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Submission in response to the Victorian Law Reform Commission's Consultation Paper 7:
"Surveillance in Public Places"

Following a number of highly publicised terrorist attacks in recent years, there has been a series of national and international responses in a bid to reduce the chances of something similar reoccurring. One of the responses involves the increased surveillance and monitoring of communities and individuals across the globe in an effort to detect and prevent any perceived threat. This response, inter alia, has changed political and social landscapes worldwide.

The gradual handing over of personal liberty as a reaction to the instilment of fear from Government for our personal and national safety has reached tipping point. The balance of priorities between community safety and individual rights appears to have been blurred in many respects, and all but lost in others. One outcome of the drastic political shift towards national security is the increased use of public surveillance methods.

Surveillance has become part of everyday life, a 'condition of modernity'¹ for a large proportion of the Australian community. As surveillance proliferates in public spaces, questions and concerns around privacy logically follow. Considerations and debates about concepts of privacy reveal a large variety of disciplines that are concerned with this issue.

It comes as no surprise then that a singular concept of privacy and/or its relation to the surveillance of public space does not exist. As surveillance technology rapidly evolves and the environment of what is considered "public space" continues to shift, processes of information exchange and discussion are needed on an ongoing basis if regulatory frameworks are to keep tabs on this transient area of concern.

When taking into account conceptions of public space and privacy, it vitally important that the voice of the majority, or what is considered the mainstream, doesn't drown out alternative concerns. The Victorian Aboriginal Legal Service Co-operative Limited is therefore appreciative of the opportunity to respond to the Victorian Law Reform Commission's *Surveillance in Public Places Consultation Paper* in order to contribute to that alternative voice. Topics addressed are as follows:

- Approaches to understanding privacy;
- Privacy and the relationship with surveillance of public space;
- Problematic conceptions of the public and the private;
- Risks involved in the surveillance of public space;
- Human rights considerations;
- Surveillance as a crime prevention tool; and
- Summary and recommendations.

¹ Bennett as sighted in Butler D (2009) 'Surveillance Society' *The Vancouver Sun* 28th February 2009.

Privacy

Privacy is a reasonable expectation for every person. It has also been argued that people have a right to be free from surveillance or fear of surveillance: surveillance meaning ‘the systematic observation or recording of one or more people’s behaviour, communications, or personal information’ (Australian Privacy Charter Council 2004).

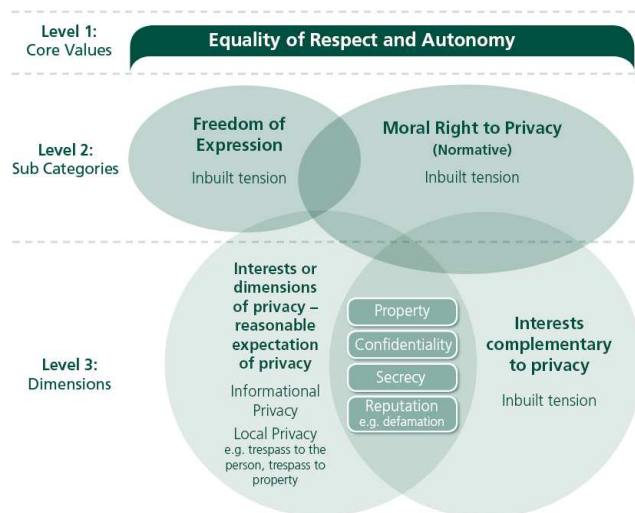
Concerns over surveillance technology and the potential for the harm to privacy are by no means new. The Australian Privacy Charter Council was arguing strongly for increased protections to privacy in the face of increased surveillance back in December 1994:

A free and democratic society requires respect for the autonomy of individuals, and limits the power of both State and private organisations to intrude on that autonomy. Privacy is a key value which underpins human dignity and other key values such as freedom of association and freedom of speech.

