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Attn: Dave Mitchell

Dear Mr Hatzistergos

Request for submission on the *Workplace Surveillance Act 2005 (NSW)*

I refer to your letter dated 30 November 2010 in which you invited me to provide a submission on the *Workplace Surveillance Act 2005 (NSW)* (WS Act) as part of the review of that Act. The following comments are made in accordance with my functions under section 36(2)(g) of the *Privacy and Personal Information Protection Act 1998 (NSW)* (PPIP Act) to provide advice on matters relating to the privacy of individuals. As you know this Office has no statutory role under the WS Act, however the use of surveillance devices is a significant privacy issue because firstly it involves the collection of personal information of those individuals who are subject to it, and secondly, it involves individuals being subject to the gaze of employers which can have an effect on freedom of movement. This Office has over six years experience in providing information and advice to the general public, to private organisations and to NSW government agencies about the statutory requirements and the means of redress under the WS Act and the now repealed *Workplace Video Surveillance Act 1998 (WVS Act)*. This experience has provided a solid platform from which we have been able to observe the effectiveness and shortcomings of its operation with regard to the protection of workplace privacy.

In his second reading speech on the Workplace Surveillance Bill (the WS Bill), the then Attorney General the Hon Bob Debus stated that the aim of the WS Bill was to 'create a sensible and practical system for regulating workplace surveillance by employers of employees'¹. The general operation of the Act appears on its face to meet to this objective to the extent that it is not a difficult law to comply with, it encourages transparency in relation to overt

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[http://www.parliament.nsw.gov.au/Prod/parlment/nswbills.nsf/0/941266a03eb10718ca256ff600242edb/\\$FILE/A4705.pdf](http://www.parliament.nsw.gov.au/Prod/parlment/nswbills.nsf/0/941266a03eb10718ca256ff600242edb/$FILE/A4705.pdf)

surveillance, and it imposes some rigour in relation to covert surveillance. However, over the course of its operation there has been a noticeable shift in the balance of the sensible and practical nature of the system away from the expectation of employee privacy toward a favouring of the needs and interests of the employer. Employees are not generally in a position to argue against the introduction of surveillance. They have to decide whether to surrender themselves to workplace surveillance or to work elsewhere. This is a difficult choice when one has financial and family commitments and it will sometimes result in individuals reticently agreeing to submit themselves to surveillance in order to secure an income.

The shift in the balance towards the interests of employers has in part been driven by ever-increasing technological sophistication (particularly in the area of web-based applications), by the exponential digitisation of information and the relatively low cost of surveillance devices². In my view, the review of the WS Act is an important opportunity to address this imbalance so that the statutory scheme is tilted less towards the needs of the employer and more toward the needs of the employee. The need to do so is rendered more acute because of the gaps in the patchwork of privacy laws in NSW. In particular, the exemption for employee records under the *Privacy Act 1988* (Cth)³ means that those individuals employed by private sector employers in NSW who believe that their personal information has been improperly obtained via surveillance devices do not have the option of bringing a workplace privacy complaint to the Office of the Australian Information Commissioner⁴. If the growing imbalance is not addressed it is likely that workers in NSW will be left with little expectation of workplace privacy.

In any case it is our position that any laws which go to the protection of individual rights should be consistent throughout Australia. In our view there should be a national legislative approach to the protection of privacy in the workplace, akin to the suggested national approach to privacy laws mooted by the Australian Law Reform Commission in 2008⁵. With regard to workplace surveillance it is important that all employees in Australia be able to expect the same level of protection against intrusion into their working life no matter where they live in Australia.

Governance

In our experience there is an expectation on the part of individuals seeking advice or lodging a complaint that this Office will be able to intervene in situations where an employer may have failed to comply with the

² This phenomenon may have had some impact on the alarmingly high number of surveillance warrants being granted to law enforcement bodies in NSW: <http://www.smh.com.au/nsw/spying-on-the-increase-but-the-bugs-dont-necessarily-bite-20110117-19u58.html>

³ Section 7B(3) *Privacy Act 1988*.

⁴ Formerly the Federal Privacy Commission. I should point out that it is possible for me as Acting Privacy Commissioner to accept and investigate privacy related matters under section 36(2)(k) of the PPIP Act but the standards against which I might measure the alleged conduct are best-practice standards only and have no legislative force. As noted above I have no authority with regard to compliance with the WS Act.

