

TRANSCRIPT

LEGISLATIVE ASSEMBLY ECONOMY AND INFRASTRUCTURE COMMITTEE

Inquiry into Workplace Surveillance

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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.

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Thank you so much for joining us today and answering some of our questions. You have got a very interesting background, as I have read. We thought we would allow you maybe 5, 6 minutes just to give us a bit of an understanding on what you do, and then we might ask some questions. Thank you.

Jake GOLDENFEIN: Yes, happy to. Thank you so much for having me. It is a pleasure to be invited and to be here. My name is Jake Goldenfein. I am a Senior Lecturer at Melbourne Law School at Melbourne University. I am also a Chief Investigator in what is called the Australian Research Council Centre of Excellence for Automated Decision-Making and Society. A centre of excellence is the largest organised grant that the Australian Research Council gives, and our centre, which we briefly call ADM+S, involves nine universities, about 20 chief investigators, around 200 research fellows and PhD students. It is resourced, when you include everything, to about the tune of \$70 million and continues until the end of 2027.

I am also a member of the NTEU, and I was a co-author on the NTEU submission as well. Within ADM+S we have some research projects that have looked into workplace surveillance, which have included the work of Lauren Kelly as well. She is a PhD student at ADM+S.

My own history, I have been studying surveillance and privacy law and data governance for several years. I published a monograph in 2020 called *Monitoring Laws*. My general field of study is data governance, data commodification and the governance of AI and automated decision-making.

I am very happy to talk about some of the outcomes from the research that we have done. I am also very happy to talk more to some of the things you were talking about earlier, offer some additional perspectives or clarity if you need anything like that.

The CHAIR: Perfect. Thank you very much for that. I think we have saved the best until last, John.

John MULLAHY: We have.

The CHAIR: We have had a really good insight now of the whole issue presented from all different sides, and actually you might help us put this all together, I am hoping.

Jake GOLDENFEIN: I can try. I will do whatever I can.

The CHAIR: Yes, giving us something really good to finish up as we get together, and then we can deliberate about what we do going forward in terms of recommendations. I will let others do questions first, and then we might come back to me.

Kim O'KEEFFE: Thank you. Hi, Jake. Welcome.

Jake GOLDENFEIN: Hi. Thank you.

Kim O'KEEFFE: I might just ask—you mentioned you have done some research. Is there anything—obviously we have got a short period of time—that you would specifically like to share with us? We have had so many questions answered, and they are probably quite repetitive. I would like to step away from that now and really tap into your expertise and experience. Is there anything that you feel is perhaps the change that needs to happen or the impactful things that you are fearful about, something within your space that you feel would help us? I think that would be a really great place to start.

Jake GOLDENFEIN: You have heard a lot about it already, but I would say that some of the anxiety that people have described, vis-a-vis interacting with these surveillance systems or working under conditions that are highly quantified and subject to metrics and KPIs, is not just coming out of one company, one organisation or even one sector; it is expanding across workforces. It very much depends on the status of workers as well. So for a long time we have had these KPI systems in Australia, since the early 90s. There was a whole big union dispute. The history of the legal reception of engineered standards is quite interesting and quite complicated and really a bit of a failure, because what it ultimately came down to was the New South Wales industrial relations commission saying these things are to be managed exclusively in negotiations between unions and employers; they are not going to be the subject of industrial relations law. Then it just sort of fell off the map, and it all has developed from there. But from warehousing, especially after COVID, we are seeing these kinds of systems move through different kinds of professional work. We as academics are evaluated in a very different way, so we are insulated in a lot of ways. Our performance evaluation happens very slowly because our work happens very slowly. But the professional staff at the university all of a sudden in the last couple of years are reporting, 'Well, I'm receiving messages from my manager if I'm not active on Slack every 20 minutes, if I'm not active on Teams every 20 minutes,' and it is making them feel really, really unusual and peculiar and it is changing the texture of the workplace in a really significant way.

