

Recommendations

GENERAL

1. The Victorian parliament should enact new laws that promote the responsible use of surveillance devices in public places.

PRINCIPLES

2. The legislation should include the following guiding principles.
 1. People are entitled to a reasonable expectation of privacy when in public places
 2. Users of surveillance devices in public places should act responsibly and consider the reasonable expectations of privacy of individuals
 3. Users of surveillance devices in public places should take reasonable steps to inform people of the use of those devices
 4. Public place surveillance should be for a legitimate purpose related to the activities of the organisation conducting it
 5. Public place surveillance should be proportional to its legitimate purpose
 6. Reasonable steps should be taken to protect information gathered through public place surveillance from misuse or inappropriate disclosure.

REGULATOR OF PUBLIC PLACE SURVEILLANCE

3. A regulator should be responsible for the oversight of public place surveillance in Victoria.
4. The regulator should have the following functions in relation to public place surveillance:
 - a. research and monitoring, including use, technologies and current laws
 - b. educating, providing advice and promoting understanding of laws and best practice
 - c. developing and publishing best practice guidelines
 - d. reviewing advice prepared by public authorities and significant private users of public place surveillance
 - e. examining the practices of public authorities and significant private users in relation to their public place surveillance practices
 - f. advising a public authority or significant private organisation of any failure to comply with laws and best practice guidelines
 - g. investigating and taking civil proceedings in relation to potential breaches of the SDA
 - h. reporting to the Minister on an annual basis on any matters in relation to any of its functions, including any failure by public authorities and significant organisations to comply with advice under paragraph (f).
5. Public authorities and significant private users should be required to provide advice to the regulator annually on their compliance with public place surveillance guidelines in relation to designated surveillance devices.
6. The Victorian government should define 'significant private user' for the purposes of the regulatory regime.

Recommendations

7. In addition to any other powers conferred on the regulator by legislation, the regulator should have the power to do all things necessary or convenient for, or in connection with, the performance of the functions of the regulator.
8. In addition to his or her annual reporting function, the regulator should also have the power to report formally to the relevant Minister about any matters relating to his or her functions. The Minister should be required to table all reports provided by the regulator in parliament.
9. The functions of the regulator should be exercised by the Victorian Privacy Commissioner.
10. The Commissioner for Law Enforcement and Data Security should conduct a review of, and create guidelines for, Victoria Police's use of surveillance and surveillance-captured data.

MODERNISING THE SURVEILLANCE DEVICES ACT

11. The words '*an activity carried on outside a building*' should be removed from the definition of 'private activity' in section 3 of the SDA so that it reads:

private activity means an activity carried on in circumstances that may reasonably be taken to indicate that the parties to it desire it to be observed only by themselves, but does not include an activity carried on in any circumstances in which the parties to it ought reasonably to expect that it may be observed by someone else.
12. The SDA should be amended so that courts are directed to consider whether a public place surveillance user has given adequate notice of their surveillance activities when considering whether a person has given 'implied consent' to any of the conduct that falls within sections 6–9 and 11–12 of the SDA.
13. The SDA should be amended to expressly prohibit the use of an optical surveillance device or listening device to observe, listen to, record or monitor any activity in toilets, shower areas and change rooms which form a part of any public place. This prohibition should include a law enforcement exemption similar to that in section 9B(2) of the SDA.
14. The definition of 'tracking device' in section 3 the SDA should be amended so that it includes all electronic devices capable of being used to determine the geographical location of a person or object.
15. The Governor in Council should be permitted to make regulations that allow specific law enforcement activities to be exempted from the general prohibition in section 8 of the SDA against using a tracking device without consent.
16. The proposed new regulator should advise Parliament regularly about the use of ANPR technology in Victoria, including whether the current regulatory controls are adequate.
17. The automatic substitute consent regime in Part 4A of the *Guardianship and Administration Act 1986 (Vic)* should be extended so that the 'person responsible' may consent to the installation of a tracking device for a person over the age of 18 years who is incapable of giving consent to the installation of that device.
18. Sections 6 and 7 of the SDA should be amended to prohibit participant monitoring using a listening or optical surveillance device subject to the following additional exceptions:

- a. the use of a listening or optical surveillance device by a law enforcement officer to record a private conversation or private activity to which he or she is a party if:
 - i) the law enforcement officer is acting in the course of his or her duty; and
 - ii) the law enforcement officer reasonably believes at least one party to the conversation or activity of having committed or being in the course of committing an offence
 - b. the use of a listening device or optical surveillance device by a party to a private conversation or private activity if:
 - i) a principal party to the conversation or activity consents to the listening device being so used; and
 - ii) recording of the conversation or activity is reasonably necessary for the protection of the lawful interests of that principal party.
19. Sections 6–9 and 11–12 of the SDA should be amended to include civil penalties as an alternative to criminal penalties. The regulator should be permitted to commence proceedings for the imposition of a civil penalty.
20. A new offence should be included in the SDA that makes it unlawful to use a surveillance device in such a way as to:
- a. intimidate, demean or harass a person of ordinary sensibilities; or to
 - b. prevent or hinder a person of ordinary sensibilities from performing an act they are lawfully entitled to do.
21. A civil and alternative criminal penalty should apply for breach of the offence. The regulator should be permitted to commence proceedings for the imposition of a civil penalty.

CREATING STATUTORY CAUSES OF ACTION

22. There should be two statutory causes of action dealing with serious invasion of privacy caused by misuse of surveillance in a public place.
23. The first cause of action should deal with serious invasion of privacy by misuse of private information.
24. The second cause of action should deal with serious invasion of privacy by intrusion upon seclusion.
25. The elements of the cause of action for serious invasion of privacy caused by misuse of private information should be:
- a. D misused, by publication or otherwise, information about P in respect of which he/she had a reasonable expectation of privacy; and
 - b. a reasonable person would consider D’s misuse of that information highly offensive.
26. The elements of the cause of action for serious invasion of privacy caused by intrusion upon seclusion should be:
- a. D intruded upon the seclusion of P when he/she had a reasonable expectation of privacy; and
 - b. a reasonable person would consider D’s intrusion upon P’s seclusion highly offensive.

Recommendations

27. The defences to the cause of action for serious invasion of privacy caused by misuse of private information should be:
 - a. P consented to the use of the information
 - b. D's conduct was incidental to the exercise of a lawful right of defence of person or property, and was a reasonable and proportionate response to the threatened harm
 - c. D's conduct was authorised or required by law
 - d. D is a police or public officer who was engaged in his/her duty and the D's conduct was neither disproportionate to the matter being investigated nor committed in the course of a trespass
 - e. if D's conduct involved publication, the publication was privileged or fair comment
 - f. D's conduct was in the public interest, where public interest is a limited concept and not any matter the public may be interested in.
28. The defences to the cause of action for serious invasion of privacy caused by intrusion upon seclusion should be:
 - a. P consented to the conduct
 - b. D's conduct was incidental to the exercise of a lawful right of defence of person or property, and was a reasonable and proportionate response to the threatened harm
 - c. D's conduct was authorised or required by law
 - d. D is a police or public officer who was engaged in his/her duty and the D's conduct was neither disproportionate to the matter being investigated nor committed in the course of a trespass
 - e. D's conduct was in the public interest, where public interest is a limited concept and not any matter the public may be interested in.
29. The remedies for both causes of action should be:
 - a. compensatory damages
 - b. injunctions
 - c. declarations.
30. Costs should be dealt with in accordance with section 109 of the VCAT Act.
31. Jurisdiction to hear and determine the causes of action for serious invasion of privacy by misuse of private information and by intrusion upon seclusion should be vested exclusively in the Victorian Civil and Administrative Tribunal.
32. These causes of action should be restricted to natural persons. Corporations and the estates of deceased persons should not have the capacity to take proceedings for these causes of action.
33. Proceedings must be commenced within three years of the date upon which the cause of action arose.