

## **“ON CAMERA, 24/7”**

# **HOMELESSNESS AND SURVEILLANCE**

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## 1. Executive Summary

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*'The big problem is where do you spend your time if you have no home? You spend it in public because you've got no choice, Jessie, aged 27'<sup>1</sup>*

This submission is made by the PILCH Homeless Persons' Legal Clinic (**HPLC**) in response to the Victorian Law Reform Commission's (**VLRC**) Consultation Paper on Surveillance in Public Places (**Consultation**). The HPLC welcomes the opportunity to contribute to the Consultation, given its longstanding interest and work in the area of regulation and use of public space.

On many occasions, the HPLC has been fortunate to speak directly with people experiencing homelessness about their perspectives on public space issues. In response to the Consultation we were also fortunate to work with the VLRC in a hosting a forum on public place surveillance (**the surveillance forum**) which sought the views and comments of participants (all of whom had experienced homelessness) on the issue of surveillance in public places. These views and comments have informed the HPLC's response to the Consultation. Our response explores the potentially positive and negative impacts of surveillance, the relevance of human rights, inadequacy of current surveillance regulation and options for reform.

People experiencing homelessness rely on public space in different ways. Those who sleep rough may have little choice about where they perform various intimate activities such as sleeping, bathing, urinating/defecating.<sup>2</sup> For others, public space provides a place to exist in a broad sense; to be safe and warm, to eat and drink, to be with friends and family, and to rest. For this group of people, public space can provide a welcome respite from the squalid or dangerous conditions at the bottom end of the Victorian accommodation market.

Nevertheless, people experiencing homelessness often find themselves on the wrong side of public space. For some people it is difficult to blend in with the crowd and look 'normal' and surveillance serves to amplify this sense of isolation and difference. Our discussions with participants of the surveillance forum demonstrated that for people experiencing homelessness being watched (by surveillance cameras / security personnel / police) is a fact of life. It is a unfortunate paradox that the people who rely so much on public space for their quotidian existence are the same people who are watched, monitored, moved on and generally excluded.

The HPLC considers that enhanced regulation of surveillance is needed to stem discrimination against people experiencing homelessness in public space. In addition to improving the human rights protections available to this group we also hope that any reform of public place surveillance serves a collateral purpose of developing public debate about the effectiveness and justification of surveillance systems.

We note that on the basis of comments made during the surveillance forum that people experiencing homelessness seem resigned to the fact that for them, privacy is almost non-existent. This is not good

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<sup>1</sup> Chris Middendorp, "Homelessness and Public Space: Unwelcome Visitors" (2002) <[http://www.chp.org.au/parity/articles/results.shtml?filename\\_num=00149](http://www.chp.org.au/parity/articles/results.shtml?filename_num=00149)> accessed 14 June 2009.

<sup>2</sup> Don Mitchell "The right to the city: social justice and the fight for public space", Guilford Press (2003).



enough. The HPLC considers that addressing the way in which surveillance is used in public places provides a good opportunity to better protect the rights of people experiencing homelessness to privacy and to non-discrimination.

## **1.2 Recommendations**

**Recommendation 1:** That surveillance users be required to provide a clear notice advising whether CCTV cameras are live monitored

**Recommendation 2:** That funding be provided for a detailed examination of the ways in which surveillance (a) deters crime in respect of people experiencing homelessness and (b) results in increased apprehension rates where acts of violence are caught on camera.

**Recommendation 3:** That in making any recommendations for reform or regulation of surveillance in public places, the VLRC be guided by and seek to uphold the full range of human rights including the right to privacy, the right to non-discrimination and the right to freedom of movement.

**Recommendation 4:** That the VLRC adopt a broad definition of the right to privacy which provides for privacy in public and includes protection of a right to identity, personal development, integrity, intimacy, and autonomy.

**Recommendation 5:** That surveillance principles be adopted to provide an overarching framework guiding regulation of public place surveillance.

**Recommendation 6:** That the draft surveillance principles proposed by the VLRC be adopted.

**Recommendation 7:** That an additional surveillance principle to the effect that 'Public place surveillance should not be used to profile particular groups of people or to discriminate against people' be adopted.

**Recommendation 8:** That there be regulatory oversight in relation to one off or intermittent use of surveillance where a serious invasion of privacy has been committed.

**Recommendation 9:** That a regulator be given specific responsibility in relation to public space surveillance.

**Recommendation 10:** That an independent regulator have a broad monitoring and research role in respect of surveillance issues.

**Recommendation 11:** That funding be allocated for targeted research into the ways in which people experiencing homelessness are exposed to and affected by public place surveillance.

**Recommendation 12:** That the independent regulator implement a community education and information program in relation to privacy rights and responsibilities as set out in the surveillance principles, particularly as they relate to people experiencing homelessness



**Recommendation 13:** That surveillance users be required to register with the independent regulator.

**Recommendation 14:** That any registration system be linked with an ability to enforce public place surveillance rules.

**Recommendation 15:** That where an enterprise is found to have breached certain surveillance rules or registration requirements, that the independent regulator have the power to withdraw registration and/or authority to operate a surveillance device.

**Recommendation 16:** That statutory rules be made in respect of public place surveillance.

**Recommendation 17:** That statutory rules be required to give full effect to the surveillance principles.

**Recommendation 18:** That statutory rules should clarify the position in relation the retention, use and release of material obtained from surveillance devices.

**Recommendation 19:** That any statutory regulation provide for access to surveillance material.

**Recommendation 20:** That people experiencing homelessness be provided with assistance to access to surveillance material including the ability to lodge claims for such material by telephone.

**Recommendation 21:** That the independent regulator be given an 'own motion' power to investigate the use of surveillance in public places together with the ability to act on individual complaints.

**Recommendation 22:** That the independent regulator be given the power to obtain information and compel production of documents in relation to a public place surveillance investigation.

**Recommendation 23:** That either an independent regulator or an affected individual should be able to initiate a complaint about breaches of statutory surveillance rules or principles.

**Recommendation 24:** That the independent regulator be given jurisdiction to consider and conciliate complaints in respect of public place surveillance which breaches a statutory rules in respect of this issue.

**Recommendation 25:** That the Victorian Civil and Administrative Tribunal be provided with jurisdiction to hear complaints that cannot be resolved by the independent regulator.

**Recommendation 26:** That where an enterprise is found to have breached a statutory rule in respect of public space surveillance that compensation may be awarded in respect of pain and suffering.



## 2. Introduction – homelessness, public space and surveillance

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The issues raised by the Consultation are highly relevant to people experiencing homelessness. Understanding homelessness is an important part of understanding the way in which some people are more reliant on public space than others. The widely accepted definition of homelessness in Australia divides people into the following categories - 'primary', 'secondary' and 'tertiary'<sup>3</sup>. Primary homelessness refers to people with no form of conventional accommodation and may involve living on the streets, under bridges, in parks and squatting in deserted buildings. Secondary homelessness refers to people with no fixed address who frequently move between temporary accommodation such as staying with friends/family, emergency accommodation, refuges and hostels. Tertiary homelessness refers to people who live in accommodation such as rooming or boarding houses which fail to satisfy minimum standards.

*'I'm a normal bloke. But it's hard to live normal without somewhere to call your own. You have nowhere to store your gear. Nowhere to wash. Nowhere to be private. Nowhere to bring friends. Nowhere to recover when you're crook,' Larry, aged 58<sup>4</sup>*

There are a number of potential locations in which people experiencing homelessness may be subject to surveillance which include spending time / sleeping / socialising / keeping warm and staying safe / eating - in shopping centres, malls, on public transport carriages or in transport hubs, in the city centre and surrounding urban areas including parks. It is also worth noting that people experiencing homelessness spend a considerable period of time in surveillance environments when seeking assistance from government and non-governmental services.

