

Workplace surveillance

Submission to the Legislative Assembly Economy and
Infrastructure Committee, Parliament of Victoria

15 July 2024

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Who we are

The Australian Lawyers Alliance (ALA) is a national association of lawyers, academics and other professionals dedicated to protecting and promoting justice, freedom and the rights of the individual.

We estimate that our 1,500 members represent up to 200,000 people each year in Australia. We promote access to justice and equality before the law for all individuals regardless of their wealth, position, gender, age, race or religious belief.

The ALA is represented in every state and territory in Australia. More information about us is available on our website.¹

The ALA office is located on the land of the Gadigal people of the Eora Nation.

¹ www.lawyersalliance.com.au.

Introduction

1. The ALA welcomes the opportunity to provide a submission to the Legislative Assembly Economy and Infrastructure Committee ('Committee') on workplace surveillance.
2. The ALA's submission will address:
 - a. the effectiveness of current privacy and workplace laws;
 - b. surveillance data and ownership of that data;
 - c. the impact of workplace surveillance; and
 - d. international and domestic examples of best practice workplace surveillance regulation and privacy protection.

The effectiveness of current privacy and workplace laws

3. The current patchwork of legislative instruments which affect or are relevant to workplace surveillance in Victoria includes the:
 - *Surveillance Devices Act 1999* (Vic), which generally regulates the installation, use, maintenance and retrieval of surveillance devices, as well as the handling of information obtained through surveillance devices;
 - *Privacy and Data Protection Act 2014* (Vic), regarding the responsible handling of personal information in Victoria's public sector;
 - *Health Records Act 2001* (Vic), regarding the handling of health information specifically and which outlines principles similar to the Australian Privacy Principles;
 - *Charter of Human Rights and Responsibilities Act 2006* (Vic), which requires public authorities to act in ways compatible with human rights, including the right to privacy and reputation (see: section 13); and
 - *Privacy Act 1988* (Cth) and the Australian Privacy Principles, specifically concerning the handling of surveillance records and any stored surveillance data.

4. ALA members are concerned that this patchwork of legislative instruments does not adequately and directly address workplace surveillance, including the complexities of modern technology – for example, digital monitoring software that tracks keystrokes or that captures screen contents.

Employer disclosure to employees regarding surveillance in the workplace

5. The ALA is also concerned that employees in Victoria are largely unaware of the laws listed above relevant to workplace surveillance and, by extension, are unaware of their rights – including whether they are being monitored at work, how they are being monitored at work, when they are being monitored, what information is in fact being gathered, the use of the information gathered from surveillance, and how any information gathered from surveillance may affect their employment status.
6. There is no requirement in Victoria for employers to disclose surveillance in the workplace to their employees.² ALA members report that there is generally very little to no disclosure to employees about workplace surveillance in Victoria.
7. While employers may decide to tell their employees pursuant to their own internal policies, ALA members reflect that these are rare occurrences that are largely dependent on the employer's preference. ALA members also note that some employment contracts may outline that an employee may be subject to surveillance and what form that surveillance may take; however, it is not disclosed how data collected from that surveillance may be used or how that data will be stored.
8. This is in stark contrast to the approach in other jurisdictions where employers are required to notify employees about workplace surveillance – for example, in NSW.³ The ALA refers the Committee to the *Workplace Surveillance Act 2005 (NSW)*, which provides a comprehensive legislative framework to specifically govern workplace surveillance.

² Office of the Victorian Information Commissioner, 'Employee monitoring and surveillance', *Privacy During Employment* (Web Page, June 2019) <<https://ovic.vic.gov.au/privacy/resources-for-organisations/privacy-during-employment/#employee-monitoring-and-surveillance>>.

³ See: *Workplace Surveillance Act 2005 (NSW)* Part 2.

