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**Surveillance in Public Places:
A Human Rights Perspective**

June 2009



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About the Human Rights Law Resource Centre

The Human Rights Law Resource Centre (*HRLRC*) is an independent community legal centre that is a joint initiative of the Public Interest Law Clearing House (Vic) Inc and the Victorian Council for Civil Liberties Inc.

The HRLRC provides and supports human rights litigation, education, training, research and advocacy services to:

- (a) contribute to the harmonisation of law, policy and practice in Victoria and Australia with international human rights norms and standards;
- (b) support and enhance the capacity of the legal profession, judiciary, government and community sector to develop Australian law and policy consistently with international human rights standards; and
- (c) empower people who are disadvantaged or living in poverty by operating within a human rights framework.

The four 'thematic priorities' for the work of the HRLRC are:

- (a) the development, operation and entrenchment of Charters of Rights at a national, state and territory level;
- (b) the treatment and conditions of detained persons, including prisoners, involuntary patients and persons deprived of liberty by operation of counter-terrorism laws and measures;
- (c) the promotion, protection and entrenchment of economic, social and cultural rights, particularly the right to adequate health care; and
- (d) the promotion of equality rights, particularly the rights of people with disabilities, people with mental illness and Indigenous peoples.

Contents

1. Introduction	1
1.1 Scope of this Submission	1
1.2 Background	1
1.3 Recommendations	2
2. The Human Rights Framework	3
2.1 Introduction	3
2.2 Obligations under the Charter	3
2.3 The Impact of Charters on Policy Development – Lessons from Other Jurisdictions	4
3. Right to Privacy	6
3.1 Introduction	6
3.2 Sources of the Right to Privacy	7
3.3 Definition of Privacy	8
3.4 Limitations on the Right to Privacy	8
3.5 The Right to Privacy and Surveillance	10
3.6 Principles to Guide Public Place Surveillance	12
4. Options for Reform	13
Schedule 1 – Case Notes	14
Peck v The United Kingdom (Application No. 44647/98, 22 January 2003)	14
Wood v Commissioner for Police for the Metropolis [2009] EWCA Civ 414	16
Iordachi & Ors v Moldova (Application No 25198/02, 10 February 2009)	18

1. Introduction

1.1 Scope of this Submission

1. This submission is made by the Human Rights Law Resource Centre (**HRLRC**). Its primary recommendation is that the Victorian Law Reform Commission's draft principles to guide public place surveillance be amended to expressly reflect human rights standards and obligations.¹
2. The HRLRC also endorses the recommendations made by Liberty Victoria and is of the opinion that implementation of these recommendations would be consistent with the Victorian Government's obligations under the *Charter of Human Rights and Responsibilities Act 2006* (**Charter**), particularly in relation to the right to privacy which requires positive action through the adoption of legislative and other measures.²
3. Section two considers the relevance of the human rights framework to this inquiry and sets out relevant Charter obligations.
4. Section three expands upon the meaning of the right to privacy in human rights law, including in relation to balancing the right to privacy against other rights and interests.
5. Section four outlines Liberty Victoria's recommendations as endorsed and adopted by the HRLRC.

1.2 Background

6. Currently, there are significant gaps in Victorian privacy legislation.³ Importantly, there is no actionable right to privacy in Australian law, either at common law or in legislation. The HRLRC submits that the existing regulatory framework on public place surveillance fails to adequately protect and promote the right to privacy and that reform, consistent with human rights principles, is required.

¹ Victorian Law Reform Commission, *Surveillance in Public Places: Consultation Paper* (2009) (**Consultation Paper**).

² Human Rights Committee, *General Comment No. 16 on the right to respect of privacy, family, home and correspondence, and protection of honour and reputation*, Thirty-second session, 1988.

³ Privacy is currently regulated by the *Information Privacy Act 2000* (Vic), the *Surveillance Devices Act 1999* (Vic) and the *Privacy Act 1988* (Cth).

1.3 Recommendations

7. The HRLRC makes the following recommendations:

Recommendation 1:

Law and policy on public place surveillance should be consistent with human rights standards under the *Victorian Charter of Human Rights and Responsibilities Act* and international human rights law.

Recommendation 2:

The draft principles to guide public place surveillance should be amended to expressly reflect human rights obligations and standards.