As a result of their heavy reliance on public space, people experiencing homelessness are increasingly subject to prosecution for committing offences public space. One example of the way in which infringements can affect people experiencing homelessness can be seen in the case of Tom.<sup>5</sup> This HPLC client lived in and around Flinders Street Station, suffered from an acquired brain injury and accumulated a total of \$100,000 dollars in fines from activities such as drinking in a public place, travelling without a ticket and begging. In dismissing all the charges against Tom, the Magistrates Court recognised the way in which public space laws can discriminate against people who spend the majority of their time in public.

It is as yet unclear how surveillance affects people experiencing homelessness. As the Consultation Paper notes, 'There is little information available about the number of CCTV cameras in use in Victoria'<sup>6</sup> and no central registration point which records location and ownership of the cameras. At this point it is therefore very difficult to know when and at what point people experiencing homelessness become subject to surveillance. Nonetheless, the HPLC considers that the increasing use of Closed Circuit Television (**CCTV**) and applications such as 'Google Earth' and 'Google Street View' will be highly relevant (and often injurious) to individuals who live on the streets. It is therefore crucial, as we argue

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<sup>3</sup> Chamberlain & MacKenzie, 'Understanding Contemporary Homelessness: Issues of Definition and Meaning', (1992) 27 *Australian Journal of Social Issues*; and Chamberlain & Johnson, 'The Debate about Homelessness' (2001) 36(1), *Australian Journal of Social Issues* 35, 39

<sup>4</sup> Chris Middendorp, "Homelessness and Public Space: Unwelcome Visitors" (2002) <[http://www.chp.org.au/parity/articles/results.shtml?filename\\_num=00149](http://www.chp.org.au/parity/articles/results.shtml?filename_num=00149)> accessed 14 June 2009.

<sup>5</sup> Name has been changed

<sup>6</sup> VLRC, Surveillance in Public Places – Consultation Paper, January 2009, p 29



further in this submission, there is increased information about surveillance available to the public, specific research in relation to effect of surveillance on people experiencing homelessness and far better regulation of surveillance in public places.

## 2.1 Overview of the HPLC

The HPLC is a project of the Public Interest Law Clearing House (**PILCH**) and was established in 2001 in response to the great unmet need for targeted legal services for people experiencing homelessness.<sup>7</sup>

The HPLC has the following aims and objectives:

- to provide free legal services to people who are homeless or at risk of homelessness, in a professional, timely, respectful and accessible manner, that has regard to their human rights and human dignity;
- to use the law to promote, protect and realise the human rights of people experiencing homelessness;
- to use the law to redress unfair and unjust treatment of people experiencing homelessness;
- to reduce the degree and extent to which homeless people are disadvantaged or marginalised by the law; and
- to use the law to construct viable and sustainable pathways out of homelessness.

Free legal services are offered by the HPLC on a weekly basis at 14 outreach locations that are accessed already by homeless people for basic needs (such as soup kitchens and crisis accommodation facilities) and social and family services.<sup>8</sup> Since its establishment in 2001, the HPLC has assisted over 4000 people at risk of, or experiencing, homelessness in Victoria.

The HPLC also undertakes significant community education, public policy advocacy and law reform work to promote and protect the right to housing and other fundamental human rights. In 2005, the HPLC received the prestigious national Human Rights Law Award conferred by the Human Rights and Equal Opportunity Commission in recognition of its contribution to social justice and human rights.

The HPLC operates and provides its services within a human rights framework. Central to the human rights framework is the right to participate, including individual and community participation and consultation, which creates an empowering environment for individuals to assert their rights and contribute to the democratic process. The HPLC recognises the right to participate by working and consulting directly with a range of key stakeholders, the most important of which is the Consumer Advisory Group (**CAG**). The CAG was established by the HPLC in 2006 and is comprised of people who have experienced homelessness or who are currently homeless. The role of the CAG is to provide guidance and advice, and make recommendations to the HPLC with a view to enhancing and improving the quality of the HPLC's service delivery, policy, advocacy, law reform and community development activities. The CAG not only provides feedback and guidance to the HPLC but also gives people who have experienced homelessness a voice to actively represent their interests and build the participation and engagement of the general community around the issue of homelessness.

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<sup>7</sup> See <http://www.pilch.org.au>.

<sup>8</sup> Host agencies include Melbourne Citymission, The Big Issue, the Salvation Army, Anglicare, St Peters Eastern Hill, Ozanam House, Flagstaff Crisis Accommodation, Salvation Army Life Centre, Hanover, Vacro, Koonung Mental Health Centre, St Kilda Crisis Centre, St Luke's (Bendigo), Loddon Mallee Housing Service (Bendigo) and Homeground Housing Service. Legal services are provided at our host agencies by volunteer lawyers from law firms: Allens Arthur Robinson, Baker & McKenzie, Blake Dawson, Clayton Utz, Mallesons Stephen Jaques, Minter Ellison, DLA Phillips Fox, Corrs Chambers Westgarth, Freehills, Stella Stuthridge and Associates, Arnold Dallas McPherson and the legal departments of Goldman Sachs JBWere and the National Australia Bank.



## 2.2 Homelessness and the downsides of surveillance

There are a number of key ways in which surveillance may negatively affect people experiencing homelessness and their use of public space. In particular, it may serve to:

- Reduce space for social and cultural engagement;
- Reduce anonymity and contribute to 'profiling' of people with particular attributes, and
- Potentially increase policing of homeless populations.

For many people experiencing homelessness, public space provides their only link to social and support networks. Academic findings have shown that in particular, homeless youth draw 'on the resources of the city physically and emotionally in building up a sense of 'home' and a sense of self. As well as basic living facilities, the contact with other people during the day...was crucial in helping young people cope with everyday difficulties and develop social skills, as well as dealing with specific housing, health, legal and emotional problems.'<sup>9</sup>

During recent consultations<sup>10</sup> the HPLC arranged a workshop with a group known as the 'Parkies' in Collingwood.<sup>11</sup> The Parkies regularly congregate in the parks and on the streets of Fitzroy and Collingwood where they talk and drink and often come into contact with police. During the workshop, a participant referred to the difficulties of sharing a one bedroom flat with nine other people. She explained that this situation occurs where people whom she regards as family move into her small flat for a number of reasons; domestic disputes, time in prison, alcohol and drug issues and homelessness. The participant also explained that she could not turn family members away, which often led to extreme overcrowding in her flat and difficult living conditions.

In this context, it is not hard to understand why some people are compelled to spend a significant amount of time in public. During an SBS interview with the Parkies, Cathleen Hudson noted 'we all come here and meet because we know we can all catch up with each other here... I've got my nieces and nephews here. It's a place where it's safe for children, kids as well and we're not off on the streets.'<sup>12</sup> These sentiments are echoed by comments made during the consultation that 'The corner on Smith Street is a meeting place and the only place we got. It's our family and it's the place where we meet up.'<sup>13</sup>

Another pressure is the changing nature of public space. Shopping centres and malls are areas which can provide people experiencing homelessness with warmth, comfort and security. We note that in discussing these spaces participants of the surveillance forum experienced confusion as to whether these areas are public or private. This confusion may reflect the way in which access to these areas is "assured only to those who engage in permitted behaviours which, increasingly, are associated with consumption activities".<sup>14</sup> Indeed, the use of alfresco dining, automatic telling machines (banking 'on the

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<sup>9</sup> Catherine Robinson "Creating Space, Creating Self: Street-frequenting Youth in the City and Suburbs", *Journal of Youth Studies* 3:4(2000) 439.

