



**Better Practice
Guideline
Use of Optical
Surveillance Devices
to combat littering and
illegal dumping
June 2016**

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Section One: Background

1.1 What are the issues?

Littering and illegal dumping are becoming an increasing issue for Local Government. The incidence and costs of littering and illegal dumping are increasing in line with growing population, community expectation and disposal costs. With changing technology, there are new ways to address these issues and identify those committing the offences.

The relevant environmental legislation is the *Litter Act 1979 (WA)* for the offence of littering and the *Environmental Protection Act 1986 (WA)* for the offence of illegal dumping. Littering and illegal dumping are separate offences and require different matters to be proven to secure a conviction.

Local Government property local laws and public places Local Laws may also provide Local Governments with enforcement powers in respect to materials dumped on Local Government property and in public places.

This Better Practice Guideline focuses on how Optical Surveillance Devices (OSD), can be used, and the specific legal and practical issues relevant to their use, as a means of combating littering and illegal dumping. The Guideline also includes case studies and opportunities for Local Government to work with State Government on these issues.

This Better Practice Guideline has been developed with funding from the Waste Authority through the Waste Avoidance and Resource Recovery Account.

Keep Australia Beautiful (KAB) also have a range of Programs which Local Governments can access such as Adopt-a-Spot, Litter Reports Scheme and KAB can also provide anti-litter promotional material.

NOTE: The term Optical Surveillance Device has been used because it is the terminology used in the *Surveillance Devices Act 1998* and covers the complete suite of technology potentially being used or that will be used in future. OSDs are commonly referred to as CCTV, however the term CCTV is no longer strictly accurate because of changing technology and recording systems.

1.2 How should Local Governments use this Guideline?

This Guideline should be used by Local Governments considering or using OSD to combat littering and illegal dumping. It highlights some of the main considerations in relation to OSD use to combat littering and illegal dumping however it is not an exhaustive guide and Local Governments are likely to require specialist advice in some areas.

1.3 What supporting mechanisms are needed?

To address littering and illegal dumping, a range of different approaches are needed, including infrastructure to facilitate disposal of materials, education to ensure the community is aware of the environmental and fiscal impact of littering and illegal dumping, incentives to encourage good behaviour, enforcement of the laws in relation to littering and illegal dumping and promotion that enforcement is occurring. The last two points should be emphasised as enforcement not only has to be undertaken, to be an effective deterrent, it must also be *seen* to be undertaken. This issue is further explored in Section 2.5.

The use of OSD is one tool which can assist with enforcement in relation to littering and illegal dumping. However, it should be very clearly noted that to discourage littering or illegal dumping in the first instance a range of activities need to be undertaken.

Other resources are available for specific purposes, such as a Better Practice Guide to Charity bin locations being developed by the Department of Environment Regulation and the Waste Authority.

1.4 What is the applicable Legislation?

Disclaimer: please note that the information in this Guideline is intended only to provide a summary and general overview of legal considerations regarding the use of OSD to combat illegal dumping. It is not intended to be comprehensive nor does it constitute legal advice. Local Governments are advised to obtain their own legal advice on matters raised in this Guideline, including in relation to specific circumstances.

Environmental

Littering

The *Litter Act 1979 (WA)* (**Litter Act**) provides Local Governments with the ability to issue infringements, or to prosecute persons who deposit, or caused to be deposited, litter onto any land or into any waters in certain circumstances.

Illegal dumping of waste

The *Environmental Protection Act 1986 (WA)* (**EP Act**) creates an offence of discharging or abandoning, or causing to be discharged or abandoned, solid or liquid waste. Local Governments, with the consent of the CEO of the Department of Environment Regulation, can prosecute this offence. WALGA understands that there have been limited Local Government actions under this EP Act.

Table 1 compares the key elements of each of these pieces of legislation and identifies some considerations of the circumstances in which they can be used. Local Government seeking further assistance or guidance in relation to use of the Litter Act or EP Act can contact the Department of Environment Regulation (**DER**).