Recommendation 3:

That the following recommendations of Liberty Victoria be adopted:

- (a) There should be a legislated, actionable right to privacy;
- (b) That all businesses using covert surveillance in public places be required to register their use with a surveillance regulator;
- (c) That all businesses using overt surveillance in public places be required to provide clear notice of the surveillance and contact details for the data administrator;
- (d) That it be illegal to use a surveillance device in a public place to grossly infringe another person's personal privacy without their consent or lawful authority;
- (e) That the role of the Victorian Privacy Commissioner should be expanded to include regulation of surveillance devices in public places within Victoria;
- (f) That a broad definition of "public place" be adopted (such as that under the *Racial Discrimination Act 1975 (Cth)*); and
- (g) That the *Surveillance Devices Act (Vic)* be amended to make it technology neutral and expressly prohibit surveillance which grossly infringes another's privacy (i.e. surveillance in toilets, showers and bathrooms)

2. The Human Rights Framework

2.1 Introduction

8. The human rights framework is a useful and relevant guide for policy development and decision-making in complex areas such as surveillance in public places. The HRLRC submits that a human rights approach to surveillance in public places will protect the human rights of groups and individuals and will practically assist in the development of laws and policies that strike an appropriate balance between competing interests.⁴

2.2 Obligations under the Charter

9. The utility of the human rights framework has been recognised in Victoria through the enactment of the Charter which requires all arms of government (parliament, public authorities and courts) to consider human rights as part of decision-making processes. By virtue of the Charter, laws and policies relating to public place surveillance will be impacted by human rights principles regardless of whether such principles are expressly reflected in the laws and policies themselves.
10. The Victorian Charter establishes a 'dialogue model' of human rights protection which seeks to ensure that human rights are taken into account when developing, interpreting and applying Victorian law and policy. The dialogue between the various arms of government is facilitated through a number of mechanisms.
11. First, prior to introduction to parliament, bills must be assessed for the purpose of consistency with the human rights contained within the Victorian Charter, and a Statement of Compatibility tabled with the Bill when it is introduced to Parliament.
12. Second, all legislation, including subordinate legislation, must be considered by the parliamentary Scrutiny of Acts and Regulations Committee for the purpose of reporting as to whether the legislation is incompatible with human rights.

⁴ Relevant interests are outlined in detail in Chapter 4 of the Consultation Paper and include risks such as: loss of privacy in public places; loss of anonymity in public places; possibility of error and miscarriage of justice; discriminatory profiling of groups; voyeuristic uses; other antisocial uses of surveillance equipment; excluding groups from public places; chilling political speech and association; and changing the nature of public life. Competing benefits include: safety; convenience; crime control; and freedom of expression and journalistic activity.

13. Third, public authorities must act compatibly with human rights and also give proper consideration to human rights in any decision-making process.
14. Fourth, so far as possible, courts and tribunals must interpret and apply legislation consistently with human rights and should consider relevant international, regional and comparative domestic jurisprudence in so doing.
15. Fifth, the Supreme Court has the power to declare that a law cannot be interpreted and applied consistently with human rights and to issue a Declaration of Inconsistent Interpretation. The Government must respond to such a Declaration within six months.
16. Finally, the Victorian Equal Opportunity and Human Rights Commission has responsibility for monitoring and reporting on the implementation and operation of the Victorian Charter and also for conducting community education regarding the Charter.
17. The Charter ensures that human rights language and standards will be relevant to regulation of public place surveillance. Therefore, the HRLRC submits that it is best practice to expressly include human rights considerations in the development of law and policy from the earliest stages.

2.3 The Impact of Charters on Policy Development – Lessons from Other Jurisdictions

18. The experience in comparative jurisdictions, such as the United Kingdom, is that adopting a human rights approach can have a significant positive impact on public sector culture and the development and interpretation of laws. Some of the benefits of using a human rights approach to the development by governments of laws and policies include:
 - (a) a 'significant, but beneficial, impact on the development of policy';
 - (b) enhanced scrutiny, transparency and accountability in government;
 - (c) better public service outcomes and increased levels of 'consumer' satisfaction as a result of more participatory and empowering policy development processes and more individualised, flexible and responsive public services;
 - (d) 'new thinking' as the core human rights principles of dignity, equality, respect, fairness and autonomy can help decision-makers 'see seemingly intractable problems in a new light';
 - (e) the language and ideas of rights can be used to secure positive changes not only to individual circumstances, but also to policies and procedures; and

- (f) awareness-raising, education and capacity building around human rights can empower people and lead to improved public service delivery and outcomes.⁵
19. These general, practical benefits that flow from a human rights approach provide further impetus for the mainstreaming of human rights in law and policy development.

