T R A N S C R I P T

LEGISLATIVE ASSEMBLY ECONOMY AND INFRASTRUCTURE COMMITTEE

Inquiry into workplace surveillance

Melbourne – Tuesday 3 September 2024

MEMBERS

Alison Marchant – Chair
Kim O'Keeffe – Deputy Chair
Anthony Cianflone
Wayne Farnham
John Mullahy
Dylan Wight
Jess Wilson

WITNESSES

Chris Molnar, Co-Chair, Workplace Relations Committee, and

Donna Cooper, General Manager, Policy, Advocacy and Professional Standards, Law Institute of Victoria.

The CHAIR: Welcome to the public hearings for the Legislative Assembly Economy and Infrastructure Committee's Inquiry into workplace surveillance. All mobile telephones should now be turned to silent.

All evidence today is being recorded by Hansard and broadcast live on the Parliament's website. While all evidence taken by the Committee is protected by parliamentary privilege, comments repeated outside of this hearing, including on social media, may not be protected by this privilege.

Witnesses will be provided with a proof version of the transcript to check. Verified transcripts and other documents provided to the Committee during the hearing will be published on the Committee's website.

Thank you for your time today. I will just introduce the Committee first, and then we might hand over to you. If you would like to talk to your submission or anything extra that you would like to speak to, to give us a bit of background to help us then start off with some questions, that would be great. I am Alison, the Member for Bellarine.

Kim O'KEEFFE: Kim O'Keeffe, Member for Shepparton.

Anthony CIANFLONE: I am Anthony Cianflone, Member for Pascoe Vale.

John MULLAHY: John Mullahy, Member for Glen Waverley.

Dylan WIGHT: Dylan Wight, Member for Tarneit.

The CHAIR: I might hand over to you. Thank you.

Chris MOLNAR: I am Chris Molnar. I am one of the co-chairs of the Workplace Relations Committee at the Law Institute of Victoria.

Donna COOPER: I am Donna Cooper, the General Manager of Policy, Advocacy and Professional Standards at the Law Institute.

The CHAIR: Thank you. We have got your submission, but we would love you to talk to that a little bit more to help us out and get going.

Chris MOLNAR: Terrific. What we propose is for me to make an opening statement if you like, and then of course we would be more than happy to take any questions and deal with any issues that you might have with our written submission or what we have said today.

First of all, the Law Institute of Victoria appreciates the opportunity to appear before the Committee for this Inquiry into workplace surveillance. The Law Institute is Victoria's peak body for lawyers and those who work with them in the legal sector, representing more than 20,200 members. The LIV has a long history of contributing to, shaping and developing effective legislation. The LIV welcomes a comprehensive review of Victoria's workplace surveillance laws and commends the Victorian Parliament for initiating this inquiry. The LIV submission to the Committee responds to the terms of reference numbered 1, 2, 6, 7 and 12. The key themes of our submission are, first, concerning the effectiveness of Victoria's current laws regarding the regulation of workplace surveillance; secondly, the possible impact of workplace surveillance laws on Victorian workers' physical and mental safety, on occupational health and safety generally, on any power imbalances between employers and employees and on productivity generally; and thirdly, the inconsistent patchwork of regulation on this subject around Australia.

At a high level the LIV notes that the issue of workplace surveillance concerns the complex interaction of quite a few interrelated layers of regulation across the Victorian and Australian legal landscape, including privacy laws, general laws regulating surveillance, occupational health and safety and, more specifically, workplace surveillance laws. In line with this understanding the LIV's principal recommendation is that Victoria should implement the more broadly applicable workplace surveillance laws which apply in New South Wales and the Australian Capital Territory, which we observe oblige employers to provide notices of surveillance to employees. Not only will this achieve greater consistency across significant parts of Australian jurisdictions but it will also ensure that Victoria implements a more comprehensive and better targeted regime regarding

workplace surveillance, which should offer greater protection for Victorian workers, but without—and we emphasise this—creating an unreasonable burden on business.