Table 1: Comparison of the Litter Act and EP Act

| Factor | Litter Act | EP Act |
|---------------|-------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|
| When to use? | <p>Generally, the Litter Act is used for less serious offences. As long the material deposited contrary to section 23 satisfies the definition of 'litter', the Local Government can take action under that Act.</p> <p>An example of where a Local Government may choose to issue an infringement or prosecute under the Litter Act rather than the EP Act is in the case of non-hazardous waste weighing less than one tonne.</p> | <p>Generally, the EP Act is used for more serious offences. As long as the material deposited contrary to section 49A satisfies the definition of 'waste', the Local Government, with the consent of the DER CEO, can prosecute.</p> <p>An example of where a Local Government may choose to prosecute under the EP Act rather than the Litter Act is in the case of hazardous materials or materials weighing greater than a tonne.</p> |
| Who can use? | <p>Authorised officers under section 26(1) (being members of the Council or employees of the Local Government in whose Local Government area the offence occurred) can issue infringements.</p> | <p>Authorised officers have various powers under the EP Act. Local Government employees must apply to the Director General of the DER to be appointed as authorised officers under section 87.</p> |

| | | |
|-------------------------|---------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|-----------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|
| Process for prosecution | Gather, record and store evidence ensuring chain of custody in accordance with contemporary investigative practice. | Gather, record and store evidence ensuring chain of custody in accordance with contemporary investigative practice. The CEO of a Local Government must obtain the consent of the CEO of the DER to commence a prosecution under section 49A of the EP Act. |
| Penalties | Infringements Littering - \$200 individual, \$500 for corporations. Littering creating public risk - \$500 individual, \$2000 for corporations. Prosecution Various penalties for specific offences, up to \$5,000. | Prosecution Section 49A provides that the unauthorised discharging or abandonment of waste is an offence. Maximum penalty \$62,500 for individuals, \$125,000 for corporations. |
| Funds from penalties | If Local Government issues the infringement or undertakes the prosecution, any moneys recovered in the form of fines are returned to the Local Government. | If Local Government undertakes the prosecution, any moneys recovered in the form of fines are returned to the Local Government. If the DER undertakes the prosecution the funds go to consolidated revenue. |
| Other considerations | If infringements are issued, they must be supported by sufficient evidence to prove each element of the offence. This is to ensure if the infringement is contested, the Local Government can defend the matter in court. | |
| Resources | <i>Litter Regulations 1981 (WA)</i> Schedule 1 includes a list of types of litter that can create public risk. Schedule 2 includes the format of a Litter Infringement Notice. https://www.der.wa.gov.au/about-us/legislation | DER can offer Local Governments assistance to undertake prosecutions, such as advising on evidence requirements or, if necessary, undertaking the prosecution. https://www.der.wa.gov.au/about-us/legislation |

Security and Privacy

The *Privacy Act 1988* (Cth) does not apply to Local Governments and Western Australia does not have its own dedicated privacy legislation that generally applies to the collection of personal information by Local Governments.

The *Surveillance Devices Act 1998 (WA)* (**SD Act**) and the *Security and Related Activities (Control) Act 1996 (WA)* (**SRAC Act**) are relevant to the installation and use of OSD by Local Governments in Western Australia. Appendix 1 provides excerpts from the relevant legislation.

The SD Act imposes a general prohibition on installing, using or maintaining an 'optical surveillance device' (i.e. an OSD), or causing any of those things to happen, to record or observe 'private activities'. There are some exceptions to this, including where the use of the OSD results in the unintentional recording or observation of a 'private activity'. The SD Act does not impose any restrictions on the use of OSD to record activities which are not 'private activities'.

'Private activities' are activities carried on in circumstances indicating that any parties to the activity would want the activity only to be observed by them, but do not include activities carried out in circumstances where the parties ought reasonably to expect that such activities may be observed. For the statutory definition of 'private activities' see Appendix 1.

The SD Act does not list factors relevant to determining whether the parties ought reasonably to expect that an activity may be observed by others. Case law indicates that the location and the physical environment in which OSD are located are relevant (see *Re Surveillance Devices Act 1998; Ex parte TCN Channel Nine Pty Ltd* [1999] WASC 246).

It is likely that activities, including littering or illegal dumping, carried out in a number of locations in which Local Governments are likely to install OSD to seek to combat littering or illegal dumping would not be 'private activities'. This is because persons ought reasonably to expect that they may be observed by others on Local Government property and in public places. More information about the questions to be asked to determine the suitability of a location for an OSD are set out in section 2.2 of this Guideline.

The SD Act also prohibits publishing or communicating 'private conversations' or records of 'private activities' recorded by an OSD, subject to some exceptions. Some of these exceptions are where the publication or communication is made in the course of the duty of the person making the publication or communication or in the course of legal proceedings. For these exceptions to apply, the publication or communication must be no more than is reasonably necessary in the public interest, in the performance of a duty of the person making the publication or communication or for the protection of the lawful interests of the person making the publication or communication.

The SRAC Act is also relevant as it requires that a person who installs an OSD for remuneration must hold a licence for that purpose.

The *State Records Act 2000* (WA) and the *Freedom of Information Act 1992* (WA) apply to the handling and release of OSD footage in the same way that those Acts apply to other records held by Local Governments.