We also had incidents happen at the university around the student encampments, the protest encampments, where students were identified as participating in protests that the university had not endorsed and given disciplinary notices. And this identification—there was suspicion that it was through facial recognition technology. We are aware that the university sector in Victoria does use facial recognition technology. But the more banal way in which it was done in these instances was that whenever you log on to a university system you have two-factor authentication—I am sure you have it in your business as well—so you use your mobile phone. Your mobile phone then connects to the routers, the wireless routers in the university, and they geolocate the MAC address from your phone, connect it to the router and connect it to the login that has just happened. So you are constantly identified spatially, where you are in these organisations, through your mobile phone, which is a device that you own.

With all of these things people are more and more aware that 'Okay, when I go to work my swipe card taps are being tracked, and actually where I am in the building is constantly available to my employer.' And I think that this is creating really more and more anxiety, especially because we do not know anything about it. So they are the psychosocial dimensions of it. But in terms of the research that we did across the warehousing sector, you know there is very little occupational health and safety training that happens around the use of systems that use KPIs. So you have people reporting, 'Well, I'm working in a coolroom. I have a little iPad with a countdown clock telling me how much time I have left to finish packing this box, and when it hits zero it goes red, right, and I know I'm in trouble. At the same time I'm a smaller person and I need to grab things off the shelf, but the stairs, the ladders, are all the way down the other end of the room. So I just climb the shelf.'

You know, these kinds of things are reported again and again, and none of that is new. That was happening in the 90s, and there is a whole swathe of cases that went through the Industrial Relations Commission, which were people getting injured at work, cutting corners, because, they said, 'We're trying to keep up with the rate. We're trying to keep up with the standard that got set, because we know that our failure to do that gives management an excuse to engage in discipline.' Indeed that was the very rationale for the introduction of these systems in the first place. It was not necessarily to improve efficiency, it was to give employers tools to discipline their workers, who in the Franklins warehouse in the 90s were very well organised in an extremely militant union. The employers there reported feeling like they had lost control over the workforce, and this was one of the ways in which they sought to regain control.

Kim O'KEEFFE: Thank you. Great.

The CHAIR: Anthony.

Anthony CIANFLONE: Thanks, Chair. And thanks, Jake, for coming along. There are probably a hundred different questions I could ask of you, from philosophical right through to the most pragmatic, to be honest. Like you say, a lot of this technology has in many ways been in place for quite a few decades. I remember working as a humble waiter in Lygon Street, you know, for my first job. There was a little computer screen—you would have to log on, put the order on. Without it really being realised, every waiter was being tracked on sales and whatnot. This is going back to the late 1990s, early 2000s, and it has very much evolved now.

Especially with your organisation coming on the scene now until 2027 it is quite interesting, because in many ways a lot of this technology, as it is evolving, to me is almost like the third tranche of a major economic revolution. You know, we had the industrial revolution, we had the internet and now we are heading into automated machine learning as the next big phase, many believe. I guess in that context my question is: what can we as a committee in Victoria work to anticipate and make provision for in the report and recommendations in this space? Given it is still very early days and evolving so quickly, how can we put forward a report in the next six months or so that acknowledges what is currently going on and where we are heading, so it stays meaningful over the next decade and beyond?

Jake GOLDENFEIN: Absolutely. It is important to recognise that the regulatory work that is happening around AI is not necessarily going to come out with a set of prescriptions of use. What it is going to do is say, 'If you want to build or use an AI system, these are the compliance hoops that you need to jump through.' It is effectively a kind of product safety law. It says in order to build an AI you have to make sure it is transparent, it has been audited and it satisfies all of these obligations—but it is not going to say you cannot use that to supervise your workers. What we need is principled sectoral regulation that says, for instance, if you are going to use a new digital system for workplace management, whether it is making managerial decisions, human resources decisions, task allocation, for instance, it should not cause harm to workers. To me this is the most basic principle. If you are going to introduce a surveillance system, it should not cause harm to workers, because what we are getting are reports of all kinds of harm.