The LIV highlights that any new legislation should recognise the need to strike an appropriate balance between the competing public interest in protecting employees' privacy rights on the one hand and managing workplace health and safety and productivity on the other hand. Amongst other things, the LIV recommends that, firstly, Victorian employers should be required to provide employees with information about the methods and scope of any workplace surveillance used, similar to requirements in New South Wales and the ACT; and secondly, that any reforms should align with Victoria's proposed Occupational Health and Safety Amendment (Psychological Health) Regulations, with consideration given to excessive or inappropriate workplace surveillance within the definition of psychosocial hazards. In that regard we note that employers already have the obligation under occupational health and safety legislation to eliminate safety risk in the workplace, including the risk of excessive workplace surveillance.

The LIV office is informed to speak on this issue through the LIV workplace relations section, which is composed of legal practitioners who are members of the Law Institute and who are interested and engaged in the area of workplace relations. The section is comprised of experienced workplace relations practitioners across the spectrum, including lawyers traditionally representing both employer and employee perspectives. In making its submission, the LIV recognises that different industries will have different perspectives on the issue. The LIV, as the peak legal body for lawyers and those working in the law in Victoria, proposes moderate legislative reforms consistent with legislation in New South Wales and the ACT in a way which will not unduly burden businesses whilst also managing appropriately workplace health and safety and ensuring that workers are aware of the extent of surveillance in the workplace.

We welcome further questions from the Committee in relation to this submission on workplace surveillance laws in Victoria. Thank you.

The CHAIR: Thank you very much for that. We have had a few witnesses today for this hearing, and it has given us a really good starting point on the current landscape. I think we have got quite a few questions for you to try and unpick a little bit more of that. That would be great. I might hand to Kim first.

Chris MOLNAR: Sure.

Kim O'KEEFFE: I might jump to a question about the New South Wales and ACT acts, because they have been raised and you obviously had some fairly in-depth comments there in your submission, which I thought were really valuable. Are there any aspects of these laws that need updating to better protect workers? Are they relevant for the times that we are living in now?

Chris MOLNAR: I think where we are coming from is that we are in a situation where we have obviously the Surveillance Devices Act, which deals with different types of surveillance across a whole spectrum but in particular deals with private conversations and private activity. It only deals in a minor way with workplaces and obviously deals with the situation where you do not want employers putting surveillance in workplace bathrooms and toilets and that. That is all perfectly understandable. What we see as the next stage is really, conceptually, to put in what the ACT have done and what New South Wales have done, which is really about awareness. Workers ought to be aware of what surveillance is taking place. Now that of course will vary. It has varied as much in the past to today as it will in the future, and it is hard obviously to be specific about what that is. Probably many employers do not even know what functionality a lot of their devices have, and that is potentially an issue. We see that conceptually as where we ought to go in that space. There would be debate about what works, what does not work and the way that it is drafted. My observation as a lawyer is that probably the ACT act is perhaps a little bit better drafted and has greater clarity than the New South Wales act. The New South Wales act—and I do not want to be critical of New South Wales legislation–

John MULLAHY: Go on, we are Victorian.

Dylan WIGHT: We do; we are happy for that.

Chris MOLNAR: I do not want to be read that I in some way have been critical of the New South Wales legislation, but the ACT act has a lot more clarity and it is easier to read from a lawyer's perspective than the New South Wales act. I mean, both acts are not long acts, but certainly the ACT act reads better in terms of the

way that it is drafted. There are also some other provisions in the ACT act which address things like provision around consultation. I think there are also provisions around access to data, and that is certainly something which I think would need to also be looked at in terms of being consistent with the sorts of laws we have in Victoria, in particular around consultation and consultation required under the OH&S Act and also consultation that is required federally under, for example, modern awards. I think that maybe that is something that needs to be looked at, but it is interesting also to see that they have also included some right of access—not ownership but certainly access—to what data might be collected by the employer in that context.

Kim O'KEEFFE: That is employee access?

Chris MOLNAR: Yes.

