

Listening Act goes looking

On 1 January 2000, the Victorian government's Surveillance Devices Act 1999 came into operation, extending state laws well beyond "listening devices".

Philippa Campey investigates.

The Victorian *Surveillance Devices Act 1999* was enacted on 1 January 2000 and repeals the *Listening Devices Act 1969*. It is intended to update the existing *Listening Devices Act 1969* to encompass new technologies. Whereas previous legislation applied only to listening devices, the new Act covers listening devices, data surveillance devices, optical surveillance devices, including binoculars, and tracking devices.

Rhetoric during parliamentary debate of the Surveillance Devices Bill indicates that the improvement of privacy protection has informed the introduction of the law. "This is an extremely important development in the protection of both privacy and civil liberties of Victorian citizens," said Ron Bowden (*Hansard* 11 May 1999).

Yet, also motivating the new Act seems to be a need to give law enforcement officers more power to prevent and punish crime. "If an absolute prohibition [of surveillance devices] is imposed which will cover all police officers and law enforcement officers we might as well be giving those who break the law an advantage over those who enforce it," said then shadow Attorney General Rob Hulls.

Issues of privacy cited during parliamentary discussions to justify the Bill, include infringements on public figures' lives, such as the case of Senator Bob Woods in 1997.

At the time, Senator Woods was emerging from an extra-marital relationship and was also being investigated by Federal Police over allegations he had rorted his parliamentary expenses. On 7 February 1997 *The Daily Telegraph* published a photograph showing Woods and his wife in their back yard, with the headline: "In the garden of their home, a senator and his wife confront a scandal". The photograph was taken on public land, using a telephoto lens.

The Australian Press Council found that discussion in the accompanying story of Woods' alleged parliamentary expenses rort and his extra-marital relationship were of public interest, but that the publication of the photograph was a "blatant example of [an] unjustified breach of privacy." (Australian Press Council (1997) Adjudication No. 916 (April 1997): <http://www.austlii.edu.au/au/other/apc/916.html>). *The Daily Telegraph* unsuccessfully argued that as no trespass was committed in taking the photograph, the picture was legal and therefore justified.

Under the *Surveillance Devices Act 1999*, the photograph would still be legal because the photographed activity occurred "outside a building", although it would still infringe the Press Council's rules on ethical reporting.

The case of Lindsay Fox erecting video surveillance cameras on his property to survey the beach in front of his house, was also cited in parliamentary debate. "Mr Fox has no right to spy on people," said Rob Hulls. But in fact, Mr Fox does have the right, under both the old and new laws, because he is videoing activities that occur outside a building.

These two examples serve to highlight a flaw in the legislation. The definition in the Act of "private activity" is:

- any activity carried on in circumstances that may reasonably be taken to indicate that the parties to it desire it to be observed only by themselves, but does not include:
 - an activity carried on outside a building
 - an activity carried on in circumstances in which parties to it ought reasonably to expect that it may be observed by someone else.

So the legislation does not prohibit surveillance of private activities occurring outside a building.

If the new Act does not increase the protection of privacy in these circumstances, over and above a technological 'update', then its effect seems to be to increase the power police have in gathering evidence by way of surveillance devices.

The Scrutiny of Acts and Regulations Committee found that, contrary to the expressed intentions of Parliament, individuals' privacy could now in fact be threatened by

continued on page 17 >

Listening Act goes looking

... continued from page 8

ss. 23 and 24 of the Act. These give the police the right to use any person's property for surveillance. There is now a positive duty on citizens to assist in the collection of evidence against suspects, and they are subjected to a criminal sanction for contravening an assistance order or even telling a close friend about the situation. The Committee found this to be an intrusion into the rights characterised as a 'right to home privacy'. The Committee also noted that assisting police with criminal investigations could potentially expose the individual to reprisal. The legislation therefore represents a shift in the balance away from the rights of individuals and the presumption of innocence "as part of making the gathering of evidence easier".

Nigel Waters, former Head of the Privacy Branch of the Human Rights and Equal Opportunity Commission of Australia, has warned of a "function creep" in the use of surveillance technology.¹ As more police surveillance activity is contracted out to private companies, the potential for the abuse of information is increased. The control of gathered information in the hands of private companies may become increasingly difficult. Secondary uses of information could be for marketing and advertising strategies through the identification of behavioural trends, or even voyeurism or blackmail, he says.

It is a matter of concern that, in the name of crime prevention, police potentially have both the technology and power to target any kind of anti-social, or even abnormal behaviour. The legislation does require that courts must take into account a number of

matters, including privacy, before granting a warrant for the use of a surveillance device, and there are reporting requirements.

Certainly these requirements are a safeguard against abuse of police power, but the shift in emphasis from individuals' to police rights is undeniable. This is reminiscent of George Orwell's predictions of the police state in 1984:

"There was of course no way of knowing whether you were being watched at any given moment...It was even conceivable that they watched everybody all the time."

In its initial submission in response to the Surveillance Devices Bill in 1998, the Australian Press Council criticised many issues.² Some of the criticisms remain relevant to the enacted law.

The Press Council argued there is no public interest in the introduction of legislation which regulates the news gathering activities of the media and that freedom of the press is an essential feature of democracy. Its submission noted that invasions into privacy by the media are currently regulated by the Council, citing the case of *The Daily Telegraph* and Senator Woods. Further, because the right to freedom of speech is not explicit in Australian law, new legislation restricting free speech is not subjected to appropriate judicial scrutiny.

Drawing on the role of media as the fourth estate, the Press Council called for an overriding public interest test within the legislation so that costly legal battles were not necessary to determine whether a surveillance-

derived news story was in the public interest. This has not been granted.

Another criticism of the legislation is that it does not specifically address the issue of workplace surveillance. Under the legislation, employers who wish to place (hitherto legal) covert optical surveillance in the workplace must prove in court that as an employer they are either a party to all activities in their workplace (by being intrinsic to 'employment'), or that the workplace is a public space (even though it may be indoors).

While the new law does not excessively hinder the activities of businesses and the media (beyond this new onus to justify in court their optical surveillance) it does increase the power of police over individual rights. The justification for the legislation, in terms of privacy protection, is undermined by the Act itself, which makes few improvements in privacy protection. <

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Notes

1. Waters, Nigel (1996) 'Street surveillance and privacy' *Privacy Law & Policy Reporter* vol 3, no 3, June, pp 48-51.

2. Australian Press Council (1998) Submission from the Australian Press Council to the Department of Justice, Victoria on its Discussion Paper Surveillance Devices Bill, July 1998: <http://www.presscouncil.org.au/pcs/site/fop/surveill.html>.