Submission No 37

INQUIRY INTO WORKPLACE SURVEILLANCE

Organisation: Law Institute of Victoria

Date Received: 1 August 2024

LAW INSTITUTE VICTORIA

T: 03 9607 9311

1 August 2024

Legislative Assembly Economy and Infrastructure Committee
Parliament of Victoria
Parliament House, Spring Street
EAST MELBOURNE VIC 3002

By email only to: worksurveillanceinq@parliament.vic.gov.au

Dear Committee,

Re: Inquiry into workplace surveillance

The Law Institute of Victoria (**LIV**) 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 the opportunity to provide feedback to the Legislative Assembly Economy and Infrastructure Committee (**the Committee**) in response to the Parliamentary Inquiry into workplace surveillance (**the Inquiry**). The LIV consents to this submission being published.

In this submission the LIV provides responses to Terms of Reference 1, 2, 6, 7 and 12. This submission is informed by the views of members of the LIV's Workplace Relations Section, which consists of experienced workplace relations practitioners representing both employer and employee perspectives.

Executive Summary

The LIV welcomes a comprehensive review of Victoria's workplace surveillance laws. The LIV commends the Parliament of Victoria for initiating an inquiry into Victorian workplace surveillance laws, with a view to assessing whether legislation regulating workplace surveillance is keeping pace with contemporary needs and technological progress.

In the course of its comments on Terms of Reference 1, 2, 6, 7 and 12, the LIV makes several recommendations to enhance workplace surveillance laws in Victoria. The principal recommendation of the LIV is that Victoria should implement more broadly applicable workplace surveillance laws, akin to those in New South Wales (**NSW**)[1] and the Australian Capital Territory (**ACT**).[2] Aside from having the – desirable – effect of achieving greater consistency between Australian jurisdictions in their regulation of workplace surveillance, the adoption in Victoria of legislation similar to the *Workplace Surveillance Act 2005* (NSW) and *Workplace Privacy Act 2011*

[1] *Workplace Surveillance Act 2005* (NSW).
[2] *Workplace Privacy Act 2011* (ACT).

Law Institute of Victoria ABN 32 075 475 731
Level 13, 140 William Street, Melbourne VIC 3000
GPO Box 263, Melbourne VIC 3001
T 03 9607 9311 **F** 03 9602 5270
E lawinst@liv.asn.au **W** www.liv.asn.au

(ACT) would be welcomed given that the NSW and ACT regimes are more comprehensive and better targeted than present regulation under the *Surveillance Devices Act 1999* (Vic) (**SDA**), in turn offering greater protection for workers.

Whilst recommending the adoption of more comprehensive workplace surveillance regulation in Victoria, the LIV recognises that a justification for workplace surveillance may lie in its ability to facilitate the maintenance of a working environment that is safe, including from internal or external discrimination or harassment – thereby allowing employers to discharge their occupational health and safety (**OHS**) duties.[3] Accordingly, the LIV also recommends that any new legislation should recognise the need to strike an appropriate balance between the competing public interests in protecting employees' privacy on the one hand, and managing workplace health, safety, and productivity on the other. This should be a guiding principle of any such legislation.

Further, the LIV recommends, amongst other things, that (1) Victorian employers should be required to provide employees with information about the methods and scope of any workplace surveillance used; and (2) any Victorian legislative changes should align with Victoria's proposed Occupational Health and Safety Amendment (Psychological Health) Regulations, with consideration given to including excessive or inappropriate workplace surveillance within the definition of 'psychosocial hazard'.

Term of Reference 1: The effectiveness of current privacy and workplace laws when it comes to employee workplace surveillance.

The LIV submits that Victoria's current laws relating to regulation of workplace surveillance are ineffective, to the extent that they do not adequately protect workers' privacy.

Currently in Victoria, workplace surveillance is regulated by the SDA, which applies generally to prohibit the installation, use or maintenance of listening and optical surveillance devices for certain purposes and without the consent of all relevant parties. For example, section 6(1) of the SDA provides that:

Subject to [the exceptions provided in subsection (2)], a person must not knowingly install, use or maintain a listening device to overhear, record, monitor or listen to a private conversation to which the person is not a party, without the express or implied consent of each party to the conversation.

