a prosecution (if these are different) obtained;
(h) Whether prosecutions utilizing information gathered under a surveillance warrant were successful;
(i) Whether warrants are being issued repeatedly against the same targets;
(j) Whether a judge or magistrate rejected an application for a surveillance warrant, and if so, why;
(k) Any other relevant matter coming out of this review.

**KEY RECOMMENDATION 2 (see page 6):** Given the emphasis placed on terrorism-related offences when the Act was brought to Parliament, the Council for Civil Liberties recommends that the Attorney-General as part of this report to Parliament undertakes an examination of the use of surveillance device warrants and indicates:

(a) How may warrants have been issued in respect of suspected terrorism offences;
(b) How many warrants issued in respect of suspected terrorism offences have resulted in successful prosecutions.
(c) The scope and nature of suspected crimes and offences for which surveillance warrants are being issued.

**KEY RECOMMENDATION 3 (see page 10):** As the Attorney-General does not seem to have been making submissions to judges in respect of applications for warrants as authorized by s.51(2) of the

Act, the Council for Civil Liberties urges the Attorney-General to recommend to Parliament as part of this report that Parliament legislate for the appointment of an independent body, similar to the Queensland Public Interest Monitor, to be staffed by experienced criminal law barristers. The Council recommends that this body be appointed with (a) the duty to review applications for surveillance device warrants; and (b) the powers to request further particulars about any application for such a warrant; and (c) to address the issuing authority in respect of any such application.

**2. Reporting requirements and the use of evidence obtained by covert surveillance**

The Act contains a number of reporting requirements relevant to this review.

Pursuant to Section 45, the New South Wales Attorney General (**AG**) is required to lay a report before Parliament within three months of the end of each financial year (**the AG's Report**). We have been able to locate three of the Attorney General's Reports: 2008, 2009 and 2011. These reports are in general two pages in length and capture two features: the numbers of warrants issued delineated by type, for example, listening device, or video device; and the number of reports received by the Attorney General's Office under Sections 44 and 51 of the Act. These quantitative assessments do not speak to either compliance with, or the effectiveness of, the surveillance or information-gathering regime in New South Wales. Therefore these reports are not an effective tool for assessing whether the policy objectives of the Act remain valid and whether the terms of the Act remain appropriate for securing those objectives.

The New South Wales Ombudsman is required to report every six months to the Attorney General (**the Ombudsman Reports**). For the purposes of this submission we have reviewed these reports. The CCL notes the quality of the reports is generally very good. The reports cover for example whether officers obtained warrants properly, and whether they have reported about the use of the warrants. The New South Wales Ombudsman is required to report about "the extent of compliance with this Act" by New South Wales law enforcement agencies under Section 49 of the Act. The reports reveal persistent problems on the part of the New South Wales Police in reporting about the use of surveillance devices under Section 44 of the Act.

**Recommendation: Given the consistent pattern of failure by the New South Wales Police to report as required under the Act, the Council for Civil Liberties requests that the Attorney-General, as part of this review, provides Parliament with:**

**(a) An overview of these reporting failures to the parliament, the measures that have been taken to improve performance over the history of the Act, and an opinion as to any possible further measures to overcome the existing reporting failures, including what, if any, role parliament or any other body can play in the implementation of such measures;**

**(b) As part of its recommendations in respect of this problem, an opinion as to whether the New South Wales Police should specifically include on-time reporting under the Act as part of its performance reviews of individual officers, and appropriate disciplinary measures in the case of flagrant or continual breaches.**

As acknowledged, although the reports can be used as a tool with which to monitor *compliance*, the reports are not useful for assessing the *effectiveness* of the Act. An exception to this is the six-monthly report for the period ending 31 December 2012, which contains an analysis of whether surveillance warrants result in the police acquiring 'relevant information' (which unfortunately is not defined).[2] This report highlights that such information was obtained under 57% of warrants issued to the New South Wales police.

