



St Kilda Legal Service Co-Op Ltd
St Kilda Community Centre, 161 Chapel St, St Kilda 3182
T: 9534 0777 F: 9525 5704 e: st_kilda_vic@clc.net.au

**St Kilda Legal Service Submission
to the Victorian Law Reform Commission
Inquiry into Surveillance in Public Places**

About St Kilda Legal Service

St Kilda Legal Service was amongst the first community legal centres to be established in Victoria. The Legal Service began as part of the St Kilda Community Group that was set up to provide welfare services to the local community. The Legal Service is a registered co-operative and a voluntary Board of Directors oversees the management of the Service.

The Legal Service provides free and accessible legal services to members of the community within the Cities of Port Phillip, Bayside, Stonnington and parts of Glen Eira. The Legal Service is committed to redressing inequalities within the legal system through casework, legal education, community development and law reform activities. The Legal Service conducts a night service three nights a week, staffed entirely by volunteer lawyers, and employs an administrator, a casework lawyer, a community legal education lawyer, a volunteer coordinator and a community drug outreach lawyer. The Legal Service also conducts a duty solicitor service at the Moorabbin Justice Centre one day per week for applicants in family violence intervention order matters.

St Kilda Legal Service Submission

Definition of Public Place

The Legal Service agrees the definition of 'public place' should not exclude privately owned properties. One of the areas where CCTV surveillance issues impact upon clients of the Legal Service is in privately owned shops. The Legal Service agrees there should be a broad definition of 'public place' and

¹ Victorian Law Reform Commission, *Surveillance in Public Places* Consultation Paper (2009), p19-20

supports the adoption of the definition of public place set out in the *Racial Discrimination Act 1975(Cth)*:

public place includes any place to which the public have access as of right or invitation, whether expressed or implied and whether or not a charge is made for admission to the place².

Victorian Law Reform Commission (VLRC) Consultation Paper Questions

The Legal Service does not address all 24 questions set out in the VLRC Surveillance in Public Places Consultations Paper. The questions are not all addressed in the order set out in the Consultation Paper.

Are there any surveillance practices in Victorian public places that are particularly concerning? If so why? (q. 17 of the Consultation Paper)

The Legal Service has particular concerns about:

- the proliferation of CCTV cameras;
- the impact of these cameras on already marginalised sectors of society; and
- the lack of adequate regulation around the use of CCTV cameras *and* the use of the footage obtained from these surveillance cameras.

Use of information obtained through CCTV surveillance practices

The Legal Service has concerns about practices around the *use* of footage from CCTV cameras. The Legal Service understands that the Consultation Paper and reform proposals contained within the Paper focus on “surveillance practices... rather than on the *use* of personal information obtained through such practices.”³ However, as recognised by the VLRC, “the harm caused to a person’s privacy by the publication of information collected through surveillance will often be easier to identify and describe than the harm associated with the surveillance practice itself.”⁴

In the Consultation Paper the VLRC describes an example of law enforcement use of CCTV:

[The Crime Stoppers] program places surveillance footage, some of which is from CCTV, on a website to elicit information from the public about an alleged crime.⁵

During one of the VLRC facilitated Round Table Consultations:

The police suggested that unnecessary restrictions on the publication of images provided by witnesses would have a significant negative impact on criminal investigations. They gave the example of police use of surveillance material on the Crime Stoppers program. That program collects information about crime, including surveillance footage, from businesses and individuals. The footage is included on a website in the hope of eliciting information

² Racial Discrimination Act 1975 (Cth) s18C(3) cited in Victorian Law Reform Commission, *Surveillance in Public Places* Consultation Paper (2009), p20

³ Victorian Law Reform Commission, *Surveillance in Public Places* Consultation Paper (2009), p22

⁴ Ibid p23

⁵ Ibid p30

about crime from the public. The police were opposed to regulation that would require lengthy applications for warrants.⁶

The Legal Service has significant concerns about the human rights implications of some practices associated with the Crime Stoppers program.