1.5 What support is available for Local Government?

The Department of Environment Regulation has the ability to support Local Government in undertaking various activities relating to responding to littering and illegal dumping. This support can include:

- Training: to assist Local Governments to enforce the Litter Act and Environmental Protection Act (see example).
- Assistance on prosecutions: DER is able to provide advice to Local Governments to ensure that the required evidence has been gathered, stored and recorded in accordance with the rules of evidence.
- Equipment: DER can partner with the Local Government (see example).

Example: Online Training for Litter Act

Through the Keep Australia Beautiful Council, an online training course is available for Local Government in relation to the Litter Act.

For more information visit <http://www.kabc.wa.gov.au/resources/for-local-government/training-package>

Example: Working with DER

An opportunity exists for Local Governments to Partner with the Department of Environment Regulation (DER) to use OSD to identify those responsible for littering or illegally dumping. As a first step, DER can loan OSDs, check surveillance imagery, undertake the prosecutions (under the EP Act) and publicise any successful prosecutions. As the partnership develops Local Government can assist by reviewing imagery captured by OSD and providing statements on the timing, nature and location of littering or dumping offences.

The Local Government would need to:

- Suggest littering or illegal dumping 'hot spots' for OSD installations
- Commit to at least a weekly drive by of the site(s)
- Take photos and notify DER if littering and or illegal dumping occurs at the site.

For more information about how your Local Government can work with DER, contact the Senior Manager Investigations for illegal dumping at DER on 6467 5000 or info@der.wa.gov.au

Section Two: Better Practice Approaches

2.1 Feasibility

Aim: Identify if your Local Government has the financial and human resources to install/monitor/check OSD and follow up instances of littering and illegal dumping.

Approach

Identify financial resources available for purchase and monitoring of equipment within your Local Government. Identify what human resources and skillsets are available within different departments. If in house OSD monitoring is not feasible for your Local Government, consider other approaches. Identify whether it would be useful for the purposes of monitoring and dealing with littering and illegal dumping for a Local Government employee to be appointed as an 'authorised person' under the EP Act and therefore exercise the powers held by an 'authorised person'.

Rationale

It is not enough to just install OSD, aside from the initial financial outlay for the equipment ongoing monitoring of footage and equipment is essential. It is important to identify what resources your Local Government has to undertake the activities as well as the resources to follow up on outcomes.

If your Local Government has limited resources to monitor OSD there are opportunities through the WALGA Preferred Supplier Panel (see section 2.3) to consider surveillance as a service – with some vendors having 24/7 operations centres with real time and event triggered monitoring of cameras.

The Department of Environment Regulation has also identified that there are options to work collaboratively with Local Government (see Example in section 1.5). For investigations to be initiated by Local Government under the Environmental Protection Act an authorised officer must be employed as staff.

For some key considerations relating to OSD the *Australia and New Zealand Police Recommendations for CCTV Systems* provides some good guidance.

2.2 Legal Considerations

Aim: To ensure legal issues have been considered and addressed in the location and monitoring of the OSD.

Approach

Answering the following questions will assist in determining when an OSD should be used:

1. Where will the OSD be located? What will it be attached to?

OSD should only be attached to buildings, structures or other things, such as trees, and positioned to record activities, on land or locations which are under the control or care and management of the local government.

Locations which may be suitable for Local Governments installing OSD to monitor illegal dumping activities include parks, bushland areas, road reserves, carparks and verges which are under the control or care and management of the Local Government. However, the suitability of each specific location where an OSD is proposed to be installed must be considered.

2. Is there public access to the site that will be the subject of the OSD recording?

OSD should only be installed in locations which are open to the public. In such places, it is unlikely that a person could reasonably expect that their activities would not be observed by others. Therefore, activities captured on OSD are unlikely to constitute 'private activities' as defined in the SD Act, the recording of which may represent an offence.

3. How frequently is the site visited by other persons? Do people regularly pass by, whether on foot or in vehicles?

If the site is regularly visited or passed by other persons, this will support an argument that activities captured on OSD are not 'private activities' because such persons could not reasonably expect that their activities would not be observed by others.

4. Will the OSD record activities carried out in an enclosed or screened area in which a person could reasonably expect not to be observed?

It is likely that a person could reasonably expect not to be observed in such an area. An example is a toilet cubicle or change room in a public place. Although it is unlikely that an area where illegal dumping occurs would be so enclosed or screened, Local Governments should still be satisfied that placement of the OSD would be unlikely to capture a private activity.