<sup>10</sup> Held as part of the PILCH Homeless Persons' Legal Clinic response to the National Human Rights Consultation

<sup>11</sup> See also <[http://news.sbs.com.au/livingblack/park\\_life\\_563637](http://news.sbs.com.au/livingblack/park_life_563637)>

<sup>12</sup> SBS Living Black, [http://news.sbs.com.au/livingblack/park\\_life\\_563637](http://news.sbs.com.au/livingblack/park_life_563637), 20 April 2009

<sup>13</sup> Comment to PILCH Homeless Persons' Legal Clinic response to the National Human Rights Consultation 2009

<sup>14</sup> Joe Doherty et al, "Homelessness and Exclusion: Regulating Public Space in European Cities" (2008) *Surveillance and Society* 5(3) 290, at 291, <[http://www.surveillance-and-society.org/articles5\(3\)/homelessness.pdf](http://www.surveillance-and-society.org/articles5(3)/homelessness.pdf)> accessed 15 June 2009;



street')<sup>15</sup> and massive shopping centres reflect the extent to which public space is increasing bound to commerce and consumption.

### 2.3 Reduce anonymity and increase profiling

Another issue for people experiencing homelessness is the degree to which they are unable to enjoy anonymity in a surveillance environment. In this regard it has been noted that sleeping rough has a 'direct impact on physical appearance. People who sleep rough struggle to shower and eat properly and without any facilities many people find it nearly impossible to look 'normal'<sup>16</sup> and disappear in a crowd. The inability to maintain a minimum standard of appearance can also 'intensify low levels of self esteem. Some chronically homeless people try to avoid places where they can be seen by the public to avoid being negatively judged'.<sup>17</sup> This comment is supported by a recent survey of homeless people in seven EU countries in which it was found that homeless people monitor and alter their own behaviour as a consequence of surveillance.<sup>18</sup> Accordingly, increasing surveillance may provide a situation in which people experiencing homelessness are subjected to increased levels of both *actual and perceived* scrutiny as a result of surveillance. As a result, increased surveillance may result in a corresponding decrease in the space in which people experiencing homelessness can comfortably exist. Further, such surveillance may further marginalise people experiencing homelessness and work to increase the barriers to their social inclusion.

### 2.4 Potentially increase policing of homeless populations

The possibility that increased surveillance will result in an equivalent increase in public space prosecutions is unclear. It is clear, however, that people experiencing homelessness use public space in several ways which could increase exposure to prosecution on the basis of surveillance footage and activities.

Laws and powers controlling the movement of individuals and groups in public places have the potential to disproportionately affect people experiencing homelessness. Legislation has already been introduced in South Australia, ACT, NSW and Queensland giving police a widened scope of power relating to the use and regulation of public spaces, which allows police to direct groups congregating in parks and on streets to disperse in certain circumstances.<sup>19</sup> While Victoria has not yet followed these jurisdictions, city councils have implemented similar provisions under local bylaws in the interest of addressing anti-social behaviour in public places,<sup>20</sup> despite there often being no other safe place in which group members can relax or socialise.

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<sup>15</sup> S Boyd, "I thought it was Public Space": The Impact of Privatisation of Public Space, taken from Out In The Open: Public Space Edition, Volume 19, Issue 1, February 2006 p 15

<sup>16</sup> Chamberlain, Johnson and Theobald, 'Homelessness in Melbourne: Confronting the Challenge', February 2007, p 30

<sup>17</sup> Ibid, p 30

<sup>18</sup> Henk Meert et al, 'The Changing Profiles of the Homeless People: conflict, rooflessness and the use of public space' (2006) Transnational Report, Working Group 2, European Observatory on Homelessness, FEANTSA, Brussels, <[http://www.feantsa.org/files/transnational\\_reports/2006reports/06W2en.pdf](http://www.feantsa.org/files/transnational_reports/2006reports/06W2en.pdf)> (last accessed 20 June 2009).

<sup>19</sup> *Summary Offences Act 1953* (SA), *Crime Prevention Powers Act 1998* (ACT) s 4, *Summary Offences Act 1988* (NSW) s 28F, *Police Powers and Responsibilities Act 2000* (Qld) s 38.

<sup>20</sup> See for example *General Local Law 2003 No 7* of Frankston City Council which was recently amended to grant 'move on powers' to authorised officers, where such officers can direct persons to leave public places and not



Public spaces also represent an important place in which homeless people can earn an income. For example, people may rely on begging or unlicensed busking as a last resort to supplement income. It has been the experience of service providers who work with homeless people that begging is viewed as an alternative to crime<sup>21</sup> however begging is an offence under Victorian law and local laws.<sup>22</sup> Recent consultations undertaken by the HPLC with people engaged in begging indicate that a majority of people surveyed had been either stopped or approached by the police while begging. The participants of the begging consultation also indicated the main reasons for this activity are to buy food (80.77%), pay for accommodation (57.69%) and to pay for transport (42.31%).

People experiencing homelessness are also potentially exposed to prosecution for behaviour which would not have been criminal if occurring in private. During the HPLC consultation with the Parkies, one participant noted, 'If we're hanging around in a group on Smith Street, even if we're not drinking, we'll be asked to move on. The police say, 'someone made a complaint', and that one person's wishes are worth more than ours'.<sup>23</sup> The HPLC considers that to the extent surveillance may increase in exposure to criminal sanctions it also acts to build yet another barrier for people trying to exit homelessness.

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return for 24 hours in circumstances reasonably necessary to uphold public safety, public order or the lawful enjoyment of others of a public place.

<sup>21</sup> Federation of Community Legal Centres (Vic) Inc., "A Good Night For All - Options for improving safety and amenity in inner city entertainment precincts", (2005)  
<<http://www.communitylaw.org.au/lrs.php#Public%20space>> accessed 14 June 2009.

<sup>22</sup> *Summary Offence Act 1966* (Vic), section 49A; local law 5.1 of *Melbourne City Council Activities Local Law 1999* (No. 1 of 1999)

<sup>23</sup> Comment made during PILCH Homeless Persons' Legal Clinic workshops in relation to the National Human Rights Consultation



### 3. Surveillance and safety

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*I was set on fire and pissed on by some kids. I was sleeping in a cardboard box and they took it from me. I was asleep in St Kilda and was woken by a flash, people were taking pictures of me sleeping.*<sup>24</sup>

During recent human rights workshops conducted by the HPLC, 80% of people with an experience of homelessness stated they felt they had been treated in a cruel or degrading way during their experience of homelessness.<sup>25</sup> In this context it is unsurprising that a number of participants raised 'safety' as an issue during the surveillance forum. Views differed as to whether cameras had any impact on safety; one participant stated he would feel safer sleeping within view of a camera whereas another participant suggested that sleeping in view of a camera may not prevent a 'bashing' but would enable the police to apprehend the perpetrator of the crime. By contrast, some participants considered that surveillance cameras would make no difference to violent attacks and in his opinion nobody would help if a homeless person was being bashed. One person referred to the failure of surveillance cameras to improve safety on public transport and remarked the 'human element' is what deters crime.

The potential of surveillance to assist homeless victims of crime was demonstrated in a 2008 Queensland case. In this case, reported in the media at the time,<sup>26</sup> Queensland Police told Peter Willimae that he could not drink alcohol in a public place and then became angry when he refused to discard his drink. The Police admit Mr Willimae was not disturbing anyone at the time of the incident. The Police then searched his bag and surveillance camera footage was captured of the Queensland Police officers assaulting Mr Willimae. Interestingly, both the victim, Mr Willimae, and a bystander were charged, the latter as a result intervening to assist him. The outcome provides an useful demonstration of the utility of surveillance footage. Mr Willimae did not have access to the footage and was found guilty and fined \$500. The bystander applied for and used the footage and all charges were dismissed.