How to define that is of course a challenge, absolutely, but our legal thinkers, our politicians, do this kind of thing all the time. It is of course a negotiated political understanding because workplaces do want to realise efficiencies where they can, but there is 'realising efficiencies' and there is realising efficiencies in ways that detriment workers more than they need to. I see what you are saying—it is part of this same problem: technology is coming; we need to manage it. But it also needs to be thought about in the workplace, and that is what is absent at the moment.

Anthony CIANFLONE: Yes. I mean, we have heard that much different evidence from other people that have appeared and made submissions, including many from the business community who frankly believe either we should wait for the current privacy review being undertaken federally before we proceed here in Victoria right through to everything we have in place, including the 1999 Surveillance Devices Act and the 2014 Information Privacy Act in Victoria, being sufficient, which makes no provision for where technology is heading in the workplace as we speak.

Jake GOLDENFEIN: I would agree with the comments that were made before that the current regulatory regime is not sufficient for a few reasons, including the gaps. But also data protection is not the ideal way in which to manage this. Data protection gives rights to individuals to consent to certain kinds of data processing and to know what kind of data is stored about them. But if you really want to manage surveillance and data governance in a workplace, it cannot be just at the individual level. You need to understand how these things are being used across the workplace and differently for different people, because so much of this is about giving management the capacity to treat different people differently based on the data that they collect about them.

An individual cannot really understand how these systems are used in a workplace just by exercising rights given to them under data protection, and that is why we are seeing more holistic things happen in other parts of the world, like duties to consult. This is also a very, very old idea. This comes of European industrial democracy; this is the notion that you have a consultative committee who understands when new technology is coming into place. That is absolutely baseline. Same with transparency—it should be absolutely baseline. Even these things that are developing do not quite yet go into the sort of substantive limitations that Alysia was mentioning about 'Actually, don't do surveillance in these cases, don't sell worker data as a secondary product from their labour, don't do surveillance when it causes harm' et cetera.

Anthony CIANFLONE: Thank you.

The CHAIR: Great question. John.

John MULLAHY: You have got me worried. I see a dystopian future of a workforce that is anxious and exacerbating mental health issues and problems across the thing. What it sounds like is that if we do not take any action, as some of the submissions we had were suggesting, we will end up in a place that will be

problematic for everyone. How should Victoria regulate workplace surveillance to minimise those psychosocial harms?

Jake GOLDENFEIN: I would endorse again the content of the NTEU submission—which I helped to produce—which sets out a list of effectively workplace privacy principles that set some hard lines about when it is appropriate and when it is not appropriate to do surveillance and establishes a basis for proportionate surveillance for legitimate purposes and when it is not possible to have a legitimate purpose. I have always been a believer that forms of surveillance that unnecessarily cause harm to workers cannot be legitimate. And that opens some space for debate about what constitutes harm, but I think it is a good starting point for that debate to move forward.

John MULLAHY: We are interesting creatures, that we would put systems in place that do cause mental health and psychosocial harm.

Jake GOLDENFEIN: We are interesting creatures to do that, but the fact is you get more out of your workers when they are scared for their jobs, and when they are scared that they are not producing enough they work harder and they work faster and they work in more dangerous ways. And then you get to effectively disabuse yourself of the responsibility for the harm that is caused on the basis that, ‘Oh, we just set a computational system. The computational system makes the decisions. It wasn’t our decision really to tell you you had to work this much.’ You even get negative consequences on employers and managers, because their job changes to make them effectively data entry people. They are making sure that the software systems that they have to track their workers are working properly, rather than actually interacting with them on an interpersonal level or necessarily getting to participate in the decision-making that comes out of that data tracking as well. Sometimes it is sort of just, ‘Well, it tells us this, so this.’