Example

The following appeared on the Crime Stoppers website with an accompanying still photograph:

The *young man* [our emphasis] pictured here was allegedly involved in criminal damage (graffiti) on a Connex carriage... Police have released images of the man in the belief he may be able to assist them in their enquiries.⁷

The young person in the above example may have been, at the time of publication of the still image, a child as defined by the *Children, Youth and Families Act 2005* (Vic). The Legal Service does not agree that “the use of information collected by CCTV is likely to be regulated by information privacy laws”⁸ in all instances. The above is an example where current privacy laws offer no protection to the individual.

The Australian Law Reform Commission (ALRC) considered the issue of identification of young people alleged to have committed a crime in its 2008 report “*For Your Information: Australian Privacy Law and Practice*” but concluded that the issue of the “public identification of a child or young person alleged to have committed a crime” was beyond the scope of the inquiry. The ALRC commented that it:

...encourages consideration of broader provisions relating to public identification of a child or young person alleged to have committed a crime, applying throughout the criminal investigation and proceedings. The ALRC considers that these provisions are situated most appropriately in relevant state and federal legislation dealing with child welfare or criminal matters. This issue lies beyond the scope of this Inquiry and the ALRC has not made a recommendation on the issue.

St Kilda Legal Service supports the position of the specialist community legal centre YouthLaw on this issue as stated in its 2007 submission to the ALRC Inquiry:

Under Victorian law there are restrictions on identifying a child charged with a criminal offence, and publication of proceedings. Such laws realise Australia's international obligations to protect the privacy of children in the criminal justice system and promote young offenders rehabilitation and reintegration into society as found in the United Nation’s Convention on the Rights of the Child.

The Children, Youth and Families Act 2005 (CYFA) provides that publicity of young offenders, under the age of 18 years is prohibited without court permission. Section 534 states that a person must not publish a report of a

⁶ Ibid p136

⁷ Crime Stoppers: Unsolved Crimes <
<http://www.vic.crimestoppers.com.au/unsolvedcrimes.aspx?show=1&page=2>> at 24 June 2009

⁸ Victorian Law Reform Commission, *Surveillance in Public Places* Consultation Paper (2009), p23

proceeding in the court that contains any particulars likely to lead to identification of a child.

However this protection against publicity does not extend to alleged young offenders being investigated by police. In Victoria there have been cases where young offenders have been identified prior to their matter proceeding to court, and this has severely breached their right to privacy.

Under Rule 8 of the United Nations Standard Minimum Rules for the Administration of Juvenile Justice (Beijing Rules) the young person's right to privacy is to be respected at all stages in order to avoid harm being caused to him or her by undue publicity or the process of labelling. In principle no information that may lead to identification of a juvenile offender may be published.⁹

It is not only police who are publishing information that could identify young persons alleged to have committed an offence. With the increasing use of CCTV cameras by retailers the Legal Service is concerned that young people may be identified as alleged shoplifters by store owners.

Case study

A newsagent within the Legal Service catchment area displays at its counter still photographs of individuals taken from CCTV footage. The implication is that the persons in the photographs have been involved in shoplifting from the store although there is no caption accompanying the photographs.

The Legal Service is concerned about the impact on the reputation of individuals (not only young people) by the above practice. The lack of regulation of the use of CCTV cameras and regulation of the use of footage obtained from the cameras, as well as the affordability of CCTV technology, may make this practice attractive to retailers attempting to reduce theft. It is noted by the VLRC that "newsagents reportedly find that 4.5% of their turnover is 'walking out the door'".¹⁰ . The Legal Service notes that while "the main reason for installing CCTV is to reduce crime and other public disorder... it is by no means certain that these outcomes are achieved"¹¹.

The Legal Service takes the view that there is currently insufficient regulation of CCTV cameras and insufficient regulation of the use of information obtained via CCTV surveillance.

Principles to guide public place surveillance

1. Do you agree with the draft principles proposed by the commission to guide policy making about public place surveillance?