⁵ <http://www.austlii.edu.au/au/other/alrc/publications/reports/108/>

requirements for overt workplace surveillance or breached the provisions relating to covert surveillance, particularly with regard to the placing of surveillance devices in change rooms, toilets or showers⁶. As noted above, this Office has no statutory role under the WS Act, but because the installation of surveillance devices in the workplace is a significant privacy issue and because there is no one point of contact for information or advice about the WS Act in NSW we are a logical point of contact for employees, representative organisations and to a lesser extent employers and employer groups⁷. While the preamble to the PPIP Act provides that the PPIP Act provides for the protection of the privacy of individuals generally and because section 36(2)(k) empowers me to deal with privacy related matters I am able to provide advice in response to enquiries about the WS Act and in some cases investigate complaints about workplace surveillance. However if I were to investigate a complaint about workplace surveillance I would not be able to make a finding with respect to compliance the provisions of that Act or refer the matter for prosecution without your consent. Because there are no offence provisions in relation to Part 2 matters, complainants who believe their employer has failed to comply with the conditions for overt surveillance find themselves in a regulatory void. Where non-compliance is easily remedied in nature (by such things as the provision of notice and/or the erection of signs), prosecution via local courts appears to be cumbersome and is not favoured by complainants. The expectation of complainants is that they should be able to lodge a complaint with a regulatory body such as this Office, the Department of Industrial Relations or the Office of Fair Trading.

In this regard there appear to be no compelling reasons why the WS Act should fall within the portfolio of the Attorney General rather than the Minister for Industrial Relations. The NSW Department of Industrial Relations has information about the WS Act on its website⁸ and is a logical point of contact for employers, employees and representative bodies. In the alternative, we suggest the establishment of a Workplace Commissioner whose role would be to monitor compliance with matters pertaining to the workplace such as compliance with the WS Act. For operational and service efficiencies, such a role could be coupled with an existing statutory independent officer currently engaged in compliance and oversight functions.

Compliance

As noted above, this Office has been a source of information and advice to members of the public, to businesses and to government and non-government agencies regarding workplace and general surveillance issues generally for over ten years. Of all the telephone and email surveillance

⁶ In this regard we note that sections 15 and 26 prohibit surveillance in these areas.

⁷ This includes the provision of copies of the '*Short Guide to the Workplace Surveillance Act 1995*⁷ which were issued by the then Legislation and Policy Division of the Attorney General's Department.

⁸ http://www.industrialrelations.nsw.gov.au/Employers/Employer_responsibilities/Workplace_surveillance.html

enquiries we have received since the commencement of the WS Act⁹, around 4.5% of those matters concerned matters regulated by the WS Act. In our view the fact that we receive such enquiries is a demonstration firstly of the lack of general awareness that this Office has no formal role under the WS Act and secondly a lack of awareness that the Legalisation and Policy Division is responsible for its administration and is therefore the appropriate source of information and advice.

Some of the matters raised by employees and union representatives include:

- the use of information obtained via video surveillance for performance monitoring
- no notification of surveillance given to employees
- no signs put in place
- use of global positioning satellite devices when employees not at work
- employers to monitoring emails without the knowledge of employees
- video surveillance with audio capacity¹⁰
- no policies in place in relation to collection, storage, use and disclosure and destruction of and access to surveillance materials
- difficulty laying a complaint against employer with police¹¹

Most of these matters relate to the situations where an employer has carelessly installed surveillance devices rather than situations in which an employer has obtained an authority to conduct covert surveillance¹². In regard to employers compliance with 'covert surveillance authorities' approved under Part 4 of the WS Act, we note that there has been a slight decline in the total number of authorities approved in the last three reporting years¹³. On its face this is an indication that fewer workplaces subject to covert surveillance, however the reports should not be viewed as a reliable indicator of the use of covert surveillance by employers in NSW for two reasons. Firstly, covert surveillance impedes detection and it is possible that employers have installed covert devices without recourse to an authority. There is no mechanism for the Legislation and Policy Division to inspect

⁹ Total number of surveillance enquiries on the Office of the Privacy Commission records database from 7 October 2005 to 2 February 2011 was 382, 84 of which directly related to matters regulated by the WS Act.