Recommendation 1:

Law and policy on public place surveillance should be consistent with human rights standards under the *Victorian Charter of Human Rights and Responsibilities Act* and international human rights law.

⁵ See, generally, Department for Constitutional Affairs (UK), *Review of the Implementation of the Human Rights Act* (July 2006); British Institute of Human Rights, *The Human Rights Act: Changing Lives* (2007); Audit Commission (UK), *Human Rights: Improving Public Service Delivery* (October 2003).

3. Right to Privacy

3.1 Introduction

20. This section discusses the right to privacy in human rights law. The analysis contained in this section does not differ from that already contained in the Consultation Paper's section on human rights.⁶ It is provided as the grounds for the HRLRC's support of Liberty Victoria's recommendations.
21. Schedule 1 contains case notes on cases from various jurisdictions that consider the right to privacy and public place surveillance. In summary, and as expanded below, the jurisprudence sets out the following principles with respect to the right to privacy:
- (a) the concept of 'private life' is interpreted broadly;⁷
 - (b) surveillance must be reasonable and proportionate to its aim;
 - (c) the fact and method of surveillance must be the least restrictive means of achieving the relevant aim;
 - (d) the victim of surveillance need not prove that surveillance was specifically used against him or her;⁸
 - (e) laws regulating surveillance have to give a sufficiently clear indication about the circumstances in which, and the conditions under which, surveillance in public places is permissible;⁹ and
 - (f) effective measures have to be taken by States to ensure that information concerning a person's private life does not reach the hands of persons who are not authorized by law to receive, process and use it.¹⁰

⁶ Consultation Paper, pp. 109-114.

⁷ *Peck v The United Kingdom*, Application No. 44647/98, 22 January 2003 (**Peck**)

⁸ *Iordachi & Ors v Moldova*, European Court of Human Rights, Application No 25198/02, 10 February 2009 (**Iordachi**); and *Liberty & Ors v The United Kingdom*, Application No. 58243/00, 1 July 2009 (**Liberty**)

⁹ *Iordachi* and *Liberty*.

¹⁰ *Iordachi*, *Liberty*, and *Peck*.

3.2 Sources of the Right to Privacy

22. The right to privacy is set out in Article 17 of the International Covenant on Civil and Political Rights (**ICCPR**), which states:¹¹
- (1) No one shall be subjected to arbitrary or unlawful interference with his privacy, family, or correspondence, nor to unlawful attacks on his honour and reputation.
 - (2) Everyone has the right to the protection of the law against such interference or attacks.
23. The right to privacy which is contained in section 13 of the Charter substantially mirrors Article 17 of the ICCPR and states:
- A person has the right—
 - (a) not to have his or her privacy, family, home or correspondence unlawfully or arbitrarily interfered with; and
 - (b) not to have his or her reputation unlawfully attacked.
24. Section 32 of the Charter provides that international law and the judgments of domestic, foreign and international courts and tribunals relevant to human rights may be considered in interpreting a statutory provision. The Explanatory Memoranda to the Charter states that decisions of the Human Rights Committee will be particularly relevant. Consequently, the discussion below does not distinguish between the right to privacy under international law and in the Charter.
25. Whilst not directly relevant to Victoria, it is worth noting the right to privacy is also contained in the European Convention on Human Rights (**ECHR**) as there is a helpful body of case law in which judicial consideration of this right has been given. The ECHR provides that:¹²
- (1) Everyone has the right to respect for his private and family life, his home and his correspondence.
 - (2) There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others.

¹¹ *International Covenant on Civil and Political Rights*, opened for signature 16 December 1966, 999 UNTS 171 (entered into force on 23 March 1976).

¹² Article 8, European Convention of Human Rights, 2 November 1950.

26. The ECHR right is similar to that in the ICCPR and the Charter, although it is more prescriptive in the potential limitations on the right to privacy.

