

**VICTORIAN LAW REFORM COMMISSION
WORKPLACE PRIVACY: OPTIONS PAPER**

SUBMISSION OF THE VICTORIAN INDEPENDENT EDUCATION UNION

1. General Comments

1.1 The Victorian Independent Education Union (VIEU) is pleased to take this opportunity to provide a submission in response to the Workplace Privacy Options Paper published by the Victorian Law Reform Commission.

1.2 VIEU represents 14,000 workers in non-government education including teachers, school officers, clerical and administrative staff, teacher aides and grounds and maintenance staff. These employees work in Catholic Schools, Independent Schools, the Catholic Education Office and with Private Education Providers.

1.3 As acknowledged in the Victorian Law Reform Commission Workplace Privacy Issues Paper, privacy is a human right under public international law. Further, privacy, autonomy and dignity are inextricably linked. Yet, Australia is lagging behind other Western democracies that recognise employee privacy, and privacy in general as a “fundamental right at the core of an organised free society”.¹ It is of great concern that in Australia there is no legal recognition of a right to privacy and no comprehensive statutory definition of privacy.²

1.4 Given the technological change in recent years, the capacity for employers to monitor employees through a broad variety of mechanisms has dramatically increased. “Never before have employers had such significant capacity to monitor employees and their performance, and to intrude upon their private lives. Employers’ monitoring and surveillance capacities have been greatly enhanced by the combination of improvements in technology, and reductions in its cost”.³

1.5 “The centrality of work to people’s lives makes the issue of privacy protection in the workplace an important one”.⁴ It must also be recognised that the importance of work extends beyond financial remuneration for many employees. The importance of the social aspect of work, the values shared in

¹ Peter Isajiw, ‘Workplace Email Privacy Concerns: balancing the Personal Dignity of Employees With the Proprietary Interests of Employers’, (2001) *20 Temple Environmental Law and Technology Journal* 73, 104. Also discussed in Karen Wheelwright, ‘Using email and the internet at work – your rights and obligations’, paper delivered to the VIEU Legal Conference 2004

² Victorian Law Reform Commission, *Workplace Privacy Issues Paper* (2002), 8

³ Colin Fenwick and Breen Creighton, ‘Australia’, in Roger Blanpain (ed) *The Evolving Employment Relationship and the New Economy*, Kluwer Law International, 2001, 3.

⁴ Victorian Law Reform Commission, *Workplace Privacy Issues Paper* (2002), 1

the workplace, the relationships that exist between employees and their employers and the contribution that workers make to the community is critical and cannot be undervalued. VIEU believes that it is in this context that the importance of workplace privacy must be examined.

2. Options for Reform

2.1 Of the two options proposed by the Victorian Law Reform Commission Options Paper, VIEU advocates for Option 1, with some provisos as set out below. That is:

A separate Act that would require employers to seek authorisation in advance from a regulator before undertaking either some or all surveillance, monitoring or testing practices in the workplace.

2.2 For the purposes of simplicity VIEU has completed this submission by answering the questions set out in the Victorian Law Reform Commission Workplace Privacy: Options Paper in respect to Option 1. These are set out below, and the answers provided also address the specific concerns that VIEU believes must be addressed within the model proposed under Option 1.

2.3 VIEU believes that as a consequence of the variety of forms of surveillance, monitoring and testing, the Act must be comprehensive in nature. This is addressed further below.

3. Responses to Questions in the Victorian Law Reform Commission Workplace Privacy: Options Paper

3.1 Should employers be required to seek authorisation from a regulator before conducting workplace surveillance, monitoring and testing? If so, what issues should be considered by the regulator in determining whether to authorise the use of these practices?

3.1.1 VIEU submits that all employers should be required to seek authorisation prior to conducting workplace surveillance, monitoring and testing. That is, VIEU believes that there should be a prohibition on any workplace surveillance unless authorised by the Act. The Act should operate from the presumption of privacy, and any submission for surveillance, monitoring or testing should proceed on the basis that the applicant needs to establish why the presumption of privacy is to be overturned.