What is reported in the research that we did is that these software systems, no matter how sophisticated they are, are always glitchy. The scanner guns run out of batteries, there are dead spots in the warehouse where there is no wi-fi, and the obligation to deal with that glitch is just extra work that the worker will have to do. They will have to prove somehow to the manager, ‘It was just recorded wrong because, you know, my scanner ran out of battery.’ Some of these workers report having to use multiple apps on their phone consecutively at the same time, and if they log that they have taken a break on one browser tab but not on the other, it records a gap. So all these kinds of things that are very, very complicated, do not always work as well as possible. We think of these as high-tech companies; often they are very basic, and it is not unbelievably sophisticated technology that so much of this is based on. It is barcodes and scanner guns.

John MULLAHY: And just to follow up on that, have you guys done any research with regard to mental health outcomes of the workforce over the last 20 years when these systems have been?

Jake GOLDENFEIN: I have not. I cannot speak to that.

John MULLAHY: Okay, thanks.

The CHAIR: You talked about workers working harder—they may work unsafely or work faster. But evidence is, and you might talk to this evidence, that actually the productivity goes down, because we are not enjoying our work or because of that pressure. So companies will argue that they are using it for productivity reasons, but the evidence shows it is the opposite. Can you talk to that? Is that fair to say?

Jake GOLDENFEIN: I think it is probably fair to say. I do not know exactly. I am sure it varies by case and varies by instance. It would vary by sector. For instance, in warehousing we spoke to a lot of people who had been in the logistics industry for a long time, and they would talk about how the workforce decreased when they introduced new technology. Once they started introducing barcodes, that was one of the most transformative technologies in the logistics sector that reduced warehousing staffing personnel really significantly. And then the introduction of robotics, again. So it is kind of very hard to measure what the goal is of introducing these technology changes. If you are doing it in order to really increase throughput in a warehouse, that is one thing, but if you are doing it in ways that just make sure your staff are sitting at their desks and tapping a key every once in a while, then you are not getting productivity. It would vary so much over the application, which makes you wonder: is this just in service of a managerial prerogative to exercise control over workers, or is it realistically in pursuit of efficiencies? I think the answer is it is of course both, and

it will be more successful in one way in certain applications and more successful in others. I do not think it can be one thing or the other.

The CHAIR: Thank you. I am just going to go to Anthony for a question.

Anthony CIANFLONE: I just wanted to ask about automated decision-making. How is automated decision-making used with workplace surveillance now, and what potential uses could it have in the future? Second to that is: what threats does automated decision-making pose to workers when it is used in combination with surveillance?

Jake GOLDENFEIN: One thing to keep in mind is that when we say ‘automated decision-making’ we do not mean decisions that happen entirely without humans. What we mean are decisions that are primarily informed by automated processes. The most notorious workplace examples of fully automated decision-making are in gig work, where people get app suspensions on the basis of feedback from customers and things like that.

But we see similar things in the logistics sector. In fact back in the 90s a lot of those court cases or industrial relations cases were about the degree to which you were entitled to rely exclusively on metrics for disciplinary action. What the Industrial Relations Commission said is that, no, as long as it is not the only reason you are instituting disciplinary action, you can use it, but it cannot be the only reason. How that got worked out is one thing, but there are more decisions that happen in a workplace than just discipline. In the discussions we had with workers, how good they are, how good they are according to their rate—their pick rate, their KPIs—determines whether they get overtime; it determines if they get weekend shifts, which are paid higher; it determines whether they get to work in the air-conditioned room; it determines whether they get to choose which particular kind of work. When staff begin, they all come in through labour hire, and then after a few months they choose workers to give certain workers the option to become full time. So it is not just discipline, it is, ‘Well, now your KPIs are good enough that we’ll hire you as a full-time worker.’ There are a whole range of decisions that are not necessarily considered decisions in law like dismissal would be or a formal disciplinary action, which are very much informed by these systems. As I said, a lot of management often defer to the computational result rather than necessarily spending a lot of time thinking about the degree to which it actually reflects the quality of work or somebody’s commitment to a workplace.

The CHAIR: Thank you.

Anthony CIANFLONE: Thank you, yes.

The CHAIR: Kim, I think we have time for one more.