3.3 Definition of Privacy

27. The Human Rights Committee (the body responsible for monitoring implementation of the ICCPR) has not defined the notion of privacy in either case law, or in its General Comment on Article 17.¹³ The Committee has, however, indicated that:¹⁴

privacy is a broad notion which refers to the sphere of a person's life in which he or she can freely express his or her identity, be it by entering into relationships with others or alone.

28. The dissenting opinion in *Hopu and Bessert v France* stated that:¹⁵

The notion of privacy revolves around protection of those aspects of a person's life, or relationships with others, which one chooses to keep from the public eye, or from outside intrusion.

29. Case law concerning the right to privacy confirms that the concept the concept of 'private life' is interpreted broadly.¹⁶

30. These definitions are consistent with the definition of privacy set out in the Consultation Paper.¹⁷

3.4 Limitations on the Right to Privacy

(a) Limitations under the ICCPR

31. The right to privacy is required to be guaranteed against interferences which are 'unlawful' or 'arbitrary', whether they emanate from State authorities or from natural or legal persons.¹⁸ An act which infringes privacy, but is lawful and not arbitrary, will not violate Article 17.

¹³ See the dissenting opinion in the Human Rights Committee case, *Coeriel and Aurik v The Netherlands* (453/91).

¹⁴ *Ibid* at 10.2.

¹⁵ *Hopu and Bessert v France* (549/93).

¹⁶ Peck.

¹⁷ The Consultation Paper defines privacy as the right not to be turned into an object or thing; and not to be deprived of the capacity to form and develop relationships.

¹⁸ Human Rights Committee, *General Comment No. 16 on the right to respect of privacy, family, home and correspondence, and protection of honour and reputation*, Thirty-second session, 1988.

32. The term 'unlawful' means that no interference can take place except in cases envisaged by the law.¹⁹ The Human Rights Committee has commented that this is why 'it is precisely in State legislation above all that provision must be made for protection of the right...'²⁰
33. The term 'arbitrary interference' requires an analysis of whether the interference is in accordance with the provisions, aims and objectives of the ICCPR and is reasonable in the particular circumstances.²¹

(b) Limitations under the Charter

34. In addition to the internal limitation on the right to privacy in section 13 of the charter (identical to the internal limitation described above with respect to the ICCPR), the Charter also contains a general limitations clause. Section 7(2) of the Victorian Charter provides that:

A human right may be subject under law only to such reasonable limits as can be demonstrably justified in a free and democratic society²² based on human dignity, equality and freedom and taking into account all relevant factors.

35. Section 7(2) sets out the following inclusive list of these relevant factors:
- (a) the nature of the right;
 - (b) the importance of the purpose of the limitation;
 - (c) the nature and extent of the limitation;
 - (d) the relationship between the limitation and its purpose; and
 - (e) whether there is any less restrictive means reasonably available to achieve the purpose that the limitation seeks to achieve.
36. Section 7(3) provides that the Victorian Charter should not be interpreted as giving a person, entity or public authority a right to limit the human rights of any person. For example, the right to freedom of expression should not be used to abrogate the right to privacy. Rather, a balancing exercise is envisaged.

¹⁹ Ibid, [3].

²⁰ Ibid [2].

²¹ Ibid [4].

²² According to the Supreme Court of Canada, the values of a 'free and democratic society' include: respect for the inherent dignity of the human person, social justice, equality, accommodation of a plurality of beliefs, and respect for cultural and group identity: *R v Oakes* [1986] 1 SCR 103, 136.

(c) Case Law considering Limitations on the Right to Privacy

37. The case law considering the right to privacy has indicated that the use of surveillance as a permissible limit on the right to privacy must be:
- (a) reasonable and proportionate to its aim; and
 - (b) the least restrictive means of achieving the relevant aim.
38. The judgments further indicate that laws regulating surveillance have to give a sufficiently clear indication about the circumstances in which, and the conditions under which, surveillance in public places is permissible.²³

3.5 The Right to Privacy and Surveillance

(a) Public Place Surveillance

39. The Venice Commission (the Council of Europe's advisory body on constitutional matters) has examined the extent to which video surveillance is compatible with basic human rights. This examination was conducted in the context of the right to privacy contained in the ECHR. However, as indicated above, there is significant overlap with the right to privacy as enshrined in the ICCPR and the Victorian Charter.
40. The Venice Commission's position was summarised in the Consultation Paper as follows:²⁴
- People should be notified if they are being watched in public places, or else the surveillance system should be obvious;
 - People subject to surveillance should have an effective remedy if they believe their rights have been infringed; they must also be informed of the remedy and how to use it;
 - Personal data resulting from the surveillance should be obtained and processed fairly and lawfully;

²³ Iordachi and Liberty.