...privacy protections and limitations on surveillance that do exist are being progressively undermined by technological and administrative changes. New forms of protection are therefore required.²

More recent considerations on this topic echo a similar sentiment. For instance, the ‘core values’ approach (shown below) and Solove’s (2006) taxonomy theory are both very useful starting points with which to consider the myriad of ways surveillance can impact privacy. The ‘core values’ approach to privacy is a base-level and highly relatable configuration of how equality of respect and autonomy, moral rights to privacy, and freedom of expression operate and interact.

Figure 1 – ‘Core Values’ Approach to Privacy



Source: Hickford 2007:9.

Solove, a specialist in the field, highlights privacy as a concept in disarray. Privacy is hard to articulate, definitions can be vague, and as a result lawmaking in relation to issues of privacy is not adequately informed or guided. While some theorists assert that privacy serves principally instrumental values, others are adamant in linking privacy deontologically³ to care for the self (Cohen 2008). ‘Choices about the

² Australian Privacy Charter Council (1994) ‘The Australian Privacy Charter’ *Privacy Law and Policy Reporter* 31 [online] <http://www.austlii.edu.au/au/journals/PLPR/1995/31.html> [accessed 29th June 2009].

³ The term deontological relates to philosophical theories that state that the moral content of an action is not wholly dependent on its consequences.

nature and permissible extent of surveillance are choices about the scope for self-articulation; in a very real sense, they are what enable or disable pursuit of the ideal that the liberal self represents...they are also choices about the definition and articulation of collective identity' (Cohen 2008:189). These are sizeable concepts, but are useful to keep in mind when attempting to craft reforms that account for all of society.

The challenge, then, is to try and be wary that what an individual or community perceives as privacy, or a place where privacy should exist, should be given some validity through seeking out and considering these viewpoints from a vast cross section of the community. This would be a lengthy and ongoing process that would require the resulting "solutions", whether legal or otherwise, to remain flexible to change and open to emerging changes and concerns in the community.

Section 7(1) of the *Surveillance Devices Act 1999* (Vic)⁴ states that a person must not knowingly install, use or maintain an optical surveillance device to record visually or observe a private activity to which the person is not a party, without the express or implied consent of each party to the activity.⁵ The usefulness, whether legally or practically, of this legislation unavoidably hinges on what is considered "private activity". Reconciling a conception of privacy and "private activity" is a multifarious, perplexing and seemingly insurmountable task.

To give some much needed focus to a discussion such as this, below are a number of features of surveillance in Closed-Circuit Television (CCTV) form that create social, political and technical dilemmas which can be responded to:

- It is the citizens in public spaces that are the main objects of surveillance. This poses a threat to a previously enjoyed public privacy by anonymous citizens in public space;
- Citizens are not in a position to reject or agree with the surveillance. The extent of freedom to go about lawful business unmonitored and unobserved is limited;
- There is extension for agencies and institutions to subject a section of the public to surveillance for their own purposes; and
- Development of surveillance systems has changed what can be gleaned from observations of individuals. As well as recording the presence of and recognising individuals, surveillance systems now offer the possibility of evaluating and making inferences about a person's actions and intentions, drawing on stereotypes and profiling methods (Royal Academy of Engineering 2007).

⁴ Privacy is presently regulated by the Information Privacy Act 2000 (Vic), the Surveillance Devices Act 1999 (Vic) and the Privacy Act 1988 (Cth).

⁵ Not applying to surveillance in accordance with a warrant or emergency authorisation, in accordance with the law of the Commonwealth, surveillance by a law enforcement officer in the performance of his or her duty on premises if (i) an occupier of the premises authorises that installation, use or maintenance; and (ii) is reasonably necessary for the protection of any person's lawful interests. Australian Legal Information Institute (2009) *Surveillance Devices Act 1999 – Sect 7* at www.austlii.edu.au/au/legis/vic/consol_act/sda1999210/s7.html as at 23rd June 2009.

