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Confidential

Civil Surveillance Reforms
Strategic Policy and Legal Services
Department of Justice and Attorney-General
GPO Box 149
BRISBANE QLD 4001

By email: [REDACTED]

Dear Consultation team

Consultation on surveillance reforms for Queenslanders

Thank you for the opportunity to provide feedback on the Queensland Government's consultation in relation to the implementation of certain recommendations made by the Queensland Law Reform Commission (QLRC) in its Report No. 77 – Review of Queensland laws relating to civil surveillance and the protection of privacy in the context of the current and emerging technologies (QLRC report) which was tabled on 29 June 2020.

QLS is the peak professional body for the State's legal practitioners. We represent and promote over 14,000 legal professionals, increase community understanding of the law, help protect the rights of individuals and advise the community about the many benefits solicitors can provide. QLS also assists the public by advising government on improvements to laws affecting Queenslanders and working to improve their access to the law.

This response has been compiled with input from the QLS Human Rights and Public Law Committee, Privacy, Data, Technology and Intellectual Property Law Committee, Domestic and Family Violence Committee, and Industrial Law Committee, whose members have substantial expertise relevant to this submission.

General comments

QLS recognises the importance of ensuring surveillance device legislation in Queensland is kept in-step with the rapidly evolving technological landscape and that it affords adequate safeguards against unjustified interference with individual's privacy. The COVID-19 pandemic has seen the use of these technologies shift significantly in the three years since the QLRC report. In this respect, our members have raised concerns that aspects of the draft Bill are out of date. Further, given that 'surveillance devices' are ubiquitous in both civil and workplace environments, the introduction of criminal prohibitions must be approached with caution to avoid potentially criminalising common and otherwise appropriate uses of these technologies.

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The purpose of the draft Bill is said to protect an individual's privacy, namely, from an unjustified interference, due to the use of surveillance devices. The scope of the current draft Bill is wide and seeks to impose a number of civil and criminal prohibitions as a means of giving effect to its objectives. These include:

- (a) creating criminal prohibitions on the *use, installation and maintenance* of various types of surveillance devices (with some exceptions). This extends those contained in the *Invasion of Privacy Act 1971 (Qld) (IoP Act)* to include a new offence which would implicate anyone who conducts these types of surveillance without the consent, or in the case of tracking and data surveillance, ownership or control of the device;
- (b) creating criminal prohibitions on the communication, publication and, in some instances, the possession of surveillance information. The draft Bill creates an offence to communicate or publish surveillance information without consent, regardless of whether it is obtained through lawful or unlawful surveillance methods. Surveillance information is defined as "information obtained, directly or indirectly, using a surveillance device";
- (c) imposing general obligations at civil law not to interfere with "surveillance privacy" of individuals. This includes restrictions on conducting surveillance where the individual has a reasonable expectation of surveillance privacy and has consented to such use;
- (d) creating a civil mechanism for resolving complaints about contraventions to the surveillance laws by stipulating that the Commissioner's functions include receiving complaints and dealing with them under the proposed Act; and
- (e) establishing the Surveillance Device Commission.

We note the Civil Surveillance Reforms Consultation Paper (**the Consultation Paper**) seeks feedback on a staged approach to the reforms in the draft Bill, commencing with repeal of the IoP Act and implementation of the criminal prohibitions.

QLS agrees that there is a need to update surveillance laws in Queensland and acknowledges the complexity of the issue in the context of existing state and federal surveillance device legislation and proposed Privacy Act and other legislative reforms. The challenges associated with the development of laws to protect individuals, communities and businesses are amplified by the scale and pace of technological change.

However, it is QLS's view that these challenges must be met in a poised and comprehensive way to ensure that the breadth of current legislative reviews in this domain achieve the desired outcomes and seek to mitigate any unintended consequences.

Our members are concerned that the reforms are premature given the significant reforms proposed as part of the Federal review of the *Privacy Act 1988 (Cth)*.

Any amendments to surveillance device legislation must balance the ideal position of harmonisation of laws across jurisdictions with preserving important and already established features of Queensland legislation. Harmonisation of surveillance device laws is of particular importance in a commercial/workplace context to provide certainty for businesses and affected individuals, and more generally because of the significant borderless characteristics of data collection and data flows.

Proposed staged approach to implementation

The Consultation Paper seeks the views of stakeholders in relation to the proposed staged approach to the implementation of the reform outlined in the QLRC report. Our members have a number of concerns in relation to the proposed staged approach to implementation.

Firstly, the timing for implementation of the recommendations should be considered in light of the concurrent, and ongoing, review of the *Privacy Act 1988* (Cth) and in addition, the Queensland Law Reform Commission's second review into workplace surveillance (discussed further below).

Secondly, legislative reform of the kind contemplated must be supported by appropriate regulatory guidance as well as adequate resourcing. Our members note that the current proposal is silent in relation to the establishment of the regulator (or to which existing body or agency this work might be placed), which will play an important edifying role, particularly in the context of the proposed criminal prohibitions which are currently lawful under the IoP Act.

