Law reform in action

Victorian Law Reform Commission
Inclusive Independent Innovative
The Commission’s powers as set out in section 5 of the Act are:

- to make law reform recommendations on matters referred to it by the Attorney-General
- to make recommendations on minor legal issues of general community concern
- to suggest to the Attorney-General that he or she refer a law reform issue to the Commission
- to monitor and coordinate law reform activity in Victoria, and
- to educate the community on areas of law relevant to the Commission’s work.

Our main role is to review areas of the law referred by the Attorney-General and make recommendations for reform. We also have the power to recommend minor changes to the law without a reference in response to a suggestion from the community.

We were established under the Victorian Law Reform Commission Act 2000 as the central agency for developing law reform in Victoria.

We aim to make recommendations for change that are practical to implement and make the law more accessible.

We are not the only organisation in Victoria working on law reform. The Sentencing Advisory Council and Parliamentary Committees also look at ways to reform Victorian laws. Organisations like the Law Institute of Victoria and community legal centres regularly contribute to law reform projects.
Who we are

The Commission comprises a full-time Chairperson and varying numbers of full-time and part-time Commissioners. Commissioners come from a range of backgrounds in the judiciary, academia and the community sector.

A current list of Commissioners can be found on our website: www.lawreform.vic.gov.au.

Each of the Commissioners works intensively on one or more projects, in what are called Divisions of the Commission. While these Divisions guide the direction of the projects, before publication all final reports are discussed and approved by the full Commission.

The Chairperson and part-time Commissioners are appointed for terms determined by the government.

The Commission is supported by staff who organise and carry out consultations, and research, write and produce the Commission’s publications.

References

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Our references generally fall into two categories—social justice issues and more procedural issues about the way the legal system works. Regardless of the kind of reference, the aim is to modernise and improve the law.

Since its establishment in 2001, the Commission has completed the following references:

- Easements and covenants (December 2010)
- Review of the Property Law Act 1958 (September 2010)
- Child protection applications in the Children’s Court (June 2010)
- Surveillance in public places (June 2010)
- Jury directions (June 2009)
- Law of abortion (May 2008)
- Civil justice review (March 2008)
- Review of the Bail Act (October 2007)
- Assisted reproductive technology and adoption (June 2007)
- Review of family violence laws (March 2006)
- Implementing the Uniform Evidence Act (February 2006)
- Workplace privacy (October 2005)
- Defences to homicide (October 2004)
- Sexual offences (July 2004)
- People with intellectual disabilities at risk (September 2003)
- Criminal liability of the Crown (January 2002)
- Disputes between co-owners (December 2001)
Getting a reference from the Attorney-General is not the only way a law reform project begins.

Like several other Australian law reform commissions, we run a community law reform program that seeks ideas for law reform from the community. Anyone can make a suggestion for a community law reform project at any time.

When suggestions come in, they are assessed against a range of criteria to see if they are suitable for a community law reform project. Projects selected will involve relatively minor legal changes that may have significant public benefit, or benefit a disadvantaged group in the community.

Previous community law reform projects have been:
- supporting young people in police interviews
- assistance animals
- failure to appear in court in response to bail
- residential tenancy databases.

The assistance animals project made recommendations to improve the legal protection for people with disabilities who rely on assistance animals. This project was suggested by the Victorian Equal Opportunity and Human Rights Commission. The aim was to clarify and modernise the law so that there could be greater certainty and more support for people who use assistance animals in Victoria.

The project on failure to appear in court in response to bail was a suggestion from the Victorian Aboriginal Legal Service.

The Commission recommended a minor change to bail legislation that was particularly significant for the Indigenous community and other disadvantaged groups. Following our report, the government amended the Bail Act 1977 in line with our recommendations.

The residential tenancy databases project was suggested by the Tenants Union of Victoria. In January 2006 the Commission produced a report recommending regulation of the databases.

The supporting young people in police interviews project was the result of a suggestion by the Centre for Multicultural Youth and the Youth Affairs Council of Victoria—agencies that manage a program for supporting young people in police interviews. The final report had not been tabled in Parliament at the time of writing; more information on this project can be found on our website.
The process followed by the Commission can vary depending on the scope of the terms of reference and how much time the Commission has to complete the project. In general, the process involves the following stages:

1. A problem with the current law arises.
   This could be because the law has not kept up with changes in society, is overly complex, does not function well in practice, is discriminatory, or because a court case has highlighted a difficulty in the application of the law.