It becomes increasingly clear that no matter how many elements are brought into consideration for the issue of privacy, there is an undeniable need for these issues to be viewed through a human rights lens. For example:

- The General Assembly of the United Nations adopted and proclaimed the Universal Declaration of Human Rights. Within this Declaration, Article 12 states:

*No one shall be subjected to arbitrary interference with his privacy, family, home or correspondence, nor to attacks upon his honour and reputation. Everyone has the right to the protection of the law against such interference or attacks.*⁶

- Article 8 of the European Convention on Human Rights states:

*Everyone has the right to respect for his private and family life, his home and his correspondence. There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others.*⁷

- Article 17 of the International Covenant on Civil and Political Rights states:

No one shall be subjected to arbitrary or unlawful interference with his privacy, family, home or correspondence, nor to unlawful attacks on his honour and reputation. Everyone has the right to the protection of the law against such interference or attacks.

VALS endorses the Human Rights Law Resource Centre's (HRLRC) argument that there are significant gaps in Victorian privacy legislation. As there is no actionable right to privacy in Australian common law or in legislation, VALS agrees that the existing regulatory framework on public place surveillance fails to adequately protect and promote the right to privacy and that reform, consistent with human rights principles.⁸

The rising instance and extent to loss of privacy is an extreme negative consequence that follows the increased use of surveillance in public places. As noted in the consultation paper, privacy is an internationally recognised human right and is included in the *Victorian Charter of Human Rights and Responsibilities Act 2006*, Section 13a states: '[a] person has the right not to have his or her privacy, family, home or correspondence unlawfully or arbitrarily interfered with'. This section substantially mirrors Article 17 of the International Covenant on Civil and Political Rights.⁹ VALS agrees with the primary recommendation of the Human Rights Law Resource Centre (Vic) that 'the Victorian Law Reform Commission's draft principles to guide public place surveillance be amended to expressly reflect human rights standards and obligations.'¹⁰

VALS agrees with the 3 recommendations of the HRLRC that relate to: 1) consistency with human rights standards; 2) amendments to draft principles to reflect these standards; and 3) practical suggestions to

⁶ as at www.un.org/en/documents/udhr/ [accessed 25th June 2009].

⁷ as at www.hri.org/docs/ECHR50.html#C.Art8 [accessed 25th June 2009].

⁸ Ball and Edwards (2009) *Surveillance in Public Places: A Human Rights Perspective* Melbourne: Human Rights Law Resource Centre.

⁹ Human Rights Law Resource Centre (2009) 'Privacy Rights: Submission to VLRC Inquiry into Surveillance in Public Places Summary, p.4

¹⁰ *Ibid*, p.1

protect the human right to privacy (i.e. legislated actionable right to privacy, registration, notice and regulation of surveillance etc).¹¹

The reason for VALS' agreement is that there is:

- Proposed legislation that is inconsistent with human rights will face difficulty at the stage outlined in the *Victorian Charter of Human Rights and Responsibilities Act 200* which requires a statement of compatibility.¹²
- Public authorities must act compatibly with human rights.¹³ A human rights approach can have a significant positive impact on the public sector culture in terms of amongst other things policy development.¹⁴

VALS adds that balancing of human rights is required throughout the inquiry. Given that the *Victorian Charter of Human Rights and Responsibilities Act 2006* enables an act in relation to privacy that is lawful to occur, it is essential that any law in relation to the right to privacy is appropriate. As the HRLRC notes 'case law considering the right to privacy has indicated that the use of surveillance as a permissible limit on the right to privacy must be:

- (a) reasonable and proportionate to its aim; and
- (b) the least restrictive means of achieving the relevant aim.'¹⁵

VALS argues that the above case law is not adequately reflected in the draft principles.¹⁶ Section d of the draft principles only refers to proportionality, not reasonableness. VALS agrees with the HRLRC that part b of the case law is not reflected in the draft principles at all.¹⁷ VALS adds that the following aspects of the position of the Venice Commission (the Council of Europe's advisory body on constitutional matters) should be reflected in the draft principles: remedy avenue, requirements re use of data and length of surveillance.¹⁸ The principles seem to presume that surveillance will be continuous rather than what is necessary which raises concerns about arbitrariness and proportionality.¹⁹

¹¹ The HRLRC also supports the balance of the recommendations made by Liberty Victoria and considers that they are in compliance with the right to privacy under both Victorian and international law as set out in the previous section.