²⁴ Consultation Paper, p. 113-114, citing European Commission for Democracy for Law (Venice Commission), Opinion on Video Surveillance in Public Places by Public Authorities and the Protection of Human Rights study no 404 (2007) <[www.venice.coe.int/docs/2007/CDL-AD\(2007\)014-e.pdf](http://www.venice.coe.int/docs/2007/CDL-AD(2007)014-e.pdf)>; and European Commission for Democracy for Law (Venice Commission), Opinion on Video Surveillance by Private Operators in the Public and Private Spheres and by Public Authorities in the Private Sphere and Human Rights Protection: Adopted by the Venice Commission at its 71st Plenary Session (Venice, 1-2 June 2007) CDL-AD(2007)027 (2007) <[www.venice.coe.int/docs/2007/CDL AD\(2007\)027-e.asp](http://www.venice.coe.int/docs/2007/CDL AD(2007)027-e.asp)> at 4 July 2008.

- Personal data should be collected for a specified and legitimate purpose and relevant and not excessive in relation to the purpose;
- Personal data should not be used in ways incompatible with the purpose for which it was collected;
- Personal data should be accurate and, where necessary, kept up to date;
- Personal data should be preserved in a form which permits identification of the data subjects for no longer than is required for the purpose for which it is stored;
- Personal data should be available for access by the individuals to which it relates, subject to restrictions which balance their rights against the need to restrict access for the purpose of prevention and prosecution of crime, and the privacy interests of third parties;
- The video surveillance measures should be supervised by an independent authority;

(b) *Private Users of Surveillance*

- The relevant public place under surveillance should be closely adjacent to the private area the person wants to protect; thus surveillance must not cover larger parts of the street than necessary or be installed such as to cover the exterior or interior of other houses;
- A person entering another's property where there is surveillance should be informed or made aware of the surveillance or its possibility; and is entitled to know if data has been collected and how it will be processed or used;
- That person should also have a legal remedy entitling them to have the legality of the surveillance reviewed;

(c) *Camera Surveillance in Shops*

- Cameras may be justified to protect property if proven to be necessary and proportionate; and
- Cameras may be justified in certain locations to prevent and prosecute robberies only if proven necessary, and for no longer than necessary. People should be notified if they are being watched in public places, or else the surveillance system should be obvious.

41. These principles are helpful guides to the specific application of the right to privacy to public place surveillance

3.6 Principles to Guide Public Place Surveillance

42. The Consultation Paper sets out four draft principles to guide regulation of public place surveillance, namely:
- (a) people are entitled to some privacy when in public places;
 - (b) wherever practicable public place surveillance should be transparent;
 - (c) public place surveillance conducted on a continuous basis should be carried out for a legitimate purpose that is relevant to the activities of the organisation conducting it;
and
 - (d) public place surveillance conducted on a continuous basis should be proportional to its legitimate purpose.
43. These principles already reflect to a significant degree the human right to privacy and permissible limitations on that right. One principle that the draft principles do not contain is the notion that the fact and method of surveillance should be the least restrictive in order to achieve the legitimate aim of that surveillance (although this concept may be subsumed by the proportionality requirement).
44. The HRLRC also considers that the principles would be strengthened by an express reference to the human rights framework.

Recommendation 2:

That the draft principles to guide public place surveillance be amended to include the requirement that public place surveillance that restricts the right to privacy should expressly reflect human rights obligations and standards and, specifically, that it should be the least restrictive method of achieving the legitimate aim of the surveillance.

