



**Inquiry into arrangements for security and  
security information gathering for  
state government construction projects**

**Final report of the  
Victorian Parliament Law Reform Committee**

**October 2010**

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Inquiry into arrangements for security and  
security information gathering for  
state government construction projects

**Law Reform Committee**

*This report is also available at [www.parliament.vic.gov.au/lawreform](http://www.parliament.vic.gov.au/lawreform)*

## **Committee members**

Mr Johan Scheffer MLC  
*Chair*

Mr Robert Clark MP  
*Deputy Chair*

Mr Colin Brooks MP

Mr Luke Donnellan MP

Mr Martin Foley MP

Mrs Jan Kronberg MLC

Mrs Heidi Victoria MP

## **Staff**

Ms Kerry Riseley  
*Executive Officer*

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*Research Officer from 30 June 2010*

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*Administration Officer*

## **Functions of the Law Reform Committee**

The functions of the Law Reform Committee are set out in section 12 of the *Parliamentary Committees Act 2003* (Vic). That section states:

- 1) The functions of the Law Reform Committee are, if so required or permitted under this Act, to inquire into, consider and report to the Parliament on any proposal, matter or thing concerned with —
  - a) legal, constitutional or parliamentary reform
  - b) the administration of justice
  - c) law reform.

## **Terms of reference**

### **Referred by the Legislative Council on 24 March 2010.**

That this House requires the Law Reform Committee to inquire into, consider and report no later than 30 September 2010 on the arrangements for security and security information gathering at the State Government's desalination plant under construction at Wonthaggi/Kilcunda and other similar construction projects and whether —

- 1) the rights of Victorians, including those engaged in peaceful and legitimate democratic expression, are being respected by these new arrangements, with particular reference to:
  - a) contractual conditions relating to security information collection and sharing; and
  - b) Memorandums of Understanding signed by the AquaSure consortium and firms with similar arrangements at other projects with government agencies and instrumentalities; and
- 2) any breaches of privacy have occurred or are likely to occur under these or associated arrangements and whether these arrangements are in the public interest.

### **Referred by the Legislative Council on 1 September 2010.**

That this house requires the Law Reform Committee to inquire into, consider and report by 30 September 2010, concurrently with the inquiry referred to it by the Legislative Council on 24 March 2010 concerning the memorandums of understanding at the Wonthaggi-Kilcunda desalination plant and other construction projects, on the many memorandums of understanding signed by Victoria Police with various organisations in recent years.

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# Final report

On 24 March 2010 the Legislative Council required the Law Reform Committee to

inquire into, consider and report no later than 30 September 2010 on the arrangements for security and security information gathering at the State Government's desalination plant under construction at Wonthaggi/Kilcunda and other similar construction projects and whether —

1. the rights of Victorians, including those engaged in peaceful and legitimate democratic expression, are being respected by these new arrangements, with particular reference to:
  - a. contractual conditions relating to security information collection and sharing; and
  - b. Memorandums of Understanding signed by the AquaSure consortium and firms with similar arrangements at other projects with government agencies and instrumentalities; and
2. any breaches of privacy have occurred or are likely to occur under these or associated arrangements and whether these arrangements are in the public interest.

On 1 September 2010 the Legislative Council voted to require

the Law Reform Committee to inquire into, consider and report by 30 September 2010, concurrently with the inquiry referred to it by the Legislative Council on 24 March 2010 concerning the memorandums of understanding at the Wonthaggi-Kilcunda desalination plant and other construction projects, on the many memorandums of understanding signed by Victoria Police with various organisations in recent years

On 8 December 2009, the Minister for Police and Emergency Services, Hon Bob Cameron MP, wrote to the Commissioner for Law Enforcement Data Security, asking him to review Memoranda of Understanding (MOUs) that have been entered into under the *Commissioner for Law Enforcement Data Security Act 2005* (Vic).

The Minister asked the Commissioner to ensure that the MOU documents appropriately reflect the standards for law enforcement data security and integrity, and, assure that appropriate compliance, controls and arrangements are in place.

