

# VLRC Consultation on Surveillance in Public Places<sup>1</sup>

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## 1. Executive Summary

Liberty Victoria is a peak advocacy organisation for civil liberties in Australia. We believe in the principles of justice, openness and the rule of law and aim to secure the rights of all persons equally to the extent that they do not infringe upon the rights of others. Insofar as this inquiry is concerned, we believe that surveillance in public places is largely inevitable but that certain precautions should be put in place to ensure the personal privacy of persons in public places is not unduly infringed. Our primary recommendations are:

1. There should be a legislated, actionable right to privacy;
2. That all businesses using covert surveillance in public places be required to register their use with a surveillance regulator;
3. That all businesses using overt surveillance in public places be required to provide clear notice of the surveillance and contact details for the data administrator;
4. That it be illegal to use a surveillance device in a public place to grossly infringe another person’s personal privacy without their consent or lawful authority;
5. The role of the Victorian Privacy Commissioner should be expanded to include regulation of surveillance devices within Victoria;
6. That a broad definition of “public place” be adopted (such as that under the *Racial Discrimination Act 1975* (Cth));
7. That the *Surveillance Devices Act* (Vic) be amended to make it technology neutral and expressly prohibit surveillance which grossly infringes another’s privacy (i.e. toilets, showers and bathrooms);

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<sup>1</sup> Liberty Victoria would like to thank Craig Silva, Rhys Michie and Georgia King-Siem for their assistance in preparing this submission.

## 2. Overview

Public places are areas of public resort where members of the public may relax and interact with each other in a safe and convivial manner. Surveillance technologies were originally developed to improve security and thereby enhance our sense of well being within our society. However as Ellul has argued, "All technical progress has three kinds of effects: the desired, the foreseen, and the unforeseen" <sup>2</sup>. Unfortunately like most technologies, surveillance technologies can be used in both positive and negative ways. In many instances, their use in public places has reduced our sense of well being. Surveillance devices such as CCTV have reduced our sense of privacy and anonymity, but have not significantly reduced crime rates.<sup>3</sup>

Just as authorised surveillance devices have failed to live up to expectations, the unscrupulous use of surveillance devices has lived down to some of the worst predictions (i.e. upskirting, stalking, etc). The reality is that these technologies cannot be undone (even if one wanted to) and instead, as a society, we must develop rules for the use of such devices and the information that they collect.

In Victoria and across Australia, there is no uniform approach to surveillance in public places. Rather, each jurisdiction has a series of statutes which touch on surveillance and privacy; sometimes conflicting and sometimes leaving large gaps in between. Liberty believes a uniform approach is required; initially at a state level and later at a national level. Accordingly Liberty welcomes the VLRC's consultation paper and offers the following comments and recommendations.

## 3. Current Law and Practice

Surveillance in public places in Victoria is poorly regulated. The *Information Privacy Act 2000* (Vic) ("**the IPA**") only regulates the public sector while the *Surveillance Devices Act 1999* (Vic) ("**the SDA**") was intended to regulate public sector use of surveillance devices and the monitoring of private conversations. In addition, the *Privacy Act 1988* (Cth) ("**the Privacy Act**") provides some regulation of how organisations collect and use personal information. However, it is noted that the Privacy Act does not apply to individuals, small organisations, journalists or political parties. Consequently, the Privacy Act is limited to the Commonwealth public sector and larger organisations. In total, there are 15 pieces of state and federal legislation which govern, to a greater or lesser degree, surveillance in public places (not to mention various binding codes, standards and guidelines).<sup>4</sup>

Despite or perhaps because of this plethora of governance, there is no uniformity and little understanding of surveillance in public places. Moreover, any uniform framework developed must

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<sup>2</sup> Ellul, J. (1990). *The technological bluff*. Grand Rapids, MI: Eerdmans.

<sup>3</sup> Australian Institute of Criminology (2004) *Closed circuit television (CCTV) as a crime prevention measure*, AICrime reduction matters No. 18. Canberra, AIC. <http://www.aic.gov.au/publications/crm/crm018.html>; Welsh, BC & Farrington DP (2002) *Crime prevention effects of closed circuit television: a systematic review*, Home Office Study 252, London: Home Office Research, Development and Statistics Directorate.

