

Monitoring employees at work: the *Workplace Surveillance Act* 2005 (NSW)

Introduction

The *Workplace Surveillance Act 2005 (NSW)* (the Act) regulates the surveillance of employees by their employers. It was assented to on 23 June 2005 and will commence on proclamation. The Act is the first such legislation in Australia and prohibits the surveillance of employees by employers unless certain notice requirements are met or a magistrate has authorised the use of covert surveillance. An important aspect of the Act is its regulation of "computer surveillance" which extends to the monitoring and accessing by employers of electronic records of employees' email and internet activity.

Key provisions

Section 3 of the Act distinguishes between three types of surveillance:

- camera surveillance – defined as the monitoring or recording of visual images or activities;
- computer surveillance – defined as the monitoring or recording the use of a computer. This includes monitoring the sending and receipt of emails, and the accessing of internet websites; and
- tracking surveillance – defined as surveillance by means of an electronic device the primary purpose of which is to monitor geographical location or movement.

Covert surveillance

The Act makes it an offence for an employer to conduct "covert surveillance" of an employee while the employee is at work unless the surveillance is authorised by a covert surveillance authority or is for security purposes and employees (or a body representing a substantial number of employees) are given prior written notice of this. Importantly, *all* surveillance of employees by an employer is considered covert surveillance unless the notice requirements in Part 2 of the Act are met.

Notified Surveillance

Surveillance will be notified where:

- employees receive notification in writing at least 14 days prior to surveillance commencing;
- the notice specifies the kind of surveillance, how it will be carried out, when it will start, whether it will be continuous or intermittent and whether it will be for a limited period or ongoing;
- in the case of camera surveillance, cameras are clearly visible and there are signs notifying people that premises may be under surveillance;
- in the case of computer surveillance, the surveillance is carried out in accordance with the employer's policy on computer surveillance of which employees have been notified; or
- in the case of tracking surveillance, there is a notice on the vehicle or item on which the tracking device is installed indicating that it is the subject of tracking surveillance.

Authorised covert surveillance

An employer may apply to a magistrate for authorisation to conduct covert surveillance where the surveillance is

for the sole purpose of establishing whether or not an employee is engaged in unlawful activity at work. A magistrate may only issue a covert surveillance authority where reasonable grounds exist to justify its issue and must take into account general considerations of privacy.

Prohibited surveillance

The Act strictly prohibits the surveillance by an employer of an employee in any change room, toilet facility, shower or bathing facility.

Employers are further prohibited from conducting surveillance of employees using notified surveillance devices while those employees are not at work. For example, while an employee may be tracked using a notified tracking device at work, such tracking must not continue once the employee is no longer at work. The only exception to this is computer surveillance where the employee uses equipment or resources provided at the expense of the employer.

Restrictions on blocking emails and internet access

Subject to some exceptions, the Act makes it an offence for employers to prevent the delivery of an email sent by or to an employee unless the employer is acting in accordance with its email or internet policy and the employee is given a notice that the delivery or receipt of the email has been prevented.

Non-delivery of emails does not need to be notified where:

- the email is believed to be a commercial electronic message within the meaning of the *Spam Act 2003* (Cth);
- the content of the email may result in damage or interference with a computer, computer programs or the employer's computer network; or
- the content of the email would be regarded by a reasonable person as menacing, harassing or offensive.

It is also an offence under the Act for an employer to block an employee's access to an internet website.

Extended definition of "employer" and "at work"

Importantly, the Act extends the meaning of "employer" in several important respects. First, an employer will be deemed to be the employer of employees of a related corporation such that surveillance of those employees will be covered under the Act. Second, a person for whom an employee performs work will be deemed to be that employee's employer notwithstanding the fact that the employee is actually employed by a third person. This covers labour hire arrangements and can result in an employee having two employers for the purposes of the Act.

