

Commissioner's Speech to the Standing Committee on Social Policy of the Legislative Assembly Re: Schedule 2 of Bill 88, *Working for Workers Act*, 2022

- Good afternoon.
- Thank you for the opportunity to present my views on Bill 88.
- Accompanying me is Lauren Silver, Senior Policy Advisor, from my office.
- My focus will be on Schedule 2 of the bill that would amend the *Employment Standards Act* to require employers with twenty-five or more employees to have a written policy explaining whether, how and in what circumstances they monitor workers electronically as well as the purposes for which they intend to use the information collected.
- I am encouraged by the government's efforts to promote transparency of workplace monitoring practices.
- Since the pandemic began, demand for workplace monitoring and remote surveillance tools has dramatically accelerated¹ as more people work from home.
- According to Statistics Canada,² in January of 2021, thirty-two per cent of Canadian employees mainly worked from home, compared to just 4% five years before.
- Even after the pandemic ends, a recent Ipsos poll predicts only half of Canadians currently working from home expect to return to the office regularly in 2022.³
- As more people work from home, employers seek new ways of supervising and measuring their performance remotely.
- This shift is resulting in increased demand for employee monitoring technologies.
- A Market Research Future report estimates that by 2028 the employee monitoring industry will be worth \$6.8 billion US.

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- The productivity software industry is also steadily growing, expected to hit an estimated \$38 billion by 2027.⁴
- Employee monitoring software — also referred to as “bossware”⁵ — has many different capabilities, including the ability to:
 - monitor all computing device activity, such as keystroke logging, email communications, network activities, and the contents of screens
 - record and interpret employee audio and video inputs, and analyze their facial expressions to interpret sentiments and behaviors
 - track employee location, movements, and activities remotely and over time through tools like GPS, telematics, wearables, digital health apps and biometric timekeeping software
- When combined and fed into algorithms, all of these data can provide employers with a rich source of information to not only detect and flag employee behaviours but also predict and nudge behaviors as well.
- Automated decision-making based on inferred characteristics can influence employee performance and prospects for success and promotion.
- Advancements in technologies and analytics are only expected to intensify these current trends⁶
- It’s easy to see the potential for electronic monitoring tools to get predictions wrong or just go too far, particularly now that the workplace can extend to the home or wherever the employee happens to be.
- Where do we draw the line between personal and private space?
- How do we determine which activities should or should not be monitored when an employee is working from home?

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- Does electronic monitoring extend to location tracking, website searches or personal calls during time off?
- Does employee surveillance include monitoring their social media activity?
- Or tracking employees who avail themselves (or not) of workplace wellness initiatives and health programs for insurance or other purposes?

[Pause]

- To address these kinds of issues, I believe electronic workplace monitoring should ultimately be governed by a more comprehensive Ontario private sector privacy law, similar to the one proposed last year in the government's white paper on modernizing privacy in Ontario.
- Such a law would be similar to existing laws in British Columbia, Alberta, and Quebec that already protect employee privacy.
- As does the federal privacy law for federally regulated workplaces.
- Yet, there is no statutory privacy protection for employees of provincially regulated businesses in Ontario.
- As with any collection, use, and disclosure of personal information in the employment context as in other contexts, transparency and accountability of organizations are critical.
- Bill 88 is a first step in enhancing transparency by requiring certain employers to provide employees with copies of their electronic monitoring policies.
- But transparency alone is not sufficient.

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- Accountability too must be strengthened by allowing workers *to do something* with those policies.
- Workers should be able to complain when employers don't comply with workplace monitoring policies.
- They should be able to ask for an investigation and seek meaningful redress if they are affected by breaches of those policies.
- They must be able to challenge overly-invasive policies that go too far and have them reviewed by an independent regulator with the power to encourage or impose course correction.
- There should be established boundaries around acceptable employee monitoring based on what is fair and reasonable, and clear prohibitions against monitoring employees surreptitiously or after they have disconnected from work.
- These are some of the basic hallmarks of a modern privacy regime that should protect the privacy rights of employees and *all* Ontarians.
- Until a more comprehensive privacy law is introduced, I recommend that Bill 88 be amended at the very least to require provincially-regulated employers with 25 or more employees to provide a copy of their electronic monitoring policies to my office.
- This would allow the IPC to examine these policies, identify emerging patterns and trends across different sectors, and provide education and advice on best practices.
- Based on our general observations, we could report to the legislature from time to time on the state of workplace electronic monitoring in Ontario.
- This window into workplace privacy issues in Ontario could help inform the development of future regulations by focusing on areas of highest risk.

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- It would also establish a body of knowledge that could help employers, employees, and legislators find a positive path forward amid new technological developments in a rapidly-evolving and uncertain future of work.
- Lastly, I recommend that Bill 88 make explicit that nothing in law, contract, terms or conditions prevents an employee or employer from consulting or sharing information about electronic monitoring with the IPC.
- And that any general observations made by the IPC based on the information received could be used for the purposes of reporting to the legislature from time to time.

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- Ontario workers deserve real transparency, accountability, and privacy protection in this new era of remote work.
- To achieve that, I recommend that Bill 88 be amended to allow for an incremental approach towards protecting privacy in this sector and developing evidence-based regulations.
- Thank you for your time. I would be pleased to answer any questions you may have.

¹ Cybersecure Policy Exchange. [Workplace Surveillance and Remote Work: Exploring the Impacts and Implications Amidst Covid-19 in Canada](#) (September 2021), retrieved on March 14, 2022.

² Statistics Canada. [Working from home after the COVID-19 pandemic: An estimate of worker preferences](#) (May 26, 2021), retrieved on March 17, 2022; Ontario Workforce Recovery Advisory Committee: [The Future of Work in Ontario](#) (November 2021), retrieved on March 17, 2022.

³ Ipsos. [Only Half \(50%\) of Canadians Currently Working from Home Say They Expect to Return to the Office Regularly in 2022](#) (December 26, 2021), retrieved on March 17, 2022.

⁴ Intrado Global Newswire. [Cloud-based Office Productivity Software Industry 2020-2027](#). (January 22, 2021). Retrieved on March 22, 2022.

⁵ Electronic Frontier Foundation. [Inside the Invasive, Secretive "Bossware" Tracking Workers](#) (June 30, 2020), retrieved on March 18, 2022.

⁶ Mateescu, A & Nguyen, A, [Explainer: Workplace Monitoring and Surveillance](#), Data & Society (February 2019), retrieved on March 18, 2022.