<sup>4</sup> See page 126 of the VLRC Consultation Paper for a description of each.

be flexible enough to cater to the existing range of devices (CCTV, GPS, RFID, ANPR, biometrics<sup>5</sup>, mobile phones, etc) and embrace future developments.<sup>6</sup>

At least one of those future developments is likely to be technologies capable of assessing and responding to or even anticipating human behaviour.<sup>7</sup> This raises the spectre of surveillance devices not only collecting audio/visual information, but also behavioural information. Another avenue of development is devices capable of collecting medical or genetic information. The recent use of temperature scanners by customs to assess the health of incoming airline passengers is a small example of a general trend. It is foreseeable that such bio-metric technologies could be used to collect more detailed information (i.e. current health, genetic disposition, etc) at even the mass surveillance level.<sup>8</sup>

Bio-metric records can be shared and collated with other data sets which contain the same bio-metric information. For instance, face recognition technology or other remote bio-metric devices allow unique identification of an individual without recording any other identifying information such as name or driver's licence number (or other unique identifier). That data, along with any other information collected, can be shared and collated (linked) with other data sets containing the same identifier. The use of bio-metric records as unique identifiers significantly increases the potential for breaches of privacy principles as provided for in state and federal legislation when used with surveillance in public places.

The potential for abuse of privacy is also increased when surveillance technologies are convergent. One example is the use of remote bio-metric scanning with a GPS function of a mobile phone; linked to phone account records, the data set becomes a complete record of identity, revealing a future in which anonymity or privacy in public would be almost impossible. The commercial potential for these technologies is clearly apparent, and merely increases the likelihood of their development and implementation.

For some, these technologies are an untenable invasion of personal privacy and lead to an Orwellian erosion of civil liberties. For others, they promise to deliver a safer, more integrated and socially aware society. How these technologies are regulated will determine the end result.

#### **4. Risks and Benefits**

It is apparent that surveillance technologies offer significant benefits; or at least the perception of them. While they may not prevent crime, they are useful tools in solving and prosecuting crime.

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<sup>5</sup> Closed circuit television (CCTV); global position system (GPS); radio frequency identification (RFID); Automatic Number Plate Recognition (ANPR); biometrics include any biophysically unique information such as voice, face, retina, fingerprint, DNA, scent, etc).

<sup>6</sup> For instance, predictive technologies which are capable of assessing and responding or even anticipating human behaviour are already in development.

<sup>7</sup> Such as more recent CCTV software designed to analyse group dynamics and focus on 'aggressive' or 'antisocial' behaviour.

<sup>8</sup> Infrared scanners combined with CCTV would be able to scan large groups and, coupled with facial recognition software (or other individual identifiers), provide detailed analysis of each person's general health (temperature and heart rate) and social dynamics (body language in relation to other group members).

They are used regularly to respond to accidents and manage crowds. They can reduce security costs and often provide both users and subjects with a greater sense of security. Portable surveillance devices are used by journalists and by the general public to share and communicate their experiences. And of course marketers and other organisations can use the information derived from surveillance devices to obtain valuable demographics and even personalised marketing opportunities. While some may be less popular than others, these benefits are tangible and have a dollar value in our society.

On the other hand, these technologies also pose a risk to our current way of life. First and foremost is the erosion of privacy. While in Australia we do not have a right to privacy, most Australians have an expectation of at least some level of privacy when in public.<sup>9</sup> As surveillance technologies have proliferated, our expectations of privacy have reduced,<sup>10</sup> but it remains an important human right which requires protection. Liberty agrees with Roger Clarke as cited in the Consultation Paper that privacy fulfils important functions psychologically, sociologically, economically and politically. A society without privacy would be dysfunctional based on human nature as we understand it.<sup>11</sup>

Another risk posed by surveillance in public places is a loss of anonymity. Most people take it for granted that when they go about their daily business, no-one is watching them and compiling a list of what they do and where they go. Celebrities and victims of stalkers will attest to the inherent value of anonymity in our society. Do we want our every action in public to be a matter of public record which can be reviewed by anyone, anytime?

Surveillance in public places is often used to investigate and prosecute criminal activity. Concomitant with that is a reliance on the accuracy of evidence from those technologies. Technology is not infallible however and there are examples of false positives resulting in a miscarriage of justice.<sup>12</sup> In promoting surveillance in public places as means of prosecuting crime, it is important that the risk of false positives also be recognised. Furthermore, it should also be recognised that surveillance in public places can be used to facilitate crime (e.g. surveillance of ATMs, blackmail based on embarrassing conduct, etc).<sup>13</sup>

As surveillance systems become more sophisticated, they will provide an effective (but not infallible) way to monitor groups, particularly by profiling and predicting behaviours. This may be useful for

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<sup>9</sup> See page 58-59 of the Consultation Paper.