Recommendation 3: That the following recommendations of Liberty Victoria be adopted:

- (a) There should be a legislated, actionable right to privacy;
- (b) That all businesses using covert surveillance in public places be required to register their use with a surveillance regulator;
- (c) 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;
- (d) 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;
- (e) The role of the Victorian Privacy Commissioner should be expanded to include regulation of surveillance devices in public places within Victoria;
- (f) That a broad definition of "public place" be adopted (such as that under the *Racial Discrimination Act 1975* (Cth)); and
- (g) 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. surveillance in toilets, showers and bathrooms).

¹² Human Rights Law Resource Centre(2009) 'Privacy Rights: Submission to VLRC Inquiry into Surveillance in Public Places Summary, p. 3

¹³ Ibid p. 4

¹⁴ Ibid p. 4

¹⁵ Ibid p. 8

¹⁶ Ibid p. 12

¹⁷ Ibid p. 4

¹⁸ Ibid pp. 10-11

¹⁹ Ibid p. 12

Additionally, s13 of the Charter in terms of the requirement of lawfulness and non-arbitrariness should be reflected in the principles. This accords with the HRLRC's calls that that 'the principles would be strengthened by an express reference to the human rights framework'.

Public versus Private Space

Public space as defined in the *Racial Discrimination Act 1975* (Cth) includes any place to which the public have access as of right or by invitation, whether express or implied and whether or not a charge is made for admission to the place (section 18C3). Like the Human Rights Law Resource Centre, VALS favours this broad definition of public place.²⁰

*People have a right to private space in which to conduct their personal affairs. This right applies not only in a person's home, but also, to varying degrees, in the workplace, the use of recreational facilities and public places.*²¹

VALS is well versed in the issues and arguments around the policy and policing of what is considered public space. This stems from an awareness of long running negative ramifications for the Aboriginal and Torres Strait Islander community (among other marginalised groups) as a result of conflicting definitions of what constitutes legitimate and illegitimate use of public space. As articulated in VALS' research (2008), certain behaviours, gatherings, areas, and times draw attention to what is considered "appropriate" use of public space.

It has already been documented that the imposition of essentially non-Aboriginal and Torres Strait Islander standards of public behaviour are resultant of increased police activity in relation to public behaviour (Cunneen 1999).²² This concern highlights a failure to consider Aboriginal and Torres Strait Islander peoples use of open space as *cultural* space. Where there is concentration on policing of street offences, coupled with the increased surveillance of public places, it is understandable that many Aboriginal and Torres Strait Islander People will perceive such actions as aimed directly to their specific use of public space.

One piece of research in surveillance studies suggests that visual surveillance can affect the experience of space and place in two ways. As articulated by Cohen (2008), surveillance fosters a kind of passivity that is best described as a ceding of power over space. At the same time, spaces exposed by surveillance function differently than spaces that are not. As a result, this kind of exposure can shape peoples ongoing performance of identity and community.

A further example of the potential impact of increased surveillance activity on the Aboriginal and Torres Strait Islander community is in relation to public drunkenness. It is an offence to be drunk in a public place in Victoria. VALS has previously argued, and continues to argue, that legislation that allows for drunken people to be locked up because the occurrence exists out in the open, or what is deemed "public space", is implemented in a manner towards Aboriginal and Torres Strait Islander peoples that is indirectly discriminatory. There lies an assumption that individuals using the public space when consuming alcohol have access to an alternative space that would render their behaviour legal.

Consequences for the same behaviour are based on whether the drunkenness is visible or behind closed doors and under a roof in a *private* space. The reality is that much of what is considered public space by councils and law enforcement is considered cultural space by others (such as some members of the Aboriginal and Torres Strait Islander community and the homeless community etc).