Recommendation

That workplace surveillance laws should be enacted in Victoria, laws which would:

- reflect modern surveillance tactics;
- require that employers notify their employees about any surveillance (the type, timing, limitations and the visibility of surveillance equipment) in the workplace and about the employer's policy on workplace surveillance, including a required notification in employment contracts used by the employer;⁴
- require that employers, when notifying their employees about workplace surveillance, provide information which distinguishes between overt and covert surveillance, and the circumstances in which each will be utilised;
- reflect that invasive monitoring practices should be prohibited or restricted unless expressly justified by specific circumstances;
- prohibit covert surveillance unless a formal order is sought either from a Court or tribunal;⁵
- require that there are clearly marked areas in the workplace where surveillance is prohibited, including but not limited to bathrooms and change rooms;⁶
- prohibit workplace surveillance of employees when they are not at work or working;⁷
- require that, in the case of GPS/tracking surveillance, clearly visible signage is provided within all company vehicles detailing that such surveillance is being used;
- require that strict security measures are implemented by employers to ensure that any surveillance footage and records are protected from data breaches; and
- require regular and mandatory audits of workplace surveillance practices to ensure compliance with all privacy laws.

⁴ See: *Workplace Surveillance Act 2005* (NSW) Part 2.

⁵ See: *Ibid* Part 4.

⁶ See, eg, *Ibid* s 15.

⁷ See, eg, *Ibid* s 16.

Surveillance data and ownership of that data

9. ALA members are concerned that employees are largely unaware that their employers own any data obtained through surveillance in their workplace. This exacerbates the power imbalance between employers and employees and can even have significant impact on an employee's mental health.
10. The ALA is also concerned by reports from ALA members of instances where, in the context of workers' compensation claims, employers have rejected requests for access to data obtained through workplace surveillance. This compromises the progression of those claims and access to justice for injured employees across Victoria.

Case study A

Client A worked for a financial services company. A camera was installed directly above her workstation. Client A's employer advised that the camera would monitor staff (including the frequency of their toilet breaks) but also in case anything happened generally in the workplace.

Client A was bullied in that workplace and sought to make a claim for compensation. When she asked for footage from that camera to substantiate her claims of bullying, the employer refused to produce that footage.

Case study B

Client B was sexually assaulted in her workplace.

When Client B requested a copy of CCTV footage from camera surveillance in the workplace, the employer claimed that such footage did not exist.

The employer did eventually provide some CCTV footage to Victoria Police, only after a police complaint was filed.

Recommendation

That the Victoria-specific workplace surveillance legislation recommended above should include:

- a requirement that employers must provide details to their employees of the appropriate use of surveillance footages and records, and assurances regarding the security of that footage;
- a requirement that employers share data obtained through surveillance upon request from an employee or from that employee's legal representative; and
- that a failure to comply with any of the provisions in Victoria's workplace surveillance legislation would attract penalties, in addition to any action taken against that employer by the Office of the Australian Information Commissioner (which is currently limited only to responding to incidents of employers/entities mismanaging or mishandling data obtained through workplace surveillance).

Recommendation

That the Victorian Government undertakes a public education campaign about employees' rights in relation to workplace surveillance.

The impact of workplace surveillance

11. The impact of workplace surveillance on employees in Victoria is significant and greatly concerning to ALA members.
12. Reduced productivity, low morale, mistrust, and a strain on employees' mental health are outcomes regularly reported to ALA members by employees who are being monitored at work. These outcomes have broader ramifications on Victoria's economy and health system.
13. As mentioned above, workplace surveillance also further skews the power imbalance between employers and employees, since:
 - employers can exert a higher level of control over employees based on what they see or read through surveillance of their employees;

- employees feel a diminished sense of autonomy within the workplace when they are being monitored and also feel restricted in their communications with both their employer and other employees; and
- employees feel anxious and under greater scrutiny due to the ability for employers to use information obtained through surveillance against employees.

Case study C

Client C was bullied by the management at their workplace.

Part of this bullying behaviour was to direct a camera to wherever the Client C was seated in the office. This bullying behaviour caused Client C significant distress, resulting in Client C suffering a psychological injury.