<sup>10</sup> Compare the expectation levels of privacy between different generations as illustrated by technologies such as Twitter, Facebook or MySpace.

<sup>11</sup> See further Daniel Solove (2007) *I've Got Nothing to Hide and Other Misunderstandings of Privacy*, 44 San Diego Law Review 745-767.

<sup>12</sup> Conversely, it is also likely that perpetrators have been cleared due to false negatives by technology.

<sup>13</sup> Authorised surveillance is not immune from misuse either; where an employee obtains surveillance information which is commercially valuable, they may be tempted to misuse that information for personal gain.

law enforcement, but might also be used by the private sector to exclude particular groups based on their actual and/or predicted behaviour or composition.<sup>14</sup>

Another, often sensationalised, risk is that of voyeurism. Surveillance devices allow individuals to record the conduct of others for their own entertainment or titillation. Recent examples include the photographing or videotaping of children at the beach by paedophiles or the recording of people injuring or embarrassing themselves in public which is later broadcast on television.

There are two clear consequences of a lack of privacy in public places; a loss of freedom of speech and a loss of freedom of association. Neither of these are protected as fundamental human rights in Australia (we have a limited right to freedom of political communication – not freedom of speech). As surveillance becomes more ubiquitous, people begin to self censor or engage in what is termed ‘anticipatory conformity’ of both speech and association.<sup>15</sup> This is desirable when limited to extreme behaviours, but is deleterious to society as a whole if taken too far.<sup>16</sup>

Already those with criminal histories are ostracised by the community where their history is known (which can contribute to their reoffending). A lack of anonymity in public would increase the level of ostracism of any who do not conform to the norm, resulting in an ever decreasing band of acceptable normative behaviour.<sup>17</sup>

Australia has a proud history of multiculturalism and we believe our diversity enhances our community. A failure to adequately protect our right to privacy, freedom of speech and association will lead to anticipatory conformity and ultimately destroy the lifestyle and society we enjoy today. Thus while surveillance in public places offers many potential benefits, it comes with many inherent risks, some of which are particularly grave. Liberty believes that comprehensive, appropriate and uniform regulation with greater education is the only way to minimise those risks.

## 5. Options for Reform

As noted in the Consultation Paper, there is no cohesive approach to surveillance in public places in Victoria (or Australia). The current fragmented approach is confusing and fails to regulate various forms of surveillance entirely. The enforcement pyramid illustrates a compliance oriented approach to regulation.<sup>18</sup> Liberty endorses this approach and believes the focus should be on education promoting compliance rather than on more punitive (and less enforceable) approaches.

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<sup>14</sup> For instance, if a shopping centre surveillance system identifies a group of youths as antisocial and unlikely to spend money within the shopping centre, shopping centre management may seek to exclude that group or the individuals within it.

<sup>15</sup> S. Zuboff (1988) *In the Age of the Smart Machine: The Future of Work and Power*, Basic Books, New York; cited in J. Mingers & L. Willcocks eds. (2004) *Social Theory and Philosophy for Information Systems*, John Wiley & Sons, West Sussex, p284.

<sup>16</sup> Such as the ‘chill’ effect on political speech and association or the Panopticon example as detailed in the Consultation Paper at pp 78-79.

<sup>17</sup> At least in public. See also A. Funder (2003) *Stasiland: True Stories from Behind the Berlin Wall*, Granta, London for an interesting exploration of the effects of surveillance on social structures and human behaviour.

<sup>18</sup> As outlined on page 136 of the Consultation Paper.

The proliferation of small and inexpensive surveillance devices means it impossible to enforce a complete prohibition on surveillance in public places. Moreover, regulation will only restrict the legitimate use and not the covert misuse of such devices. This does not mean surveillance in public places should not be regulated. Instead, it means the focus of any regulatory regime must be on education and providing accessible avenues of redress for those adversely affected.

Liberty agrees with the European Human Rights Convention that proportionality is required between the surveillance used and the purpose for which it is used. In the United Kingdom, councils were given broad powers to use surveillance to prevent terrorism and serious crime.<sup>19</sup> Inevitably, councils abused this power to catch residents committing trivial offences (i.e. dog fouling, littering, jaywalking, etc). Thus a balance must be struck between too little and too much regulation with the focus remaining on education.

First and foremost, Liberty supports the creation of a right to privacy. Such a right would provide a cause of action against those who wilfully and unlawfully, infringe another's privacy. Where the use of the technology is not overly invasive or where there is no expectation of privacy, then no cause of action would arise. Where however, a person or business grossly invades another's privacy, it would allow that person to seek redress directly.