3.1.2 Applicants should need to address what steps have already been taken to address the issue for which any application is being made. The authority should be satisfied that all other alternatives have genuinely been explored prior to the granting of any application for workplace surveillance, monitoring or testing. For example, there is a clear difference between an employer seeking to determine whether an employee is engaging in illegal activity, or whether the authority is to monitor the behaviour of an employee for

performance purposes. Further, the applicant should be required to demonstrate how the activity, should it be authorised, will address the problem.

3.1.3 In addition, the authority should take into account the impact that any surveillance will have on other members of the community. For example, should a school apply for an exemption it is critical that the Authority consider a range of school community members in making a decision. In addition to teaching and non-teaching staff employed by schools, any decision will also need to incorporate the potential breach of privacy of students, parents, volunteers, and the broad range of visitors who come into contact with schools.

3.1.4 Given the enhanced capacity of employers to monitor employees, there is a need for the Act to ensure that any surveillance is in accordance with principles of natural justice and procedural and substantive fairness. The Act should take into account that there is an unequal power balance between employers and employees, and that without the protection of the Act, employees will have little, if any, right to privacy. Consequently, the Act needs to be comprehensive in nature to ensure that it covers all forms of surveillance and will need to be regularly reviewed to ensure that it covers any new forms of surveillance, monitoring and testing.

3.2 Are there any practical difficulties with the concept of industry-wide authorisations?

3.2.1 VIEU is opposed to the concept of industry-wide authorisations. VIEU submits that authorisation should only be granted on a case by case basis to individual workplaces subject to the application of clearly understood principles.

3.2.2 The concept of industry-wide authorisations makes the incorrect assumption that all workplaces within a specific industry are homogenous, when this is clearly not the case. There is a real danger that should industry-wide authorisations be granted, they would allow employers unfettered use of surveillance or monitoring activities in what may be inappropriate circumstances.

3.2.3 VIEU cannot envisage circumstances that would genuinely warrant an industry-wide authorisation. For example, if authorisation is granted to detect unlawful activity at a specified workplace, there is no apparent justification for extending approval more broadly. This will only result in an unnecessary intrusion on employee privacy.

3.2.4 Given the power imbalance that already exists between employers and employees within workplaces, VIEU submits that industry-wide authorisations would only operate to the detriment of employees within workplaces.

3.3 Are there any surveillance, monitoring or testing practices which should be permitted without authorisation? If so, which ones and why?

3.3.1 As stated above, VIEU believes that the Act should operate from the presumption of privacy, and any submission for surveillance, monitoring or testing should proceed on the basis that the applicant needs to establish why the presumption of privacy is to be overturned. Accordingly, VIEU believes that no surveillance, monitoring or testing practices should be permitted without authorisation. VIEU submits that the privacy of employees should be a fundamental right.

3.3.2 Further, VIEU submits there should be no capacity for applications to be made by third parties, particularly parties external to the industrial system. For example, VIEU is concerned that parents may seek exemptions in order to monitor their children. Such exemptions would clearly compromise the privacy of other members of the school community.

3.4 Should overt and covert practices be treated differently? If so, why?

3.4.1 VIEU submits that overt and covert practices should be treated differently. However, both overt and covert practices should be approved by the Authority, with clear overriding principles addressing the rights and responsibilities of all parties.

3.4.2 As outlined in the Options Paper, The *Workplace Video Surveillance Act 1998* (NSW) provides an example of legislation that operates effectively to protect employees against unwarranted monitoring or surveillance.⁵ Whilst restricted to video surveillance only, VIEU believes that this legislation could be used as the basis for a more comprehensive legislative framework in Victoria. However, the VIEU notes that this legislation requires the authorisation of covert surveillance only and strongly advocates for an Act that requires the authorisation of both covert and overt surveillance.

