T R A N S C R I P T

LEGISLATIVE ASSEMBLY ECONOMY AND INFRASTRUCTURE COMMITTEE

Inquiry into workplace surveillance

East Melbourne – Monday 23 September 2024

(via videoconference)

MEMBERS

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

WITNESSES

Susan Accary, President, Victoria Branch Committee, and

Sha Hotchin, Secretary, Victoria Branch Committee, Australian Lawyers Alliance.

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 given 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 the 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 so much for joining us today, and the Committee. I thought I might just quickly introduce the Committee for you. I am Alison, the Chair, Member for Bellarine. We have Deputy Chair Kim O'Keeffe, Member for Shepparton; John Mullahy, Member for Glen Waverley; Anthony Cianflone from Pascoe Vale; and Wayne Farnham, Member for Narracan.

We thought we might allow you a few minutes—maybe 3 or 4 minutes—to just speak to your submission and what you are seeing from your perspective, and then we will jump into some questions.

Susan ACCARY: Thank you so much, Chair. What I would love the opportunity to do is to give a short opening statement, and I will introduce myself. But firstly thank you again for the opportunity to be here today. Sha and I are here on behalf of the Australian Lawyers Alliance, the ALA. I am Susan Accary—I am the President of the Victorian branch—and appearing alongside me is Sha Hotchin, who is our incredible secretary for the ALA.

I would also like to acknowledge the traditional owners of the lands from which Sha and I are coming to you today, the Wurundjeri people of the Kulin nation. I pay my respects to their elders past and present and to any Aboriginal and Torres Strait Islander people taking part in today's public hearing.

By way of background, the ALA is a national association whose members are dedicated to protecting and promoting access to justice, human rights and equality before the law for all individuals regardless of their position, their wealth, their gender or their age, race or religious belief. The ALA is represented in every state and territory across Australia, and we estimate that our 1500 or so members represent over and beyond 200,000 people every year nationally, predominantly in a legal capacity. ALA members are plaintiff lawyers representing people who are injured in a workplace. Our clients have mixed experiences with workplace surveillance. For some clients, surveillance in the workplace results in footage or data being available as crucial evidence of injuries caused in the workplace and can be helpful for our clients to be able to establish the harm caused to them. That is dependent of course, though, on whether or not the employer assisting with that evidence-gathering process releases any footage or data obtained through workplace surveillance. That assistance unfortunately is not always forthcoming. In the context in particular of our specialty, workers compensation claims, for example, ALA members have encountered instances where employers have rejected requests for access to data obtained through workplace surveillance. This compromises considerably the progression of these claims and access to justice for injured employees across Victoria. Sha and I can speak to that today in particular.

For other clients, ALA members report that workplace surveillance is being used to intimidate and harass them in the workplace. This has resulted in reduced productivity, low morale, mistrust and a strain on employees' mental health as well as broader ramifications for Victoria's economy and also health system.

The ALA's position is that we are greatly concerned about the inadequacy of the current patchwork of legislative instruments in Victoria to effectively address workplace surveillance issues. Employers currently are not required to even disclose that they are monitoring the employees through workplace surveillance. We support Victoria in particular adopting New South Wales-style legislation to directly address all forms of workplace surveillance, and in particular for the Victorian Government to undertake a public education campaign about employees rights in relation to workplace surveillance.

That is our opening statement, Chair. Sha and I of course are here to answer any questions from the Committee. We were given some theme questions as well, which were sent to the ALA beforehand, if you would like our thoughts and observations on them too.

The CHAIR: Perfect. Thank you for all that. I really do appreciate that you have got some real-life case studies for us to pick up a little bit further, and thanks for including those in your submission as well. I might go to the Deputy Chair Kim for our first question.

Kim O'KEEFFE: Thank you. Good afternoon, Susan and Sha. Thank you so much for your submission. Obviously your law background is so, so helpful. I am probably going to allude to that a little bit in one of the questions I have got in front of me. In your submission and also your examples today you state that employers have withheld surveillance data from employees in cases of alleged bullying and sexual harassment. Is this allowed under Victorian law? What protections should be set in place to prevent this? And is it fair and reasonable that there is an opportunity for them to do that?

Sha HOTCHIN: Would you like me to talk to it, Susan?

Susan ACCARY: Yes.

Sha HOTCHIN: Thank you, Kim. It is a very good question. What I would say is that it is not just limited to surveillance for psychological injury but also physical injury, and I might talk to a particular case that we have at the moment as an example. Normally what will happen is that an injured worker will submit a WorkCover claim, and they provide their evidence of the injury and the claim form together with any medical material to support the injury, but they do not have access to any of the employer's records. The authority has the power to ask an employer or any party to provide evidence, and that is actually in the Workplace Injury Rehabilitation and Compensation Act. It is section 552 of the Act where they can actually ask for that information. But the concern is that the authority does not always ask for that information, and even if they do ask for that information, there is no obligation to then disclose that information to an employee.