Kim O’KEEFFE: One more, sure. Thanks. Jake, you have touched on it, but what risks do employers face when using automated decision-making to performance-manage their staff, and how can that be minimised? Because there might be relevance in that.

Jake GOLDENFEIN: Oh, yes. There are a range of risks, and I think, for instance, that what you heard from Lauren or what you heard from some of the professional staff who responded to the survey in the NTEU submission is there is a risk of producing antagonism, because technological mediation of managerial relations means you are not engaging with people anymore. So it can be very isolating; it can be very alienating. One of the rationales that we believe employers are actually using these systems for, be it for efficiency or for other reasons, is to sort of have workers interact less. You have a headset or you have got this app that you are constantly having to engage with, and lots of workers report, ‘Well, at this warehouse where we didn’t use this we used to joke around; we used to talk. Now I work here I haven’t spoken to anyone in months.’

Kim O’KEEFFE: The culture within that workplace would have a big impact on them.

Jake GOLDENFEIN: The culture is you go, you hit your rate—you have got to pack your 150 boxes that day—and then you are finished and you can go home.

For managers there is the question of the quality of the work experience, the texture of the work experience and the degree to which you interact with people and have colleagues. I think that some of the mental health impacts that were discussed earlier have to do with people being very anxious at their job. The more isolated

those workers feel, the more isolated their work experience, the worse the mental health outcomes. These are real risks. There are also the occupational health and safety risks, which I think are really significant.

But I also think that in pursuit of better data and understanding about how workers work there is a risk that you are missing something. There is a risk that you put aside that part of work that can only be qualitatively described. You miss how the workers who actually perform social roles in the workplace, which cannot be recorded in data, are extremely valuable. So there is a risk to employers that they are not making the best decisions because what some of their decision-making ought to be based on is not recordable through technology. They somehow have moved their mindset over to a very quantitative one, where they are like, 'No, we're going to be very data-driven, evidence-driven now.' That might be because that is what their bosses want as well, because it is easier to demonstrate the correctness of your decisions when you have data to back them up.

Kim O'KEEFFE: But then I look at my own workplace. We have KPIs in place, but that can become a really positive culture within your workplace if you value that work that is being done and the pressures are not there. Yes, of course there is a level of expectation—we all know that when we have KPIs—but to what level? I think that is the fine line, and I think it is the work culture and the expectations from the management and how that workplace functions. KPIs—we know we need those, and they can be a really positive thing for your staff. I know they are for my staff, and they actually love them. They all work together and go 'We smashed it this month' or 'We've got to work a little bit harder next month'. But I do not feel there is that pressure. I feel like it is actually an environment where if the expectations are not met, we can talk about that. So the next month we look at that and say 'Well, how do we manage that better without you feeling pressured' or 'How do we do that, supporting you more?' I think they are the gaps in this sort of workplace.

Jake GOLDENFEIN: Absolutely. And of course it depends on the employer a lot. I suppose it goes back to this idea that there are legitimate uses for these kinds of systems—for understanding how your workplace runs and for understanding where efficiencies can be realised. But if you are using KPIs to speed up work in ways that ultimately harm workers and are causing injuries, are causing psychosocial harm, which sounds like not what is happening in your workplace—

Kim O'KEEFFE: No. That is right.

Jake GOLDENFEIN: then that is absolutely where the problem is.

Kim O'KEEFFE: Absolutely. Yes. Thank you, Jake.

The CHAIR: I am so sorry; we could probably chat all afternoon. I really appreciate you coming along today and answering some of our questions.

Jake GOLDENFEIN: No, it is my pleasure.

The CHAIR: If it has sparked anything and you would like to add something further or write to us, we do take further submissions in that form.

Jake GOLDENFEIN: Yes. Okay.

The CHAIR: That would be lovely as well. Thank you for your time today.

Jake GOLDENFEIN: No, it is my pleasure. Nice to talk to you. Thank you for having me.

The CHAIR: Thank you. We will now end the broadcast.

Committee adjourned.