

Health, aged care and retirement living briefing

CCTV...and 1984

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In his novel *1984* Orwell spoke of a society in which the few watch the many. Our contemporary society at times seems to have had its capacity to independently analyse situations and circumstances effectively euthanised as something no longer needed or wanted. Via the various forms of media we are confronted with such an unprecedented level of loudly voiced opinions and views (including 'alternative versions of facts') as to encourage silent and uncritical acceptance. So much so that it seems we have become a society entirely comfortable with the loud few speaking for the silent many.

There are signs this is occurring in relation to the installation of CCTV in residential aged care.

Let it be stated at the outset that the installation of CCTV in circumstances in which full and complete explanations and commitments as to use are given in understandable terms to residents themselves who have the capacity to understand and consent is not of itself of concern. Whilst there are inherently complex privacy issues in relation to staff and visitors to rooms in which it is operating, it would be clear in those circumstances that the human rights of the resident are being respected.

Installation other than with the express consent of the resident personally is another matter entirely, and raises issues such as the capacity of a 'representative' or 'substitute decision maker' to authorise the deprivation of such a fundamental human right such as privacy and, to the extent that such authorisation is to be permitted, the constraints which should apply to the exercise of that authority.

We should be mindful in these considerations of the results of a number of surveys in relation to the use of CCTV in residential aged care. These surveys are significant because they raise for consideration by the community generally (and by default, government via legislation) the extent to which it wishes to protect the privacy of residents without capacity.

Notably, these surveys have found residents to be strongly against the installation of CCTV in private rooms. However this position is much less so with families, and in some surveys families are positively in favour. This contrast is significant because of the divergence of view.

Why would that be?

An explanation might be that most current aged care residents are of a generation of independence, including independent thought, who continue to hold strongly to that ideal and manifest it whenever circumstances present. They also hold to a higher value the virtues of resilience and trust. On the other hand 'current' generations may be more attracted to 'instant fixes', and sacrifices of principle seem often made to that end.

In this latter case one might ask *what* it is that, truly, is being 'fixed'.

Advocates will espouse installation of CCTV will (at least partially) 'fix' abuse and the potential for it.

One might suggest however that there are other less evident 'fixes' at play in the exercise of 'representative discretion' to authorise (or direct) CCTV use.

Specifically, there is evidence that some of the voices in favour of the introduction of CCTV into the rooms of residents are driven, variously, by commercial gain, personal advancement, convenience and/or conscience.

In this latter instance being able to watch Dad, or have Dad watched, on CCTV may assuage guilt – about him being there, about limited (or no) visitation, about the need to appear more concerned about him than other family members able to be accused of being less diligent about his care – and it does so by the inherent justification that it enhances his 'safety'. Meaning of course that his privacy and dignity can be justifiably sacrificed on the altar of 'risk minimisation'.

Those arguing for CCTV introduction at the will and behest of 'representatives' will reference cameras and other surveillance as already prevalent in so many aspects of our lives. We can't shop, drive, fuel the car or (often) visit our neighbours without CCTV recording our actions.

The question is the extent to which this justifies further intervention and interference with privacy (ie, 'we already have it everywhere, so what's the difference') or, by contrast, we should view the use of CCTV in private residential care rooms as requiring very sensitive

protections to ensure it is not beyond the appropriate 'balance' as referenced by Barack Obama¹.

Finding that balance between privacy and security obviously requires some deep consideration of the fundamental human rights which are impacted by CCTV (including the extent to which that impact can be authorised by the Commonwealth, given its international human rights commitments, including Principles which governments are encouraged to implement²). These are comprehensively addressed in the Australian Human Rights Commission submission to the Aged Care Royal Commission³.

Amongst these commitments is the Convention on the Rights of Persons with Disabilities (to which Australia is a signatory and has also ratified) Article 22 of which states:

*No person with disabilities, regardless of place of residence or living arrangements, shall be subjected to arbitrary or unlawful interference with his or her privacy, family, home or correspondence or other types of communication Persons with disabilities have a right to the protection of the law against such interference.*⁴

A couple of points bear emphasis:

- 'regardless of place of residence';
- 'arbitrary or unlawful interference'.

Together they suggest a means to finding Obama's 'balance'.

It is without argument (presumably) that a person does not lose their right to privacy or have it compromised by their place of residence, such as within a residential care facility.

