Submission to Queensland Law Reform Commission on review of Queensland's laws relating to civil surveillance and the protection of privacy in the context of current and emerging technologies

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Public Law Research Program Team

School of Law and Justice

USQ School of Law and Justice

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The USQ School of Law and Justice was established in 2007. Currently, approximately 1800 students are enrolled in undergraduate and graduate law programs taught on Toowoomba and Springfield campuses and online, with on-campus teaching conducted in an exceptional small group environment. The Bachelor of Laws and Juris Doctor programs are approved academic qualifications for admission as a lawyer. The School has cooperative and supportive relations with the legal profession in its Darling Downs and Ipswich regions, and regular organised engagement with the regions' secondary schools and community groups.

Academics in the School of Law and Justice are located on both Toowoomba and Springfield campuses. A very high proportion have doctoral qualifications and the School has a strong commitment to quality legal research and publication and to retaining a close research-teaching nexus.

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Dr Jeremy Patrick is a Lecturer at the University of Southern Queensland School of Law and Justice, where he serves as Coordinator of Research and Research Training. He has law degrees from the University of Nebraska (J.D.), University of Toronto (LL.M.), and York University (Ph.D.). He specializes in civil liberties, constitutional law, and law and religion, and has published in American, Canadian, and Australian scholarly journals. Notable publications include 'Religion, Chaplaincy, and the National School Chaplaincy and Student Welfare Program' (2014) 33 *University of Queensland Law Journal* 187; 'A Polemic Against the Standing Requirement in Constitutional Cases' (2013) 41 *Capital University Law Review* 603; 'Civil Liberties Advocacy Organizations in Canada: A Survey and Critique' (2008) 32 *Oklahoma City University Law Review* 187; 'Section 38 and the Open Courts Principle' (2005) 54 *University of New Brunswick Law Journal* 218. He is co-editor of *Constitutional Recognition of First Peoples in Australia: Theories and Comparative Perspectives* (Federation Press, 2016).

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Introduction

This submission relates specifically to Question # 1 of the QLRC Consultation Paper. Although some of the general propositions asserted below are relevant to the resolution of other questions raised in the Consultation Paper, no specific submissions on those questions are offered here.

Submissions

Questions

Q-1: What considerations should apply to surveillance that is conducted in a public place?

Submissions

General

1. Privacy is a fundamental human right. Recognition of this right is a necessary precondition for the flourishing of human dignity and personal autonomy. Respect for privacy is a key element in many fundamental human rights, including freedom of assembly, freedom of religion, freedom of speech, freedom from unreasonable searches and seizures, reproductive freedom, and many more.

2. Where a right to privacy has been identified in a particular context, it should be protected by law. This protection may include the observance of international human rights instruments, constitutional rights guarantees, civil and criminal statutory protections, regulations and executive orders, agency policies and guidelines, the common law, and more.

3. The right to privacy is not absolute. Where a reasonable expectation of privacy exists, legitimate and necessary government ends may justify an infringement of the privacy of one or more individuals. The balancing of the right to privacy with other considerations, such as public safety, should be done in a careful, rational matter that is capable (when possible) of public deliberation and input.

4. Even when the right to privacy may be legitimately infringed due to a finding that it is outweighed by legimiate and necessary government ends, the least intrusive means of achieving those ends must be adopted. Such intrusion should be carefully limited in scope and duration. Where private information from the intrusion is stored in an electronic or material form, access to it should be carefully regulated and it should be destroyed when the circumstances that justified its collection no longer exist (unless legislation pertaining to the retention of historical records requires its preservation).

5. All government agencies are required to respect the right to privacy, and each should develop policies and procedures to ensure that its operations comport with the standards identified above.

6. Permanent oversight of the right to privacy in Queensland should be allocated to a specialised government agency. This agency should be able to collect information on breaches of privacy, resolve complaints from members of the public, and recommend new legislative or other protections.

Surveillance of Public/Quasi-Public Places

7. Individuals who enter traditional public places (such as parks or city streets) or who enter quasi-public places (such as shopping centres or restaurants during normal opening hours) maintain their right to privacy.

8. Individuals in public places do not have a reasonable expectation of visual privacy. They expect that their movements and actions will or can be observed by other individuals in those places.

9. Visual surveillance of public places does not *per se* infringe the right to privacy. Live visual surveillance of public places by security personnel, drones, or CCTV cameras will, in most contexts, comply with the right to privacy.

10. The recording, tracking, storing, and data-matching of information obtained through visual surveillance may infringe the right to privacy. Individuals reasonably expect to be observed while in public places, but they do not reasonably expect their actions to be recorded and stored, their movements from location to location to be tracked, or for their

identities to be electronically matched with existing records through facial-recognition or other software.

11. The retention and further use of information obtained through visual surveillance of public places must justified by special circumstances. The hypothetical possibility that a crime *could* be committed somewhere (and evidence thereof obtained) is not sufficient basis for a public safety justification. For example, a local council should not install CCTV cameras on a public thoroughfare and record the footage unless that specific area has been identified as high-risk because multiple crimes have been committed there or because multiple accidents have occurred there. A fast-food franchise should not routinely install CCTV cameras in the dining areas of its restaurants, but may be justified in installing such cameras in specific restaurants that have been repeatedly the target of robberies. Locations with at-risk populations (such as childcare centres), high-value inventories (jewelry stores, banks), or special security needs (police stations, hospital emergency rooms) will likely be justified in permanently installing video surveillance cameras and storing the recorded data for a specified period of time.

12. Individuals in public places do have a reasonable expectation of auditory privacy for normal conversation. They do not expect other individuals who are not in close proximity will be able to overhear their conversations.

13. Government actors, corporations, and individuals should be legally prohibited from auditory surveillance in public places unless special justifications outweigh the right to privacy. For example, a municipal transit system may be justified in installing video surveillance inside subway cars for public safety reasons, but would probably not be justified in adding listening devices.

14. Public notification through signage that surveillance is being conducted in a public place does *not*, by itself, legitimise that surveillance. Such signs are rarely noticed or remarked upon by individuals. Further, they present individuals with a no-win situation: abandon their right to privacy or leave the public place. In situations like these, the burdens of non-compliance levied upon an individual deligitimise notions of "implied consent." Public notification may be a necessary precondition to help minimise the intrusiveness of surveillance already justified on other grounds, but cannot be considered a justification in and of itself.

15. All data obtained through visual or auditory surveillance of individuals in public places should be subject to strict controls in terms of: 1) Who has access to the information (formally and informally); 2) For what purposes may the information be used (with special attention paid to the problem of function creep); 3) How long will the information be stored. Use of this information should evaluated according to the concept of the reasonable expectation of privacy. If the individual knew their information were being collected and used in this specific way, would it make them feel uncomfortable, offended, or afraid?

16. Privacy is an evolving concept, and therefore the right to privacy must be evaluated according to contemporary societal and cultural values.

Conclusion

The author would be pleased to discuss further any of the submissions made above.

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