2. The Commission receives a reference from the Attorney-General or begins a community law reform project.
   The Commission receives a letter from the Attorney-General specifying the parameters of the project and the reporting date. These are called the ‘terms of reference’. Community law reform projects involve minor changes to the law and are suggested by individuals or organisations.

10. The Government decides whether to implement the recommendations (in whole or in part).
   Proposed changes to the law will be debated by Parliament and may be accepted, amended or rejected.

   This may include changes to legislation, which will be put to Parliament, or changes to practices.
3. The Commission’s staff undertake initial research and consultation.

This can involve researching the law in other states and countries, looking at the work of other law reform commissions, studying cases and talking to people affected by the law. An information paper may be produced outlining the issues and asking for submissions.

4. A committee of experts might be formed to offer advice to the Commission and guide their recommendations.

For example, for the Commission’s reference on the law of abortion, a panel of medical experts was established to provide specialist advice.

5. A consultation paper is published that outlines the issues involved, may identify some options for reform and invites submissions.

Specific questions may be asked to guide submissions.

6. Submissions are considered by researchers.

Further research is also undertaken.

7. Researchers hold consultations with people affected by the law, workers in the area, experts in the field and relevant organisations.

The Commission may also hold forums and roundtables to speak about its work and gather views about possible changes to the law. The Commission tries to ensure that marginalised groups who may be affected by the law are consulted.

8. A final report is published that outlines our research and makes recommendations for changes to the law and practice.

Recommendations could involve introducing new legislation, changing existing legislation or making non-legislative changes, such as increasing education, promoting cultural change or establishing new bodies to bring about change.

9. The Attorney-General tables the report in Parliament within 14 sitting days.

The report cannot be released to the public until this has happened.
Our approach

The law affects all members of society. It is important that everyone has an opportunity to participate in processes of legal review to ensure recommendations for change are relevant, responsive and fair.

The Commission encourages individuals, community groups, private sector organisations, legal bodies, and local and state government representatives to express their views and participate in the law reform process.

Inclusive

We work closely with the community when undertaking a reference by:

– consulting with people affected by the law under review
– getting feedback on our proposals for reform
– using many different forms of consultation, such as online submissions, roundtables, forums and one-on-one meetings to make sure people get a chance to have their say
– consulting with individuals and groups who have particular professional expertise
– ensuring people who are often marginalised from the legal process and policy-making—including Indigenous people, young people, people from rural and regional areas, people with disabilities, people from non-English speaking backgrounds and older people—can have a say on laws that affect them.
Submissions

We ask the community to respond to a project through a submission process at least once during a project’s lifetime. Submissions can be made in many formats, from a couple of sentences sent by email or a phone conversation, to a more formal written document.

The submissions are analysed by the project’s researchers to identify views and themes and to gauge public opinion on a variety of issues. They are used as a source of information when writing the final report for the project and are often quoted in the report.

All submissions are available for anyone to come in and read, unless the author asks for them to be made confidential. More recently, public submissions have also been put on our website.

Innovative

We are committed to progressive reform that is designed to improve, simplify and update the law.

We try to:
– use up-to-date techniques for consulting with the community that suit the people affected by the law
– use technology and online resources
– work closely with community groups, the legal profession and other research bodies to draw on initiatives and experience in other states and countries.

Independent

The Commission is an independent, government-funded organisation that is transparent in its operation and removed from the political process.

Consultation

When the Commission receives a reference from the Attorney-General, staff research the key issues and identify the individuals and groups within the community who are affected by the laws under investigation.

The Commission arranges meetings with those identified to get their input into the project’s planning. This may involve travelling across the state to meet with people.

Consultation occurs throughout the life of a project. Strategies to get people involved include:
– regular visits to and consultation with people from outer suburban, rural and regional centres
– meetings with groups of people who are likely to be affected by our proposals, to give them an opportunity to provide their views
– electronic communication, including email newsletter updates and social media.