The availability of the Commissioner's review is essential to the Committee being able to test the limited evidence it has received and the Committee determined not to conduct hearings until it had the opportunity to consider the review.

The Committee had not received the report on the Commissioner's review by the time it is required to report to the Parliament.

In addition, the further requirement from the Legislative Council on 1 September, that the Committee concurrently inquire into 'other construction projects, on the many memorandums of understanding signed by Victoria Police with various organisations in recent years' cannot be completed by the 30 September reporting date.

On these grounds the Committee has resolved that it is unable to proceed with the Inquiry.

**Adopted by the Law Reform Committee  
16 September 2010**





# Extract from the minutes of proceedings

Thursday 16 September 2010

The minutes of the proceedings of the Committee show the following divisions which took place during the consideration of the draft report.

## Motion

**That the page headed “[Draft] Final Report” One stand part of the report.**

*Moved: Luke Donnellan*

*Seconded: Colin Brooks*

The Committee divided:

**Ayes: 4**

Colin Brooks

Luke Donnellan

Martin Foley

Johan Scheffer

**Noes: 3**

Robert Clark

Jan Kronberg

Heidi Victoria

*Question agreed to.*

## Motion

**That in view of the fact that the Committee has been unable to test any of the submissions received against the report into the Commissioner for Law Enforcement Data Security’s review into M.O.U.’s, the submissions received should not be made publicly available and should not be listed in the Final Report.**

*Moved: Martin Foley*

*Seconded: Colin Brooks*

The Committee divided:

**Ayes: 4**

Colin Brooks

Luke Donnellan

Martin Foley

Johan Scheffer

**Noes: 3**

Robert Clark

Jan Kronberg

Heidi Victoria

*Question agreed to.*

**Motion**

**That the draft report be the report of the Committee.**

*Moved: Colin Brooks*

*Seconded: Luke Donnellan*

The Committee divided:

**Ayes: 4**

Colin Brooks

Luke Donnellan

Martin Foley

Johan Scheffer

**Noes: 3**

Robert Clark

Jan Kronberg

Heidi Victoria

*Question agreed to.*

**Motion**

**That the report be tabled in session on Wednesday 6 October 2010.**

*Moved: Martin Foley*

*Seconded: Colin Brooks*

The Committee divided:

**Ayes: 4**

Colin Brooks

Luke Donnellan

Martin Foley

Johan Scheffer

**Noes: 3**

Robert Clark

Jan Kronberg

Heidi Victoria

*Question agreed to.*

# **Inquiry into arrangements for security information**

## **Minority Report**

**4 October 2010**

## Shutting down the inquiry

This inquiry was shut down by the Labor majority at a meeting of the Committee on 16 September. Not only did the majority terminate the inquiry, they ruthlessly suppressed any public knowledge of the evidence the Committee has received.

The ground cited by the majority for shutting down the inquiry was that the availability of the review by the Commissioner for Law Enforcement Data Security (CLEDS) was essential to the Committee being able to conduct its inquiry and hold hearings.

Unknown at that time, at least to the minority members of the Committee, was that CLEDS had in fact provided the report on its review to the Minister on 24 August.

We are not permitted in this report to refer to Committee proceedings other than those proceedings that are disclosed in the majority report or the published extracts, but readers are entitled to assume that the Committee would have made clear to the Minister that it was seeking the CLEDS report in order to proceed with its inquiry.

Notwithstanding that, the Minister did not make the report available to the Committee once he had received it, even though he had more than three weeks to do so prior to the Committee's meeting of 16 September. This in turn gave the majority the excuse they were looking for to shut down the inquiry.

However, even the long delay in the CLEDS inquiry's report and the government's failure to provide the report to the Committee are not valid reasons for the majority not to have proceeded with the inquiry, held hearings and taken evidence. Once it was clear that hearings could no longer be delayed awaiting the CLEDS report, those hearings could and should have been scheduled and held.