An example is that we had a worker who was opening a truck when he was delivering certain material. He said that there was a barrel in this truck that had been loaded on and it fell on him. His claim form said he opened the truck doors and the barrel fell. There was surveillance of this. The authority arranged for a circumstance investigation during the process of the decision-making on the claim. The circumstance investigator had access to the footage. That circumstance investigator asked the injured worker for a statement. The injured worker provided a statement, which he signed, which said that the barrel fell on him. What the injured worker did not say was that when he opened the door he could see that the barrel was rocking so he touched it, and it rocked back and forth and then it fell on him. Missing that particular information has led to issues now when he is claiming for damages, because the defendant's solicitor is now alleging that he is a liar. He did not actually put in his statement the full story. He did not have access to the footage—he did not know of the footage; he was not aware of it—and the statement is therefore slightly inconsistent with this evidence.

Look, I am hoping this is not going to cause too much of an issue, but the problem is it is actually causing some sort of dispute which is protracting the case, and it is involving extra cost and it is involving complication and a lot of stress. There was no obligation on the authority, the circumstance investigator. There is nothing in the legislation that says that the worker is entitled to access that footage, and when he was making this claim he was not legally represented. When he made that statement he was not legally represented. It is only now, later on, that we have become aware of this and it is causing this issue. Does that answer your question?

Kim O'KEEFFE: Yes, it does, and it is probably a good example of where there are not enough protections in place and, yes, he is very vulnerable. Thank you.

Susan ACCARY: Deputy Chair, if I may add to Sha's answer and case example: in general, as lawyers who help and support injured workers and injured plaintiffs, our goal is to ensure that we take them through a legal process as simply and as quickly as possible—in particular minimising any further trauma. In respect to your question, Deputy Chair, what we would be advocating for is that where there is evidence, and if that is workplace surveillance, that evidence should be promptly given in a dispute—without court proceedings being issued either—to enable meaningful conversations so we can progress claims as swiftly as possible. That would not only help an injured worker but could also help an employer in reaching resolution of that claim. Currently our legal framework does not particularly allow for that, but rather it can allow for the lack of disclosure of that information. What we would be looking for is a pathway so that early disclosure and early participation in meaningful conversations are actually beneficial to all involved in any legal dispute.

The CHAIR: Perfect. Thank you. Thanks for that. John, I might go to you next.

John MULLAHY: Thanks, Sha and Susan, for the ALA's submission to our inquiry. My question is around how many of your members report dealing with workplace surveillance issues or matters and what the most common issues are that are raised by them with you.

Susan ACCARY: It is interesting doing it via Zoom. Thank you for the question. Sha, would you like to answer that?

Sha HOTCHIN: Sure. I can answer that. John, we have not actually put a request out to all of our members to come to us with these particular issues. Normally what our members observe is that there is this gap in evidence gathering. Often when an injured worker is aware of some form of surveillance, they can call for it, but usually it is only when court proceedings have actually commenced. Prior to that there is no obligation for that evidence to necessarily be disclosed to an injured worker. So often when our members experience that issue we tend to jump over it and move forward to when the matter is litigated and the collating of evidence. In the process of these submissions, when we did start speaking to our members, many of whom do represent injured workers in the workplace, many did come back with case examples, and it seems to be a bigger issue. It is just we have worked around it in how to obtain that evidence when there is an issue. But like Susan said, if we can have something in place early, it will alleviate a lot of that protracted proceeding and cost.

John MULLAHY: You have just scratched the surface and realised that there is probably a broader issue underneath that needs to be attended to.

Sha HOTCHIN: That is correct.

The CHAIR: Thanks, John. Wayne, I might head to you next.

Wayne FARNHAM: Thank you, Susan, and thank you, Sha, for attending today and your submission. It is good to get into this space about the legalities of everything else. From evidence I have heard today, there seems to be a balancing act in all of this surveillance and data collection. I am getting the impression that it is unbalanced at the moment, which is problematic, obviously, especially in your space when we come to workers compensation, which is very important. We heard a submission earlier from Laundry Association Australia, where they use data collection probably for the purpose of training people, getting their productivity up. But then when we are talking about your space and what is going on with the workplace, it does concern me a little bit. And I suppose when we are talking about surveillance, how far is too far when we talk about surveillance of people working from home, which is occurring a lot now, especially post COVID, and surveillance occurring out of hours? That seems to be a bit of a problem. And the data that is collected and stored by a third party, that is also becoming, I can see, an issue. It seems to be a pattern of the day, and the data owned by an individual. Can you just give us your thoughts on that and leaning into the New South Wales model and what they do?

Sha HOTCHIN: Susan, do you want to start with this one or would you like me to?