¹⁰ The definition of surveillance in the WS Act in section 3 excludes surveillance by means of a listening device: 'Camera surveillance that is regulated by [the WS] Act will also be regulated the Surveillance Devices Act 2007 if the camera is used to record a private conversation.'

¹¹ Non-compliance with Part 2 (overt surveillance requirements) is deemed to be covert surveillance. Improper covert surveillance and other offences under the Act or regulations may only be prosecuted with the authority of the Attorney General, an officer prescribed by the regulations, by the secretary of an industrial organisation or by the person who was the subject of the surveillance

¹² As we understand it there have been a handful of cases heard in the Industrial Relations Commission such as *Staal and Tupene and Health and Research Employees' Association of New South Wales (on behalf of Nagy and Others) and Western Sydney Area Health Service [2004] NSWIRComm 27*.

¹³ It was reported that there were 48 applications approved in 2007, 39 in 2008 and 31 in 2009. In this regard we note that the fifth column of the table in the report describes the types of surveillance as: (a) video camera (b) still camera (c) computer and (d) computer tracking, however the some of returns from the various court houses use other terms such as 'workplace surveillance', 'covert', video/audio, 'Covert – static camera physical' 'Covert camera and records'. We suggest that the use of terminology describing the mode of surveillance be consistent with the terms required in section 28(2)(c) the WS Act and Form 1 in Schedule 1 of the WS Regulation to allow a more meaningful year to year comparison of the numbers of applications received, refused and approved.

workplaces to monitor compliance with the WS Act. Secondly it is possible that employers might not be truthful in reporting matters under section 35 which requires that an employer furnish the issuing Magistrate with a report regarding certain matters including the period of surveillance, the details of the surveillance record and the whether the surveillance has been removed. There are no formal means by which the reports can be audited. Given these concerns we therefore suggest that there be a requirement for the body responsible for the administration (preferably the Department of Industrial Relations or a Workplace Commissioner as discussed above) to conduct audits of workplaces generally to monitor compliance with Parts 2 and 3 of the WS Act. The administrator should have the power to inspect workplaces to monitor compliance with the conditions for overt surveillance and with section 35 reports. The administrator should also be the source of advice about the WS Act and should have the power to investigate, resolve complaints and to prosecute offences.

Other recommendations

- We suggest that consideration be given to whether there are currently other industrial practices that should be considered as forms of surveillance such as drug and alcohol testing and the use of biometric technology such as finger and iris scanning. These practices should only occur in workplaces where the collection and use of that information is reasonably necessary and directly related to the particular employment because such practices involve close contact with the body and render information about individuals which is particular to that person. Additionally, (as with certain professions) such activities should only occur when specifically sanctioned by law. Misuse of such information could cause significant harm to the individual through identity theft and identity fraud. The disclosure of the information should be prohibited except with leave of a local court.
- We also suggest that there be a mechanism in the WS Act or Regulation to take account of the introduction of new surveillance technologies such as radio frequency identification devices or any other devices which are capable of capturing information about an employee without their knowledge.
- We further suggest that the WS include a requirement that employers must consult the 'Workplace Commissioner' (or the Privacy Commissioner) prior to the introduction of any overt surveillance devices into the workplace they should be required to and prepare a surveillance policy identifying the intended purposes of the device, identify any possible secondary uses, and whether such uses might be employed and if so, how the subject individuals might be notified and given the opportunity to opt out of those uses. Consultation with a regulator will provoke critical questions such as, 'do I really need to monitor my employees?' and 'will the impact on the privacy of the employees outweigh the benefits of surveillance'. Having asked these

questions some employers may decide not to undertake employee surveillance or they may decide to use devices or procedures which minimise the collection of information about employees.

These measures, along with consistent national workplace surveillance laws and consideration of a more effective regulatory, compliance and oversight regime by the establishment of a NSW Workplace Commissioner (or similar equivalent responsibilities) would in our view go a long way to addressing imbalance in WS Act further toward the interests of the employee and to re-establishing the reasonable expectation of workplace privacy.

I hope this submission assists you in reviewing the WS Act. Please contact Ms Jenner on (02) 8019 1600 if you would like to discuss any of the above comments.

Yours sincerely

John McAteer
Acting Privacy Commissioner