The Committee was under a duty to proceed to conduct the inquiry to the best of its ability on the available evidence, and it is deplorable that the majority refused to allow this to occur.

Refusing to proceed with the inquiry is in breach of the Committee's duty under the Parliamentary Committees Act 2003 and is also insulting to those persons who put time and effort into preparing submissions to the inquiry in response to the Committee's public advertisement seeking submissions. That advertisement expressly stated:

*All submissions and comments will be treated as public documents unless confidentiality is requested.*

The Committee majority by their actions have reneged on the terms on which submissions were invited from the community.

The majority not only refused to conduct public hearings or include in the Committee's report any account of the submissions received or any assessment of the issues raised.

The majority have also deliberately resolved not to make public the submissions received, and have even voted to excise from the draft report the names of those parties who made submissions.

The consequence of the orchestrated suppression of this inquiry is, so the Committee secretariat have informed us, that the minority members are prohibited from even mentioning in this minority report either the names of the submitters or anything contained in the submissions.

In the experience of the minority members, this deliberate suppression of the names and evidence of submitters and the consequent gagging of the minority members of the Committee is unprecedented.

The conduct of the Labor majority in relation to this inquiry marks a sad end to what has otherwise been a co-operative and constructive four years of work by the Committee. The majority's conduct is so far removed from their conduct in relation to previous Committee inquiries that it strongly suggests that at some stage during the inquiry the Labor members of the Committee were instructed by the government to prevent the inquiry proceeding and to prevent any evidence emerging from it.

The government's desire to suppress the issue of the misuse of security information is further demonstrated by the fact that the CLEDS report was not made public until late on 23 September, so that resultant media coverage would occur on the eve of an AFL Grand Final, a time when many Victorians and many media outlets were pre-occupied with other matters.

The majority's suppression of the submissions received prevents us from reporting to the Parliament on the contents of the submissions, including anything contained in them that might explain why the government would want to resort to such measures.

However, even the publicly available evidence raises many important and unanswered questions about the desalination plant MOU, including

- why the government entered an MOU on the terms it did;
- why the government included a provision to enable personal information about Victorian citizens to be handed over to a private company;
- whether it was lawful or appropriate for the government to enter into an MOU on the terms it did, and
- what protections of the rights of Victorians subject to surveillance could and should have applied to any such arrangements?

## **The publicly available evidence**

The existence of the MOU became public on 5 December last year, when the media reported that secret police files on people protesting against the desalination project were being made available to the private consortium building the plant.

It was reported that Victoria Police has agreed to hand over photos, video recordings and other police records to AquaSure to help it "manage" protests and potential security threats.

The Government was reported to have signed the MOU with Victoria Police and AquaSure on 28 August to protect the site at Wonthaggi as well as the electricity supply to the project and new pipelines from the plant to Cardinia Reservoir. It was also reported that the MOU included a provision that Victoria Police "will release law enforcement data" to AquaSure, and further provided that:

*Law enforcement data may take the form of any text, images, audio and video, may be stored on computing devices, in hard copy, or on other storage media, and includes (but is not limited to) data related to individuals, aggregated data, written reports and correspondence, memoranda, police diaries, official notebooks, running sheets and other data repositories.*

At that time, it was reported that a similar agreement had been entered into regarding the North-South Pipeline. The Department of Sustainability and Environment reportedly told the media that such agreements were common for major projects.

News that private information about citizens gathered by Victoria police could be handed over to third parties in this way caused widespread and justifiable anger. In response, the Minister for Police and Emergency Services wrote to the Commissioner for Law Enforcement Data Security on 8 December 2009 asking CLEDS to undertake a review of Victoria Police MOUs relating to community safety and critical project infrastructure delivery.

## **The need for a Parliamentary inquiry**

Further consideration of the implications of this issue subsequent to the initial reports and government responses only added to public concern about the government's surveillance of Victorian citizens and to the desirability of a full Parliamentary inquiry into what had occurred.