Liberty Victoria agrees with Option 1, that there be instituted an independent regulator to monitor public place surveillance. Further, Liberty Victoria believes that this role should be provided by extending the responsibilities of the Office of the Victorian Privacy Commissioner ("**the OVPC**") or another existing statutorily independent regulator. Combining similar functions into the one regulator offers many advantages, not least of which is greater efficiency and a more uniform approach to regulation. At present, the OVPC is restricted to the Victorian public sector. It is envisaged that this role would be expanded to include both the private and public sectors. Further, Liberty notes and agrees with the broad definition of 'public place' used in the Racial Discrimination Act 1975 (Cth). The use of surveillance on private property such as shops, shopping centres and sporting venues where the public has access by invitation can properly be considered to be within the scope of the this review, and to omit the regulation of and monitoring of surveillance in such places by businesses and individuals would seriously impinge on the efficacy of reform and exclude activity where there is considerable risk of the abuse of privacy and anonymity.

An important addition beyond the recommendations would be that the regulator have a role in monitoring and licensing the use of covert surveillance on a case by case basis, by government, businesses and individuals, as a means of ensuring adherence to the relevant privacy principles and to monitor both the practice of covert surveillance and the individuals and organisations engaged in its use. All covert use of surveillance devices in public places by businesses should be registered with a central regulator and would require a declaration detailing; why the surveillance must be covert, what information it will collect, where it will be used and how long it will be kept for.

As noted in the consultation paper, surveillance technology is increasingly sophisticated, is decreasing in cost and is more widely available than ever before. All three trends can be expected to continue, and therefore the prevalence of covert surveillance by government, businesses and

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<sup>19</sup> *Regulation of Investigatory Powers Act (UK)* (known as 'RIPA').

individuals can also be expected to increase. By its very nature, covert surveillance is hard to detect, and therefore comprehensive monitoring of its use will prove to be difficult yet an important role remains to establish mandatory and voluntary codes and practices that will be adhered to by organisations and individuals with legitimate purposes.

As the use of surveillance increases in public places, the regulator should be required to educate the public on its prevalence, use, and how to comply with existing law and industry best practices, and/or best practice voluntary or mandatory standards. Ideally, the regulator would develop a standard of best practice which may be voluntary or mandatory. Compliance with the standard should be a criterion for Victorian Government procurement. It would be a positive outcome if compliance formed part of the selection criteria for organisations that sit on government panels or tying adherence to eligibility for government funding. The Environment Procurement Policy and standards for the security and integrity of law enforcement data systems provide appropriate models to follow.

Liberty advocates that the regulator be given the power to investigate the use of surveillance in public places. The collection, collation and publication of empirical data would improve transparency and improve the quality of information upon which decisions are based. Ideally, the regulator would be given the power to investigate concerns raised by the community, formal complaints and by their own motion. Establishing an investigatory regime that reflects the Privacy Commissioner's current powers of investigation is probably the most efficient option at the present time. It may be the case that should such a regime be established, extending the investigatory powers to include the power to conduct inquiries would be useful. A model based on the NSW Privacy Commissioner's power to conduct inquiries and the relevant powers to obtain documents and information may be appropriate.

Knowledge of and openness about surveillance has a twofold objective. Firstly, the public should have the right to protect their privacy and anonymity. The ability to exercise that right depends upon their knowledge and awareness of surveillance practices. Secondly, knowledge of the prevalence and capacity of surveillance capabilities will enhance the deterrent potential of surveillance and contribute to the positive aspects of its use.

The regulator should be empowered to report to parliament. Minimally this should comprise an annual report detailing their monitoring functions and recommendations for legislative reform. If the regulator was empowered to conduct inquiries and audits, they should be empowered to provide reports of those inquiries and audits to the public. Similarly, the regulator should be empowered to make a special report to parliament on any matter arising in connection to their functions. Furthermore, the regulator should be empowered to recommend that any report about public place surveillance be tabled in parliament. The reporting functions of the Victorian Privacy Commissioner, the NSW Privacy Commissioner and the Federal Privacy Commissioner provide appropriate models. Empowering the regulator to report to parliament would increase transparency, compliment the education program and enhance the public's trust in the regulator.

