

Submission to the Victorian Law Reform Commission

Surveillance in Public Places Consultation Paper July 2009

Fitzroy Legal Service

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About Fitzroy Legal Service

The Fitzroy Legal Service (FLS) is one of the oldest community legal centres in Australia, and has been operating for over thirty-five years. With the support of over 150 volunteers actively engaged in the organization, FLS is able to provide a free legal advice service five nights per week. FLS also operates a vibrant casework practice with an enduring criminal law focus, dealing predominantly with legally aided and pro bono matters. Law reform, community legal education, and community development work also form core activities of the legal service. Relevantly for the context of this submission, FLS has had a long term involvement in debates around use of public space, social order offences, police accountability and other issues impacting on clients whose involvement with the justice is disadvantageously affected by a range of factors including poverty, homelessness, drug/ alcohol use.

Introduction

This submission is written from the shared experience of Fitzroy Legal Service staff and volunteers. We are grateful for the opportunity to participate in consultation processes around this issue which we consider to be of significant practical concern and import.

Issues of particular concern we seek to address are as follows:

- the documented failure of surveillance technology as a long term strategy to deter crime, and associated diversion of resources energy and planning away from more sophisticated and sustainable community building strategies
- the use of surveillance technology to generate/ exacerbate experiences of discrimination and marginalisation, particularly in the context of social order offences, racial and other profiling practices, and in relation to users of public space
- impacts on rights to privacy, presumption of innocence, freedom of association, equality before the law
- reinforcement of unequal power relationships through knowledge of/ access to surveillance devices and data generated

We have elected to present materials and case studies in relation to these at the outset, following which responses to the question format will be set out in brief.

Failure of surveillance technology to deliver on safer communities

As the Commission is aware, a large proportion of surveillance activity is utilised only in identifying offending conduct/ offenders following the event, with varying effectiveness. The deterrent and prevention capacity of surveillance activity is often questionable. Localised examples include: large commercial ventures with extensive surveillance who are still required to ‘write off’ a significant amount of stock as a result of theft; central business district offending rates relating to concentration of

licensed premises and associated social order issues regardless of surveillance capacity.

We are concerned that the failure of surveillance to deliver of safer communities is not given adequate attention. Focus is instead diverted to identifying and eliminating individuals from engagement with the community, primarily through laying of criminal charges, increasingly for social order offences such as drunk in a public place. These approaches fail to recognise the need to engage with the root causes of community problems, and the importance of community engagement, education and problem solving to developing safer environments.

The marketing of surveillance devices as a solution to criminal and social concerns is inaccurate and not supported by evidence. Appropriate strategies would involve weighing up the relative human rights impacts, demonstrated need, and resources required for surveillance devices. Importantly, such consideration should include the broad community costs of loss of anonymity, invasion of privacy, and increased control over community members by the State and increasingly, by corporate interests.

Discrimination & Marginalisation

In the context of surveillance of public spaces, community members whose reliance on public space is higher will experience reduced privacy and autonomy in their activities. This increased reliance may be related to choices informed and/or constrained by youth, culture, homelessness, poverty.

Of particular concern is increased law and order discussion around policing for 'perceptions of safety' as opposed to policing actual incidences of 'crime' such as assaults or theft. Similar to United Kingdom approaches (where surveillance technology has been enthusiastically embraced) these policies include a significant focus on the amorphous category of 'social order offences', including increased arrests for minor offences such as drunk in a public place, resist/ hinder police, and calls for increased powers to issue 'move on' orders.

Strategies used to eject 'undesirables' from being present in the community and in public spaces clearly have negative social impacts. The interface between communities and law enforcement officers is infused with aggression, whilst those negatively affected develop a clearer sense of marginalisation and alienation. We are concerned that surveillance technologies serve these causes to a high degree, and have the potential to de-legitimise use of public spaces by affected communities.

This is particularly the case during zero tolerance periods of policing. Examples include - identification of 'soft targets' around needle syringe programs and primary health care services catering to the needs of complex needs clients; high level surveillance experienced by persons living in high rise commission flats whose poverty decreases their right to privacy and dignity in their homes without the need for warrants or specific grounds to be made out.