By contrast, in the case of *Rowe v. Kemper*<sup>27</sup> a homeless man (Mr Rowe) was using disabled toilets to change his clothes. After being asked to move by a cleaner, a dispute arose and police were called and part of the ensuing incident was captured by a CCTV camera. The applicant was subsequently directed by the police to leave the area for eight hours and when he refused, he was arrested on charges of contravening that police direction. The conviction of Mr Rowe was quashed on appeal. In upholding the appeal, the Queensland Court of Appeal placed considerable reliance on the CCTV footage which culminated in the appellant being knocked to the ground by several police officers. In the reasons of Justice MacKenzie he states '[t]his case requires analysis, almost in the manner of a video referee or third umpire, of the sequence of brief events that occurred... Emulating those officials, I have viewed the footage of the arrest of a number of times in real time and frame by frame.'<sup>28</sup>

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<sup>24</sup> PILCH Homeless Persons' Legal Clinic, *Promoting and Protecting the Human Rights of People Experiencing Homelessness in Australia*, 15 June 2009, p 30

<sup>25</sup> PILCH Homeless Persons' Legal Clinic, *Righting the Wrongs of Homelessness*, 15 June 2009, p 33

<sup>26</sup> ABC Online, Caught on camera: Qld Police Punching homeless man, <http://www.abc.net.au/news/stories/2008/07/22/2310407.htm> accessed 02/07/09

<sup>27</sup> [2008] QCA 175 (27 June 2008)

<sup>28</sup> *Ibid*, at para 85



Despite the potential for surveillance footage to assist people experiencing homelessness we note it is equally possible to point to examples in which such material may also operate to the disadvantage of people in this situation (as discussed above). Furthermore, discussion during the surveillance forum unearthed a number of assumptions by people experiencing homelessness in relation to CCTV. These assumptions include a view that most CCTV footage is live monitored; that as a result of live monitoring someone may intervene and prevent a violent attack; that CCTV cameras have a deterrent effect on crime and that CCTV footage will assist in the apprehension of offenders.

The HPLC is concerned that assumptions about surveillance may potentially create an unjustified expectation of safety amongst people experiencing homelessness. As a preliminary measure to avoid any misunderstanding about the operation of surveillance devices, we recommend that surveillance users be required to provide a clear notice advising whether CCTV cameras are live monitored. The HPLC also recommends that funding be provided for a detailed examination of the ways in which surveillance (a) deters crime in respect of people experiencing homelessness and (b) results in increased apprehension rates where acts of violence are caught on camera. We consider that such research would be a valuable way understanding and potentially dispelling assumptions about surveillance which currently operate to stifle debate about the effectiveness and need for cameras.

**Recommendation 1:** That surveillance users be required to provide a clear notice advising whether CCTV cameras are live monitored

**Recommendation 2:** That funding be provided for a detailed examination of the ways in which surveillance (a) deters crime in respect of people experiencing homelessness and (b) results in increased apprehension rates where acts of violence are caught on camera.



## 4. Human rights and surveillance

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Human rights considerations lie at the core of any examination of surveillance in public places and its effect on people experiencing homelessness. Amongst the many benefits of a human rights approach, it has been found that the language and ideas of human rights have a life beyond the courtroom and enable individuals to challenge unfair treatment.<sup>29</sup> A human rights based approach has also been found to result in improved public service outcomes and increased levels of 'consumer' satisfaction.<sup>30</sup>

In Victoria, the *Charter of Human Rights and Responsibilities Act 2006 (the Charter)*, already imposes human rights obligations on the Victorian Government and 'public authorities' when developing, interpreting and applying Victorian law and policy. Human rights obligations imposed by the Charter include:

- A requirement that draft legislation be assessed for compatibility with the rights contained in the Charter before being introduced to Parliament (Statement of Compatibility);
- that all proposed legislation be considered by the parliamentary Scrutiny of Acts and Regulations Committee to determine the compatibility of legislation with human rights;
- that public authorities must act compatibly with human rights and give consideration to rights in making any decisions;
- that courts and tribunals must interpret and apply legislation consistently with human rights, and
- that the Supreme Court has the power to issue a declaration that a law cannot be interpreted and applied consistently with human rights.

The issues of public place surveillance and homelessness give rise to a number of specific human rights issues including the rights to privacy, freedom of movement and non-discrimination. Human rights are 'all universal, indivisible and interdependent and interrelated'<sup>31</sup> and on this basis each right – although considered separately below – should not be considered in isolation.

**Recommendation 3:** That in making any recommendations for reform or regulation of surveillance in public places, the VLRC be guided by and seek to uphold the full range of human rights including the right to privacy, the right to non-discrimination and the right to freedom of movement.

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<sup>29</sup> British Institute of Human Rights, *The Human Rights Act: Changing Lives* (2007, 1<sup>st</sup> edition), p 5

<sup>30</sup> Ibid p 5

<sup>31</sup> United Nations World Conference on Human Rights, *Vienna Declaration and Programme of Action*, 1993 para 5 (pt 1). Ad



#### 4.1 Non-discrimination

Surveillance may increase the risk of discriminatory profiling of groups with certain characteristics. A UK report has referred to the way in which 'undesirable' people have been refused entry to shops on the basis of particular personal characteristics including age, associations and perceived drug use<sup>32</sup>.

Similarly a 1998 study found that 'targeting of the homeless, the vagrant and the alcoholic... was a regular feature' in two out of three CCTV control rooms studied, not because of any criminal behaviour, but because of their 'capacity to convey a negative image of the city'.<sup>33</sup>

Ostensibly such conduct is prohibited under the International Covenant on Civil and Political Rights (ICCPR)<sup>34</sup> and the Charter. In accordance with these documents the Victorian Government has an obligation to ensure that its laws provide for everyone to be treated equally and to be free from discrimination on grounds including 'other status'.<sup>35</sup> Although international jurisprudence establishes that 'other status' refers to people who are 'homeless', 'unemployed' or a 'recipient of social security payments',<sup>36</sup> unfortunately it is still lawful to discriminate against people on these grounds under Australian anti-discrimination legislation.

Comments from participants at the surveillance forum demonstrate the effect of current gaps in Australian anti-discrimination legislation. One participant stated he had been questioned while simply sitting in the foyer of a shopping centre, while another had been refused entry to shops on the basis of his appearance. One participant spoke of entering a shop and instantly hearing a loudspeaker announcement calling for security. Another participant said he was followed around a shopping centre. It is also interesting to note that some participants considered that discrimination would deny them of the security benefits of surveillance because when responding to a violent incident, a security guard or police officer would assist a 'suit' but not a homeless person.

#### 4.2 Freedom of movement

Surveillance may affect the freedom of movement of people experiencing homelessness by assisting police and security personnel to move people away from certain areas. Freedom of movement is a human right protected under both the ICCPR and the Charter<sup>37</sup> and encompasses the right to remain in a particular location and the right to avoid being forced to move. Furthermore, this right has also been described as an 'indispensable condition for the free development of a person'.<sup>38</sup> One participant of the

<sup>32</sup> John Flint, 'Surveillance and Exclusion Practices in the Governance of Access to Shopping Centres on Periphery Estates in the UK' (2006) 4 (1/2) *Surveillance in Society*, 52, 54 and 60 cited in the Consultation Paper at p 43

<sup>33</sup> Clive Norris and Gary Armstrong, *The Maximum Surveillance Society: the rise of CCTV* (1998) Berg Publishers, at 45, quoted in Michael McCahill, *The Surveillance Web* (2002) Willan Publishing, at 14.