²⁰ Ibid p. 12

²¹ Australian Privacy Charter Council (1994) 'The Australian Privacy Charter' Privacy Law and Policy Reporter 31 [online] <http://www.austlii.edu.au/au/journals/PLPR/1995/31.html> [accessed 29th June 2009].

²² This is commonly referred to as "Zero Tolerance Policing".

When you consider that in October 2002, custody incidents were 17 times more likely to involve Aboriginal and Torres Strait Islander peoples than non-Aboriginal and Torres Strait Islander peoples and 19 percent of all Aboriginal and Torres Strait Islander people's custody incidents were for public drunkenness compared with eight percent of all non-Aboriginal and Torres Strait Islander peoples (Taylor and Bareja 2005), it is clear that this is a weighty issue. With this in mind, it appears unlikely that calls for legislation and policing to deal with issues such as public drunkenness as a safety and social welfare issue will come to fruition. As the current treatment of some behaviours in public spaces are inappropriately and disproportionately effecting some members of the community over others, it is understandable that there exists a high degree of concern that public surveillance will reveal itself as another crippling element to these individuals.

VALS observes that the surveillance activities of Victoria Police for law enforcement purposes are not examined by the VLRC in the current Consultation Paper, however it is our belief that it is critical to illustrate how monitoring practices can dramatically effect certain environments and the people who choose to inhabit them. A central factor stems from the loss of anonymity in public spaces. This can in effect lead to the exclusion of groups from public places.

...paradoxically, prevailing legal understandings of spatial privacy do not recognize a harm that is distinctively spatial: that flows from the ways in which surveillance, whether visual or data-based, alters the spaces and places of everyday life (Cohen 2008:191).

VALS considers this possibility a vastly significant risk to individuals and the broader communities' ability to engage in certain behaviours. Consider, for example, the limits to political speech and association that are potentially compounded by the exclusion of certain groups from public spaces due to surveillance practices.

The Venice Commission adopted as its 70th plenary session (16th March 2007) 'opinion on video surveillance in public places by public authorities and the protection of human rights' (CDL-AD(2007)014)²³ contends, inter alia, that:

- Video surveillance of public areas by public authorities or law enforcement agencies can constitute an undeniable threat to fundamental human rights such as the right to privacy and the right of respect for his or her private life, freedom of movement and right to benefit from specific protection regarding personal data collected by such surveillance;
- Whilst individuals have a reduced privacy expectation in public places, this does not mean that they waive those fundamental rights;
- A surveillance measure is unjustified if it is devised and/or used in a discriminatory way, for instance in order to register exclusively the criminal behaviour of some components of the population selected under specific criteria like gender, membership of a determinate ethnic group, ethnic minority, religious group etc;
- Taken on a systemic basis, people should be notified of their being surveyed in public places, unless the surveillance system is obvious;
- The person who is the subject or alleged subject of surveillance must have an effective remedy if subject to ambiguous surveillance, hasn't provided consent or believes their rights have been infringed upon. Individuals must be informed of the remedy, and how to use it; and

²³ as at [http://www.venice.coe.int/docs/2007/CDL-AD\(2007\)014-e.asp](http://www.venice.coe.int/docs/2007/CDL-AD(2007)014-e.asp)

- A specific independent authority should be set up in order to ensure compliance with principles and requirements with regard to the protection and individuals and personal information.²⁴

Risks

In addition to the potential risk to the Aboriginal and Torres Strait Islander Community as outlined above, Solove (2006) more generally identifies four groups of activity that may result in harm to an individual's privacy which together constitutes what Solove has coined his "*taxonomy of privacy*":

- Information collection (via surveillance);
- Information processing (via careless storage of information, secondary use of information other than for purposes for which it was collected etc);
- Information dissemination (breach of confidentiality, disclosure, exposure, and distortion: appropriation and the dissemination of false or misleading information about individuals); and
- Invasion of private affairs (i.e. intrusion concerning invasive acts that disturb a person's solitude and 'decisional' interference involving Governmental raid into a persons decisions regarding private affairs).