We note that the definition of public space adopted by the Commission is broad. Whilst it important that regulation extends to range of public spaces including

shopping centres and entertainment venues, we note that different considerations may apply than in relation to traditional public spaces (e.g. streets, park grounds). For example, management and ownership of spaces may create higher duties of care towards the public, and greater risks of particular behaviours may be present (e.g. theft in shops, violence in licensed premises). It is important that distinctions are drawn where different considerations are at play, and particularly where no implied consent to surveillance as a condition of entry/ use of public spaces can fairly be assumed.

Privacy, presumption of innocence, freedom to congregate/ of movement, equality before the law

Human rights law and discourse are underpinned by values broadly endorsed by the community. These values recognise amongst other things the need to maintain an appropriate balance between individual freedoms and state control, and to create safeguards for the rights of minorities against the ‘tyranny of the majority’. These values also encompass a language to support the development of safe and healthy communities where competing rights are respected and valued in the interests of the whole. Adequate contemplation and controls reflecting these considerations is required as surveillance technologies become increasingly sophisticated and impacts on freedoms and privacy are correspondingly increasingly affected.

Whilst receiving limited protection under law, privacy is a value that members of the Australian community express to be of importance in a wide range of ways. The right to privacy of community members in public spaces is particularly important for individuals who are unable to access ‘private’ (purchased) spaces. In relation to the presumption of innocence, surveillance technology to a large degree presumes the relevant intrusion on privacy and other freedoms to be permissible in order to identify potential or actual offenders. Clearly the quantity of persons whose privacy invaded is much broader.

For this reason, it would seem important to identify grounds for the use of surveillance technology and strictly apply appropriate checks and balances to prevent unnecessary intrusion on privacy. As stated above, we are concerned that combined with an increased focus on social order offences, use of public space may become an increasingly contested site with implications for the fundamental freedoms of individuals to meet, be in public spaces, and be treated equally under the law.

Reinforcement of unequal power relationships

Particularly concerning in the context of surveillance is a range of presumptions about the ‘good use’ to which surveillance will invariably be put, and the trust that should be placed in those persons with access to the location and data of surveillance devices. Without adequate regulation, oversight, information and access, this would seem to be a baseless presumption, and not conducive to community safety.

A specific issue arising in case work contexts is the sometimes short retention period of surveillance data. For example City of Melbourne retains CCTV footage for one month, whilst we understand the Department of Transport routinely retains footage for a shorter time again. Prosecuting authorities have the option whether to access

footage or not, depending on its contents. On the other hand, community members are unlikely to be aware of the location/ existence of cameras or to receive legal advice in order access the footage in time.

This reinforces unequal power relationships based on presumptions of trust and infallibility. Similarly, cooperative relationships between security companies and police do not generally extend to community members, who are again disadvantaged in accessing data unless proceedings are on foot and a subpoena is issued.

Complaints are received by our service where violence is alleged to have been perpetrated by authorities in areas where surveillance devices do not operate, or charges have been laid but surveillance data is no longer available. The underlying presumptions around how safety is created and maintained by surveillance clearly require analysis.

Further comment

We are concerned that our submissions should not be deemed to be simply opposed to surveillance activity. However, whilst acknowledging extensive surveillance activity to be an existing and broadening trend in our society, we believe it is crucial to acknowledge its significant limitations and flaws as a tool to enhancing the health and safety of communities.

In particular, we consider that impacts on marginalised communities, servicing of draconian social order strategies, impacts on fundamental rights and freedoms, and increased state intervention and control into community life are matters that should be given due consideration in public debate.

An unquestioning approach that simply involves ‘rolling out’ new surveillance technologies with minimal regulation, oversight or justification is likely to have harmful impacts on community life and freedoms presently enjoyed.

Options for Reform

We agree that a multifaceted approach to increased use of surveillance in public places is appropriate and support a monitoring role for a regulator.

We share concerns regarding matters outlined in the case for reform by the Commission, including broad community impacts of unseen observers whose intentions, activities, and legitimacy is not routinely brought into question.

We agree government must take an active role in regulation.

In relation to concerns raised that the absence of surveillance could lead to concentration of offending, we note that surveillance is already present in areas of concentrated offending without corresponding benefits.

This is supportive of the view that creating safer communities requires complex, multifaceted, long-term problem solving approaches cognisant of a range of rights. Surveillance technology has limited capacity to support this project.

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?

We support draft principles to guide policy making. However, we consider the draft principles as too watered down to provide strong guidance. We consider the approach taken by the European Human Rights Convention is a preferable statement of principles. Transparency, proportionality to identified purpose, and a general right to privacy as the starting premise of a set of principles is a stronger statement.