Some of our members have queried whether the establishment of a Surveillance Device Commission is a judicious use of scarce resources, particularly in circumstances whereby the Government is not able to adequately resource existing agencies such as the Office of the Information Commissioner.

It is a view shared by a number of our members that there is merit in exploring the capability of current State and Federal regulatory agencies and departments, to deliver the functions proposed for a Surveillance Devices Commission. This is subject to ensuring that any additional remit is supported by adequate resourcing and budgetary allocations.

Thirdly, a staged approach to the implementation to the draft Bill will result in the piecemeal introduction of complex legislation that potentially puts practitioners, the relevant regulatory agencies and the courts in a situation where the application of the law will be uncertain and therefore not achieve its desired objective.

In our view, a staged approach is likely to dilute the intended purpose of the legislation. A preferable approach for consideration would be to set a period from enactment to commencement sufficient to enable all sectors of the community to prepare for implementation of the reforms.

Proposed criminal prohibitions and issues of consent

As noted at the outset, the scope of 'surveillance devices' contemplated within the draft Bill are pervasive and are an indivisible part of individuals' day-to-day lives. As such, the QLS reiterates its view that reforms of this kind should be approached in a cautious manner.

QLS holds a number of concerns in relation to the proposed criminal prohibitions.

Firstly, it is understood that the proposed offences have been included to ensure harmful use of relevant technology is prohibited and to target conduct such as tracking individuals in domestic violence situations or for other criminal law related purposes such as recording third parties, or publishing private materials.

To reflect the seriousness of these activities, some members have suggested that prohibitions of this nature may be better placed in the Criminal Code. The inclusion of criminal prohibitions in draft legislation of the proposed kind may contribute to confusion in relation to its application in the context of other criminal offending. It is also unclear how the proposed criminal prohibitions would sit alongside other legislative reform including, for example, the amendments to modernise the offence of unlawful stalking arising from recommendations in the Hear Her Voice report 1, which have been enacted in the *Domestic and Family Violence Protection (Combating Coercive Control) and Other Legislation Amendment Act 2023* (Qld) but have not yet commenced.

The QLS strongly urges further consideration be given to the best and most effective legislative instrument for criminal prohibitions of surveillance devices, coupled with an analysis of the potential justice impacts.

Secondly, in regard to the issue of consent, we note that each of the 'use prohibitions'¹ in the draft Bill include a lack of consent as an element of the offence. However, the draft Bill is silent on parents/guardians or carers tracking children/persons with impaired capacity.

The Consultation Paper states "As noted in the QLRC report, some children and adults will not be able to give or refuse consent under the QLRC draft Bill, because they will not satisfy the requirement of capacity. In such a case, **the general law governing consent**, and the consent of children and adults with impaired capacity, will continue to apply" [emphasis added].

The Consultation Paper cites page 49 of the QLRC report, which in turn cites the test in *Gillick v West Norfolk* and guidance provided by the OAIC and OIC which essentially adopts that test. Further consideration of that issue in detail was deemed to be outside the scope of the QLRC review. The QLRC report suggested it may be useful for the new regulator to provide guidance about a child's capacity to give or refuse consent and an adult's capacity to consent, including the assessment of an adult's capacity. The QLRC report also notes that 'In doing so, the new regulator might refer to the legislative scheme for the appointment of substitute decision-makers for adults with impaired capacity, and to explain the operation and application of that scheme'.

Our members' view is that the issue of consent needs to be addressed further in the draft Bill to protect all concerned. Members consider that further consideration, consultation and commensurate drafting in relation to the matter of consent should occur as originally contemplated in the QLRC report.

Thirdly, our members have also raised concerns in relation to the limited justification and evidence offered in respect of the removal of the current exception for participant monitoring where the person making the recording, and the person being recorded are party to the conversation. The existing Part 4 of the IoP Act permits a participant, to a 'private conversation', to record it without the consent of the other party. That is, the act of making the recording does not require justification, although justification is needed to use or publish the recording. This is particularly important where there is a power imbalance between the parties where the other party is unlikely to provide consent, say for example, a conversation with the police, a council officer or a work supervisor.

Our members are of the view that the current law strikes an appropriate balance (at least in respect of private individuals' recording their own private conversations). Accordingly, our members propose that the current long-standing exception for participant monitoring be retained. This would allow individuals to continue to record conversations that may reasonably be necessary to protect their interests, without having to *know* at the time of making the recording that the recording is or will become necessary to protect those interests, in order to avoid committing an offence.