3.4.3 This legislation presumes that surveillance is covert unless employees are notified in writing of intended video surveillance 14 days in advance, the cameras are clearly visible and signs notifying people (in addition to employees) that they may be under surveillance or clearly visible.⁶

3.4.4 Covert surveillance is only permissible when carried out solely for the purpose of establishing whether or not an employee is involved in unlawful activity and the surveillance is authorised by the appropriate authority and issued by a magistrate. Significant financial penalties apply to employers who breach legislation, including using recordings obtained by surveillance for purposes other than that for which they were approved. For example, surveillance may not be used for the purpose of performance reviews.⁷

⁵ Victorian Law Reform Commission *Workplace Privacy: Options Paper*, 2004, 106 - 7

⁶ *Workplace Video Surveillance Act 1998* (NSW), s4(1)

⁷ *Workplace Video Surveillance Act 1998* (NSW), s9(3)(a)

3.4.5 This is of particular concern to VIEU given the range of people who visit schools daily, ranging from employees, volunteers, parents, students, volunteers, etc. VIEU is most concerned that such a broad range of members of the community could be submitted to unwarranted surveillance and monitoring without their knowledge.

3.4.6 It is critical for employees to be made aware of the purpose for which information is collected for surveillance, and that such information may only be used for the primary purpose for which it was intended. For example, VIEU is concerned about the potential for monitoring and surveillance to be utilised for the purpose of information gathering in performance reviews. The awards and agreements that cover members of staff who work within the Independent school sector already provide appropriate mechanisms for employers to conduct performance reviews, and VIEU is concerned about the motives of employers who would seek to misuse surveillance and monitoring for this purpose. In addition, VIEU submits that there would be little chance of covert surveillance, monitoring or testing without appropriate approval, meeting the principles of natural justice and procedural and substantive fairness.

3.5 Should there be a mechanism to ensure proper consultation or communication with workers during the authorisation process? What is the best way to do this?

3.5.1 VIEU believes that it is critical that proper consultation or communication takes place with workers during the authorisation process.

3.5.2 VIEU submits that all employees should have a right to consultation entrenched in the Act. This should also incorporate the right for the relevant Trade Union/s to be included in the consultation process. This is detailed further at section 3.2.

3.5.3 The application process should require an employer to provide all affected employees with comprehensive information regarding why a notice is being sought prior to any hearing. In addition, all relevant detail, such as the problem that the employee is seeking to address, and any safeguards to be put in place to guard an employee's privacy should be provided to each employee in writing. Employees should be given an opportunity to raise any concerns with the employer, and guaranteed a genuine process of consultation.

3.6 How can such a procedure be made effective, given the imbalance of power that may exist between an employer and workers?

3.6.1 A requirement of the Act should be that the relevant Trade Union has been notified, given the same information as employees, an opportunity to meet with and interview affected employees and involvement in the consultative process. Trade Unions should be authorised to appear on behalf of employees and a notification provided by the authority as to matters such as hearing dates. Evidence that a genuine consultative process has been undertaken should be provided to the Authority at the time of hearing

3.6.2 VIEU is concerned that the legislation seeks to protect employees who would otherwise be disadvantaged from the unequal power base between employers and employees by virtue of the contract of employment. Accordingly, a complaints based review process should be enshrined in the legislation to bring suspected or known abuse of the Act to the Authority. The Authority should be vested with the power to conciliate any dispute in respect of the Act and hear and determine disputes in regard to applications.

3.7 Would it be more appropriate for a court to assess authorisation applications than a regulator?

3.7.1 VIEU submits that the authority created under the new Act would need to be a stand-alone authority, presided over by a judicial officer, for example a County Court judge. VIEU submits that this is necessary to ensure that the authority has the necessary level of authority and judicial experience. Accordingly, there is a need for funding to ensure that body can operate independently and not just as an addition to an existing authority. VIEU submits that the authority should include an inspectorate that would regularly report to employee and employer organisations.

3.7.2 Further, VIEU advocates that authorisation granted should be based on a series of minimum standards. Authorisations should be given only for a fixed period, and an appeals process should be incorporated into the legislation.