While these are general examples of ways in which surveillance can cause harm to privacy, we would like to focus on a number of areas of potential risk to harm via surveillance practices that hold greater significance for the Aboriginal and Torres Strait Islander community.

Discriminatory profiling of groups

Professor David Lyon (2001) asks with regard to the experience of surveillance: is intrusion or exclusion the key motive? Lyon suggests that while many of us have understandable responses towards our threat to privacy, intrusion to private life and anonymity being jeopardised, one key element rarely touched on is the idea of 'social sorting':

The increasingly automated discriminatory mechanisms for risk profiling and social categorizing represent a key means of reproducing and reinforcing social, economic, and cultural divisions in informational societies (2001:9).

According to this idea, categorical suspicion has consequences for anyone, 'innocent' or 'guilty', caught in the surveillance gaze. In this sense, the limitations on citizen's rights are not evenly distributed with negative effects falling on certain sections of the community (Royal Academy of Engineering 2007).

In a similar way in which Zero Tolerance Policing and Move On Laws' function, surveillance of public space eludes to presumptions of guilt in place of the presumption of innocence. These presumptions fall on those who occupy certain spaces more than others, use space differently than others, and behave in spaces that are under the watch for suspicion.

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

²⁴ For example, in the Netherlands the Commission for the Protection of Personal Data has been established by law. Any collection and processing of personal data regulated by law is supervised by this commission and where collection and processing of data is not allowed by law, the Commission should be notified (as sighted in The Venice Commission 2007).

*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.*²⁵

Trust in Government

Interestingly, one of the Royal Academy of Engineering's priorities is to hold responsibility when it comes to designing systems of surveillance and data collection. Their 2007 report²⁶ outlined some critical points where technology could be used for unreasonable or unnecessary surveillance and unwarranted consequences for fair treatment and human rights. Specifically, Government use of surveillance technologies has the potential to significantly decrease levels of democratic trust:

The extent of citizens' trust in the Government to procure and manage new technologies successfully can be damaged if such projects fail. Essential to generating trust is action by Government to consider as wide a range of failure scenarios as possible, so that failures can be prevented where possible, and Government can be prepared for them where not (Royal Academy of Engineering 2007:8).

Shroff (2007) argues that continued public trust cannot be taken for granted as individuals must feel confident that any intrusion into their lives is for necessary and proportional purposes. The Aboriginal and Torres Strait Islander community has a significant level of mistrust towards the Government. This has been influenced by past practices such as colonisation, failure to recognise Indigenous Australians in the Constitution, delayed recognition of land rights and the inappropriateness of removing children from their families (i.e. stolen generations).

Who controls what

It has been suggested that new technology is only as good as the person or organisation using it (Grabosky 1998). By extension, it could be argued that the person or organisation using the technology is only as they have to be to meet the requirements that are set by the body that governs the use of that technology. As stated by Grabosky, it is simply 'not sufficient to assume that new technologies of crime control will automatically lend themselves to responsible use' (1998:5).

*What we need are limits. We need to decide what is beyond acceptability. And we need transparent methods for decision. Most Governments don't use any robust methods by which they might be able to assess proposed surveillance technologies, either in themselves or in comparison to other technologies or indeed to non-technological options.*²⁷

Surveillance as a Crime Prevention Tool

A very strong argument for the use and increased use of surveillance technologies in public (and private) spaces is the benefits for crime prevention efforts. This is a very powerful argument to persuade the community that sacrifices to privacy are well invested as people's fear of crime are alleviated by yet another crime prevention tool.

Another very persuasive and widely used argument in favour of surveillance of public places is the "nothing to hide" argument that claims surveillance would only pose a problem for people who had something to hide, i.e. are engaging in behaviour that they shouldn't, whether illegal or otherwise.

²⁵ Liberty Victoria (2009) VLRC Consultation on Surveillance in Public Places [online] <http://www.libertyvictoria.org.au/> [accessed 25 June 2009].