For most projects, we will establish an advisory committee to help guide us in exploring the issues. Members of advisory committees will be selected because of their expertise or their experience and involvement in issues relevant to the project.
Why change the law?
Surveillance in public places affects all Victorians, whether we are shopping, catching public transport, driving on main roads or going to a sporting event. Surveillance devices are becoming increasing available, affordable and sophisticated. With mobile phones, everyone now has a surveillance device in their pocket.

Some other examples of surveillance in public places include:
- GPS tracking of vehicles
- CCTV cameras in streets and shopping malls
- Automatic number plate recognition.

The Commission was asked by the then Attorney-General to look at why surveillance is being used in public places, how it is being used and how it is controlled.

Surveillance serves a number of important purposes, including the promotion of public safety, the prevention and investigation of crime, and news gathering. Many organisations and individuals rely heavily on surveillance technology in their everyday activities, including police, transport operators, retailers, private investigators, sports venues and journalists.

But there are negative consequences that may come from the increased use of surveillance in public places, including a loss of privacy and anonymity. One concern is that this may change the way we express ourselves and behave when in public. This may not happen immediately, but over time it may affect the way we use and enjoy public places.

In researching the existing laws, the Commission found that surveillance in public places is generally unregulated by Victorian legislation. The laws that do exist are unclear, they have not kept pace with technological change and they do not appear to be actively enforced.

In its final report, the Commission made 33 recommendations aiming to modernise the regulation of surveillance in public places and encourage the responsible use of surveillance devices.

Terms of reference
In April 2006, we began the reference on surveillance in public places.

The specific terms of reference for this project were:
In light of the widespread use of surveillance and other privacy-invasive technologies in workplaces and places of public resort, and the potential benefits and risks posed by these technologies, the Victorian Law Reform Commission will inquire into and report progressively upon

a) whether legislative or other reforms should be made to ensure that workers’ privacy, including that of employees, independent contractors, outworkers and volunteers, is appropriately protected in Victoria. In the course of this inquiry, the Commission should consider activities such as:
- surveillance and monitoring of workers’ communications;
- surveillance of workers by current and emerging technologies, including the use of video & audio devices on the employers’ premises or in other places;
- physical and psychological testing of workers, including drug and alcohol testing, medical testing and honesty testing;
- searching of workers and their possessions;
- collecting, using or disclosing personal information in workers’ records.

b) whether legislative or other measures are necessary to ensure that there is appropriate control of surveillance, including current and emerging methods of surveillance. As part of this examination, the Commission should consider
whether any regulatory models proposed by the Commission in relation to surveillance of workers, could be applied in other surveillance contexts, such as surveillance in places of public resort, to provide for a uniform approach to the regulation of surveillance.

In undertaking this reference, the Commission should have regard to:

- the interests of employers and other users of surveillance, including their interest in protecting property and assets, complying with laws and regulations, ensuring productivity and providing safe and secure places;
- the protection of the privacy, autonomy and dignity of workers and other individuals;
- the interaction between State and Commonwealth laws, and the jurisdictional limits imposed on the Victorian Parliament;
- the desirability of building on the work of other law reform bodies.

Our terms of reference also originally included the publication of photographs without the subject’s consent. This issue was removed from the terms of reference by the Attorney-General in October 2006 and was referred to the Standing Committee of Attorneys-General.

Commission Division and research team

For most references, the Commission’s Chairperson will appoint two or more Commissioners to work intensively on a project; the chosen Commissioners are called a Division of the Commission.

Commission staff are appointed to a research team for each reference. The team undertakes research and consultations and produces draft reports for consideration by the Division. Each team usually consists of a team leader, research officers and research assistants.

The Division meets regularly with the research team to give direction to their work and provide feedback on report drafts, and to finalise recommendations.

The Division for the surveillance in public places reference comprised the Commission’s Chairperson Professor Neil Rees, Paris Aristotle, Hugh de Kretser, Professor Sam Ricketson and Justice Iain Ross.

Consultative committee

In 2009, we established a consultative committee of individuals with different experiences of public place surveillance to gain responses to our draft recommendations. While the committee members provided useful advice, the Commission alone is responsible for the recommendations in the report.