Susan ACCARY: I might start, if I may, just with a case example, and I will have Sha lead into it. But it is an interesting area, and it can be a double-edged sword for both workers compensation lawyers and in particular employment lawyers. If I may give an example from an employment law colleague recently who represented a community worker. That community worker had official workplace surveillance on them for the purposes of safety because they were going offsite and into client homes; however, that surveillance in fact was then used to performance manage them and to understand their whereabouts during work hours and whether or not, for example, they were taking excessive breaks. So there is an interesting almost binary situation here, where you can see in fact certain aspects of workplace surveillance—to your example, data collection—could be meaningful to help productivity. There could be certain levels—and it probably should not be dubbed 'workplace surveillance'—that could help with safety. But on the other hand, it can at the moment be used against employees, and hence our recommendation, as you say, is for Victoria to align with the New South Wales scheme. Sha, would you like to continue on with some case examples?

Sha HOTCHIN: Yes. So I guess really I think the employment law rules still should apply about reasonableness and an employer making decisions based on the full gamut and scope of the employment issue or dispute. An example might be, I once represented a worker who was working in a mental health ward in security, so he was tasked with looking after the staff and also the patients in this hospital. He came onto his shift and there was a mental health patient that was escaping. He then manhandled this patient and used some force to restrain him. There was surveillance footage which was about 30 seconds long which showed the

kerfuffle with him and this patient, and he was reprimanded, he was found to have engaged in misconduct and he lost his job as a result of that behaviour. In the course of restraining this patient everyone fell, and he did injure his back. So he also had a WorkCover claim, and originally that WorkCover claim was rejected because of the misconduct.

Subsequently it was found that the misconduct did not cause the injury. The injury was from the fall, and he was just doing his job. But in the process of running his workers compensation claim, evidence then came to light that the footage did not show. He had actually come to his shift early, and because he had come into his shift early he was not wearing his body vest camera. He saw that this person was escaping, he was trying to help his colleagues and there was a lot of resistance. There were a lot of physical issues that were not in the footage in the lead-up. When he came onto the camera screen, all you saw was him holding this man, and he ended up using a punch. What had actually happened was all the staff that he was taking directions from had run away from the scene. They were quite fearful, so they had locked all the doors. A code black was called. The police did not attend the scene immediately. There were a lot of things that had happened, and the authority actually made the finding that they did not see that there was misconduct in the management of this patient. But the employment law scenario had already happened, the timeframes did not match up with the workers comp timeframes and he still lost his job.

In answer to your question about access to this footage and how it is used, I think that it needs to be used like any evidence in employment law, where it is a part of the story but not the complete story. An employer should be doing their due diligence as they ordinarily would when it comes to performance managing an individual. A staff member who is going on breaks—that may not necessarily be a reason to terminate their employment, but it might be a reason to start asking questions, and then with other evidence they can form a proper decision. I do not necessarily believe that our members are against surveillance being used in performance management; it is just it should not be the be-all and end-all because it may lead to these issues. If a worker is advised, when they are signing their employment contract, that they will be under surveillance for five different things, they may then perform those five different things really well because they are aware that this is what is expected of them and there will not be any misunderstanding of what the expectations are. But if an employer is using that surveillance for something else, then that is where it can be fraught with issues.

Wayne FARNHAM: Thank you.

The CHAIR: Interesting. Thank you. I am mindful of the time, so I am just going to ask one little, quick question. Out of curiosity, are you seeing surveillance happening at home? If someone is working from home and, let us say, they have clocked off at 5 o'clock but are still being surveilled—are you seeing any of that happening?

Susan ACCARY: That is an excellent question, Chair. It will be dependent on your definition of surveillance. What our members are seeing is the use of different technology to understand, through laptops, for example, work-issued laptops, if employees are still working or not working. So, yes, we are seeing that in a hybrid sense, and certain programs that are able to identify what a worker is and is not doing online are being used.

The CHAIR: And are you seeing any claims coming from that or disciplinary actions or dismissals?

Susan ACCARY: Yes, from time to time we are. Excuse my lack of technical expertise in terms of IT programs that can be set up—and I will stay within my realm of the law—but there are keystroke and other time-recording applications that are seen by our members where we have clients who are being dismissed on the basis of that. It is important to note that, holistically speaking, there would be a range of other issues perhaps that are contributing to a client's claim in that way. But yes is the answer.

The CHAIR: And our legislation obviously is not keeping up with that hybrid work scenario that we are seeing at the moment.

Susan ACCARY: Yes, Chair, that is correct. What we see and what we submit is that there is great inconsistency with the law, and it has not kept up to date with a hybrid way of work. In fact, and it is to Sha's point, our understanding is that employers have an implied consent. It is an implied consent for employees to better understand a policy or a contract in respect to surveillance, and it is not express consent. Therefore what

we also see is a lot of mistrust and loss by employees who have not quite understood what technology is in place. Therefore there are greater disputes as a result because of the lack of information.

The CHAIR: Perfect. Thank you so much for coming along and answering some of our questions today and the work that you have done in your submission. We do really appreciate it. Thank you very much for your time today.

Committee adjourned.