<sup>34</sup> *International Covenant on Civil and Political Rights* opened for signature 16 December 1966, 999 UNTS 171, (entered into force 23 March 1976, entered into force for Australia 13 November 1980), see for example Art 17: "no-one shall be subjected to arbitrary or unlawful interference with his privacy, family, home or correspondence..."

<sup>35</sup> ICCPR Art 26; Charter s 8: "all persons are equal before the law and are entitled without any discrimination to the equal protection of the law".

<sup>36</sup> The European Court of Human Rights has interpreted non-discrimination on the grounds of 'other status' to include non-discrimination on the basis of a criminal record: see *Thlimmenos v Greece*, 6 April 2000, Application No 34369/97. Also see generally S Joseph, J Schultz and M Castan, *The International Covenant on Civil and Political Rights: Cases Commentary and Materials* (2<sup>nd</sup> ed, 2004) 689

<sup>37</sup> Art 12 ICCPR, s 12 Charter: "...everyone...shall, within that territory, have the right to liberty of movement and freedom to choose his residence; art 22 ICCPR, s12 Charter: "Every person lawfully within Victoria has the right to move freely within Victoria and to enter and leave it and has the freedom to choose where to live..."

<sup>38</sup> Human Rights Committee, General Comment 27, Freedom of movement (Art 12), para 1



surveillance forum told of having difficulty with an automatic teller machine and subsequently being told by a security guard that he had been hanging around for too long and needed to leave. The guard then walked him out of shopping centre premises. Another participant said that he was questioned and moved on by police after lingering on a street corner in the vicinity of an injecting room in Sydney.

Participants in the surveillance forum referred to circumstances in which surveillance resulted in increased attention from shop staff, police and security personnel. In this context it is not surprising that a recent survey in seven EU countries found that people experiencing homelessness attempt to reduce visibility in public places where they are likely to be observed and confine themselves to the edges, the dark corners and the hidden recesses<sup>39</sup>. In marginalising and isolating people, the HPLC considers that surveillance may lead to an indirect violation of the rights to freedom of movement. This potential violation occurs passively by virtue of the way in which people experiencing homelessness seek to avoid the humiliating and degrading experience of being moved away from an area in which others are able to freely circulate.

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<sup>39</sup> Henk Meert et al, 'The Changing Profiles of the Homeless People: conflict, rooflessness and the use of public space' (2006) Transnational Report, Working Group 2, European Observatory on Homelessness, FEANTSA, Brussels, <[http://www.feantsa.org/files/transnational\\_reports/2006reports/06W2en.pdf](http://www.feantsa.org/files/transnational_reports/2006reports/06W2en.pdf)> (last accessed 20 June 2009).



## 5. Are people experiencing homelessness entitled to privacy?

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The Charter provides for protection from arbitrary or unlawful interference with privacy in similar terms to article 17 of the ICCPR.<sup>40</sup> In effect, both the Charter and ICCPR provide that a person has the right not to have his or her privacy, family, home or correspondence unlawfully or arbitrarily interfered with. The precise definition or scope of this right is unclear although concepts of 'personal autonomy', 'human dignity' and the idea of a 'private sphere' have been used in an attempt to clarify the issue. It is also unclear whether this right extends to public places because of the way in which privacy has been historically linked to home and family. Despite this, the extension of the right to privacy to public places has been recognised in jurisdictions such as the European Court of Human Rights, the United States and the United Kingdom<sup>41</sup> however as yet Australia has not adopted this position.

### 5.1 People experiencing homelessness: views on privacy.

A number of participants at the HPLC's surveillance forum expressed doubts about whether people experiencing homelessness have a right to privacy. Although it might be imagined that everyone – regardless of their housing status – has at least some expectation of privacy, we found this was not the case. Some participants expressed the view that public space is – as the name suggests – public and that by virtue of their housing arrangements people experiencing homelessness considered they were not entitled to the benefit of privacy.

Other participants gave a more equivocal response. They suggested that for privacy to exist, a 'private space' needs to exist. In this regard, participants noted that for people experiencing homelessness such a private space only exists if it is provided by a friend or relative. Participants generally agreed that this was not an option for most people. Yet the need for privacy remains. This is reflected by comments from one participant who suggested that the city centre should provide a dedicated 'private space' with signs indicating that surveillance is not presenting use. These statements reflect a sense of resignation that the city and public space currently provides no privacy for people experiencing homelessness. Such remarks indicate a clear necessity for both privacy and private space in public space, for people who have limited access to more conventional private spaces.

During the surveillance forum reference was made to the pervasive presence of surveillance. One person said that an emergency housing provider had installed CCTV throughout the housing facility, including in common rooms and corridors. It was not clear whether residents were happy with the cameras or whether they made any difference to safety however, as one participant remarked, 'you are on camera 24/7'. These remarks were echoed by another participant who gave the example of emergency housing in Western Australia in which footage enabled the housing manager to effectively deal with anti social / violent behaviour but also lamented the fact of being on camera all the time. By contrast, another participant explained that he had lived in emergency accommodation with surveillance

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<sup>40</sup> The *International Covenant on Civil and Political Rights*, opened for signature 16 December 1966, 999 UNTS 171, (entered into force 23 March 1976, entered into force for Australia 13 November 1980), states in article 17 that: 'No one shall be subjected to arbitrary or unlawful interference with his privacy, family or correspondence, nor to unlawful attacks on his honour and reputation.' The Charter states in section 13 that 'A person has the right – (a) not to have his or her privacy, family, home or correspondence unlawfully or arbitrarily interfered with...'

<sup>41</sup> *Katz v United States* 389 US 347 (1967); *Peck v United Kingdom* (2003) I Eur Court HR; *Von Hannover v Germany* (2004) III Eur Court HR 294; *Wood v Commissioner of Police for the Metropolis* [2009] EWCA Civ 414 (21 May 2009).



cameras and noted that the cameras made no significant difference to drug issues or safety. This participant said that people dealing drugs would simply ensure that any transactions were done in a surveillance blind spot.

## 5.2 Preferred approach – a right to privacy in public?

Part of the difficulty in defining privacy is the extent to which this idea is shaped by individual, subjective considerations. As one participant at the surveillance forum noted, while one person might not have a problem injecting drugs on a park bench, another person may have significant difficulties finding an appropriately private space.

Drug use amongst people experiencing homelessness is an area in which privacy is clearly relevant. Research shows there are strong links between substance use and homelessness. One study of people experiencing homelessness indicates that 43% of the sample group had problems with substance use and that of this group, 66% of people developed a substance use problem *subsequent* to becoming homeless.<sup>42</sup> This research suggests that substance use problems are more often a *consequence* of homelessness rather than the cause of homelessness.

The increased use of surveillance potentially increases the prospect of prosecution of people experiencing homelessness for drug related offences and reduces the areas in which these people may use drugs in 'private'. In relation to the issue of illegal conduct in public, one participant of the surveillance forum made the perhaps obvious suggestion that 'if you're doing nothing wrong, you've got nothing to hide'. One response to this remark is that it reverses the criminal onus and makes people guilty until proven innocent. Furthermore, in light of the connections between drug use and homelessness, it might also be argued that increased surveillance increases the risk of people being punished for being homeless.