As Member for Eastern Victoria Region, Mr Edward O'Donohue, said in moving the reference to the Committee in the Legislative Council on 24 March:

The memorandum states:

*The use of intelligence will play a significant role in enforcing the law at construction sites or along the construction corridors in relation to the project.*

*The secretary and Project Co personnel, contractors and subcontractors will be relied upon to gather and disseminate intelligence to Victoria Police in a timely manner for the purposes of both proactive response and general enforcement.*

In other words, Victoria Police will not be the lead agency for intelligence gathering. Much of that function will be given to the state government and AquaSure.

... the government together with AquaSure determined that the usual standing procedures or legislative powers of police were not sufficient and that a memorandum of understanding for information sharing, in effect corporate spying on individuals, was required.

The memorandum of understanding at paragraph 4.6 sets out the need for a 'proactive response' and states:

*Where intelligence has identified persons known or believed to be involved in organising or conducting protest action and proactive measures are considered appropriate, a joint operation is to be considered by the secretary, project company's manager and Victoria Police. ...*

*Victoria Police resources which may be considered for use in such a joint operation include the search and rescue squad and the security intelligence group. ...*

The Sunday Age, in an article of 14 March 2010, quoted Michael Pearce, SC, the president of Liberty Victoria as saying:

*The whole thing is very murky and seems to be part of a massive state government over-reaction to protests which are, for the most part, lawful and legitimate ... It was ludicrous to equate desalination protesters with terrorists by engaging a counter-terrorism outfit such as the Security Intelligence Group ...*

The president of the anti-desalination group Watershed Victoria was quoted in the same article as saying:

*I find it astounding ... It is putting AquaSure on some sort of standing that we've never extended to a private consortium.*

As Mr O'Donohue told the Legislative Council, issues raised by the desalination plant MOU requiring further analysis included:

- the impact on privacy;
- how many other MOUs for infrastructure projects are being signed;
- whether Victorians who protest at an infrastructure project should have a right to know who is gathering information about them;
- whether the rights of individuals are being compromised;
- what is the justification;
- when the information will be used; and
- whether the information will be passed onto third parties and under what circumstances.

## **Further MOUs coming to light**

Subsequent to the initial reference to the Committee, a number of other memoranda of understanding signed by Victoria Police with various organisations came to light in contexts other than construction projects. Most prominent was a memorandum of understanding between Victoria Police and the AFL.

The existence of these MOUs raises similar issues to those raised by construction project MOUs, and also raises questions as to why Victoria Police entered into those various other MOUs, whether it was appropriate for Victoria Police to do so and, if so, what principles, obligations and safeguards should apply to them.

## **The CLEDS report**

The CLEDS report<sup>1</sup>, when finally made public on 23 September, found serious concerns in the way Victoria Police handle sensitive data, including that:

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<sup>1</sup> Commissioner for Law Enforcement Data Security *Review of Victoria Police Major Project Development MOUs under s11(1)(e) of the Commissioner for Law Enforcement Data Security Act 2005*, 24 August 2010

- Victoria Police law enforcement data release policies, procedures and training are inadequate and confusing
- there are failures of the desalination plant MOU to adequately cover the key regulatory requirements, i.e., human rights, information privacy and information security
- there are drafting errors and oversights in the MOU that impose obligations on Victoria Police that are inconsistent with legal and regulatory requirements and render the MOU legally unenforceable against Aquasure, including its confidentiality and privacy requirements
- no privacy impact assessment, information security threat and risk assessment or human rights impact assessment has been undertaken in relation to major project development MOUs.

These findings can only add to existing concerns about information gathering and handling by Victoria Police arising from previous revelations including misuse of the LEAP database, the matters disclosed in evidence given to Victoria Police/OPI murder leaks inquiry, and police accessing journalists' phone call records.

The CLEDS inquiry was confined to investigating the role of Victoria Police in relation to the desalination plant and North-South Pipeline MOUs. It did not cover the government's role and conduct in relation to those MOUs or any other major project MOUs.