The committee members were:

- Louise Connor, Secretary (Victoria), Media and Arts Alliance
- Andy Frances, Manager, Security and Venue Support, Melbourne Cricket Club
- Leigh Gassner, former Assistant Commissioner, Region 1 (CBD), Victoria Police
- Moira Paterson, Associate Professor, Monash University Faculty of Law
- Michael Pearce SC, President, Liberty Victoria
- Bill Penrose, Vice President, Victorian Local Governance Association
- Jen Rose, Manager, Policy and Projects, Youth Affairs Council of Victoria
- Helen Versey, Victorian Privacy Commissioner
- Dr Deane Wilson, Senior Lecturer in Criminology, Monash University.
Consultation paper

In March 2009 we published a consultation paper, which was informed by our preliminary consultations and extensive secondary research. The paper described current uses of public place surveillance in Victoria and examined likely future trends.

The paper also explored the concept of privacy, provided an overview of the relevant law in Victoria and other jurisdictions, and considered the risks and benefits associated with public place surveillance.

The Commission found that existing laws did not comprehensively regulate the use of surveillance in public places in Victoria. The three major bodies of relevant law—the Surveillance Devices Act 1999 (Vic) and Commonwealth and Victorian information privacy laws—were not specifically designed to regulate public place surveillance.

The development of laws to cover particularly offensive forms of surveillance, such as ‘upskirting’ and the recording of images related to child pornography, were attempts to address some of the limitations in the regime. Also, surveillance in some contexts—for example, in casinos and bars—is separately regulated. This makes it difficult for surveillance users and the community to know which surveillance activities are permitted in public places.

The consultation paper presented a number of options for reform, designed to stimulate public discussion. We called for submissions and posed 24 questions to guide responses.

The questions included:
– What is surveillance?
– What is a public place?
– What do you think a person’s ‘reasonable expectation of privacy’ in a public place is?
– Are you aware of people or organisations that use surveillance in public places?
– Do you have any suggestions about the need for potential law reform and the form this should take?

The responses to these questions informed the recommendations in the final report.

The Commission received 44 written submissions in response to our consultation paper from a variety of organisations and individuals, including community representatives, human rights advocacy groups, legal organisations and users of surveillance technology.

We also visited 18 surveillance users at their premises to get an understanding of the way surveillance is used in public places in Victoria. Many of these users have surveillance technology that can record the images of thousands of people a day. We viewed the technology used, discussed the individual practices of operators, and examined the protocols and procedures in place to protect the integrity of the information collected.

Roundtables

Roundtables are in-depth discussions between small groups of people who have specific expertise or experience with an issue. The outcomes of these discussions can contribute to final recommendations to change the law.

Commission staff take notes of what people say at the roundtables, and these may be referred to when writing the consultation paper and final report.

We held more than 30 roundtables on the uses of surveillance and the laws or regulations that apply to different industries.

Government organisations were included in many of the roundtables. This included state government departments, the police, local government, transport operators, schools, universities and sporting organisations.

Private businesses were also involved, including people who run shopping centres or entertainment venues such as hotels. We also talked to private investigators, the media, and security companies who all regularly use forms of surveillance.

As well as surveillance users, we talked to people who could be observed in public places or who advocate on their behalf including young people, people from certain ethnic groups, civil liberty groups, and groups that work with homeless and mentally ill people.
Youth Affairs Council roundtable

Sometimes the Commission will seek out people whose views it is interested in hearing but who don’t normally make submissions.

For this reference, this included young people, homeless people and Indigenous people.

To talk to these people, we contacted organisations that work with them, such as the Homeless Person’s Legal Clinic, Victorian Aboriginal Legal Service and the Youth Affairs Council.

The Youth Affairs Council organised a roundtable with researchers from the Commission and members of its Youth Reference Group.

The roundtable went for one hour and gave the young people who attended the chance to have their views on surveillance heard.

The Youth Affairs Council published its own report on the issue, Marginalised Young People, Surveillance & Public Space, soon after the release of our final report. Co-author of the Youth Affairs Council report, Dean Wilson, was on the reference group for the Commission’s surveillance reference.

The recommendations in the Youth Affairs Council report aimed to build on the recommendations from the Commission and the issues raised by young people in its focus groups were similar to those heard by the Commission.

Final report

The final report was the product of further research and consultations in which we sought feedback on the proposals made in the consultation paper, and information about the scope, nature and impact of public place surveillance in Victoria.

The final report was tabled by the then Victorian Attorney-General, the Hon Rob Hulls, on 12 August 2010.