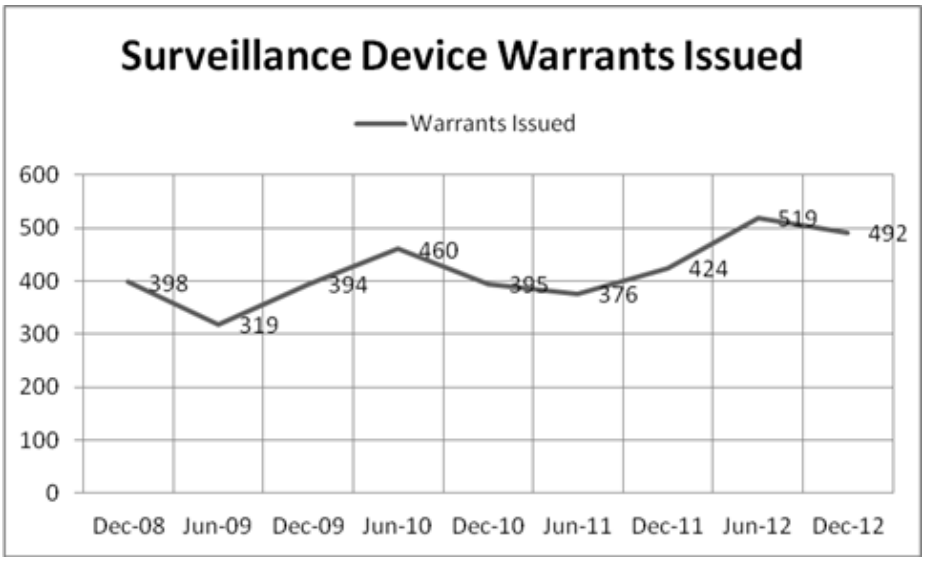
**Recommendation: Given the lack of information that can be used to monitor the Act's effectiveness, the Council for Civil Liberties urges that as part of this review the Attorney-General recommends to Parliament that it amends the Act. The Council recommends that the Act be amended so as to ensure that New South Wales law enforcement agencies include in their reports to the Attorney-General, and the Ombudsman and the Attorney-General include in their reports to Parliament, the following:**

**(a) Whether the information gathered by surveillance was used to prosecute (i) the suspected crime which lead to the warrant being issued; (ii) an incidental offence; or (iii) some other offence;**
**(b) The length of a warrant;**
**(c) Whether a warrant was (i) not used; or (ii) withdrawn;**
**(d) How many devices were (i) sought to be; and (ii) actually used under a warrant;**
**(e) The time period for which a device was actively being used under a warrant;**
**(f) If a device was not able to be activated, why;**
**(g) Given that 43% of warrants result in no 'relevant information' being obtained, why in the agency's view there was no 'relevant information' or information useful to a prosecution (if these are different) obtained;**
**(h) Whether prosecutions utilizing information gathered under a surveillance warrant were successful;**
**(i) Whether warrants are being issued repeatedly against the same targets;**
**(j) Whether a judge or magistrate rejected an application for a surveillance warrant, and if so, why;**
**(k) Any other relevant matter coming out of this review.**

[2] NSW Ombudsman, *Report under s.49(1) of the* Surveillance Devices Act *for the period ending 31 December 2012*, p.5 <http://www.ombo.nsw.gov.au/__data/assets/pdf_file/0008/10133/2012-Surveillance-Devices-sdReport.pdf> (last accessed 24 August 2013).

### 3. Increased use of surveillance devices

The CCL notes with concern the increased use of surveillance devices in New South Wales. Since the passing of the SDA, the number of surveillance warrants issued in New South Wales is as follows:[3]




The graph shows a marked increase of surveillance devices in New South Wales since the operationalization of the Surveillance Devices Act in 2008. The CCL is concerned that together with the increased use of closed-circuit cameras and the traceability of an individual's biology and telecommunications (including use of the Internet), society is becoming one where surveillance is the norm. This has profound implications for the development of our relationships and the way we coexist. As the CCL stated in its 2006 Submission to the Inquiry into the *Surveillance Devices Bill* (as it then was):

> *"Privacy is no trivial matter. Intrusion upon it lays the victim open to victimisation and discrimination. Covert intrusions leave a person vulnerable to mistaken data-matching. The knowledge that words and actions may be being monitored restricts autonomy and hampers personal growth and the development and enjoyment of relationships. In the hands of the unscrupulous, covert surveillance leaves victims open to blackmail."*