A number of jurisdictions have found a right to privacy exists in public including the US,<sup>43</sup> UK<sup>44</sup> and under the ECHR.<sup>45</sup> In the case of *Peck v The United Kingdom*<sup>46</sup> it was held that privacy 'protects a right to identity and personal development, and the right to establish and develop relationships with other human beings and the outside world... There is, therefore, a zone of interaction of a person with others, even in a public context, which may fall within the scope of 'private life.'<sup>47</sup> Although vague, the right to privacy has been held to include (among other things) the protection of a right to identity, personal development, integrity, intimacy and autonomy<sup>48</sup>. It has also been held that special obligations exist to fulfil the right to privacy in relation to people who are in a vulnerable position including children, the elderly, people with disabilities, homosexuals and transsexuals<sup>49</sup>. The HPLC considers that 'special obligations' to fulfil the right to privacy also exist in respect of people experiencing homelessness. In considering options for

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<sup>42</sup> Chamberlain, Johnson and Theobald, 'Homelessness in Melbourne: Confronting the Challenge', February 2007, p 20

<sup>43</sup> *Katz v United States*, 389 US 347 (1967), referred to in the Consultation Paper at paragraph 3.39.

<sup>44</sup> *Campbell v Mirror Group Newspapers Ltd* [2004] 2 AC 457, referred to in the Consultation Paper at paragraph 3.47.

<sup>45</sup> *PG and JH v United Kingdom* (2001) IX Eur Court HR; *Peck v United Kingdom* (2003) I Eur Court HR, referred to in the Consultation Paper at paragraph 3.44.

<sup>46</sup> *Peck v The United Kingdom* Judgment, Application number 44647/98, 28 January 2003

<sup>47</sup> *Ibid*, p 13

<sup>48</sup> M Nowak, U.N. Covenant on Civil and Political Rights CCPR Commentary, 2<sup>nd</sup> revised edition, p 385 - 389

<sup>49</sup> *Ibid*, p 380



reform in respect of surveillance the HPLC considers that an expansive definition of the human right to privacy should be adopted.

**Recommendation 4:** That the VLRC adopt a broad definition of the right to privacy which provides for privacy in public and includes protection of a right to identity, personal development, integrity, intimacy, and autonomy.



## 6. Is public place surveillance sufficiently regulated?

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The *Surveillance Devices Act 1999* (Vic) (**SDA**), the *Information Privacy Act 2000* (Vic) (**IPA**) and the *Privacy Act 1988* (Cth) are all pieces of legislation which touch on the use of surveillance devices. For different reasons, however, these pieces of legislation are insufficient to regulate public place surveillance.

### 6.1 Current legislative Provisions

#### (a) Surveillance Devices Act

The SDA governs the installation, use and maintenance of surveillance devices which are defined as optical surveillance devices, listening devices, data surveillance devices, tracking devices and any combination of these things. The SDA prohibits certain activities related to particular surveillance devices rather than regulating the lawful use of surveillance devices.

At the surveillance forum, participants were particularly concerned by optical surveillance. The SDA provides that optical surveillance devices (including CCTV, and personal/mobile phone cameras) must not be installed, used or maintained to record or observe a private activity.<sup>50</sup> Under SDA provisions, a private activity is one which is 'carried on in circumstances that may reasonably be taken to indicate that the parties to it desire it to be observed only by themselves'. Relevantly, an activity is deemed not to be private if it is carried on 'outside a building' or 'in any circumstances in which the parties to it might reasonably expect that it may be observed by someone else'.<sup>51</sup>

This definition of 'private activity' under the SDA excludes a number of personal and intimate activities performed in public by people experiencing homelessness and serves to render much of their lives open to video surveillance. As discussed above, people experiencing homelessness may bathe, urinate or sleep in a park, alley way, train station, car park or building alcove and all of these areas are outside a building. Similarly, stores, shopping malls, cafés or (as discussed in the Consultation Paper<sup>52</sup>) urinals/open changing rooms are areas where an activity 'may be observed by someone else'. For a person experiencing primary homelessness, these areas are where the majority, if not the entirety of their lives are played out, leaving them under the constant gaze of ubiquitous, unregulated optical surveillance.

#### (b) Information Privacy Act 2000 (Vic), Privacy Act 1988 (Cth)

The IPA and the *Privacy Act 1988* (Cth) regulate the collection, storage and use of personal information in Australia. The Consultation Paper makes the pertinent point that 'information privacy laws... were not designed specifically to regulate the use of surveillance practices'.<sup>53</sup> It is therefore doubtful that the IPA would be able to address public place surveillance issues such as discriminatory profiling, voyeurism and exclusion of certain groups from public places.<sup>54</sup> The HPLC is also concerned that the IPA has no application to individuals and small businesses,

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<sup>50</sup> SDA s 7(1).

<sup>51</sup> Ibid, s 3.

<sup>52</sup> Consultation Paper paragraph 5.19.



given the use of surveillance by emergency housing providers and other small enterprises and the ways in which this surveillance tends to affect people experiencing homelessness.<sup>55</sup>

Another significant issue with the IPA's application to surveillance is that it currently only applies to information 'about an individual whose identity is apparent, or can reasonably be ascertained'.<sup>56</sup> This clearly poses difficulties where a company or government agency takes a continuous recording from a CCTV camera, populated with images of numerous unidentified (and potentially unidentifiable) patrons, and releases it to the police or uses it to profile customers.

(c) Cause of action

There are several common law causes of action relevant to the use of surveillance in public places. Common law torts of nuisance and trespass may provide options in seeking redress against excessive surveillance in some circumstances; however, because such action requires interference with an interest in land, it is a woefully inadequate option for people experiencing homelessness. A claim for breach of confidence may also be available where a person is recorded in a public place, and this recording is disclosed to other parties. However, the scope of this cause of action appears limited. In referring to the Australian jurisprudence on this cause of action, the Consultation Paper notes that the person must have been recorded engaging in 'some private act',<sup>57</sup> but it is unclear whether and in which circumstances an activity performed in public could be seen as amounting to a 'private act'. Furthermore, breach of confidence would not appear to apply where surveillance footage has not been published or disclosed.

The lack of a statutory cause of action for damages resulting from a breach of the SDA has been identified by the VLRC.<sup>58</sup> The VLRC also highlights the absence of a complaints mechanism in relation surveillance practices. While these lacunas are of concern to the wider community, the HPLC contends that they are of greater significance to people experiencing homelessness. For example, recent reports have indicated that the potential for exploitation of rooming house residents, (who fall within the category of tertiary homelessness), is high, and that complaints to landlords are ignored or actively stifled.<sup>59</sup> Charges have been brought against landlords of boarding houses overseas for spying on their tenants,<sup>60</sup> and it is conceivable that this type of surveillance problem could arise in Victoria. Unfortunately, an aggrieved person in Australia would have no statutory recourse to damages for such an intrusion of privacy and, if there were

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<sup>53</sup> Ibid, paragraph 5.67

<sup>54</sup> Consultation Paper paragraph 4.20.

<sup>55</sup> Ibid paragraph 5.49

<sup>56</sup> IPA s 3.

<sup>57</sup> Consultation Paper paragraph 5.107, referring to Gleeson CJ's comments in *ABC v Lenah Game Meats* (2001) 208 CLR 199 at [34], in which his Honour cited *Hellewell v Chief Constable of Derbyshire* [1995] 1 WLR 804 at 807 with approval.

<sup>58</sup> Ibid paragraph 5.26.