4. Options for Reform

45. This section adopts Liberty Victoria's submissions on reform of the regulation of public place surveillance. Human rights obligations allow for a degree of flexibility in their application and the recommendations contained in this section are, in most part, not the only way in which the Victorian Government could uphold its obligation to protect and promote the right to privacy.
46. However, the HRLRC is of the opinion that Liberty Victoria's primary recommendation, that the Government should create an actionable right to privacy (also option 6 in the Consultation Paper) is of vital importance.
47. The HRLRC also supports the balance of the recommendations made by Liberty Victoria and considers that they are in compliance with the right to privacy under both Victorian and international law as set out in the previous section.

Recommendation 3:

That the following recommendations of Liberty Victoria be adopted:

- (a) There should be a legislated, actionable right to privacy;
- (b) That all businesses using covert surveillance in public places be required to register their use with a surveillance regulator;
- (c) That all businesses using overt surveillance in public places be required to provide clear notice of the surveillance and contact details for the data administrator;
- (d) That it be illegal to use a surveillance device in a public place to grossly infringe another person's personal privacy without their consent or lawful authority;
- (e) The role of the Victorian Privacy Commissioner should be expanded to include regulation of surveillance devices in public places within Victoria;
- (f) That a broad definition of "public place" be adopted (such as that under the *Racial Discrimination Act 1975 (Cth)*); and
- (g) That the *Surveillance Devices Act (Vic)* be amended to make it technology neutral and expressly prohibit surveillance which grossly infringes another's privacy (i.e. surveillance in toilets, showers and bathrooms)

Schedule 1 – Case Notes

Peck v The United Kingdom (Application No. 44647/98, 22 January 2003)

Principal Facts:

1. This case concerns CCTV images of the applicant, Mr Peck, which were later released to the media. The applicant was suffering depression, and in November 2005 he walked down the street with a kitchen knife in his hand and he attempted to commit suicide. The CCTV footage did not capture his suicide attempt, but the operator did notice a man with a knife and called police, who picked up the applicant and gave appropriate medical assistance. The applicant was not charged with an offence. He was taken to the police station, but released after he had been treated by a Doctor.
2. The respondent, Brentwood Borough Council, later released the CCTV footage of the applicant to several media outlets. Whilst some outlets noted that the man had not been charged, the general impression of the media coverage was that the images showed a man who had been intercepted with a knife in a potentially dangerous situation.²⁵ The council also used the images in its own publication. In none of the publications was the applicant's face adequately obscured (there was, in some publications, partial obscuring of his face, but it was not sufficient to prevent friends and family from identifying the man due to his distinctive hair style and moustache).
3. The Applicant made a number of complaints in relation to the respondent's disclosure of the images, namely to the Broadcasting Standards Commission, the Independent Television Commission (the **ITC**), the Press Complaints Commission. The applicant also applied to the High Court for leave to apply for judicial review of the Council's disclosure of the images.
4. The applicant filed a complaint with the ECHR alleging a breach of his right to privacy under Article 8 of the Convention.

Summary of Decision:

5. The applicant was on a public street when the CCTV footage was taken. However, he argued that the footage related to a period immediately following his attempted suicide and that it,

²⁵ Peck, at 3.

accordingly, related to a personal and private matter. The Court considered the concept of “private life” and said:²⁶

Private life is a broad term not susceptible to exhaustive definition. The Court has already held that elements such as gender identification, name, sexual orientation, and sexual life are important elements of the personal sphere protected by Article 8. That Article also protects a right to identity and personal development, and the right to establish and develop relationships with other human beings and the outside world and it may include activities of a professional or business nature. There is, therefore, a zone of interaction of a person with others, even in a public context, which may fall within the scope of “private life”.

6. In applying the concept of ‘private life’ to the applicant’s claim, the Court noted:²⁷

The present applicant was in a public street but he was not there for the purposes of participating in any public event and he was not a public figure. It was late at night, he was deeply perturbed and in a state of distress. While he was walking in public wielding a knife, he was not later charged with any offence. ... the relevant moment was viewed to an extent which far exceeded any exposure to a passer-by or to security observation... and to a degree surpassing that which the applicant could possibly have foreseen when he walked in Brentwood on [that night] ... Accordingly, the Court considers that the disclosure by the Council of the relevant footage constituted a serious interference with the applicant’s right to respect for his private life.