3.7.3 VIEU believes that it is critical that there is no capacity for the parties appearing before the authority to be represented by counsel. It is submitted that this would impose enormous costs, particularly on employees, that would discourage employees from seeking to be properly represented.

3.8 Is the proposed test to be used by the regulator that a practice is 'reasonable in the circumstances' an appropriate one?

3.8.1 As previously stated, VIEU submits that the Act should operate from the presumption of privacy. Hence, it would be appropriate to develop minimum standards of Workplace Privacy that should be considered by the authority prior to any approval being granted. Whilst 'reasonable in the circumstances' appears to be a logical test, it should be premised on a presumption of privacy and minimum standards.

3.8.2 In addition, the Act should incorporate appropriate powers for the authority to review the implementation of the Act and inquire into workplace surveillance either at its own initiative or at the application of employer organisations and unions.

3.9 What is the preferred method of handling complaints – conciliation or direct investigation by the regulator, or some element of both?

3.9.1 VIEU advocates that the preferred method of handling complaints would include elements of conciliation and direct investigation by the authority.

3.9.2 VIEU believes that the powers of direct investigation ensure that any allegations of inappropriate use of surveillance, monitoring and testing can be appropriately investigated. The power to inspect alleged breaches of the Act offers employees an important level of protection and when coupled with severe penalties for breaching the Act, should offer a significant disincentive for employers to abuse surveillance, monitoring and testing procedures.

3.9.3 Further, it is the experience of VIEU that the process of conciliation offers parties in dispute an important opportunity to explore the potential for resolution. VIEU believes that conciliation would be an important aspect of the dispute resolution process contained within the Act.

3.10 In your experience of other jurisdictions where the regulator has an inspectorate (such as OHS), how effective is the inspectorate model?

3.10.1 VIEU believes that the inspectorate model has the capacity to be effective. However, the level of effectiveness will be dependent on the provisions of the Act and an appropriate level of funding provided.

3.10.2 VIEU believes that the Occupational Health and Safety Act is appropriate and powerful legislation, where the inspectorate model works effectively. This is largely a consequence of fact that the Act operates from a premise that employees have a right to a healthy and safe workplace, and specifies the role and powers given to elected Health and Safety representatives.⁸

3.10.3 VIEU also submits that the most appropriate structure to deal with Workplace Privacy and surveillance matters should be tripartite in nature, with designated roles for government, employers and unions.

3.11 What level and kinds of penalties should there be for breaches of the Act?

3.11.1 VIEU submits that breaches for penalties should be significant to ensure that all parties can have confidence that the provisions of the Act will be applied appropriately. Accordingly, financial penalties and restrictions on any offender's ability to apply for further authorisations/exemptions should be considered.

⁸ *Occupational Health and Safety Act 1985*

3.12 Is this enforcement regime appropriate? Are there any other mechanisms for enforcement that should be considered?

3.12.1 VIEU believes that legislation is necessary due to the increasing use of surveillance in the workplace. Should the Act operate from the presumption of privacy, a comprehensive legislative process will need to be enacted to ensure that any workplace surveillance, monitoring or testing operates in accordance with clearly understood principles. At all times the Act should afford employees with the right to natural justice and procedural and substantive fairness. VIEU submits that it is critical that the Act recognises that there is clear power imbalance between employers and employees, and operates to protect employees who would otherwise be extremely vulnerable.

3.12.2 As previously stated, VIEU believes that *The Workplace Video Surveillance Act 1998* (NSW) provides an example of legislation that operates effectively to protect employees against unwarranted monitoring or surveillance. Whilst VIEU advocates for legislation that is more comprehensive in nature, it is believed that the principles of *The Workplace Video Surveillance Act 1998* can be extended to the proposed Act.

3.13 Should there be some lead time before the authorisation process applies?

3.13.1 A transition period of 12 months will provide an appropriate time to allow all parties to understand and therefore comply with the legislation. This would allow the Authority to commence operations, produce relevant material, publicise the new requirements, address relevant bodies such as trade unions and employer associations and allow an effective transition period.