²⁶ in conjunction with the United Kingdom's Academy of Social Sciences.

²⁷ Wood (2009) 'A new "baroque arsenal"? Surveillance in a global recession' Surveillance and Society 6(1) p.2

Persuasive as this argument may be, Solove undoes the “nothing to hide” argument by making the point that holding secrets or concealing truth is not what privacy is all about, and that by focusing on this rather limited understanding of privacy, we run the risk of not recognising wider underlying privacy and societal concerns.²⁸

And, what is true of surveillance as a crime prevention tool is both logical and blatantly obvious, yet remains masked by the promise of catching criminals through the aid of technology: surveillance technology can only deal with a crime *after* it has occurred. In many cases CCTV or other surveillance cameras are often unmonitored. The remaining argument in favour of surveillance as a crime prevention tool is rather weak: we behave differently if we think we are being watched.

A recent report that studied the use and effectiveness of CCTV as a crime prevention tool in public places (such as rail networks) in Queensland concluded that while CCTV can be effective in *detecting* crime and/or increased reporting as opposed to actually *preventing* any type of crime (Wells, Allard and Wilson 2006). ‘[I]t is often presumed that CCTV will prevent crime and disorder by acting as an effective psychological deterrent to potential offenders’ (2006:1). This research suggests that this is not the case.

International research assessing the impact of camera surveillance on crime rates support the Queensland findings in that CCTV is largely ineffective in reducing crime and additionally contends that CCTV has different effects depending on the crime under consideration (Welsh and Farrington 2002, in Wells, Allard and Wilson 2006). For example, generally findings support the contention that CCTV *may* result in reductions in some offences against property such as vehicle crime and vandalism but has no impact on shoplifting (Armitage, Smyth and Pease 1999 in Wells, Allard and Wilson 2006).

In any case, the point remains that no matter how efficient surveillance methods become in the fight against crime, the increased exposure to these methods runs the real risk of augmenting society to a point where privacy would no longer have meaning.

Displacement of crime to other areas

Another possible result of surveillance of public places is that instead of any prevention of crime or detection of crime, there could simply be a shift in crime from surveyed areas to areas that are not. It could therefore be argued that in some cases surveillance does not in fact eliminate or reduce crime, but instead simply moves the same activities into different time periods or areas without such surveillance methods and a perceived diminished chance of apprehension (Flight, van Heerwaarden and van Soomeren, 2003, in Wells, Allard and Wilson 2006).

Time and money

As the literature illustrates, surveillance in public places is far more abundant in countries other than Australia. This does not mean that research on overseas dilemmas in this field, such as the United Kingdom which commentators have argued is the most surveyed country in the world,²⁹ is inapplicable or inappropriate for comparison for Australian scenarios. On the contrary, as Australia trends towards higher levels of surveillance of public places, we should be considering the impact of similar measures in an attempt to be proactive, rather than reactive, to the proliferation of the use of surveillance. A significant similarity Australia shares with the UK at present is the weathering of the global financial crisis.

²⁸ Solove D (2007) in Shroff M (2007) ‘Protecting the Protectors’ *Speech at the NZ Police Association Conference, Wellington, 31st October – 1 November 2007* [online] <http://www.privacy.org.nz/protecting-the-protectors-an-address-by-marie-shroff-privacy-commissioner/> [accessed 21st June 2009].

²⁹ Norris and Armstrong (1999) in Webster (2009) ‘CCTV policy in the UK: reconsidering the evidence base’ *Surveillance and Society* 6(1):10-22.