5. Will the OSD record activities carried out on private property?

As a first principle, OSD should not be positioned so as to capture any activities carried out on any land not under the control or management of the Local Government. It is arguable that a person could reasonably expect that their activities carried out on private property would not be observed by others. Exceptions to this could be activities carried out in a front or back garden, or an unoccupied lot, which are visible and could be observed and/or overheard from the footpath or road. In the absence of a definitive rule on the matter, Local Governments should exercise caution when installing OSD that may capture activities on private property that may be 'private activities'.

6. Should signs be erected to alert persons that OSD recording is occurring?

Practical considerations will apply to whether such signs should be erected – such as amenity and any desire to catch perpetrators in the act. If signs are installed to alert persons to the existence of an OSD at a site, this may support an argument that such persons could not reasonably expect that their activities at that site would not be observed by others.

Rationale

Historically, some Local Governments have been reluctant to use OSD due to concerns about legislative restrictions and privacy. By going through these questions Local Governments can undertake a general assessment to evaluate the suitability of the location.

2.3 Technology Selection and Location

Aim: Appropriate technology is selected that is fit for purpose and is located in a place to optimise its effectiveness.

Approach

Key considerations for the technology selection and location include the power source, quality of image recorded, data storage and retrieval options, orientation of camera and physical location.

Through the WALGA Preferred Supplier Panel on Security Systems and Services Local Governments can access a number of preferred suppliers who can offer advice regarding the right technology for your particular circumstance.

Details of the WALGA Preferred Supplier Panel for 'Security Systems and Services' are available from the WALGA website (www.walga.asn.au)

Rationale

Using the WALGA Preferred Supplier Panel allows Local Governments to access quotes for service from a range of different suppliers without the requirement for tendering. Some of the Preferred Suppliers have enhanced offerings (see example) which can be particularly helpful for Local Governments seeking to put systems in place.

Example: Training options

WALGA Preferred Supplier Redfish Technologies provide a two day training course specifically for Local Governments officers looking to use OSD in their operations. This detailed course includes key issues such as determining stakeholder outcomes for OSD, understanding the requirements for OSD systems, designing the right system, and selecting fit for purpose equipment.

As the technology associated with OSD is changing so rapidly, Redfish also provides updates to participants for a year after they have attended the course.

The course has been endorsed by ASIAL (Australia Securities Industry Association Limited) the peak national body for the security industry.

For more information contact Redfish on 08 6396 0660

2.4 Review and Storage of Information

Aim: To ensure OSD material is reviewed, processed and stored appropriately.

Approach

The person/people responsible for reviewing the footage should be identified and the footage must not be used for any improper purposes. If the footage is going to be used for prosecution purposes, it should incorporate date/time watermarks and be in a non-alterable format (i.e. burnt to non-rewritable discs). An evidence log should also be maintained. Local Government record keeping requirements under the *State Records Act 2000* (WA) apply.

Rationale

Local Government is able to make the recording for a specific purpose but it is important to ensure that access to the material is not exploited for improper purposes or is not improperly disseminated. Options include implementing protocols regarding who can view the footage and implementing secure methods for storing footage.

Digital recordings can be manipulated so, to ensure that any OSD footage of illegal dumping activities can withstand scrutiny by defence counsel in court, it is important to ensure that it is secured in a format that cannot be altered.

2.5 Promotion

Aim: To promote successful infringements and prosecutions, under the Litter Act or Environmental Protection Act.

Approach

Develop and implement a plan to promote successful littering or illegal dumping infringements and prosecutions.

Rationale

The Victorian Litter Action Alliance illegal dumping prevention kit highlights the importance of promoting successful legal action “enforcement is not just about catching and prosecuting people. Public knowledge that littering laws are being enforced and will result in fines and possibly public shame is what makes this component work. But of course, enforcement must also actually happen,

not simply be promoted”¹. Through active promotion of such cases, there will be more awareness not only of the laws but that the behaviour is unacceptable and there is a high likelihood that those people illegally dumping will be caught. Options include media releases about incidents of illegal dumping, identifying that the person was caught, highlighting the cost to the community and the consequence of the activity, as well as the appropriate place for the material to be disposed of.

Social media is also another tool the Local Government can use to quickly communicate successes in this area. The Department of Environment Regulation has been actively promoting its successful prosecutions (see example).

Example: Department of Environment Regulation promotion of illegal dumping conviction via its website

Extract from Article: Thornlie man fined \$10,000 for illegal dumping

Three packets of fencing containing asbestos was dumped at Korung National park on 3 June 2015

A 27 year old Thornlie man was fined \$10,000 in Armadale Magistrates’ Court, after illegally dumping fencing containing asbestos at Korung National Park near Karragullen on 3 June last year.