Section 6(2) of the SDA provides exceptions to the prohibition in section 6(1), largely for law enforcement purposes. For example, section 6(2)(a) provides an exception for the installation, use or maintenance of a listening device in accordance with a warrant.

Section 7(1) of the SDA provides that:

[3] *Occupational Health and Safety Act 2004* (Vic) s 21(1).

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Subject to [the exceptions provided in subsection (2)], a person must not knowingly install, use or maintain an optical surveillance device to record visually or observe a private activity to which the person is not a party, without the express or implied consent of each party to the activity.

Section 7(2) of the SDA provides exceptions to the prohibition in section 7(1), again largely for law enforcement purposes.

Part 2A of the SDA, inserted by the *Surveillance Devices (Workplace Privacy) Act 2006* (Vic), contains provisions dealing specifically with the use of surveillance devices in the workplace. However, Part 2A is limited in application; it applies only to the use of surveillance devices in workplace toilets, washrooms, change rooms and lactation rooms.

Beyond this, the SDA has several limitations, namely:

- the legislation is outdated, and has not been amended since the introduction of the *Surveillance Devices (Workplace Privacy) Act 2006* (Vic);
- the legislation permits surveillance of private conversations when there is express or implied consent of each party to the conversation,[4] which fails to recognise the inherent power imbalance between an employer and employee in obtaining genuine consent; and
- the definitions of 'private activity' and 'private conversation' are restrictive. For example, a private activity is defined in section 3(1) of the SDA as: '*an activity carried on in circumstances that may reasonably be taken to indicate that the parties to it desire it only to be heard by themselves, but does not include (a) an activity carried on outside a building; or (b) an activity carried on in circumstances in which parties to it ought reasonably to expect that it may be observed by someone else*'. A private conversation is defined in section 3(1) of the SDA as: '*a conversation carried on in circumstances that may reasonably be taken to indicate that the parties to it desire it to be heard only by themselves, but does not include a conversation made in any circumstances in which the parties to it ought reasonably to expect that it may be overheard by someone else*'. This has the effect of constraining the operation of the prohibitions under sections 6(1) and 7(1) of the SDA, limiting the in-practice application of the SDA and thereby, protections against surveillance in the workplace.

As well as being restrictive, the LIV has received anecdotal feedback from its members that the definitions of 'private activity' and 'private conversation' under section 3(1) of the SDA are considered to be vague and are subject to inconsistent interpretation in the workplace context. For example, it is unclear whether a conversation amongst colleagues which takes place in a staff lunchroom constitutes a 'private conversation' under the SDA. Equally, it is unclear whether an audio voice message exchanged between employees and played aloud would constitute either 'private activity' or a 'private conversation' if audible to other employees walking past.

[4] *Surveillance Devices Act 1999* (Vic), s 6(1).

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Accordingly, the LIV recommends that Victoria implement more broadly applicable workplace surveillance laws, akin to those in NSW[5] and the ACT.[6] This would have the benefit of regulating workplace surveillance in a more comprehensive way in Victoria, offering greater protections for workers. New surveillance regulation tailored to the workplace context would also remove the need for reliance on the SDA, which, as detailed above, has several limitations – particularly as it applies to workplaces. The workplace surveillance laws currently applicable in NSW and the ACT are discussed further in the LIV's response to Term of Reference 12.

Term of Reference 2: The current practices of employers disclosing the use of workplace surveillance to employees and others.

The LIV submits that current practices could be improved.

Whilst currently under the SDA, the installation, use or maintenance of surveillance devices is prohibited under sections 6 and 7 unless the 'express or implied consent' of surveilled parties is obtained (and the installation and use of surveillance devices in workplace toilets, washrooms, change rooms and lactation rooms is prohibited outright under section 9B), the LIV recommends the introduction of targeted workplace surveillance legislation similar to that in NSW and the ACT. NSW and ACT workplace surveillance regulation does not rely on worker consent, but rather obliges employers to provide notices of surveillance to employees, detailing several matters about any surveillance in use.