We believe a strong statement of a right of privacy that permits only for legitimate and proportionate derogation a better approach. For instance, in relation to the legitimate purpose requirement, a balancing of the purpose against the rights of individuals to privacy should be a component.

In relation to the transparency issues, we note as above that a power imbalance is derived where the public is not aware of the existence of surveillance and cannot access data to protect their own rights.

We are concerned also that different types of 'public places' and associated considerations should be distinguished. We note as above that some community members are more reliant on public spaces, and do not have access to private spaces per se. We reiterate concerns that surveillance may be used as a social order tool without adequate analysis of community harms and long term impacts on cohesiveness and community building.

It would be beneficial if these values were also represented in the principles guiding policy making. Integrating a greater focus on threshold questions of the usefulness, appropriateness, risks and impacts of surveillance activity through the statement of principles could serve this end.

An overarching concern is that inadequate consideration is given to the views of a broad range of ordinary community members likely to be subject to surveillance, attributable to the formal consultation process combined with a lack of understanding regarding surveillance practice and unintended impacts by the broader community. We further believe it is not possible to have an informed debate about proportionality unless appropriate information is made available to the public regarding the significant limitations of surveillance to deliver on safer communities.

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

We consider all surveillance practices should be in principle regulated and capable of oversight. As the nature, source and purpose of the relevant surveillance activity should correspond to different regulatory requirements this does not seem too onerous to be countenanced. The relevance of regulation is raised primarily where problematic surveillance activity is identified. Hence little burden would fall on persons engaging in reasonable and proportionate activity compliant with the framework.

We believe it is important for individuals and advocates to remain enabled to engage in overt surveillance in circumstances where risk of discrimination, violence, and abuse of rights is present. See response to Question 21 below.

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?

We agree the Privacy Commissioner is an appropriate body to take up the role of independent regulator. Clearly the effectiveness of the regulator will depend on adequate resourcing as well as the strength of the regulatory framework and enforcement mechanisms.

Specific functions of the regulator

4. Should the regulator be given the functions proposed by the commission?
5. Are there any other functions that should be given to the regulator?

We are supportive of the identified functions of the regulator. Impacts on human rights, unintended impacts and community cohesiveness should also be monitored within that role. In order to be effective, the regulator should be resourced and empowered to make decisions regarding surveillance activity that is impermissible due to improper infringement on privacy or other legitimate community interests.

For example, we would be concerned that surveillance activity should not be permitted around needle syringe programs or primary health care services. Additionally, we would be concerned that adequate consideration be given to the rights of individuals to use public space and the potential of surveillance activity to negatively impact on that activity. These matters could be encompassed by facilitating the regulator to make determinations regarding the compliance of particular types of activities with the overarching principles and regulatory mechanisms.

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?

A registration scheme clearly would assist the regulator to acquire information about surveillance use. However, we are concerned that an unintended consequence of such a scheme could inadvertently alter the purpose for surveillance activity is geared. For example, a library, primary health care facility or legal service may wish to use surveillance as an occupational health and safety, duty of care, deterrent to onsite use of illicit drugs. Preserving the integrity of that purpose and protection of the privacy of individuals captured on data would be compromised if surveillance users were not aware of their rights and responsibilities in dealing with law enforcement authorities. Put bluntly, a registration scheme could, unless holders of data were aware of the need for warrants to obtain surveillance data, place holders in the position of having the purpose for which surveillance has been instituted co-opted by the State.

7. What (if any) investigatory powers should be given to the regulator?
8. Should the regulator have an own motion investigatory power in order to identify systemic problems with surveillance in public places?
9. Should the regulator have the power to develop advisory guidelines which explain the law concerning surveillance in public places?

We are supportive of the regulator having the own motion investigatory powers identified and capacity to develop advisory guidelines.

Voluntary best-practice standards

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

We support the view raised in roundtables that voluntary standards are an inadequate mechanism by which to regulate surveillance, and that recourse by complainants and rulings by the regulator should be available where regulatory breaches occur and/ or patterns emerge indicative of unacceptable community impacts.

If voluntary best practice standards were adopted, incentives should be attached to proven compliance with those standards.

Mandatory codes of practice

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

We are supportive of mandatory codes of practice.