Dylan WIGHT: Can I pick up on that? Thank you, Chair. As you said, in New South Wales and ACT it is primarily about essentially disclosing what has occurred. We know that the ACT act has consultation involved in it as well. You speak about ownership, which we spoke about with OVIC just previously, and how that can get a little bit tricky in terms of FOI requests et cetera. Would you, being that you are talking about moving towards a New South Wales–ACT model, envisage consultation—how you may be able to beef that up slightly—and right to access as well?

Chris MOLNAR: Personally, yes, I think in the workplace obligations for consultation are quite commonplace. In the OHS space employers are already required with respect to identification of hazards and any changes to the working conditions to consult with employees. As I said, there are also obligations under modern awards to consult when there is any significant change in the workplace. So we are very used to, in Australia, having the various instruments to consult with employees. Consultation is not necessarily agreeing; it is a process.

Dylan WIGHT: No, but if you are talking about fair work, as in, if you are talking about an award, do those consultation clauses in those industrial instruments—when you are talking about starting some sort of surveillance in the workplace of your employees, how do those industrial instruments intersect with your responsibilities there?

Chris MOLNAR: Very broadly, if an employer is requiring a change—and that might include a significant introduction of some new surveillance—it would be required that the employer advise employees of what is happening, the changes and the impact; invite any feedback; and take into account that feedback in terms of any decision-making process taking place.

Dylan WIGHT: Is that occurring, in your experience, in workplaces in Victoria without the legislation that we are talking about in respect to New South Wales and the ACT?

Chris MOLNAR: To the extent that there are modern awards applying and to the extent that OHS laws apply, because there are quite significant obligations to consult in the OHS legislation, I think that maybe there is an issue potentially around awareness of those obligations. But I think those employers that are aware do engage in those sorts of processes. I do not see that as a big cost. I see that as simply a process, and it is consistent with a lot of the other obligations which employers have these days.

The CHAIR: Anthony.

Anthony CIANFLONE: Thank you. Thank you for your submission as well. It is very comprehensive and much appreciated. In terms of any potential new legislation in Victoria, which we are looking at, and notwithstanding the acts in New South Wales and the ACT, what are your views? Can you talk a bit more around how we could potentially make recommendations around drafting new legislation around anticipating the evolving nature of artificial intelligence? Also, this idea around what a workplace traditionally has been, and still is in many respects, as opposed to what is evolving into more of a 'workspace'—in LIV's opinion, how can we work towards those recommendations that make provision within a future act potentially for these things?

Chris MOLNAR: I think the important thing in all of this is not to be overly prescriptive, and the reason for that, as you recognise, is that this is an evolving situation where the technology today will be very different in four or five years. We are looking at legislation that we want to be serviceable for a long time. So I would have

thought that some generic requirement in terms of notification to employees is what is required. Now, it may be that artificial intelligence has functionality, but that functionality does not have anything to do with surveillance. What we are talking about here is surveillance. But if you have, presumably, artificial intelligence that develops or has some sort of functionality that enables some level of surveillance, then I would have thought in that notice that that is the sort of disclosure which should be provided to employees. Without being overly prescriptive in terms of the requirements, if you dealt with surveillance and how that was occurring, requiring employers to identify what surveillance is taking place I think would cover anything in that AI sort of space.

Anthony CIANFLONE: From the workspace point of view, we heard some evidence earlier on today, especially from the office of the information commissioner in Victoria, around how their organisation deals with a lot of sensitive information, confidential information, and employees working from home during COVID and being in the presence of other family members when they are online having meetings and the like about sensitive things. How can that be scoped out in legislation?

Chris MOLNAR: Well, again, I just think when we deal with the workplace, the ACT legislation and the New South Wales legislation cover this. They talk about wherever work is being performed. So if you are performing work at home, as is often the case now, exactly the same requirements in terms of notification and disclosure would be required. If people are working at home using, obviously, their employer's equipment, to the extent there was surveillance you would need to disclose that.

Anthony CIANFLONE: No worries.

John MULLAHY: Would the employer have to disclose to anyone else in the household about what they are surveilling?

Chris MOLNAR: The employer?

John MULLAHY: Yes, to other people in the house.