Fifthly, the QLS notes that many of the new provisions are highly defined and warrant careful analysis to ensure that the policy objectives are met. The Consultation Paper seeks feedback in relation to the use of various terms proposed in the draft Bill and the effect on certain terminology on the scope of the conduct that will be captured by it. In this regard, our members have raised concerns with:

- the appropriateness of the definition, which is so critical to the reforms, of 'surveillance device' and the lack of clarity about that term's interrelationship with unlawful surveillance technology. A key concern is that the definition may capture devices which have predominately legitimate uses. In the "internet of things" there are many (one example is a telescope); and
- the drafting of the term 'maintenance' in the use prohibitions. Although the term 'maintenance' is used in the drafting in other states, its use in the draft Bill appears very broad when considered in the

¹ That is, as referenced in the Consultation Paper, those which seek to impose criminal prohibitions and penalties on the use, installation and maintenance of surveillance devices without consent, subject to certain exceptions.

context of potential criminal sanction. For example, would this include getting a screen replaced or adjusting an Apple watch?

Specific comments regarding domestic and family violence

Subject to the comments above regarding the correct legislative location for new offences and the need for appropriate coordination between various reforms, QLS broadly supports surveillance reforms that appropriately target the conduct of domestic and family violence perpetrators. However, QLS holds concerns regarding unintended consequences in the form of the conduct of victims of domestic and family violence being captured by the proposed offences (particularly the prohibitions on use of listening devices and optical devices).

Victims may seek to record domestic violence incidents (or situations that may escalate to domestic violence incidents) for a number of reasons, including for use as evidence in an application for a domestic violence order. Victims may also attempt to ensure their safety by openly recording incidents in the hopes of influencing the perpetrator's behaviour.

A victim of domestic violence making a recording of a domestic violence incident will generally not have obtained the consent of the perpetrator to make the recording, either because seeking such consent could jeopardise their safety or because a perpetrator is unlikely to give consent if requested. Under the proposed reforms, the conduct of a victim of domestic violence would prima facie constitute an offence and an exception would need to be relied upon. This is concerning, given that the current drafting of the proposed exceptions may not be appropriate and because criminalising the victim's conduct may provide the perpetrator with another avenue of manipulation and control if they become aware that a recording has been made that may be captured by the offence provisions.

In addition to recommending reconsideration of the removal of the participant monitoring exception, QLS suggests that a specific exception may be necessary for use of surveillance devices to make recordings that evidence domestic and family violence (as defined in the *Domestic and Family Violence Protection Act 2012* (Qld)). This is because the other exceptions - protection of lawful interests, reasonably necessary in the public interest and serious threat to individuals or property - may not always apply. For example, a victim of domestic violence may not have a genuine concern for their own safety or perceive a serious threat on each occasion, but may still have a legitimate interest in recording arguments or verbal abuse that has become routine in the relationship and therefore evidences protracted domestic violence. This is particularly relevant in the context of coercive control and considering patterns of behaviour.

In terms of the public interest exception, the drafting could be strengthened by including the words 'whether the information was ultimately captured or not' in paragraphs (b) and (c) to make it clear that the availability of the public interest exception is linked to the reason for which the recording was made (for example, in circumstances of anticipated domestic violence) rather than what was ultimately captured.

In terms of prohibitions on location tracking and digital surveillance to protect victims of domestic violence, QLS is supportive of the proposed requirement that each owner/person in lawful control of a vehicle/thing or computer must consent to the installation or activation of a tracking device or data surveillance device, as applicable. This is important in circumstances where an abusive partner is the owner of a device or vehicle and uses it to monitor the other party. Consideration should also be given to the position in respect of tracking devices/applications that cannot be readily deactivated, such as in some new vehicles, and a requirement that each owner/lawful user should be made aware of the tracking feature if it is not readily apparent. Consent and awareness requirements should exclude temporary users of a vehicle, such as a repairer, valet parking attendant or person test driving a vehicle, given the reasonableness of an owner wishing to use tracking in those circumstances.

Surveillance reform in a workplace context

QLS welcomes the targeted review and extended regulation of workplace surveillance laws in Queensland. To this end, we note the following:

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- (a) the draft Bill does not deal specifically with workplace surveillance although the provisions of the Bill are likely to have some application in the workplace;
- (b) the QLRC is conducting a second review specifically into workplace surveillance, *Queensland's laws relating to workplace surveillance*, the findings of which were due on 30 April 2021;
- (c) despite the separate review still being in progress, the Consultation Paper is also seeking stakeholder input about whether there should be specific laws regarding workplace surveillance.

QLS strongly considers that the workplace aspects should be considered before the reforms proposed in the draft Bill are progressed.

Within the workplace context, our members also raise the issue that the tracking of individuals as a consequence of them possessing workplace-issued technology is not adequately addressed in the current drafting. For example, the draft Bill does not appear to allow for 'always on' tracking which exists on most modern laptop and mobile devices.

The terms of reference to the *Queensland's laws relating to workplace surveillance* review describes the scope as whether Queensland should consider legislation to appropriately protect the privacy of workers in the context of current and emerging surveillance device technologies in workplaces. In order to achieve the desired legislative cohesion, the Society is of the view that a complementary and holistic approach is important for improving transparency for consumers and regulatory consistency for organisations.

If you have any queries regarding the contents of this letter, please do not hesitate to contact our Legal Policy team via policy@qls.com.au or by phone on (07) 3842 5930.

Yours faithfully



Chris Koprivic
President