These hard financial times have predictably shone the spotlight onto the legitimacy of spending across all services. In a 2008 journal, Nic Groombridge pointed out that the huge spending on video surveillance in the United Kingdom appears to have been a massive waste of money measured under any normal criteria.³⁰ Research Fellow David Murakami Wood from the Global Urban Research Unit at the United Kingdom's Newcastle University states that what is more, this observation is no longer confined to academic reports and analysis. He argues that the honeymoon period for surveillance in Britain is over.³¹

Wood contends that the UK is supposed to be a model for the rest of the world and that 'the enthusiasm for video surveillance increases unabated'.³² This is fuelled by local media in the UK from the previous decade that reports upbeat stories taking what the authorities report about the 'success' of the scheme with regards to both crime and prevention and detection at face value, without wider investigation or alternative view considered.³³ Wood suggests, or hopes, that it is the global recession will eventually cause the promoters of surveillance to take another look at 'the issue of the obvious inefficiency of video surveillance'.³⁴

It appears that a clear lesson can be gleaned from the surveillance situation in the UK. Furthermore, with the research evidence to the effectiveness and use of surveillance in public places for its intended or envisaged drastically lacking, VALS would argue that it would be a far wiser investment of time and money to focus on crime prevention and security measures that do not sacrifice rights to privacy, anonymity and particular freedoms in public space.

Summary and Recommendations

- a) The overuse of surveillance of public places has enormous potential to discriminate (i.e. social sorting).
- b) Government use of surveillance technologies has the potential to significantly decrease levels of democratic trust.
- c) There may be many valid uses for surveillance but proportionality needs to be monitored closely. Use of surveillance must be justified. Surveillance may be good for some purposes, but the overuse of general surveillance of public space creates an environment of suspicion and runs the risk of further placing the Government and the public in mutual positions of mistrust and suspicion.
- d) Privacy as a concept in disarray. Clarification of what is understood as private life and privacy with a strong consideration for alternative conceptualisations of the relationship of privacy within public spaces for particular groups in society that may occupy public space in certain ways, the such as Aboriginal and Torres Strait Islander community, the homeless, and youth.
- e) The "nothing to hide" argument is misleading and counterproductive in light of arguments highlighting that holding secrets or concealing truth is not what privacy is about and that by focusing on this rather limited understanding of privacy, we run the risk of not recognising wider underlying privacy and societal concerns.

³⁰ Cited in Wood (2009) 'A new "baroque arsenal"? Surveillance in a global recession' *Surveillance and Society* 6(1):1-2.

³¹ Ibid p.1

³² Ibid

³³ Ibid

³⁴ Ibid

- f) In the majority of cases, surveillance technology can only deal with a crime *after* it has occurred. CCTV is largely ineffective in reducing crime and additionally has different effects depending on the crime under consideration (Welsh and Farrington 2002, in Wells, Allard and Wilson 2006).
- g) Research suggests that large investment in surveillance technologies proves wasteful.
- h) There is a failure across sectors to consider Aboriginal and Torres Strait Islander peoples use of open space as *cultural* space. Surveillance fosters a kind of passivity that is best described as a ceding of power over space. At the same time, spaces exposed by surveillance function differently than spaces that are not. As a result, this kind of exposure can shape peoples ongoing performance of identity and community (Cohen 2008).
- i) VALS concurs with the HRLRC stance that there are significant gaps in Victorian privacy legislation. The existing regulatory framework on public place surveillance fails to adequately protect and promote the right to privacy and that reform, consistent with human rights principles, is required.³⁵ Therefore law and policy on public surveillance should be consistent with human rights standards stipulated in the *Victorian Charter of Human Rights and Responsibilities Act* in addition to international human rights law.
- j) Taken on a systemic basis, people should be notified of their being surveyed in public places.
- k) The use of public surveillance must be justified. This cannot be done without the Government's revisiting this area and explicitly identifying the reasons for the need of surveillance in public spaces. These justifications must be endorsed by research demonstrating the intended outcomes of the stated aims and a strongly articulated consideration of human rights obligations in this context.
- l) While there was an inability to facilitate discussion in the present consultation process, inquiry needs to be extended into surveillance practices and policies employed by law enforcement.

³⁵ Ball and Edwards (2009) *Surveillance in Public Places: A Human Rights Perspective* Melbourne: Human Rights Law Resource Centre.

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