



Submission No. 36

women's legal  
service victoria

Professor Neil Rees  
Chairperson  
Law Reform Commission  
Level 3, 333 Queen Street  
Melbourne VIC 3000

30 June 2009

Dear Professor Neil Rees,

### Surveillance in Public Places

Thank you for the opportunity to comment on the Consultation Paper outlining the current position in relation to surveillance in public places.

Women's Legal Service Victoria (WLSV) has been providing free legal advice, information, representation and legal education to women for over 25 years. We specialize in issues arising from relationship breakdown and violence against women. Our principal areas of work are Intervention Orders (stalking and family violence), Family Law and Victims of Crime Assistance Tribunal Applications. A significant proportion of our clients have experienced family violence and their experiences of violence are often central to their cases.

While we do not generally deal with matters involving surveillance legislation, our service seeks to comment on aspects of public surveillance, using your terms of reference, that specifically have an impact on our clients.

Your Consultation Paper presents a detailed overview of public surveillance as it currently exists and operates, the legislation in relation to public surveillance and the gaps that exist in legislation and practice.

We will restrict our submission to the limited scope of our areas of specialisation which usually involves matters between private individuals. The current state legislation that protects our clients from other individuals, albeit insufficiently, in relation to surveillance are:

- Crimes Act 1958 (Vic) s 21A prohibiting stalking;
- Stalking Act 2008 (Vic);
- Surveillance Devices Act 1999 (Vic) prohibiting the use of tracking, listening and optical surveillance devices to monitor private conversations and activities; and
- Summary Offences Act 1966 (Vic) prohibiting upskirting.

Due to the significant gaps in the current regulatory framework and the widespread use, sophistication and accessibility of surveillance technology, we believe that now is an opportunity for reform to create adequate management and control of the use of surveillance technology to address the current shortcomings.

Our comments and recommendations in relation to public place surveillance using your terms of reference are as follows:

- We agree with the overarching principles and policy guidelines discussed in approaching a broad definition of privacy in public places.
- We believe that surveillance by private individuals of other private individuals should be regulated to prevent abuse by stalkers and other forms of abuse and control using partner trackers and other tracking and surveillance devices. We believe the regulation should include once-off or intermittent use. An example where a once-off use could have a detrimental effect could include the filming of a person in a private intimate act that could be distributed to further harass and humiliate a victim or tracking a family that is in a refuge hiding from the perpetrator of domestic violence by using any of the family members mobile phone numbers. There might be a prohibition against purchasing a tracking or other surveillance device in instances where an intervention order has been made against someone in the same way that firearm licenses are revoked when intervention orders are made.
- An independent regulator should be appointed to perform the role of monitoring the use of public surveillance, formulating policy, educating users and the public at large about surveillance issues. A registration scheme should be set up similar to some European jurisdictions such as Sweden where person or organisation needing to use surveillance devices has to apply to be registered and justify the need for such a device as well as consider the human rights implications, the impact to individuals and the community at large. Certain statutory bodies or organisations (such as banks, post offices etc) handling monetary transactions can have a much more streamlined registration scheme apply to them. The regulator should have the resources and power to fully investigate complaints or identify problems in the surveillance operational landscape. We believe that as well as having a registration scheme, a licensing scheme should be required for certain operators like CCTV users, private investigators and other regular users of surveillance technology.
- We prefer mandatory codes of practice with the regulator having the power to approve industry codes and to consult widely within the industry to create best practice and industry codes of practice.
- We support sanctions for private individual breaches and organisational breaches that would act as a suitable deterrent.

## The Surveillance Devices Act 1999 (Vic)

- This should be extended to include a prohibition on any device capable of tracking. The current legislation is only relevant in relation to prohibitions against a tracking device when that is the primary purpose of the device. Unfortunately the technology has overtaken current legislation as most mobile phone technology has the ability to track. Stalkers and the like are able to purchase 'partner trackers' that are advertised to track ones partner, or ex-partner or anyone else for that matter without their knowledge. These readily available devices are easy to install and use at minimum cost and have the potential to enable stalkers to continue to stalk their victims with their mobile phones. An extension of the current legislation more in line with the NSW surveillance legislation would prohibit such use irrespective of the primary purpose of the device, thereby preventing further inappropriate tracking and stalking by mobile phones or any other device.
- This should also be extended to cover all other devices used for surveillance by having a suitable catch.all phrase that is flexible enough to cover future devices. The focus could be on the surveillance act rather than the nature of the device itself, so that the device attracts the prohibition if it is used for the act of prohibitive surveillance. Therefore tracking devices should include in their definition all devices capable of determining the geographical location of a person or object.
- We further recommend that the participant monitoring exception be removed in keeping with the legislation in NSW, WA and ACT, SA and Tasmania. We also include listening surveillance and optical surveillance in the exception. Therefore a private intimate act recorded without the other persons' consent, even if they are participants in the intimate act or the device used is optical or for listening, should be prohibited in the proposed legislation.
- We recommend that the current enforcement regime include civil penalties for breach of the provisions and that the definition of consent be clarified.

## Invasion of Privacy

- We agree with the ALRC suggestions that the legislation should contain a non-exhaustive list of types of serious invasion of privacy. The list should include but not be limited to an interference with an individual's home or family life, being subject to unauthorised surveillance; disclosure or misuse of a persons' private life, written, oral or electronic communication.
- We further recommend that the proposed cause of action include the reasonable expectation of privacy by the victim. We believe that subjective elements can be included in determining whether the act complained of is offensive or not. It would appear that the reasonable person test determining that the act be 'highly offensive' could be a very high threshold to satisfy.

- We recommend that the cause of action be broad so that the requirement of any proof of actual damage is not necessary thereby extending the conduct to behaviour that humiliates, insults, intimidates etc rather than only physical or economic harm.

We thank you for the opportunity to provide comment on your detailed, thorough and comprehensive Consultation Paper and wish you well in your future work in this regard.

Yours faithfully,

Zione Walker-Nthenda  
Law Reform & Policy Lawyer  
Women's Legal Service Victoria

## **Contact details**

This submission was prepared by Zione Walker-Nthenda on behalf of the Women's Legal Service Victoria for consideration by the Victorian Law Reform Commission.

For further information please contact:

Zione Walker-Nthenda  
Law Reform & Policy Lawyer  
Women's Legal Service Victoria  
3/43 Hardware Lane  
Melbourne VIC 3000

Date: Friday 30 June 2009