The report contained 33 recommendations to modernise surveillance laws and promote the responsible use of surveillance devices in public places.

The aim of the recommendations was to balance the freedom to use surveillance devices with the right to privacy.

The recommendations in the report included:

– clarifying, modernising and strengthening the Surveillance Devices Act 1999, including a new offence dealing with improper use of a surveillance device, such as ‘happy slapping’
– prohibiting surveillance in public toilets and change rooms
– prohibiting a person recording an activity or conversation that they are part of without the consent of the other parties
– broadening the role of the Victorian Privacy Commissioner to include regulation of public place surveillance
– creating two new causes of action (the right to sue) dealing with serious invasions of privacy.

Media coverage

The topic of surveillance and CCTV cameras is very popular with news organisations, which often conduct surveillance themselves for the purpose of news gathering.

During the consultation phase there were numerous news articles about the increase of surveillance in Victoria, in particular the use of CCTV cameras, and the Commission’s role in examining new laws.

The release of the final report generated close to 20 news stories on radio, television, newspapers and online. All the major newspapers in the state ran stories in their print and online editions, and Channel 9, Channel 7 and ABC1 ran stories in their evening news bulletins. The 7pm Project on Channel 10 also looked at the issue and the Commission’s report on 13 August 2010.

Response to the final report

When the report was tabled in Parliament, the then Attorney-General sent out a media release thanking the Commission and stating that the government would consider the recommendations.
REPORT PROPOSES MODERNISING PUBLIC SURVEILLANCE LAWS

Changes that enhance privacy protection and promote responsible use of surveillance devices have been proposed in the Victorian Law Reform Commission’s report into surveillance in public places, Deputy Premier and Attorney-General Rob Hulls said today.

Mr Hulls said the VLRC’s Surveillance in Public Places Final Report highlighted the rapid advances in surveillance technology and recommended new laws to regulate surveillance and modernise the Surveillance Devices Act 1999 (SDA).

“The widespread use of surveillance devices means we are less anonymous in public places such as shopping centres, public transport or outside a building, therefore we need to ensure there is a clear approach to surveillance regulation,” Mr Hulls said.

“If used properly, public surveillance can aid crime investigation and act as a powerful deterrent of crime but without sound regulation in place, we risk the misuse of captured images or unwarranted invasion of our privacy.”

Mr Hulls asked the VLRC to inquire into two major aspects of public concern in relation to privacy – the first concluded in 2005 with the release of the VLRC’s report on workplace privacy.

“The second phase of the reference, the use of surveillance in public places, was needed because the law must keep pace with modern technology and the development of sophisticated surveillance devices which have changed dramatically over time,” Mr Hulls said.

The VLRC made 33 recommendations including:
- Extending the scope of the Surveillance Devices Act to include technological advances such as in mobile phones, which have cameras and can be used as tracking devices;
- New legislative principles to promote the responsible use of surveillance devices in public places;
- Expanding the role of the Victorian Privacy Commissioner to educate, investigate and resolve complaints about public places surveillance breaches and oversee the operation of the legislation;
- New civil penalties for breaches of the Surveillance Devices Act as an alternative to criminal penalties;
- Prohibiting the use of surveillance devices in toilets and change rooms or being used to intimidate, harass, or prevent a person from performing a lawful act; and
- Giving people the right to sue for serious invasions of privacy arising from the misuse of surveillance in a public place, with the matter to be determined by VCAT.

Mr Hulls noted the Federal Government had yet to respond to a similar recommendation from the Australian Law Reform Commission to introduce a statutory cause of action for breach of privacy. “A national approach in this area would be preferable but in the meantime there is an important debate to be had,” he said. “It is a challenge to balance the right to privacy and the right to freedom of expression.”

Mr Hulls thanked the VLRC for its work and said the Government would consider the report’s recommendations. In seeking feedback on the recommendations the Government will seek the views of interested parties including media organisations.

More information
Interesting web links:
Australian Privacy Foundation: www.privacy.org.au
Australian Law Reform Commission: www.alrc.gov.au
UK Information Commissioner’s Surveillance Society report: www.ico.gov.uk
Other case studies

More case studies on the Commission’s projects including examples of how some of our recommendations have been made into law can be found on our website www.lawreform.vic.gov.au.