In relation to the specific functions of the regulator listed in the recommendations, Liberty Victoria believes the regulator should:

- have monitoring and research functions (see 6.71 of the consultation paper);

- be responsible for educating the public and technology users (see 6.76 of the consultation paper);
- draft advisory guidelines on the deployment and use of surveillance technologies – specifically in relation to the Surveillance Devices Act (Vic) (“**the SDA**”) as well as CCTV, RFID, biometric record collection devices and other surveillance devices as they become available (see 6.77, 6.78, 6.79, 6.80 of the consultation paper);
- have all necessary powers of investigation including auditing of registered devices (see 6.81, 6.82, 6.83 and 6.84 of the consultation paper);
- be required to table an annual report to Parliament (see 6.85, 6.86, 6.87 of the consultation paper).

The creation of a statutory cause of action for serious or gross invasions of privacy should be supported and should include as a serious invasion of privacy, the dissemination and or publication or sale of bio-metric data for the purposes of identification of the individual without the consent of the individual. Regulation of the data captured by surveillance in public places is necessary because it is likely to be digital and infinitely replicable and computable. If held indefinitely, as computing power increases it is possible that digital data will be more easily accessible and scanned so that data on an individual's location and other information will be able to be accessed retrospectively and collated with other information and identified by bio-metric records. Whilst this will raise issues (a photo or clear digital image is now a bio-metric record), arguably the development of judgements around this ‘tort’ will lead to interpretations of public interest and private interest that are in keeping with public perceptions of such.

The SDA should be amended to expressly prohibit the use of surveillance devices in areas with a high expectation of personal privacy (i.e. toilet areas, shower areas, change areas and bathrooms). This may be extended to other places where people ought to reasonably expect privacy such as lunchrooms.

With the development of technology, the present definition of a ‘tracking device’ is in need of updating. Liberty argues that including all devices that have the capacity to track, regardless of their primary purpose, including the identified exceptions, is appropriate. This reform would also achieve uniformity the NSW definition.

In the interests of privacy and consistency between jurisdictions, Liberty advocates reforming the participant monitoring provisions of the SDA (Vic) to bring them into line with NSW, SA, Tas, WA and ACT. Namely, the use of a listening device or without the consent of all known parties to the conversation should be prohibited. The SDA (NSW) is an appropriate model to be adopted, including the exception provisions which ensure the practice remains legal in limited and appropriate circumstances. Furthermore, the use of an optical device to record visually a private activity without the consent of all parties should be prohibited. The SDA (WA) provides an appropriate model to be adopted.

The publishing of material should be prohibited under the SDA. It may be useful to tighten the existing provision, as the use or dissemination of such recordings presents a real threat to privacy. There is also merit in extending the enforcement regime of the SDA to include civil penalties. This would add teeth to the Act and may increase compliance. This may provide a more cost effective



remedy and by lowering the threshold of the evidential burden could provide a means by which persons whose privacy has been breached may obtain redress. It would be better to compliment a tort of privacy with civil penalties than to substitute for it.

## 6. Conclusion

In conclusion, Liberty recommends the:

- Creation of an actionable right to privacy;
- Registration of all commercial covert surveillance in public places (including purpose and justification for covert collection, nature of data collected, time and location and length of retention) ;
- Public notification of all commercial overt surveillance in public places;
- Civil and criminal penalties for any gross invasions of privacy in public places without consent or lawful authority.
- Expansion of the OVPC's role to include the regulation of surveillance devices in public places. Further consideration should be given to extending the Information Privacy Principles (IPPs) to apply to data collected by the private sector when using a surveillance device (to the extent not already covered by the National Privacy Principles or NPPs).
- Development of guidelines for surveillance device users detailing their obligations not to a. collect more information than required, b. keep that information secure, c. not use it for any other purpose and d. to destroy the information once it is no longer required. It is envisaged that data should be destroyed within a nominal timeframe of 6 months.
- Adoption of a broad definition of "public place" such as that contained in the *Racial Discrimination Act 1975* (Cth);
- Amendment of the SDA (Vic) to make it technology neutral (i.e. broader more flexible definition of a tracking and other surveillance devices) and an express prohibition on gross invasions of privacy using a surveillance device (i.e. in toilets, showers and bathrooms). Amendment of the definition of 'participant monitoring' provisions to bring them into line with NSW, SA, Tas, WA and ACT;
- Further consideration of whether civil penalties are an appropriate measure under the SDA (Vic);

Liberty thanks the Victorian Law Reform Commission for its role in this inquiry and the opportunity for stakeholders such as Liberty Victoria to provide comment. Liberty believes that the protection of civil liberties, including the right to privacy, can be accommodated within Victoria's and indeed, Australia's, approach to surveillance of public places.

June 2009