The CCL notes that the number of warrants is increasing without published evidence of their efficacy. For the purposes of this submission, CCL examined the annual reports by the Attorney-General's Office under the Listening Devices Act (**LDA**). Whilst reporting under the LDA was still quite poor, it is noteworthy that reporting was more comprehensive under the former Act, including information such as the number of devices used under a warrant and the number of warrants refused by an issuing authority. Without published evidence the public cannot know whether the increased use of warrants reflects their usefulness in enhancing the potential for successful prosecutions or if the increase is the result of some other factor. Given the implications of surveillance for civil liberties, and the increasing use of warrants, the lack of public knowledge about the effectiveness of the use of surveillance devices requires addressing urgently.

[3] Graph provided by the Office of the NSW Ombudsman.

**Recommendation: Given the increase in the use of surveillance devices since the introduction of the Surveillance Devices Act, the Council for Civil Liberties submits that the Attorney-General should recommend to Parliament that it task the New South Wales Ombudsman with undertaking an independent analysis of the effectiveness of the surveillance warrant regime. This would require utilizing the information the Council recommends be included in reports, as set out under section two of this response. The Council for Civil Liberties recommends that the Ombudsman report back to Parliament with this analysis two full years after the reporting framework has been amended by legislation as recommended above.**

## 4. Terrorism offences

The CCL notes that the government placed a heavy emphasis on the necessity of the Surveillance Devices Act to combat terrorism when it was introduced to the Parliament in 2007. Considerable time was dedicated by the New South Wales government in linking the use of surveillance device warrants to terrorism-related offences. Because of the shortcomings outlined in section two of this response, it is not possible to tell whether the Act is succeeding in this regard. In particular, we note that the only one of the Ombudsman Reports outlines the crimes for which a warrant has been sought (the report from 31 December 2012). This report charts the 'type of offences targeted' by surveillance warrants in New South Wales. 'Terrorism' offences are listed under the category 'Other', together with a disparate array of offences including 'corrupt conduct', 'manslaughter' and 'gambling offences'. This 'Other' category accounts for 3% of the warrants issued during the reporting period.[4]

**Recommendation: Given the emphasis placed on terrorism-related offences when the Act was brought to Parliament, the Council for Civil Liberties recommends that the Attorney-General as part of this report to Parliament undertakes an examination of the use of surveillance device warrants and indicates:**

**(a) How may warrants have been issued in respect of suspected terrorism offences;**

**(b) How many warrants issued in respect of suspected terrorism offences have resulted in successful prosecutions.**

**(c) The scope and nature of suspected crimes and offences for which surveillance warrants are being issued.**

[4] NSW Ombudsman, *Report under s.49(1) of the* Surveillance Devices Act *for the period ending 31 December 2012*, p.4 <http://www.ombo.nsw.gov.au/__data/assets/pdf_file/0008/10133/2012-Surveillance-Devices-sdReport.pdf> (last accessed 24 August 2013).

The CCL notes that based on the limited information available about 50% of surveillance warrants are being issued in respect of drug- or property-related offences.[5]

**Recommendation: As the rationale of the Act is to combat terrorism, the Council for Civil Liberties urges the Attorney General to recommend in this review that Parliament amend the Act. The Council recommends that the Act be amended so that the types of offences for which surveillance devices can be sought are restricted to indictable offences involving injury to a person.**

**5. The 90-day warrant period**

The Surveillance Devices Act extended the period for which a surveillance device warrant could be used to 90 days, from the 21-day period that was in place for listening device warrants under the Listening Devices Act. The CCL has never supported this extension, and maintains the position that the 90-day period should be reduced to 21 days. During the Government's submissions to Parliament in 2007 it told the Parliament that the CCL supported this change when in fact the opposite was the case. The Government made much of this non-existent CCL support. For example, during the Consideration-in-Detail of the (then) Bill, on 13 November 2007, the Minister for Police, Mr David Campbell, stated to the New South Wales Parliament:

> *"That is right, the New South Wales Council for Civil Liberties supports a 90-day period for warrants to remain in force."*

Further, the Minister stated:

> *"groups that have made submissions to the joint working group of the Standing Committee of Attorneys-General and the Australasian Police Ministers Council and who said that we should extend the period from 21 days to 90 days [included]…the New South Wales Council for Civil Liberties. The fact that the New South Wales Council for Civil Liberties made that submission blows out of the water all the arguments we have heard from members opposite."*

In the Second Reading of the (then) Bill, the Attorney-General and Minister for Justice, Mr John Hatzistergos, continued with these claims:

> *"...three submissions about the duration of surveillance device warrants supported the maximum 90-day period...[including the] submission...from...the New South Wales Council for Civil Liberties..."*

And further:

> *"...amongst those who supported the 90-day period was [a]...bunch of bleeding hearts, the [NSW] Council for Civil Liberties..."*

Support for the government's mistaken position is found in the *Joint Working Group Report on Cross-border Investigative Powers for Law Enforcement* (2003) which states that the NSWCCL supported a 90-day period for surveillance device warrants. We have reviewed our submission to

[5] Ibid., p.5.

that report, which was in respect of a 'model bill' for the regulation of surveillance and recording. In our 2003 submission to the Joint Working Group, we stated:

> *"The NSWCCL is concerned about the tenor of the model bill; the expansion of police power; the internal authorisation of police illegality and the creation of new offences with very low thresholds of intention…"*

And further:

> *"The NSWCCL recommends that the draft bill not be supported by the Joint Working Group."*

How the above was translated to support for the 90-day warrant period (which was one provision in the middle of an extensive and complicated model bill, a bill which we roundly rejected), we cannot fathom.

Further, we do not know why the Government was relying on the 2003 Report to discern the CCL's position when we had made a submission to the review of the *Surveillance Devices Bill* (as it then was) in 2006 (**the 2006 Submission**). The 2006 Submission stated clearly our position in respect of the 90-day warrant period; our position was then, and remains, that the 21-day warrant for covert surveillance was ample (which was the position extant under the Listening Devices Act).

This position was supported by The Hon Member for Epping (now the current Attorney-General and Minister for Justice in NSW) who stated during the Consideration-in-Detail of the Bill:

> *"A period of 90 days is a very long time for the continuation of any warrant. Generally listening device warrants are effective only if surveillance police back them up, and as surveillance police are needed all over the place they are in short supply everywhere. If this Government wants to continue these warrants for 90 days because it might be able to get back to them, much of that period would be ineffective. Sometimes warrants are continued for a period of 21 days, or for shorter periods. Not every police officer that is involved in an investigation is operational; some police officers are involved in intelligence. Those people could update warrants using lawyers from the police service who had made the applications and there is no reason why that could not be done every 21 days.*
>
> *It is better to have people checking these warrants because on occasions errors are made and abuse can creep in…It is too long a period for such warrants and discipline will slacken. If people have to do things quickly they are much more likely to do them. I was reminded recently of a sexual offender who was due to be released from jail, but unfortunately the Government left it until the last week to make the necessary application. It had six months within which to do so but it left it to the last week. I admit that we have all learned a lesson from that, but in the first instance the judge would not allow that fellow to be released and it took the expense of an appeal and other matters to get him back under control.*
>
> *Establishing a long period allows abuses to creep in. The New South Wales Police Force does a wonderful job, working together with police task forces, the New South Wales Crime Commission, the Australian Crime Commission and the Federal police. But all those forces have had problems over the years. Some of those problems have shown the misuse of telephone intercepts and listening devices. After all, the Age tapes royal commission arose from great abuse on the part of New South Wales and Federal police and, I understand,*

*other State police, because they were frustrated. This is one of the reasons why the legislation was tight in 1984, and it should remain to some extent tight."*

**Recommendation: The Council for Civil Liberties urges the Attorney-General to stay true to his stated position and as part of this review recommend to Parliament that the 90-day warrant period be reduced to 21 days.**

### 6. Optical surveillance device notices

The NSWCCL 2006 Submission recommended that where an optical surveillance device is installed by an owner or occupier of a building without the issuing of a warrant, that all persons likely to be observed and recorded be informed of the existence of the device. The NSWCCL notes that this recommendation was not adopted. Instead, Section 8(1) gives an occupier the power to install optical surveillance devices without a warrant and without notifying persons that they are under surveillance.