The LIV recommends that, in accordance with the model provided by NSW and ACT legislation, Victorian employers should be required to provide employees with information which discloses the methods and scope of workplace surveillance used in the workplace.

The LIV recommends that employers should be required to:

- specify which workplace surveillance device(s) are currently being used, or are intended to be used by a certain start date;
- detail how such device(s) will be overseen and controlled;
- specify the purpose and scope of surveillance, for example if a workplace surveillance device will be installed on both an employee's computer and work phone;
- form part of an employee's onboarding documentation, akin to the 'information statement' provided to an employee at the commencement of their employment as per section 125 of the *Fair Work Act 2009* (Cth);
- include a commitment that the employer will continually review the control and oversight of any workplace surveillance device and will inform employees of any changes to monitoring practices; and
- provide information about an employee's rights to raise a complaint about the potential misuse of workplace surveillance devices.

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[5] *Workplace Surveillance Act 2005* (NSW).
[6] *Workplace Privacy Act 2011* (ACT).

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Term of Reference 6: The personal impact of workplace surveillance on Victorian workers, such as on their physical and mental safety.

The LIV is concerned that the workplace surveillance of Victorian workers has the potential to adversely impact their physical and mental wellbeing. The LIV understands that workplace surveillance may result in several adverse consequences, including but not limited to:

- negative psycho-social consequences including increased resistance to surveillance, decreased job satisfaction, and increased stress;
- decreased workplace productivity; and
- increased turnover

Workplace surveillance also bears the potential to be misused to discriminate against and/or bully an employee, which has clear consequences for employee physical and mental wellbeing.

The LIV recommends that any changes to Victorian surveillance laws should align with Victoria's proposed Occupational Health and Safety Amendment (Psychological Health) Regulations (**Regulations**). In particular, consideration should be given to the definition of 'psychosocial hazard', and the inclusion of excessive or inappropriate workplace surveillance in this definition. The inclusion of excessive or inappropriate workplace surveillance in the definition of 'psychosocial hazard' in the proposed Regulations would serve as recognition of the grave potential impact of intrusive surveillance on a person's mental, and thereby physical, wellbeing.

Term of Reference 7: The impact of workplace surveillance on workplace relations and the balance of power between employers and workers.

The use of surveillance devices – particularly covert surveillance devices, the use of which has not been notified to employees – and a lack of transparency surrounding their use can significantly undermine trust between employers and employees. This was noted in *Mr. Christopher Louis Janssens v Rowan Bustin Pty Ltd* [2023]. In this case Deputy President Bell held that whilst an employee's recording of a meeting with the Respondents' directors was lawful, the 'covert recording of work colleagues is plainly conduct destructive of a relationship of trust and confidence'.[7]

To address this, the LIV recommends that employers should be required to notify employees of the methods and scope of surveillance used in the workplace, as detailed above. Beyond this, employers should implement transparent surveillance policies and should be required to actively consult with employees to develop and review any policies relating to workplace privacy and the use of workplace surveillance devices. Maintaining collaborative and transparent dialogue between employers and employees will foster mutual trust and accountability.

[7] *Mr Christopher Louis Janssens v Rowan Bustin Pty Ltd* [2023] FWC 623 [14].

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Finally, the LIV is concerned by the current lack of regulation concerning the maintenance of workplace surveillance data and records, and that this may impact on employee privacy and unfairly disadvantage employees. The potential effects of this are illustrated by *Mr. Paul Goodwin v Wyndham City Council* [2023], in which case the Applicant, Mr. Goodwin, sought to adduce further evidence obtained via a Freedom of Information application to claim that GPS records used for disciplinary action were accessed in breach of the employer's GPS policy and the SDA.[8] The Full Bench of the Fair Work Commission (**FWC**) found that as the data did not indicate who had accessed it and for what purpose, there were insufficient grounds to establish breach of the employer's GPS Policy and the SDA.[9] To address current shortcomings, the LIV accordingly recommends that the Victorian Government consider implementing legislative workplace surveillance record-keeping requirements, again, in line with similar requirements under NSW and ACT legislation.[10]

Term of Reference 12: The interaction between State and Commonwealth laws, and the jurisdictional limits imposed on the Victorian Parliament.