Recommendation

That all employers operating in Victoria should be required to have workplace surveillance policies in place and also available to employees detailing what surveillance may be used; how it may be used and stored; and employees' rights with respect to the surveillance and its use.

International and domestic examples of best practice workplace surveillance regulation and privacy protection

14. The ALA refers this Committee to the following international examples of best practice workplace surveillance regulation and privacy protection:

- the *General Data Protection Regulation* (GDPR) in the European Union (EU), which:⁸
 - applies to businesses which process the personal data of EU citizens or residents and/or businesses which offer goods or services to EU citizens or residents;

⁸ General Data Protection Regulation, *What is GDPR, the EU's new data protection law?* (Web Page, 2024) <<https://gdpr.eu/what-is-gdpr>>

- requires those businesses to process data in ways that are lawful, fair, and transparent;
 - levies significant fines for businesses that violate the GDPR; and
 - offers anyone whose data has been mishandled the right to seek compensation.
- the *Federal Data Protection Act* (BDSG) in Germany, which implements the GDPR in Germany in order to require businesses to ensure that the processing of any personal data is legitimate, fair, honest and transparent;⁹ and
 - the *Personal Information Protection and Electronic Documents Act* (PIPEDA) in Canada, which regulates how the private sector collects, uses and discloses personal information.¹⁰

15. We also note here aspects of international law which underpin international best practice workplace surveillance regulation, and which should be incorporated into regulations to address workplace surveillance in Victoria and across Australia:

- International Labour Organization (ILO) conventions and codes of practice – for example, *The International Labour Office code of practice on the protection of workers' personal data*, which requires that employees are “informed in advance of the reasons for monitoring, the time schedule, the methods and techniques used and the data to be collected”;¹¹
- the *Universal Declaration of Human Rights* (UDHR) and *International Covenant on Civil and Political Rights* (ICCPR), including Article 12 of the UDHR and Article 17 of the ICCPR which both address the fundamental human right of a person to not “be subjected to arbitrary or unlawful interference with his privacy”; and
- the *OECD Guidelines for Multinational Enterprises*, which includes the following:¹²

⁹ See: *Federal Data Protection Act* (BDSG) <www.gesetze-im-internet.de/englisch_bdsge>.

¹⁰ Office of the Privacy Commissioner of Canada, *PIPEDA requirements in brief* (Web Page, May 2024) <www.priv.gc.ca/en/privacy-topics/privacy-laws-in-canada/the-personal-information-protection-and-electronic-documents-act-pipeda/pipeda_brief>.

¹¹ Clause 6.14, *The International Labour Office code of practice on the protection of workers' personal data*.

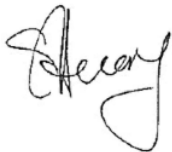
¹² *OECD Guidelines for Multinational Enterprises on Responsible Business Conduct* (2023) 17 at [14] <<https://mneguidelines.oecd.org/mneguidelines>>.

Enterprises should take steps to create a space where concerns about adverse impacts related to their activities or the activities of entities with which they have a business relationship can be safely expressed. Refraining from and taking steps to prevent the use of reprisals are important to protecting civic space and to preventing harm to groups and individuals who seek to or do investigate, express or report such concerns. Reprisals include retaliatory or discriminatory actions that are intended to censor, intimidate, harm or silence critics such as threats, reputational smears, slurs, harassment, intimidation, surveillance, strategic lawsuits against public participation, attempts to criminalise lawful activities, physical attacks and killings.

16. In terms of a domestic example, and as mentioned throughout this submission, the ALA refers the Committee to the *Workplace Surveillance Act 2005* (NSW), which offers a comprehensive legislative framework to specifically govern workplace surveillance.

Conclusion

17. The Australian Lawyers Alliance (ALA) welcomes the opportunity to provide a submission to the Legislative Assembly Economy and Infrastructure Committee on workplace surveillance.
18. The ALA is available to provide further assistance to the Committee on the issues raised in this submission.



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