However, the report makes clear that a failure by Victoria Police to comply with the desalination plant MOU will potentially expose the government and therefore the taxpayer to massive legal liability to Aquasure if the failure to comply with the MOU results in delay to the project. In effect, compliance with the MOU has become one of the government's legally binding obligations to Aquasure.

The risks created by this are compounded not only by the appallingly bad drafting of the MOU, but by the fact that Victoria Police were not made aware of the consequences of any failure by them to comply with the MOU. As the CLEDS report states:

*Finally, I am advised that Victoria Police did not know, before it executed the Desalination MOU, that the consequences for the State of Victoria if it failed to observe the provisions of the MOU were potentially very serious. (Report section 5.16, p.40)*

## **What remains concealed?**

There are strong grounds to conclude that the government has sought to conceal and prevent public scrutiny of what has occurred with the desalination plant and other MOUs by:

- the withholding of the CLEDS report from the Committee
- the shutting down of the inquiry and the suppression of the evidence it has received
- the release of the CLEDS report late on the Thursday preceding the AFL Grand Final.



Despite the measures taken by the government to try to minimize scrutiny, the CLEDS report confirms many of the concerns raised publicly about the serious threats to the privacy and other rights of Victorians arising from the MOUs.

The government's claims that there was nothing to be concerned about in relation to the potential misuse of sensitive personal information have been shown to be false.

However, there are many aspects of the issue that remain unresolved. These include:

- the extent of the surveillance of lawful protesters which has been carried out by the government, and whether such surveillance has been misused in an attempt to intimidate and harass citizens who have opposed projects like the desalination plant or the North-South Pipeline
- details of other MOUs entered into by Victoria Police, with whom they were entered into, the commitments given by Victoria Police to hand over sensitive information, and the extent to which such information has in fact been handed over
- the views of independent experts on whether the government has acted lawfully and in accordance with the Information Privacy Act and its own Charter of Human Rights and Responsibilities Act in the way it has gathered, used and disclosed information about Victorian citizens
- the financial and legal exposure of taxpayers created by the fact that Victoria Police's compliance with the MOU agreement appears to have been made a legally binding obligation of the government to the desalination plant consortium, without either the knowledge or consent of Victoria Police.

It has been reported in the media that following the CLEDS report, Victoria Police have been reviewing the MOUs they have entered and have terminated a number of them. This may have the advantage of avoiding unexpected legal entanglements and commitments to hand over information inappropriately. However, it risks opening up again the risks that presumably led to the creation of MOUs in the first place, namely a lack of clear guidelines as to what information it is or is not appropriate for police to disclose to third parties and on what basis, and how such information is to be treated by recipients.

Terminating MOUs and avoiding future MOUs will be of little benefit if it results in Victoria Police inappropriately handing over information to third parties on an undocumented basis, or conversely feeling unable to pass on vital information that would assist other agencies or ordinary citizens to prevent or avoid criminal activity or risks to public safety. Victoria Police need to ensure that operational police have a clear understanding of when it is and is not appropriate to hand over information to third parties, and of the manner in which information provision should occur. There is no assurance that this is occurring.

Furthermore, restricting future MOUs to agreements with other government agencies does nothing to end the apparent pressure being placed on Victoria Police by other government agencies to be party to inappropriate gathering and use of information about citizens exercising lawful rights of protest.

As reported above, the Committee majority have deliberately gagged us from disclosing who may or may not have made submissions to the inquiry, or what submitters may have said.

However, the public record discloses that many of those who have been subject to surveillance by government, and have first hand experience of what has occurred, have been willing to speak out about what they have been subjected to.