In assessing the interaction between State and Commonwealth laws in regulating workplace surveillance, the LIV notes that the current national legislation framework provides an inconsistent patchwork of regulation. South Australia, Tasmania, Western Australia, the Northern Territory and Queensland do not have specific workplace surveillance laws in place, and instead, workplace surveillance is governed by general privacy and surveillance laws.

In Victoria, too, workplace surveillance is governed by the general surveillance provisions in the SDA. To the extent that it is specifically addressed in the SDA, the regulation of workplace surveillance focuses largely on prohibiting the use of surveillance devices in workplace toilets, washrooms, change rooms and lactation rooms.

The most comprehensive laws governing workplace surveillance are in NSW and the ACT, where workplace-specific regulation clearly aims to balance the need for security and safety in the workplace with an employee's right to privacy.[11]

In NSW and the ACT, employers are required to provide notice of surveillance, specifying the various matters set out in the legislation (see section 10 of the *Workplace Surveillance Act 2005* (NSW) and section 13 of the *Workplace Privacy Act 2011* (ACT). There is currently no equivalent provision requiring detailed notice of surveillance in Victoria.

Both the NSW and ACT laws also set out the process for employers wishing to conduct 'covert' surveillance (namely, surveillance that has not been notified in accordance with the Act[12]). For example, the *Workplace Privacy Act 2011* (ACT) requires that an employer seeking to conduct covert surveillance seeks consent from a

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[8] *Mr. Paul Goodwin v Wyndham City Council* [2023] FWCFB 216 [44].
[9] Ibid, [94].
[10] See, for example, section 18 and Part 4, Division 3 of the *Workplace Surveillance Act 2005* (NSW).
[11] Peter Leonard, 'Workplace surveillance and privacy' (2021) 93 (16) *Computers & Law*, 60.
[12] See, for example, *Workplace Surveillance Act 2005* (NSW) s 10.

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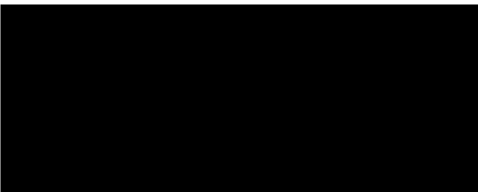
Magistrate authorising such surveillance and imposes strict controls on the retention and use of any information gathered.[13] By contrast, currently in Victoria it would be possible to conduct covert – that is, unnotified – surveillance of workers in certain circumstances (such as, in theory, a smoking area outside an office building[14]) without meeting any similar requirements.

The LIV therefore supports the introduction of more broadly applicable Victorian workplace surveillance laws, akin to those in NSW[15] and the ACT.[16] Aside from having the effect of achieving greater consistency between Australian jurisdictions in their regulation of workplace surveillance, the introduction of laws akin to those in NSW and the ACT would bring greater clarity to the regulation of workplace surveillance in Victoria, whilst also being more comprehensive and better targeted, thereby providing better protections for workers. It is nonetheless the recommendation of the LIV that any such legislation introduced in Victoria should have as a guiding principle the maintenance of an appropriate balance between the competing public interests in protecting employees' privacy on the one hand, and managing workplace health, safety, and productivity on the other.

If you would like to discuss any aspect of the above, please contact Michelle Luarte, Section Lead, DEHL, Succession and Workplace, on

Yours sincerely,



Adam Awty
Chief Executive

[13] *Workplace Privacy Act 2011* (ACT) Part 4.
[14] Noting the definition of 'private activity' in section 3(1) of the SDA.
[15] *Workplace Surveillance Act 2005* (NSW).
[16] *Workplace Privacy Act 2011* (ACT).

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