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

The mandatory codes should regulate in principle all surveillance activities. Incorporated into the code should be a balancing exercise requiring consideration to be given to privacy rights, legitimate purpose, and proportionate use. The regulator should be empowered to approve industry codes provided they comply with the minimum standards set out in the code.

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

The regulator should be empowered to investigate potential breaches. We believe it is important that power extends to oversight of the threshold issue of whether surveillance devices should be operating in the relevant area, and whether adequate and broad community consultation has occurred where community interests may be adversely affected. This is particularly significant we believe in the context of public

spaces that are not linked to commercial enterprises. We also believe it would be useful to incorporate misuse of surveillance as including discrimination, profiling, and harassment into the code.

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

A range of sanctions should be attached to breaches of the code consistent with the enforcement pyramid. Strong enforcement mechanisms should be available where surveillance is used for improper purposes.

A licensing system for some surveillance practices

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

A licensing system is appropriate for a range of forms of surveillance that have significant impacts on privacy as identified by the Commission.

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

In relation to particularly concerning trends, we reference the issues of concern outlined at the beginning of this submission. As indicated we have particular concerns around greater impacts on some communities in being exposed to excessive surveillance as a result of reliance on public places. We are also very concerned that inadequate attention is given to alternative community building initiatives and rights to privacy in the proliferation of surveillance activity occurring in Victoria. We believe it would be appropriate for the regulator to engage in a variety of activities in an attempt to reinstate some balance into the equation, including community education.

Changes to clarify and strengthen the SDA

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

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?

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?

We are supportive of changes to the SDA identified by the Commission which would contemporize its operation and strengthen its capacity to cover a range of surveillance activities.

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?

In relation to participant monitoring, we note that in many instances this is the only opportunity that individuals have to engage in surveillance activity that is self-protecting. For example, such surveillance often occurs in the context of proceedings under the Family Violence Act wherein recordings are made by affected parties, and the practice has been common for some time that participant filming occurs in the context of protests and other environments where there are community concerns that violence may occur.

In relation to the latter, Human Rights Watch style activities occurring internationally have been shown to reduce unreasonable use of force by state authorities, though it is generally the case that awareness is brought to bear that filming is occurring in order for the surveillance activity to be effective in reducing violence.

However, it is of some note that the only instance where ‘the observed’ may have the opportunity to turn the tables and be a witness themselves is one of the amendments raised to create accountability around the proliferation of surveillance activity in Victoria. Again assumptions around guilt, risk and violence are brought to bear.

22. Should the enforcement regime of the SDA (Vic) be extended to include civil penalties?
23. Should the regulator’s proposed powers to develop guidelines be extended to clarify the meaning of consent in the SDA (Vic)? If so how should the meaning of consent be clarified?

We are supportive of both of these proposals.

Creating a statutory cause of action for serious invasions of privacy

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

We are supportive of the creation of statutory cause of action as outlined. We note the statutory cause of action proposed is protective of the interests of individuals and does not address our concerns where systematic discrimination or harassment occurs in the context of surveillance activity. Racial profiling is a matter of particular concern in this context.

Conclusion - Some privacywherever practicable....

We are grateful for the opportunity to contribute to this consultation process.

We reiterate our concerns that the statement of principles does not reflect a strong valuing of privacy. The importance of this is that if the policy framework does not reflect this value strongly, it becomes difficult to conceive how proposed changes can provide required cultural shifts to stall frequently unquestioning and evidence free enthusiasm for new surveillance measures and equipment. Police and security firms should be equally required to function subject to the identified principles.

We reiterate also, the very broad definition of public space does not help distinguish between different contexts public space, wherein different sets of choices about use

can apply to the community. Our submission argues that the standards and principles which apply to these different contexts should be different.

We are also critical of reform to surveillance that does not give central space to evidence about how ineffective surveillance is in delivering on community safety. Reflected in discussion and recommendations is an implicit acceptance that widespread surveillance delivers some sort of public good.

In spite of the clear failures of these approaches in the United Kingdom, where the surveillance trend has been taken to extremes, we are concerned inadequate attention is being geared to exposing this aspect of surveillance.

In conclusion, we believe the positive value of privacy of not just to individuals but to communities needs to be better defended. The rights of institutions, commercial and non-commercial, to engage in surveillance in public and private spaces are already very significant. It is important these trends are checked by reference to the available evidence, a healthy skepticism and strong policy.