The Legal Service agrees that there should be a "clear public policy... concerning the circumstances in which public place surveillance is and acceptable and the circumstances in which it is not permissible".¹²

⁹ YouthLaw, *Privacy and Young People: YouthLaw Submission to ALRC* January 2007, p2-3

¹⁰ Victorian Law Reform Commission, *Surveillance in Public Places* Consultation Paper (2009), p37

¹¹ Sutton, A & Wilson, D, "Open Street CCTV in Australia: reviewing a surveillance Revolution", UniNews (Melbourne University) Vol.12 No.12 14-28 July 2003

¹² Victorian Law Reform Commission, *Surveillance in Public Places* Consultation Paper (2009), p13

The Legal Service submits that the principles to guide policy in this area should include principles around the subsequent *use* of materials obtained via public surveillance. As stated above, the Legal Service takes the view that when considering surveillance practices it is important to consider what limitations should be placed on the *use* of information obtained via surveillance practices so as to protect individual freedoms and human rights. The Legal Service does not accept, for example, that in all cases “the use of information collected by CCTV is likely to be regulated by information privacy laws.”¹³

2. Should the one-off or intermittent use of surveillance practices by individuals be regulated?

This question is not specifically addressed in this submission apart from the Legal service response to question 21 in relation to the exemption for participant monitoring.

A new role for an independent regulator

3. Do you agree with the proposal that an independent regulator should have responsibility for monitoring the use of public place surveillance in Victoria? Who should perform this role?

The Legal Service agrees that “[t]he nature of much of the potential harm caused by the abuse of surveillance and the inability of individuals to be aware of particular instances of abuse means that only government can effectively regulate surveillance in public places.”¹⁴ The Legal Service agrees that monitoring of the use of public place surveillance should be through an independent regulator. The Legal Service has no specific comment about the proposal that this role be filled by the Victorian Privacy Commissioner, however the Legal Service strongly believes the proposed regulator should have powers extending to both the public and the private sectors. As described above, clients of the Legal Service are impacted upon by the use of CCTV cameras by private retailers as well as use of CCTV by public bodies.

Specific functions of the regulator

4. Should the regulator be given the functions proposed by the commission?

The Legal Service supports a monitoring and research function being given to an independent regulator, the regulator having a role to improve public and user awareness and the regulator being given the power to carry out investigations and to report to parliament. The Legal Service particularly supports legal reform initiatives that increase the accountability and monitor the practices of authorities, sporting and entertainment venue operators, shopping centre operators and retailers who use CCTV surveillance cameras. The Legal Service also supports a reduction in the use of CCTV cameras in society generally. As stated above, the Legal Service notes that “the main

¹³ Victorian Law Reform Commission, *Surveillance in Public Places* Consultation Paper (2009), p23

¹⁴ Ibid p133

reason for installing CCTV is to reduce crime and other public disorder”, but “that it is by no means certain that these outcomes are achieved”.¹⁵

5. Are there any other functions that should be given to the regulator?

See below at question 8.

6. Would a registration scheme assist the regulator to acquire information about surveillance use? Is such a scheme practical? Should some users be exempt from registration requirements?

The Legal Service recognises that identifying the users of surveillance in public places through a system of registration and/or licensing (see below at q. 16) could be a useful step in facilitating the ability of a regulator to monitor the activities of users. The Legal Service does not address the issue of the practicality of such a scheme.

7. What (if any) investigatory powers should be given to the regulator?

The Legal Service supports the regulator having a broad range of investigatory powers, including an own motion investigatory power (see below).

8. Should the regulator have an own motion investigatory power in order to identify systemic problems with surveillance in public places?

The Legal Service agrees that the regulator should have an own motion investigatory power in order to identify systemic problems with surveillance in public places. In the view of the Legal Service the impact of CCTV camera surveillance on already marginalised sectors of society is often “to exacerbate social exclusion”.¹⁶

Anecdotal case example provided by local community worker

An individual, in extreme financial hardship, scrounged through the dumpster at the rear of a local supermarket for edible food that had been thrown out by the supermarket. Security personnel appeared with a hose and squirted water at the individual. They also informed the individual that his actions had been recorded by a CCTV camera.

The Legal Service is concerned that in the above example the activities of the supermarket security staff in squirting the individual with water had the effect of humiliating that individual and that the practice of the supermarket in directing its CCTV cameras to discourage scrounging through its dumpsters also had the impact of inflicting further humiliation on him.