For example, the ABC Stateline program of 16 April 2010, featured Ms Jan Beer, a protester against the North-South Pipeline. In a item entitled *Is the Victorian Government entitled to spy on protesters trying to stop important state projects?* the program transcript records:

*CHERYL HALL: Documents released under the Freedom of Information Act reveal her movements were recorded and regularly reported, not by the police, but by employees of Melbourne Water.*

*JAN BEER: There were weekly reports, monthly reports, incident managed reports, video tapes. All they had to do was go and ask the local police sergeant, who I've known for nearly 20 years, "Do we need to worry about this person? Is she a threat? Is she a terrorist?" And I know very well what the answer would be: "Don't be ridiculous." <sup>2</sup>*

The Committee could and should have invited Ms Beer and others involved in protests against the North-South Pipeline and the desalination plant to give evidence to a public hearing. The sort of covert government surveillance of lawful protesters alleged by Ms Beer is reminiscent of George Orwell's novel *1984*. Victorians are entitled to know the full facts of what has happened and why it has happened.

Similarly, the Law Institute web site contains a document entitled *Inquiry into Arrangements for Security and Security Information Gathering at State Government Construction Projects To: Victorian Parliament Law Reform Committee 23 June 2010.* <sup>3</sup>

The majority's gag on us means we are prohibited from disclosing whether or not such a submission was in fact received by the Committee. However, in the document published on its web site which purports to be a submission to the Committee, the Law Institute lists amongst its concerns:

1. Police outsourcing of law enforcement responsibilities
2. Erosion of independence of Chief Commission of Police
3. Erosion of democratic right to free assembly, and the right to peaceful protest.

These issues raised by the Law Institute of Victoria are fundamental to a free and democratic society. The Committee could and should have invited the Law Institute of Victoria and other legal and privacy experts to give evidence to it at a public hearing. It is disgraceful that the majority would not do so.

## Conclusion

It is both legitimate and desirable for Victoria Police to be proactive in gathering intelligence relating to threats of criminal activity and risks to public safety. However, the steps taken by Victoria Police must be lawful, and they must be relevant to and commensurate with the risks to which they respond. Furthermore, the data collected by the police must be used only for the purposes for which it was collected or for other purposes authorised by law. It must not be used improperly to advance other interests of government, or of private companies,

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<sup>2</sup> See <http://www.abc.net.au/news/video/2010/04/16/2875357.htm>

<sup>3</sup> See <http://www.liv.asn.au/getattachment/68fc8e03-d95e-4943-9e0b-4d4ca517ffe1/Inquiry-into-Arrangements-for-Security-and-Securit.aspx>

individuals or non-government organisations. These limitations and safeguards are vital for protecting the rights and freedoms of citizens and preserving an open and vibrant democracy.

In the context of a major construction project such as the desalination plant, which is highly controversial and which involves billions of dollars of cost, and where the government has both commercial and political interests at stake, there are justified grounds for concern that the government's motivation for seeking and entering into an MOU and for the use of police and other intelligence gathered under the MOU may be to protect its commercial and political interests rather than for legitimate purposes of protecting persons or property.

Given the importance of these issues, and given its duty to do so under the reference it was given by the Legislative Council, the Committee could and should have proceeded with the inquiry. The Committee could and should have investigated the use by the government and by Victoria Police of MOUs such as the desalination plant MOU, and whether or not such use has been appropriate, and could and should have provided Victorians with the facts about what has been happening.

The Committee could and should also have made considered recommendations as to whether changes to law or practice are needed in order to safeguard the rights of Victorians.

The fact that the Labor majority of the Committee have shut down the inquiry and suppressed the evidence it has received means that Victorians are entitled to suspect that there are further aspects of what has occurred with the desalination plant MOU or other MOUs that the government does not want Victorians to know about.

Having been prevented from receiving evidence and gagged in what we can say, the minority members of the Committee can only hope that sooner or later the full truth will emerge about those aspects of the issue which the government has kept concealed to date, and that a future government will put in place a regime that will ensure Victorians can have confidence that the state and its instrumentalities will collect and use information about them only in a lawful and legitimate manner.



**Robert Clark MLA**  
Deputy Chair



**Jan Kronberg MLC**  
Committee Member



**Heidi Victoria MP**  
Committee Member