<sup>59</sup> Tom Reilly "Slumdog millionaires cash in on hard times" *The Age* (14 June 2009) <<http://www.theage.com.au/national/slumlord-millionaires-cash-in-on-hard-times-20090613-c6su.html>> accessed 15 June 2009

<sup>60</sup> Diarmaid Fleming, 'Landladies bugged student flats', *BBC News*, 14 November 2007, available at <[http://news.bbc.co.uk/1/hi/uk\\_news/northern\\_ireland/7094642.stm](http://news.bbc.co.uk/1/hi/uk_news/northern_ireland/7094642.stm)>; Gary Dimmock, 'Landlord charged with voyeurism', *Ottawa Citizen*, 2 May 2009, available at <<http://www.ottawacitizen.com/news/Landlord+charged+with+voyeurism/1555410/story.html>>.



no publication of the recordings in question, it is not clear they would have an action at common law.<sup>61</sup>

(d) Insufficient regulation

As the above analysis demonstrates, current legislative regimes are insufficient to address the problems associated with public place surveillance, particularly in relation to people experiencing homelessness. The SDA, the IPA and the common law all fail to address current uses and dangers of surveillance practices and provide very little protection to people experiencing homelessness. Furthermore, the HPLC notes that in addition to the significant legal obstacles to the realisation of privacy rights there are also considerable practical obstacles in bringing claims to court. In this context the HPLC consider that reform to public place surveillance regulation is necessary and overdue.

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<sup>61</sup> Consultation Paper paragraphs 5.108 and 5.110.



## 7. Options for reform

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In light of the fact that privacy for people experiencing homelessness is almost non-existent, the HPLC considers that a regulatory framework around surveillance in public places should be developed. In our view, this would assist individuals to understand their rights in relation to public place surveillance and take action where appropriate. In many instances it is possible that there may not be an individual complainant in respect of surveillance practices which may breach regulation or human rights principles. To provide adequate protection in these circumstances, the HPLC considers that an independent regulator should be given sufficient power and resources to investigate and seek compliance with regulations, of its own motion. We consider that the provision of such power and resources would serve to recognise the ways in which surveillance can perpetuate and expand discrimination and breaches of privacy against people experiencing homelessness.

### 7.1 Principles to guide public place surveillance

The HPLC recommends the adoption of principles which provide an overarching framework guiding regulation of public place surveillance. The HPLC supports the principles developed by the VLRC including that:

- People are entitled to some privacy when in public places;
- Wherever practicable public place surveillance should be transparent;
- Public place surveillance conducted on a continuous basis should be carried out for a legitimate purpose that is relevant to the activities of the organisation conducting it, and
- Public place surveillance conducted on a continuous basis should be proportional to its legitimate purpose.

Participants at the surveillance forum expressed the need for surveillance to be 'transparent' and enable people to know they are being watched, by whom and for what purpose. One participant at the surveillance forum was anxious about the possibility that he was under surveillance in the premises in which he was squatting. This person was not aware if surveillance existed or could be used to prosecute him for trespass and for him this lack of clarity was a source of anxiety in addition to the stresses of his daily circumstances. As noted in part 5 of this submission, participants also referred to a number of assumptions about public place surveillance including accessibility, effectiveness, safety and crime deterrence which could be addressed (in part) by an overarching principle of transparency.

The HPLC strongly agrees that public place surveillance should be only carried out for a legitimate purpose that is relevant to the activities of an organisation. In this regard, we expect that a 'legitimate purpose' principle will be highly relevant to any registration requirement regarding use of surveillance (discussed below).

In addition to the existing principles set out in the Consultation Paper the HPLC recommends the VLRC include a surveillance principle to the effect that 'Public place surveillance should not be used to profile particular groups of people or to discriminate against people'. In the HPLC's view, the use by security personnel of CCTV and other surveillance to exclude 'undesirable' people from public areas, or to control the behaviour of such people, must be eliminated. Equally, it should be made clear that this principle of non-discrimination specifically applies in a broad sense, including to groups of people who are not



currently subject to the protection of Australian anti-discrimination legislation. Specifically, it must include reference to individuals subject to discrimination on the basis of their social status (including homelessness, employment status and being in receipt of social security benefits).

Finally, we note the Consultation Paper seeks comment on whether once off or intermittent use of surveillance practices by individuals should be regulated. The HPLC recommends that there be regulatory oversight in relation to such practices where a serious invasion of privacy has been committed.

**Recommendation 5:** That surveillance principles be adopted to provide an overarching framework guiding regulation of public place surveillance.

**Recommendation 6:** That the draft surveillance principles proposed by the VLRC be adopted.

**Recommendation 7:** That an additional surveillance principle to the effect that 'Public place surveillance should not be used to profile particular groups of people or to discriminate against people' be adopted.

**Recommendation 8:** That there be regulatory oversight in relation to one off or intermittent use of surveillance where a serious invasion of privacy has been committed.

## **7.2 The role of an independent regulator**

As described in more detail above, public place surveillance is highly relevant to the day-to-day existence of people experiencing homelessness. Participants during the forum indicated that public place surveillance has significant potential to increase discrimination, reduce privacy and affect the freedom of movement of people experiencing homelessness.

Given the potentially significant impact of surveillance on our client base and others in the community, the HPLC recommends that an independent regulator be provided with specific responsibility in relation to public space surveillance. We consider that the Office of the Victorian Privacy Commissioner (**VPC**) would be appropriate for this role. It should be noted however that should the VPC be provided with such responsibility that extra resources will be required to enable it to fulfil any regulatory, monitoring, research and compliance roles.

**Recommendation 9:** That a regulator be given specific responsibility in relation to public space surveillance.

## **7.3 Specific functions of the regulator**

### **(a) Monitoring and Research**

The HPLC notes that during the surveillance forum a number of conflicting attitudes were expressed in relation to the use of public place surveillance. Participants were in conflict as to whether surveillance improves public safety, whether it assists in deterrence or resolution of crime and as to whether it makes people change their behaviour.



The conflicting views on this issue reflect the limited public debate that exists in relation to surveillance and also the limited research on this issue. In order to address this issue and develop greater understanding of the effect of public place surveillance, the HPLC recommends that an independent regulator have a monitoring and research role in respect of surveillance issues.

In particular, the regulator should, as a matter of priority, be funded to undertake targeted research into the ways in which people experiencing homelessness are exposed to and affected by public place surveillance.

(b) Community Education

The HPLC recommends further recommends the independent regulator be charged with conducting community education in relation to privacy rights and responsibilities as set out in the surveillance principles. We refer to the surveillance principle which states that '[p]eople are entitled to some privacy when in public places' and note this principle is broadly consistent with current jurisprudence in relation to the right to privacy. Despite this, the HPLC notes that during the surveillance forum there appeared to be limited acceptance that people experiencing homelessness are entitled to a protection of their privacy. We consider that community education and information programs, conducted over time, would provide greater understanding of the entitlement and rights of people experiencing homelessness (and others) to use public space and also encourage the users of surveillance to respect these rights.

**Recommendation 10:** That an independent regulator have a broad monitoring and research role in respect of surveillance issues.

**Recommendation 11:** That funding be allocated for targeted research into the ways in which people experiencing homelessness are exposed to and affected by public place surveillance.

**Recommendation 12:** That the independent regulator implement a community education and information program in relation to privacy rights and responsibilities as set out in the surveillance principles, particularly as they relate to people experiencing homelessness.

#### 7.4 Registration

Given the increasing use and sophistication of surveillance in public places, and to provide comfort to the community (and our constituents in particular), the HPLC supports the development of a registration system for surveillance operators. This system could fall within the ambit of the independent regulator.