Chris MOLNAR: Well, presumably they are not in that workspace so I would not have thought so.

The CHAIR: Good question. Can I just add because I want to build on that, you are talking about a definition where it is work that is being performed?

Chris MOLNAR: Correct.

The CHAIR: Okay. Then how does that link in the Surveillance Devices Act to talking about private conversations and private –

Chris MOLNAR: Okay. Essentially you have got the Surveillance Devices Act and that is essentially dealing with different types of surveillance in very specific situations; it is mainly talking about private conversations or private activities. That applies generally. What we are dealing with in the Workplace Surveillance Act is really something on top of that—something that deals specifically with the workplace and requiring of the employer, if they are going to be doing any surveillance, they need to disclose it. Now, it could well be that of course if you have not disclosed it, then obviously it is going to be a breach of the Workplace Surveillance Act. Whether that is a breach of the Surveillance Devices Act is another issue altogether. It is a separate issue. But you could have breaches of both acts of course, whether it be the Workplace Surveillance Act or the Surveillance Devices Act. If you fail to give the notice and happen to be recording a private conversation that you are not a party to without the consent of the people in that conversation, it could be a breach of both. The Surveillance Devices Act operates generally. The Workplace Surveillance Act operates in a very specific situation.

The CHAIR: Just to clarify, the lines are becoming very blurred with where the workplace is, and I think that is what Anthony was going to. If, for example, you are at home but you are undertaking work, there needs to be a very clear definition of what I suppose is a private space and what is a workspace in terms of what would then be breached if there was a breach.

Chris MOLNAR: Correct. Obviously situations will be different, but if you are at home on your laptop, for example, you are obviously working on your laptop and there may be some sort of monitoring of what you are

doing on that laptop. That would be probably the case right now. So that is happening, but that does not involve any necessarily private activity or private conversation, and there are exceptions where you are using the employer's equipment. That comes out of a whole stack of stuff. But I suppose it would be an interesting situation if you had a video camera and it happened to be that there were other people in that room—that is perhaps what you were referring to—and they were involved in some sort of private activity. I would have to give some thought to that, but if I were the employer in that situation I would be putting out guidelines to the employee simply saying 'When you use this equipment you are to ensure that no other person is near this equipment, potentially, or close to this equipment' or that 'The use of this equipment is for you and your use'. That would be to protect, obviously, the employer in that sort of situation and to ensure that the employer is not inadvertently doing that. It should be understood that this is criminal law—workplace surveillance is criminal law, and the Surveillance Devices Act is also criminal law. So there would be presumably the usual concepts that would apply in criminal law in that sort of situation, and obviously there would be issues potentially around intent and involuntary or accidental behaviour in all of that as well.

The CHAIR: Thank you. Thanks for that. John.

John MULLAHY: We have discussed modern awards and having the consultation aspect of it. In your submission you mentioned that genuine consent to workplace surveillance is problematic due to the power imbalance between employer and employee. What protections are needed in legislation to overcome the difficulty of obtaining genuine consent in a work context?

Chris MOLNAR: I think of the model which applies under the Fair Work Act where, before an employee joins employment, you must give an employee a statement of employment rights, and now with respect to casual employees, you also need to give a specific statement regarding casual employment rights. That needs to be given prior to the employment beginning. I would have thought that a similar sort of statement for new employees ought to be given. You would be given your statement under the Fair Work Act and you would be given a statement under the Workplace Surveillance Act which would identify obviously what degrees of surveillance are required in this respect so the employee would be aware of that situation.

John MULLAHY: And if there are any changes, then everyone gets an updated copy or an updated version of those.

Chris MOLNAR: Correct. If there are changes in the employment, they would then need to be given an updated version of that. So there is a bit of an obligation on the employer to keep up to date with whatever surveillance devices they are using. They would need to understand the functionality of those devices and obviously then give the relevant notifications to the employees.

John MULLAHY: So if they updated any of their apps or anything like that with new functionality, they would have to know that they have an obligation on them to inform their employees.