7. On finding this prima facie breach of Article 8 of the convention, the Court next turned to consider whether the interference was in accordance with the law and whether it pursued a legitimate aim. As with other ECHR decisions, they considered not only whether the action fell within the scope of the domestic law, but also the quality of that domestic law.
8. When considering whether the Council’s action was ‘necessarily in a democratic society’ the Court noted that it was necessary to consider whether, on the facts of the case, the reasons for the action were ‘relevant and sufficient’ as well as considering the proportionality of the action to the legitimate aim of preventing crime.²⁸ The Court noted that:²⁹

²⁶ Ibid, at 13 .

²⁷ Ibid, at 15 – 16.

²⁸ Ibid, at 18.

²⁹ Ibid, at 18 – 19.

In cases concerning the disclosure of personal data, the Court has recognised that a margin of appreciation should be left to the competent national authorities in striking a fair balance between the relevant conflicting public and private interests. However, this margin goes hand in hand with European supervision ... and the scope of this margin depends on such factors as the nature and seriousness of the interests at stake and the gravity of the interference.

9. In the present case, the Court recognised the strong interest of the State in detecting and preventing crime and balanced this against the seriousness of the interference with the applicant's private life.³⁰ The Court noted in relation to the presence of less restrictive means of realising the State's interest in preventing crime:³¹

...the Council had other options available to it to allow it to achieve the same objectives. In the first place, it could have identified the applicant through enquiries with the police and thereby obtained consent prior to disclosure. Alternatively, the council could have masked the relevant images itself [before proving them to the media outlets]. A further alternative would have been to take the utmost care in ensuring that the media, to which the disclosure was made, masked those images. The Court notes that the Council did not explore the first and second options and considers that the steps taken by the Council in respect of the third were inadequate.

Wood v Commissioner for Police for the Metropolis [2009] EWCA Civ 414

Principal Facts:

10. Mr Wood worked for the Campaign Against Arms Trade (CAAT). He attended the AGM of a company associated with the promotion of the defence industry. He caused no trouble at the meeting, but stopped briefly to speak to some associates, who were known to police, outside the building. Mr Wood was photographed by Police and subsequently followed up the street where he was questioned by Police with respect to his identity. Mr Wood refused to answer the Police questions. Photographs of Mr Wood were then retained by Mr Wood whilst the Police endeavoured to establish his identity and, under the relevant legislation, could be retained for a further period where they had 'ongoing significant intelligence value' (a phrase which is difficult to define). Mr Wood complained that the Police surveillance and actions amounted to a breach of his right to privacy under Article 8 of the European Convention of Human Rights.

³⁰ Ibid, at 19.

³¹ Ibid, at 19 – 20.

Summary of Decision:

11. Mr Wood's appeal was allowed by the England and Wales Court of Appeal. Whilst being in the minority in terms of decision, Lord Justice Laws made some useful comments on the nature of Article 8, which were accepted by the other two judges sitting on this case. Laws LJ noted that the right to privacy was 'very broad indeed' but said that:

...it is important that this core right protected by Article 8, however protean, should not be read so widely that its claims become unreal or unreasonable. For this purpose I think there are three safeguards or qualifications. First, the alleged threat or assault to the individual's personal autonomy must ... attain a "certain level of seriousness". Secondly, the touchstone for Article 8(1)'s engagement is whether the claimant enjoys on the facts a "reasonable expectation of privacy"... Thirdly, the breadth of Article 8(1) may in many instances be greatly curtailed by the scope of the justifications available to the State pursuant to Article 8(2).³²

12. Lord Justice Laws expanded further on these 'qualifications', saying:

The first two antidotes, a certain level of seriousness and a reasonable expectation of privacy, though clearly important, still allow an open gate to Article 8(1) in very many circumstances; but it will often be closed by Article 8(2). Once the 8(2) stage is reached, and the court is looking for a justification from the State for what would otherwise amount to a violation, the first question will be whether the action complained of was taken or to be taken in pursuance of a legitimate aim; that is always crucial... [Also important] for present purposes is the familiar question, whether the action is proportionate to the legitimate aim in whose service it was taken.³³

13. In considering the application of these principles to the facts, Laws LJ noted that, 'the *mere taking* of someone's photograph in a public street has been consistently held to be no interference with privacy. The snapping of the shutter of itself breaches no rights, unless something more is added.'³⁴ He says the, 'real issue is whether the taking of the pictures, along with their actual and/or apprehended use, might amount to a violation'.³⁵

³² *Wood v Commissioner of Police for the Metropolis* [2009] EWCA Civ 414, at 22.