We consider registration to be an important aspect of any regulatory framework, which would assist the independent regulator in monitoring, research and compliance of public place surveillance. For example, participants in the surveillance forum discussed the extensive use of surveillance in emergency accommodation facilities. We consider that the right to privacy is clearly affected where people are 'on camera, 24/7' and that such systems require regulation and oversight. In addition, we consider that registration would enable researchers and policy makers to better understand what surveillance exists in an area and the ways in which people move through it. This is obviously highly important to people



experiencing homelessness who are likely to be subject to a significant amount of surveillance in public places. Finally, it has also been found in other jurisdictions that registration provides far greater ease in monitoring compliance with surveillance laws and principles, than a complaints based system alone.<sup>62</sup>

The HPLC recommends that the registration system be linked with an ability to enforce public place surveillance rules (see below) so that if a serious or sustained breach occurs an enterprise may lose registration and its ability to operate a surveillance device.

**Recommendation 13:** That surveillance users be required to register with the independent regulator.

**Recommendation 14:** That any registration system be linked with an ability to enforce public place surveillance rules.

**Recommendation 15:** That where an enterprise is found to have breached certain surveillance rules or registration requirements, that the independent regulator have the power to withdraw registration and/or withdraw authority to operate a surveillance device.

## 7.5 Statutory Rules vs Advisory Guidelines and their content

The HPLC supports the Office of the Victorian Privacy Commissioner's submissions in relation to voluntary best-practice standards and mandatory codes of practice<sup>63</sup>. We agree that advisory guidelines are no replacement for binding obligations and recommend that statutory rules be implemented in respect of public place surveillance, rather than standards and codes. Furthermore, we recommend that any statutory rules be required to give full effect to the overarching surveillance principles discussed above.

During the surveillance forum a number of participants expressed concerns about publication of surveillance footage. One participant voiced the opinion that where the media publishes images of young people assaulting other people, that publication exacerbates the likelihood of violence. Another participant referred to footage taken of television presenter Andrew O'Keefe when he was intoxicated and questioned the legal right of a person to own their own image. As a result of these uncertainties, the HPLC considers that any statutory rules should clarify the position about the retention, use and release of material obtained from records of surveillance devices. Although the privacy laws may apply to this information, it is not clear that this is the case, and many entities appear to assume they do not apply.<sup>64</sup> As a result, specific rules should be set out for the handling of surveillance materials (eg video footage). In particular, the rules should set out how long materials can be retained, in what circumstances material can be released to police/other officials and whether materials can be catalogued or included in a database.

<sup>62</sup> Casten Wiecek and Ann Rudinow Saetnan., *Restrictive? Permissive? The Contradictory Framing of Video Surveillance in Norway and Denmark* (2002), 22-3 taken from VLRC, 'Surveillance in Public Places: Consultation Paper', p 143

<sup>63</sup> Office of the Victorian Privacy Commissioner, Submission to the Victorian Law Reform Commission, July 2009, p 5

<sup>64</sup> Consultation Paper paragraph 5.70.



In addition, we note that during the surveillance forum a number of participants commented on the ability to obtain surveillance footage for assistance in criminal matters. One participant commented that if footage could be used by the prosecution it should also be available to the defence. Furthermore it is foreseeable that people experiencing homelessness are likely to have other uses for surveillance footage including for purposes of bringing a public liability claim, making a Victim of Crimes Assistance Tribunal claim or supporting claims of discrimination. In light of the potential benefits of surveillance for people experiencing homelessness, we recommend that any statutory regulation provide for access to surveillance material. Furthermore, we recommend that people experiencing homelessness be provided with assistance to access to surveillance material including the ability to lodge claims for such material by telephone.

**Recommendation 16:** That statutory rules be made in respect of public place surveillance.

**Recommendation 17:** That statutory rules be required to give full effect to the surveillance principles.

**Recommendation 18:** That statutory rules should clarify the position in relation the retention, use and release of material obtained from surveillance devices.

**Recommendation 19:** That any statutory regulation provide for access to surveillance material.

**Recommendation 20:** That people experiencing homelessness be provided with assistance to access to surveillance material including the ability to lodge claims for such material by telephone.



## 7.6 Complaints and enforcement

The HPLC considers that the independent regulator should be given an 'own motion' power to investigate the use of surveillance in public places together with the ability to act on individual complaints. We anticipate the 'own motion' power would be supported by a registration regime (discussed above) and would be of great assistance to clients in marginalised and disadvantaged circumstances, for whom access to justice is often a considerable challenge. Furthermore, together with the investigation power we recommend the independent regulator be given the power to obtain information and compel production of documents in relation to an investigation. Such a power would be appropriate for a number of reasons including the difficulty in investigating matters relating to surveillance and the difficulty for complainants to substantiate concerns about surveillance practices.

The HPLC recommends that an affected individual be able to initiate a complaint where a statutory rule in respect of public place surveillance has been breached. Furthermore, we consider the independent regulator should be given jurisdiction to consider and conciliate such complaints. Where an enterprise is involved in a serious, flagrant or persistent breach of a statutory rule, we recommend the independent regulator be given the power to issue a compliance notice which might, for example, require a party to take specific action removing or altering surveillance arrangements.

The HPLC considers that enforcement and compliance measures are a critical part of any regulatory framework. If the independent regulator is unable to resolve a complaint, we recommend that the Victorian Civil and Administrative Tribunal jurisdiction be empowered to hear complaints. We consider compensation to be an important part of the enforcement process but note it will be difficult for people experiencing homelessness to prove loss or damage in respect of surveillance activity. On this basis we recommend that where an enterprise is found to have breached a statutory rule in respect of public space surveillance that compensation be payable in respect of pain and suffering; however, in anticipation of concerns about this proposal, we note that a compensation ceiling may be appropriate to cap the amount of available damages awarded.

**Recommendation 21:** That the independent regulator be given an 'own motion' power to investigate the use of surveillance in public places together with the ability to act on individual complaints.

**Recommendation 22:** That the independent regulator be given the power to obtain information and compel production of documents in relation to a public place surveillance investigation.

**Recommendation 23:** That either an independent regulator or an affected individual should be able to initiate a complaint about breaches of statutory surveillance rules or principles.

**Recommendation 24:** That the independent regulator be given jurisdiction to consider and conciliate complaints in respect of public place surveillance which breaches a statutory rules in respect of this issue.

**Recommendation 25:** That the Victorian Civil and Administrative Tribunal be provided with jurisdiction to hear complaints that cannot be resolved by the independent regulator.



<b>Recommendation 26:</b> That where an enterprise is found to have breached a statutory rule in respect of public space surveillance that compensation may be awarded in respect of pain and suffering.
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## 8. Conclusion

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The issues of homelessness and public space use and surveillance are inextricably linked. Whether surveillance of public spaces is good or bad for people experiencing homelessness, it seemed clear to participants at the surveillance forum that it was here to stay. Some participants told the HPLC that surveillance may be able to attenuate some of the difficulties and hardships involved in living on the streets. They saw surveillance as having the potential to increase safety as well as reduce crime and discrimination against people experiencing homelessness. On the other hand, there are substantial negatives associated with public surveillance for people experiencing homelessness, including reducing space for social and cultural engagement; reducing anonymity and contributing to 'profiling' of people with particular attributes; and potentially increasing police of people experiencing homelessness.

The HPLC considers that protection of the human rights to privacy; non-discrimination and freedom of movement should be the starting point for any examination of public place surveillance. Despite the potential positives of surveillance, the HPLC considers that addressing the negative aspects of surveillance through law reform and regulation is crucial. It is also extremely important that further work is undertaken to understand the impact of surveillance in our society and its capacity to isolate people, amplify discrimination and further disadvantage people with an experience of homelessness. This work must then be followed by action to reduce these deleterious effects of surveillance, starting with better regulation, monitoring and complaints mechanisms.