Chris MOLNAR: Correct. So there is full awareness. There is always going to be a degree of power imbalance in a workplace, but I think if employees are aware of what surveillance is taking place, that goes a long way towards employees understanding what surveillance there is. And that is more than what you have got at the moment here in Victoria. You do not know what is happening in Victoria. There is simply an obligation on the employer not to do certain surveillance in certain situations, but employees in Victoria are not aware of what surveillance is taking place. We see that as a gap.

Donna COOPER: And that is a commonsense approach too, to have that moderate reform. It would be completely unworkable to have employers having to go out and get consent every single time; you might have a very large workforce. We think that that is moderate reform, and it would not cause an unreasonable burden on businesses to do that.

Chris MOLNAR: And there is a precedent for that in respect of New South Wales and the ACT.

The CHAIR: I am sorry to keep jumping in, but just to build on that, we have heard evidence today about that imbalance, I suppose, where someone feels they have to if they want employment or they are under pressure to sign up to something that maybe they are not really 100 per cent comfortable with. Is there an opportunity there for you talking about that genuine consent where someone actually gets to a point where they are comfortable?

Chris MOLNAR: They may not be comfortable completely. The reality is we are under surveillance when we step out of the house, and probably in the house as well—Google, as they say, is always listening. At the moment we have got a whole degree of surveillance which is taking place, and we might know about that or we might not know about that. It may be that if you are informed prior to employment that there is this sort of surveillance taking place, then you may not be happy with that and you need to make choices about whether you wish to join that employer. But that employer may have very good reasons for having that surveillance. There may be OH&S reasons, there may be productivity reasons or there may be reasons at financial institutions to be able to know what employees are doing at a minute level in order to protect not only the employer but the employee. So there are going to be those imbalances and that is there, but I think what we are saying here is that if you are aware, then at least it has been disclosed, and that goes a long way to you deciding what you want to do with that.

The CHAIR: Thank you. Dylan.

Dylan WIGHT: Thank you. My question is in a couple of parts. Given your submission, would you favour independent legislation in line with that of New South Wales and the ACT rather than amendments to current legislation?

Chris MOLNAR: Correct.

Dylan WIGHT: Okay, great. Also, we have had some submissions and heard some evidence about the creation of an independent oversight body, and we have heard some evidence and submissions that it should go into OVIC. What would be your preference? What do you think would work best? Is it necessary to create an independent oversight body? If not, who would have oversight of it?

Chris MOLNAR: We had a good discussion around this, because we have thought about this. We are dealing with criminal law, so if somebody is going to prosecute that, there needs to be somebody who reports and somebody they report to. That person needs to make a decision as to whether or not to bring a prosecution under the act. It is not civil. Of course information privacy is dealt with federally in a civil way by the OAIC. We are potentially dealing with information privacy and what happens, but these are parallel processes. For example, a breach of the Workplace Surveillance Act or the Surveillance Devices Act may also be a breach of the information privacy principles, in which case an employee may have a right under those processes federally to take action, or in Victoria in respect of a health record, to the health complaints commissioner if there is a breach of health privacy principles. You need somebody to report that to.

There has got to be a regulator. That can be WorkSafe, and that conveniently puts it in that health and safety space, because there is concern about excessive surveillance being a risk to health and safety. They would then be able to manage both of those aspects, conveniently, but obviously that would enlarge the functionality and powers of WorkSafe. The other thing is to upgrade the wage inspectorate. They have got obligations and entitlements to prosecute in respect of breaches under the Long Service Leave Act. They could also be given that role on top of what they already do, or you could create another prosecutor of course. That is another option. But that all has to do with obviously convenience, management and administration and where it is best put, I would have thought. Obviously there is regulation around privacy in the public sector, but again that is all done in a sort of civil space. You are creating or giving powers to somebody to deal with criminal prosecutions.

The CHAIR: Are there any further burning questions? I am just mindful of time. Is there anyone that has anything they really need to ask? Thank you so much for your time. I really appreciate it. If there is anything that might be additional to help the Committee with their information, we would love you to continue to provide us with further information if you need to. Thank you so much for your time.

Witnesses withdrew.