³³ *Ibid*, at 26.

³⁴ *Ibid*, at 35.

³⁵ *Ibid*, at 38.

14. Lord Justice Laws found that there was a prima facie breach of Article 8(1). However, on the facts, he found that the Police action was justified and accordingly dismissed Mr Wood's appeal.
15. Broadly speaking, the other judges agreed with the statements of law put forward by Laws LJ. However, on application to the facts, they felt that the appeal should be allowed. Dyson LJ noted:

The retention by the police of photographs of a person must be justified and the justification must be the more compelling where the interference with a person's rights is, as in the present case, in pursuit of the protection of the community from the risk of public disorder or low level crime, as opposed, for example, to protection against the danger or terrorism or really serious criminal activity.³⁶

lordachi & Ors v Moldova (Application No 25198/02, 10 February 2009)

Principal Facts:

16. The applicants were Moldovian nationals who were members of the group 'Lawyers for Human Rights'. They applicants argued that, due to the nature of their work, the relevant Moldovan legislation put them at a high risk of having their telecommunications tapped. However, the applicants did not point to any specific acts of surveillance that affected them. They noted that the system of seeking warrants in order to conduct surveillance was ineffective and that 99.24% of warrants applied for were granted. Accordingly, they argued that the legislation breached Article 8 of the European Convention on Human Rights.

Summary of Decision:

17. The European Court of Human Rights began by reiterating that telephone communications were covered by the notions of 'private life' and 'correspondence' as included in Article 8(1).³⁷ They held that, even though the applicants had not complained specifically about surveillance affecting them, the applicants were entitled to bring their claim against Moldova. In this respect, the Court referred to the earlier decision of *Klass v Germany* (6 September 1978, Series A no. 28) in which the Court held that:

...an individual may, under certain conditions, claim to be the victim of a violation occasioned by the mere existence of secret measures or of legislation permitting

³⁶ Ibid, at 86.

³⁷ lordachi.

secret measures, without having to allege that such measures were in fact applied to him. The relevant conditions are to be determined in each case according to the Convention right or rights alleged to have been infringed, the secret character of the measures objected to, and the connection between the applicant and those measures.³⁸

18. In considering the application of the *Klass* approach to the facts, the Court noted that:

The Court cannot disregard the fact that at the time when the present case was declared admissible Lawyers for Human Rights acted in a representative capacity in approximately fifty percent of the Moldovan cases communicated to the Government... [In these circumstances, the] mere existence of the legislation entails, for those who might fall within its reach, a menace of surveillance; this menace necessarily strikes at freedom of communication between users of the postal and telecommunications services and thereby constitutes an "interference by a public authority" with the exercise of the applicants' right to respect for correspondence.³⁹

19. The Court found that, in the circumstances, there was a prima facie breach of Article 8(1) of the Convention. They noted that Article 8(2) required that a contravention of the right to privacy could only be justified where the contravention was 'in accordance with the law'. They said:

The expression "in accordance with the law" ... requires, first, that the impugned measure should have some basis in domestic law; it also refers to the quality of the law in question, requiring that it should be compatible with the rule of law and accessible to the person concerned, who must, moreover, be able to foresee the consequences for him.⁴⁰

20. The Court considered the concept of 'foreseeability' and referred to the earlier decision of *Weber v Serbia* (no.54934/00, 29 June 2006) in which the Court noted the risk of arbitrariness where a power vested in the executive is exercised in secret. They said:

It is ... essential to have clear, detailed rules on interception of telephone conversations ... The domestic law must be sufficiently clear in its terms to give

³⁸ As cited in *Ibid*, at 30.

³⁹ *Ibid*, at 32 – 34.

⁴⁰ *Ibid*, at 37.

citizens an adequate indication as to the circumstances in which and the conditions on which public authorities are empowered to resort to any such measures.⁴¹

21. On balance, the Court found that the Moldovan law did not provide adequate protection against an abuse of power by the State and that there had been a breach of the applicant's right to privacy under Article 8.

⁴¹ As cited in *Ibid*, at 39.