¹⁵ Sutton, A & Wilson, D, “Open Street CCTV in Australia: reviewing a surveillance Revolution”, UniNews (Melbourne University) Vol.12 No.12 14-28 July 2003

¹⁶ Sutton, A & Wilson, D, “Open Street CCTV in Australia: reviewing a surveillance Revolution”, UniNews (Melbourne University) Vol.12 No.12 14-28 July 2003

The Legal Service is co-located with the Port Phillip Community Group. The Community Group provides emergency food vouchers and other emergency relief to members of the local community. The Legal Service is concerned that those already severely disadvantaged in society, particularly those who are homeless, are targeted in the way that CCTV is currently used. The homeless are not only denied access to adequate housing, but also face an increase in the risk of being charged with a range of offences related to their homeless status. For example, if a person is homeless they have far greater likelihood of breaching the law around being intoxicated in a public place. Moreover, if their activities are monitored on CCTV they are more likely to be charged with this offence. The Legal Service is also concerned that increasingly homeless persons are being pushed out of areas where they might previously have found shelter by the proliferation of CCTV cameras. For example, a CCTV camera positioned to record the sheltered waiting area of a railway station may have a 'security' function, but it can also facilitate train authorities 'moving on' a homeless person who uses the area to shelter for the night.

The Legal Service agrees that "[t]he legitimate interest that public authorities and private organisations have in using surveillance devices to safeguard against threats to public safety and interference with property must be balanced against the potential harm to individual and community interests."¹⁷ It is the view of the Legal Service that the regulator should have an own motion investigatory power to consider individual and community interests, including the community interest of promoting and facilitating a just and tolerant society, that may be adversely impacted upon by surveillance in public places. The Legal Service takes the view that the widespread use of CCTV in public places has the "potential to exacerbate social exclusion, undermine individual freedoms and facilitate oppressive forms of social control."¹⁸

9. Should the regulator have the power to develop advisory guidelines which explain the law concerning surveillance in public places?

The Legal Service supports legal reform initiatives that increase the accountability and monitor the practices of authorities, sporting and entertainment venue operators, shopping centre operators and retailers who use surveillance in public places. Coupled with law reform in this area the Legal Service supports the regulator having the power to develop advisory guidelines which explain the law concerning surveillance in public places. This may facilitate greater compliance by public place surveillance users with their legal obligations.

Voluntary best-practice standards

10. Would voluntary best-practice standards developed or approved by the regulator be useful?

¹⁷ Victorian Law Reform Commission, *Surveillance in Public Places* Consultation Paper (2009), p133

¹⁸ Sutton, A & Wilson, D, "Open Street CCTV in Australia: reviewing a surveillance Revolution", UniNews (Melbourne University) Vol.12 No.12 14-28 July 2003

The Legal Service does not believe a system of voluntary best-practice standards would provide adequate protection to individuals. The Legal Service agrees that “[t]he effect of... voluntary regulation is limited because of its voluntary nature and because there is no external oversight of compliance with the requirements of voluntary guidelines.”¹⁹

11. Is linking voluntary best-practice standards to government procurement criteria a good strategy for encouraging responsible use of surveillance practices? Are there other strategies for encouraging compliance with the voluntary standards?

The Legal Service believes that linking voluntary best-practice standards to government procurement criteria could only have limited effect in encouraging responsible use of surveillance practices because many small private businesses who are users of surveillance technology such as CCTV cameras do not do business with the Victorian government. The Legal Service does not support a system that relies upon voluntary standards.

Mandatory codes of practice

12. Should there be mandatory codes, if so, what conduct should they regulate?

The Legal Service supports there being a mandatory code of practice, as opposed to a voluntary code.

13. If mandatory codes are introduced, should the regulator have the power to approve industry codes that operate in their place?

This question is not addressed in this submission.

14. Should the regulator be empowered to investigate complaints made about potential breaches of a mandatory code? How broad should any such powers be?

The Legal Service believes the regulator should be empowered to investigate complaints made about potential breaches of a mandatory code. The Legal Service does not address this question in detail in this submission.

15. What kind of sanctions should be imposed for breaches of a mandatory code?

This question is not addressed in this submission.

A licensing system for some surveillance practices

16. Should users of some forms of surveillance be required to obtain a licence from a regulator?

The Legal Service recognises there may be barriers to instituting a licensing system due to the large numbers of public authorities and private businesses

¹⁹ Victorian Law Reform Commission, *Surveillance in Public Places* Consultation Paper (2009), p135

currently using CCTV technology. CCTV technology is cheap and easily accessible and its use has become widespread over the past decade and a half²⁰. The VLRC notes in its Consultation Paper that “*The Sunday Age* reported in 2007 that there were 30000 surveillance camera in Melbourne petrol stations, 2500 in pubs and clubs, 2000 in Chadstone Shopping Centre, 2000 in post offices, milk bars and newsagents and 1200 in chemists.”²¹

Surveillance practices in Victoria impact upon clients of the Legal Service. Clients of the Legal Service have been charged on the basis of footage from CCTV cameras.

