

# Executive Summary

## SCOPE OF REVIEW

This Consultation Paper introduces the second phase of our inquiry into the use of surveillance and other privacy-invasive technologies. In 2005, we published our *Workplace Privacy: Final Report*.<sup>1</sup> In this paper, we consider surveillance in public places.

Our terms of reference draw attention to the widespread use of surveillance in public places and ask us to investigate whether legislative or other measures are needed to ensure that surveillance practices are appropriately controlled.

## OVERVIEW

Surveillance is now part of our everyday lives. We are accustomed to seeing CCTV cameras in shops and at railway stations. Surveillance devices assist with the collection of tolls on freeways, and with stock control and theft prevention when used in product tags in shops. Surveillance technology is used to assist with immigration checks at airports. Many widely owned products now have surveillance capabilities. Mobile phones that are able to take photos, record sound and images and assist us to find our destinations or locate people are common.

Surveillance serves many important purposes including the promotion of public safety and the prevention of crime. It also features in areas such as journalism and entertainment. Many groups within our community use surveillance technology, including police, transport operators, retailers, private investigators, sporting and entertainment venues, and journalists. Despite this widespread use, there is no comprehensive source of information about the extent of public place surveillance in Victoria.

Because of the growing affordability and capacity of surveillance devices we are increasingly likely to be recorded or scrutinised when we are in public places. The ability to store, use and disseminate surveillance data has also grown.

Some of the negative consequences that may flow from the increased use of surveillance in public places include a loss of privacy and anonymity which may cause us to alter the way we express ourselves and behave when in public. While these adjustments may not be readily apparent in the short term, the long-term incremental effect may be permanent changes to the way in which we use and enjoy public places. Because surveillance is often covert, those people with the means to do so may retreat to private places whenever possible in order to avoid unwanted observation.

Because surveillance technology is developing so rapidly, it is time to consider how best to encourage and support its responsible use. The existing regulatory framework has a number of shortcomings which are discussed in the paper.

## PRELIMINARY CONSULTATIONS

We have already conducted a number of preliminary consultations with users of surveillance practices and members of the community to better understand surveillance practices in Victorian public places. We also sought views about whether we need to change the law and what form any new regulation should take.

## CURRENT PRACTICE

There are a number of surveillance devices that are being used in Victorian public places including CCTV, location and tracking devices, global positioning systems, radio frequency identification, automatic number plate recognition, mobile phones and biometrics. There is also an increasing trend towards the use of mass surveillance to monitor large groups of people. In Chapter 2, we examine these current practices and consider the many factors that are driving the use of surveillance devices. We examine also future trends, looking at possible applications of technological developments.

Both constitutional constraints and practical considerations have limited our inquiries. We have not considered national security uses of surveillance, or telecommunications and data surveillance practices, because these activities are regulated at the federal level. We suggest that surveillance activities conducted by state law enforcement bodies be considered separately because of the need to consider police investigation and information gathering activities as a whole.

## PRIVACY

In Chapter 3, we consider the concept of privacy and, in particular, whether it extends to public places. Privacy is an internationally recognised human right which is included in the *Victorian Charter of Human Rights and Responsibilities Act 2006*. It is now widely acknowledged that reasonable expectations of privacy extend to public places. The reasonableness of any expectation of privacy in public will depend on the circumstances, such as whether surveillance is covert, whether a permanent record is created and whether consent has been given.

## RISKS AND BENEFITS OF PUBLIC PLACE SURVEILLANCE

Surveillance appears to offer many important benefits to our community including increased safety, crime control, and as a means of expression and journalistic activity. It is appropriate, however, to test the validity of these claimed benefits, especially because the data concerning the beneficial effects of some types of widely used surveillance is limited.

In Chapter 4, we also consider the impact which surveillance in public places can have on privacy and other shared values. Unlike interferences with other important rights, loss of privacy may result in harm which the law finds difficult to characterise and remedy. We consider the impact of the misuse of public place surveillance under the following headings:

- loss of anonymity in public places
- possibility of error and miscarriage of justice
- discriminatory profiling of groups
- voyeuristic uses
- other antisocial uses
- exclusion of groups from public places
- limits to political speech and association
- changes to the nature of public life.

## CURRENT LAW

We consider the current regulatory framework in Chapter 5. No single law comprehensively regulates the use of surveillance in public places in Victoria. Three Acts of Parliament regulate some uses of surveillance in public places: the *Victorian Surveillance Devices Act 1999* (Vic) and the *Information Privacy Act 2000* (Vic) and the *Commonwealth Privacy Act 1988* (Cth). Surveillance is also regulated by a range of industry and government codes, self-imposed policies, standards and guidelines.<sup>2</sup> There is no clear public policy that emerges from this body of regulation concerning the circumstances in which public place surveillance is acceptable and the circumstances in which it is not permissible.

The development of laws to cover particularly offensive forms of surveillance, such as ‘upskirting’ and the recording of images related to child pornography, represent attempts to address some of the limitations in the current regime. In addition, surveillance in some contexts, for example in casinos and bars, is separately regulated.

The existing Victorian regulatory regime is not well equipped to deal with the challenges posed by current and emerging surveillance technology. We identify the types of surveillance practices that may fall beyond existing laws and consider whether the regulatory approaches interstate and overseas offer solutions. We also consider the recommendations of other law reform bodies that are relevant to surveillance in public places. In particular, we have considered the recommendations of the Australian Law Reform Commission (ALRC) concerning information privacy laws.<sup>3</sup> We also examine Australian approaches to regulation in other rapidly changing areas of public concern, such as the environment and the economy.

1 Victorian Law Reform Commission, *Workplace Privacy: Final Report* (2005).

2 Two tables at the end of Chapter 5 summarise legislation and binding codes and major non-binding instruments relating to public place surveillance in Victoria.

3 Australian Law Reform Commission, *For Your Information: Australian Privacy Law and Practice: Volume 3: Final Report* 108 (2008) ch 74.

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## REFORM PROPOSALS

The reform options detailed in Chapter 6 are presented for public discussion. That discussion will help us to develop recommendations for inclusion in our final report to the Attorney-General.

The reform options aim to provide greater certainty and guidance about the situations in which the use of surveillance is acceptable and unacceptable. The commission believes that regulation should be multifaceted and provide sufficient flexibility to address the many contexts in which surveillance occurs and the broad range of people who use surveillance.

We propose a number of overarching principles that may be used to guide regulatory changes and inform policy in Victoria. We ask whether these principles should apply to isolated surveillance practices or should be confined to continuous use of surveillance, for example at a bank or petrol station.

Our reform options include:

- a new role for an independent regulator to monitor, report and provide information about public place surveillance in Victoria. It is envisaged that the regulator may require statutory powers of investigation and could be responsible for regularly reporting to parliament.
- new voluntary best-practice standards to promote responsible use of surveillance in public places. We ask whether compliance with best-practice standards could be encouraged by tying them to Victorian government procurement criteria.
- mandatory codes to govern the use of surveillance in public places with sanctions for non-compliance that include civil or criminal penalties.
- a licensing system for some surveillance practices that are found to be particularly invasive of privacy.
- various changes to clarify and strengthen the *Surveillance Devices Act 1999* (Vic).
- a new statutory obligation to refrain from committing a serious invasion of privacy modelled on the statutory cause of action proposed by the ALRC in its recent report.

Some or all of these options could form part of a new regulatory regime for surveillance in public places in Victoria. The commission has not reached any final views about reform. We encourage submissions on all of the issues and questions raised in this Consultation Paper.