It is of course recognised that there are certainly compromises in the context of privacy by reason of care needs and the necessity of supports to attend to those needs, such as activities of daily living, and these are often evident in a residential care environment.

That said, simply because there are some compromises in order to meet needs should not mean that further compromises are justified, such as in the interests of 'safety' when there may be absolutely no threat or any suggestion thereof to be addressed.

¹ *Two values are in conflict here - privacy and security, both are important.* Barack Obama speaking at the opening day of the South By SouthWest (SXSW) Interactive festival in Austin, Texas, 16 March 2016

² United Nations Principles for Older Persons - Adopted by General Assembly resolution 46/91 of 16 December 1991:14. *Older persons should be able to enjoy human rights and fundamental freedoms when residing in any shelter, care or treatment facility, including full respect for their dignity, beliefs, needs and privacy and for the right to make decisions about their care and the quality of their lives.*

³ <https://agedcare.royalcommission.gov.au/system/files/2020-06/AWF.500.00267.0002.pdf>

⁴ Similar rights are also expressed in Article 17 of the International Covenant on Civil and Political Rights, also ratified by Australia.

Clearly in that latter instance any interference by CCTV invoked other than on the specific request or at the direction of the resident would be 'arbitrary'.

The question therefore arises as to the extent or gravity of the circumstances which should constitute criteria qualifying the introduction of CCTV such as to render its installation and use 'non-arbitrary'.

In that regard it is appropriate to reflect on the significance of the right of privacy as it has been recently referenced by the courts.

The South Australian Supreme Court decision in *BC v Public Advocate*⁵ provides an example:

Fundamental assumptions deeply embedded in the foundational structure and rules of the common law recognise that certain rights and freedoms are not to be infringed except by clear lawful authority. Some of the most important fundamental rights are the rights to enjoy personal liberty, freedom of movement and privacy (at least in the sense of freedom from invasive searches).

One might suggest there is some natural equivalence between invasive searches and invasive recording – each are equally a major infringement of a 'fundamental right'.

So, in what circumstances should government be justified in interfering with such a fundamental right, including by authorising someone else to permit that interference?

Clearly there must be some significant 'qualifying criteria' here – to ensure any infringement is not 'arbitrary' and also to create 'clear lawful authority' which meets the test referred to in *BC v Public Advocate*.

Comments by COTA Chief Executive Ian Yates endorse this perspective, suggesting that rather than infantilising older adults and surveilling them at all points in time, the discussion should focus on exploring how CCTV might be used *if there is due cause*.⁶

It seems however, given the evidence tendered to the Aged Care Royal Commission and the media coverage it has received, that there is risk of a 'quick fix' being promoted here and concepts such as 'due cause' will not be the focus of consideration.

A CCTV trial is currently underway in state-owned facilities in South Australia and the former Aged Care Minister, Ken Wyatt has stated he was open to the concept.

As voices are raised around this issue it might be said that there is the risk that a version of Snyder's *politics of inevitability*⁷ will be at play.

⁵ *BC v Public Advocate* [2018] SASC 193 [29] per Stanley J

⁶ <https://www.nursingreview.com.au/2018/09/cameras-in-aged-care-rooms-privacy-vs-peace-of-mind>

⁷ *a sense that the future is just more of the present, that the laws of progress are known, that there are no alternatives, and therefore nothing really to be done*
<https://www.theguardian.com/news/2018/mar/16/vladimir-putin-russia-politics-of-eternity-timothy-snyder>

Firstly there is the risk that, in light of loud voices in favour of the broad use of CCTV in private rooms, there will be insufficient consideration given to the capacity of 'representatives' to authorise interference with fundamental human rights. It is not the intention to develop the issue here, but simply assuming, in the absence of specific authority stated within the relevant document that a power of attorney or a substitute decision maker under an advance care directive has power to direct or authorise the compromise of such a right would seem to represent inadequate consideration of the matter given its significance.

Secondly there is the risk that, to the extent that criteria are established as conditions to the exercise of that authority, they are so subjective and capable of massage as to mean the interference with the right to privacy would be no more than 'arbitrary' and therefore in contravention of the human rights commitments given by the Commonwealth.

Each of these issues requires anything other than thinking which submits to the current 'orthodoxy' of loud voices speaking to uncritical acceptance. *'Orthodoxy means not thinking-not needing to think. Orthodoxy is unconsciousness.'*
— George Orwell, 1984

“ The CCTV debate - are we in danger of letting down residents without capacity? ”

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