Case study

The client was charged with theft of library books from a university library. Some of the evidence on which the charge was based was the university library CCTV footage. The CCTV footage could not be viewed on police equipment because of incompatibility of the viewing systems. The only way that the Legal Service lawyer and her client were able to view the footage before the court date was by attending the university.

The above example demonstrates the need for increased regulation of users of CCTV cameras which could include licensing requirements. CCTV footage that is relied upon as evidence should be available to an accused in a format that is readily viewable. The Legal Service also has concerns that there is no set period for a public authority or private business to retain CCTV footage. This means that an accused who seeks access to CCTV footage as potential evidence to support his or her case has no way of knowing whether the authority or business still holds the footage.

17. Are there any surveillance practices in Victorian public places that are particularly concerning? If so why?

See p. 2 of this submission.

Changes to clarify and strengthen the SDA (Vic)

18. Should the SDA (Vic) expressly prohibit the use of an optical surveillance device in toilet areas, shower areas, and change rooms?

The Legal Service has nothing further to add to the discussion of this issue

19. Should the definition of ‘tracking device’ in the SDA (Vic) be amended so that it includes all devices capable of determining the geographical location of a person or an object?

This question is not addressed in this submission.

²⁰ Sutton, A & Wilson, D, “Open Street CCTV in Australia: reviewing a surveillance Revolution”, UniNews (Melbourne University) Vol.12 No.12 14-28 July 2003

²¹ Mark Russell, ‘Smile for the Cameras: There may be One Watching You Now’ Sunday Age (Melbourne), 26 June 2007, 8 in Victorian Law Reform Commission, *Surveillance in Public Places* Consultation Paper (2009), p29

20. Should the SDA (Vic) be amended to include a new ‘catch-all’ category of surveillance devices to cover those devices that do not fit within the Act’s existing listening, optical, tracking and data surveillance categories? How could this be done?

This question is not addressed in this submission.

21. Should the exemption for participant monitoring in the SDA (Vic) be removed? If so, should this also be done for both listening and optical surveillance devices?

It is the view of the Legal Service that if the exemption for participant monitoring in the SDA (Vic) is removed there should be an exception to allow for evidence gathering in family violence and family law matters. The exemption is important for individuals in family violence and family law cases. Without it individuals may find it more difficult to gather evidence to support their case. This is because in family violence matters, for example, there are often no witnesses to the alleged abuse apart from the victim and the perpetrator. See example below.

Case study

The client had separated from her husband. The client and her ex-husband continued to run a business together. The client stated that she had been subjected to abuse during the relationship and that she was subjected to threats after the relationship had ended. The client sought a family violence intervention order. The client stated that she had recorded, without her ex-husband’s knowledge, a conversation in which her ex-husband threatened her.

The Legal Service agrees that it is “unacceptable for a person who participates in a consensual sexual act to record that act with an optical surveillance device without the consent of the other person.”²²

22. Should the enforcement regime of the SDA (Vic) be extended to include civil penalties?

This question is not addressed in this submission.

23. Should the regulator’s proposed powers to establish guidelines be extended to clarify the meaning of consent in the SDA (Vic)? If so, how should the meaning of consent be clarified?

The Legal Service supports the regulator’s proposed powers to establish guidelines being extended to clarify the meaning of consent in the SDA (Vic). The Legal Service is concerned that consent should not be implied where individuals have no reasonable “choice about being in a particular place”²³. The Legal Service notes that some of the most marginalised groups have the least choice in avoiding public place surveillance.

Creating a statutory cause of action for serious invasions of privacy

²² Victorian Law Reform Commission, *Surveillance in Public Places* Consultation Paper (2009), p154

²³ Ibid p156

24. Should there be a statutory cause of action for serious invasions of privacy along the lines proposed by the ALRC?

This question is not addressed in this submission.