**Recommendation: The Act allows owner-occupiers to set up cameras in buildings without informing people who are likely to be filmed. The Council for Civil Liberties recommends that the Attorney-General recommends to Parliament in this review that the use of optical surveillance devices without a warrant be required to be accompanied by a fixed sign that notifies anyone being observed by the device that they are being so observed, and giving contact details for the person with control of the device.**

### 7. Warrantless recording of conversations

In its 2006 Submission, the NSWCCL recommended that when a person records a conversation without a warrant, that person should be required to inform the other participants that the recording is being made. NSWCCL notes that this recommendation was not adopted.

Instead, Section 7(3)(b) of the Act allows a person to record a conversation without a warrant as long as the recording is either: for the protection of the lawful interests of that principal party; or is not made for the purpose of publishing the conversation to persons who are not parties to the conversation.

**Recommendation: The Council for Civil Liberties urges the Attorney General in this review to recommend to Parliament to require that where a listening device is being used without a warrant, all participants to the conversation be informed that the recording is being made.**

### 8. Surveillance Monitor

In its 2006 submission, the CCL recommended that the Government follow the lead of Queensland and legislate for the appointment of an experienced barrister with powers to make submissions to issuing authorities in respect of applications for surveillance device warrants and to report to appropriate ministers and Parliament. We note that this recommendation was not implemented, although s.51(2) of the Act gives the Attorney-General the power to address the court in an

application for a surveillance device warrant. In our review of the AG Reports it was not clear how many times the Attorney General had availed itself of this opportunity, if at all.

**Recommendation: The Council for Civil Liberties recommends that as part of this report, the Attorney-General report to Parliament as to how many times he addressed an issuing authority in respect of a surveillance device warrant as authorized by s.51(2) of the Act (disaggregated by year).**

**Recommendation: As the Attorney-General does not seem to have been making submissions to judges in respect of applications for warrants as authorized by s.51(2) of the Act, the Council for Civil Liberties urges the Attorney-General to recommend to Parliament as part of this report that Parliament legislate for the appointment of an independent body, similar to the Queensland Public Interest Monitor, to be staffed by experienced criminal law barristers. The Council recommends that this body be appointed with (a) the duty to review applications for surveillance device warrants; and (b) the powers to request further particulars about any application for such a warrant; and (c) to address the issuing authority in respect of any such application.**

**9. Previous warrant issued against the same target**

Our submission to the review of the *Surveillance Devices Bill* (as it then was) in 2006 included a recommendation that the issuing authority be required to consider any previous warrants issued in respect of the same target. We note that this recommendation was not implemented.

**Recommendation : The Council for Civil Liberties notes that it is impossible to tell whether surveillance warrants are being used by law enforcement agencies to harass individuals and recommends that the Attorney-General urges Parliament to amend s.19(2) of the Act to ensure that all previous warrants in respect of a target be taken into account by an authority issuing a surveillance device warrant.**

**10. Informing subjects of past surveillance**

The CCL notes that in Section 52 eligible Judges are given the power to order officers to inform surveillance targets about the warrant and the use of the surveillance device. To the CCL's knowledge this power has not been used. As reported in the Ombudsman Report of 31 December 2012, 43% approximately of warrants obtain 'no relevant information'. Given the high incidence of surveillance resulting in no information relevant to any prosecution, the CCL is of the view that reporting to targets about the use of past surveillance should be made compulsory where no information relevant to a prosecution is found.

**Recommendation: Given the high incidence of surveillance resulting in no 'relevant information,' the Council for Civil Liberties is of the view that the Attorney-General should recommend to Parliament that s.52 be amended. The Council recommends that the Act be amended so that issuing authorities can prospectively require a law enforcement agency to report to targets about the use of past surveillance where: (a) no information relevant to a prosecution is found; and (b) it is the second attempt against the same target that has resulted in no information useful to a prosecution being gathered (whether the warrant was issued in respect of the same or a different offence).**

The NSWCCL is willing and ready to discuss this submission with the Attorney-General or the NSW Parliament. Please contact us if there are any queries about anything contained in this submission.

Yours faithfully,

Jackson Rogers
Convenor – Freedom of Information & Privacy Sub-Committee
**NSW Council for Civil Liberties**