Maximum penalties for illegal dumping are \$62,500 for individuals and \$125,000 for corporations. To report illegal dumping, call DER’s 24-hour pollution watch hotline on 1300 784 782.

DER works collaboratively with other State and Local Government agencies to tackle illegal dumping.

For more information on how DER promotes successful prosecutions visit <https://www.der.wa.gov.au/your-environment/illegal-dumping>

2.5 Ongoing monitoring

Aim: Ensure there is an ongoing commitment to the use of OSD and that potential limitations of OSD use are identified.

Approach

Ensure ongoing organisational commitment to the use of OSD by embedding the monitoring/maintenance into specific job roles. The monitoring includes requirements such as ensuring the OSD is operating.

Identify the potential limitations of OSD use in a particular area and work on solutions to address identified limitations.

Rationale

OSD is not a ‘set and forget’ type of equipment, it is an ongoing commitment. By incorporating the monitoring/maintenance into specific job roles it just becomes part of usual operations.

OSDs also not a fool-proof way of stopping illegal dumping. As has been identified to combat illegal dumping a range of different approaches need to be in place. OSD also has its downfalls, OSD power can be cut, cameras can be stolen and offenders can cover their vehicle’s registration plates.

¹ Victorian Litter Action Alliance. Illegal Dumping Tool Kit. Available from <http://www.litter.vic.gov.au/litter-prevention-toolkits/litter-prevention-program-kit/illegal-dumping>

Example: OSD loss

City of Armadale purchased 5 OSD to use in combatting littering or illegal dumping and have been using them for several years. The Cameras are hidden in key illegal dumping hot spots.

While the cameras are well hidden and have security in place to prevent anyone accessing material they are still vulnerable. Four of the cameras have been smashed or stolen since installation.

Example: Circumventing OSD

The City of Greater Geraldton has OSD located at its Meru Landfill Site to assist in discouraging illegal dumping and theft from the site. The City was using mains powered OSD.

Unfortunately people breaking into the site cut through the power system to the site, which included the OSD power feed. The City now has solar powered OSD on wooden poles. Metal poles have too much deflection and that affects the image quality. The City has also moved all its recording data off-site and backhauls data to Airport Servers.

Appendix 1: Relevant statutory provisions

Surveillance Devices Act 1998 (WA)

Section 6 – Regulation of use, installation and maintenance of optical surveillance devices

(1) *Subject to subsections (2) and (3), a person shall not install, use, or maintain, or cause to be installed, used or maintained, an optical surveillance device –*

- (a) to record visually or observe a private activity to which that person is not a party; or*
- (b) to record visually a private activity to which that person is a party.*

Penalty:

- (a) for an individual: \$5,000 or imprisonment for 12 months, or both;*
- (b) for a body corporate: \$50,000.*

(2) *Subsection (1) does not apply to –*

- (a) the installation, use or maintenance of an optical surveillance device in accordance with a warrant issued under Part 4;*
- (b) the installation, use or maintenance of an optical surveillance device in accordance with an emergency authorisation issued under Part 4;*
- (c) the installation, use, or maintenance of an optical surveillance device in accordance with*

- a law of the Commonwealth;*
- (d) *the use of an optical surveillance device in accordance with Part 5; or*
- (e) *the use of an optical surveillance device resulting in the unintentional recording or observation of a private activity*
- (3) *Subsection (1)(b) does not apply to the installation, use or maintenance of an optical surveillance device by or on behalf of a person who is a party to a private activity if –*
- (a) *each principal party to the private activity consents expressly or impliedly to that installation, use or maintenance; or*
- (b) *a principal party to the private activity consents expressly or impliedly to that installation, use, or maintenance, or maintenance and the installation, use, or maintenance is –*
- (i) *carried out in the course of that person’s duty as a law enforcement officer;*
- (ii) *carried out by that person as instructed or authorised by a law enforcement officer in the course of an investigation into a suspected criminal offence; or*
- (iii) *reasonably necessary for the protection of the lawful interests of that principal party.*

Section 3(1) – definitions of ‘optical surveillance device’ and ‘private activity’

optical surveillance device means any instrument, apparatus, equipment, or other device capable of being used to record visually or observe a private activity, but does not include spectacles, contact lenses or a similar device used by a person with impaired sight to overcome that impairment.

private activity means any activity carried on in circumstances that may reasonably be taken to indicate that any of the parties to the activity desires it to be observed only by themselves, but does not include an activity carried on in any circumstances in which the parties to the activity ought reasonably to expect that the activity may be observed.