

Workplace Surveillance Bill 2005

This explanatory note relates to this Bill as introduced into Parliament.

Overview of Bill

The objects of this Bill are:

- (a) to prohibit the surveillance by employers of their employees at work except by surveillance of which employees have been given notice or surveillance carried out under the authority of a covert surveillance authority issued by a Magistrate for the purpose of establishing whether or not an employee is involved in any unlawful activity at work, and
- (b) to restrict and regulate the blocking by employers of emails and Internet access of employees at work, and
- (c) to provide for the issue of covert surveillance authorities by Magistrates and to regulate the carrying out of surveillance under a covert surveillance authority and the storage of covert surveillance records, and
- (d) to restrict the use and disclosure of covert surveillance records.

The Bill applies only to camera surveillance, computer surveillance (surveillance of the input, output or other use of a computer by an employee) and tracking surveillance (surveillance of the location or movement of an employee).

The Bill repeals and replaces the *Workplace Video Surveillance Act 1998*, which applied only to video (ie camera) surveillance.

Outline of provisions

Part 1 Preliminary

Clause 1 sets out the name (also called the short title) of the proposed Act.

Clause 2 provides for the commencement of the proposed Act on a day or days to be appointed by proclamation.

Clause 3 defines certain words and expressions used in the proposed Act. The expression **surveillance** is defined to mean surveillance of an employee by camera surveillance, computer surveillance or tracking surveillance. The proposed Act applies only to these forms of surveillance.

Clause 4 gives an extended meaning to **employer** where corporations are related, so that an employer's employees will include employees of a related corporation of the employer.

Clause 5 defines **at work** for an employer to mean at a workplace of the employer (whether or not while working), or at any other place while working for the employer.

Clause 6 provides that the proposed Act binds the Crown.

Clause 7 provides that notes do not form part of the proposed Act.

Clause 8 deals with the relationship of the proposed Act to the *Occupational Health and Safety Act 2000*.

Part 2 Notification of workplace surveillance of employees

Clause 9 provides for the application of the proposed Part to the surveillance of an employee carried out or caused to be carried out by the employee's employer while the employee is at work for the employer.

Clause 10 deals with how surveillance of employees is to be notified to employees.

Clause 11 imposes additional requirements for the notification of camera surveillance.

Clause 12 imposes additional requirements for the notification of computer surveillance.

Clause 13 imposes additional requirements for the notification of tracking surveillance.

Clause 14 creates an exemption from the employee notification requirements for

surveillance of a workplace that is not for the purpose of employee surveillance and is done by agreement.

Part 3 Prohibited surveillance

Clause 15 prohibits surveillance by an employer of an employee in a change room, toilet facility or shower or other bathing facility at a workplace.

Clause 16 prohibits the surveillance by an employer of an employee when not at work by means of a device used for surveillance of the employee at work except computer surveillance of the use by the employee of equipment or resources provided by or at the expense of the employer.

Clause 17 prohibits the blocking of emails sent to or by an employee and Internet access by an employee unless the employer is acting in accordance with the employer's email and Internet access policy notified to the employee and (except in the case of spam or menacing or offensive emails) the employee is notified as soon as practicable that an email has been blocked. An employer's email and Internet access policy cannot authorise blocking of emails or Internet access merely because the content relates to industrial matters.

Part 4 Covert surveillance of employees at work

Division 1 Restrictions on covert surveillance

Clause 18 prohibits the covert surveillance of an employee at work except as authorised by a covert surveillance authority. Covert surveillance is surveillance that is not carried out in compliance with the requirements of Part 2.

Clause 19 provides that a covert surveillance authority authorises the covert surveillance of employees for the purpose of establishing whether or not an employee is involved in any unlawful activity at work. The covert surveillance is required to be overseen by a surveillance supervisor for the authority.

Clause 20 creates exceptions from the requirement for a covert surveillance authority for law enforcement agencies, correctional centres, the casino, and camera surveillance of legal proceedings.

Clause 21 creates a defence in the case of covert surveillance that is necessary for the security of the workplace.

Division 2 Covert surveillance authorities

Clause 22 provides for the making of an application to a Magistrate for a covert surveillance authority.

Clause 23 requires an application for a covert surveillance authority to be dealt with in the absence of the public.

Clause 24 requires that reasonable grounds exist to justify the issue of a covert surveillance authority.

Clause 25 requires a Magistrate in deciding whether to issue a covert surveillance authority to have regard to whether the covert surveillance might unduly intrude on the privacy of employees or any other person.

Clause 26 requires a Magistrate issuing a covert surveillance authority to designate one or more surveillance supervisors to oversee the conduct of surveillance operations under the authority.

Clause 27 provides for the form of a covert surveillance authority.

Clause 28 provides for the period for which a covert surveillance authority remains in force and for the conditions of the authority.

Clause 29 creates the offence of contravening a condition of a covert surveillance authority.

Clause 30 provides for the variation or cancellation of a covert surveillance authority.

Clause 31 prevents a further application for a covert surveillance authority being made if a previous application has been refused, unless additional relevant information is provided.

Clause 32 requires a Magistrate who issues a covert surveillance authority to make

a record of various particulars and the grounds relied on by the Magistrate for its issue.

Clause 33 provides that a covert surveillance authority is not invalidated by a defect except one that affects the substance of the authority in a material particular.

Clause 34 requires an employer or employer's representative to report to the issuing Magistrate on surveillance carried out under a covert surveillance authority.

Division 3 Covert surveillance records

Clause 35 imposes restrictions on the storage of records of covert surveillance to ensure that they are protected against loss or unauthorised access or use.

Clause 36 imposes restrictions on the use and disclosure of records of covert surveillance for irrelevant purposes.

Clause 37 provides that information obtained inadvertently or unexpectedly as a result of covert surveillance is not considered to have been obtained unlawfully for the purposes of determinations about admissibility of evidence.

Part 5 Miscellaneous

Clause 38 makes it clear that the proposed Act does not apply to anything done under the authority of a warrant or other authority under Commonwealth law.

Clause 39 provides that a conferral of functions on a Magistrate by the proposed Act is not a conferral of jurisdiction on Local Courts.

Clause 40 provides for application to a judicial member of the Industrial Relations Commission for the issue, variation or cancellation of a covert surveillance authority by way of review of a Magistrate's decision.

Clause 41 provides for an annual report by the Minister to Parliament on covert surveillance operations.

Clause 42 makes provision for offences by corporations.

Clause 43 is a regulation-making power.

Clause 44 deals with proceedings for offences.

Clause 45 deals with authority to prosecute for an offence under the proposed Act.

Clause 46 gives effect to the Schedule of savings and transitional provisions (Schedule 1).

Clause 47 repeals the *Workplace Video Surveillance Act 1998* and the regulation under that Act.

Clause 48 requires the proposed Act to be reviewed by the Minister after 5 years.

Schedule 1 Savings and transitional provisions

Schedule 1 provides for the making of savings and transitional regulations as a consequence of the enactment of the proposed Act and also provides for the saving of existing covert surveillance authorities and pending applications for such authorities under the *Workplace Video Surveillance Act 1998*.