An employee will be considered to be "at work" when the employee is at the workplace of the employer irrespective of whether the employee is actually performing work at the time and at any other place



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Working in the Israeli Ministry of Justice

By Ben Fisher

Working in government demands one to understand everyday people with everyday issues. Upon entering the Israeli Ministry of Justice (**Ministry**), I was made to realize this from day one. Each time I arrived at the Ministry building I was reminded of the country I was in, and the fundamental challenges it still faces. Israel is a nation made up of refugees, and was established by willpower rather than steady infrastructure. The first task I received was to research the development of legislation of equal rights for people with disabilities. In this area Israel still lags behind much of the developed world – largely due to its lack of resources.

Upon arriving at the Ministry, which is metres from the heart of Arab East Jerusalem, I witnessed a clash and co-existence of cultures. I was introduced to an office comprised of article clerks of Jewish European, Jewish Middle Eastern and Arab Christian background, and to my boss, a British Ex-pat. This was Israel. It was not the Jewish Israel I was taught about in Australia, but a country which is home to people from a vast array of cultures and backgrounds.

The Ministry was always abuzz. A high paced society exists in Israel; mornings begin early, days last into the evening, and one is still expected to go out most nights. With a single day weekend (Sunday is a working day), there is no time to sleep. But at the same time, even though I was merely an intern, the secretaries became like second mothers, and everyone throughout the

Ministry was always willing to explain and answer questions.

Among my tasks, chiefly regarding disability and labour law matters, was the role of reporting on my research to committees which were conducted in the Knesset (the Israeli Parliament) and attended by the ministers and members of Parliament. I was taken aback by the extent to which law-making was a 'work shopping' of ideas in Israel. In writing the Equal Rights for People With Disabilities legislation, representatives from the police, municipal councils, Finance Ministry, Members and civil and criminal departments of the Ministry ministers and disabled representatives met bi-weekly to iron-out difficult sections of the bills to be passed. I never believed that government agencies really dealt with the issues of individuals until I participated in those meetings.

Furthermore, I was often able to meet the people affected by the agency's work. I was allowed to sit in on meetings involving ordinary individuals. Government agencies are still a part of everyday society in Israel. They deal with the everyday obstacles that people face.

Working in the Ministry gave me an opportunity to see a face of the law that I had not encountered at university. I worked with people who cared about making a difference for all of their countrymen – a concept sometimes overlooked in such a divided country. My work at the Israeli Ministry of Justice showed me the impact individuals can make – the difference that I can make! This internship has changed my outlook on the relevance of law and lawyers to society. ■

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provided the employee is performing work for the employer at that time.

Use of covert surveillance records

The Act prohibits the use and disclosure of records or information obtained by covert surveillance, subject to a limited number of exceptions.

Where the covert surveillance is authorised covert surveillance, the information or records obtained may be used:

- where that use is authorised under the covert surveillance authority;
- to establish an employee's involvement in unlawful activity; and
- for various other law enforcement and security purposes.

Where the covert surveillance is not authorised, the information or records obtained may only be used and disclosed in the detection, investigation or prosecution of an offence by a law enforcement agency.

Corporate liability

Where a corporation contravenes any provision of the Act, a director of the corporation will be deemed to have personally contravened the same provision if he or she "knowingly authorised or permitted the contravention".

Implications

Employers operating in New South Wales will have to ensure that their Internet access and email policies are

reviewed and, if necessary, updated to meet the notification requirements of the Act. It is important to note that the Act does not require employees' consent to surveillance, but simply that they are notified. Nonetheless, employee advocates operating within the NSW jurisdiction should check an employer's compliance with the Act, where reliance is placed on information obtained through surveillance to discipline or dismiss an employee. ■

Quick Quiz answers

1. The Mystery of Edwin Drood
2. Sirimavo Bandaranaike (Sri Lanka)
3. Mauve
4. National Association of Securities Dealers Automated Quotations
5. Jeremy Bentham (1748-1832)
6. Friedrich Engels
7. Dong
8. House of Lancaster and House of York
9. The Vedas
10. US sports tycoon, Malcolm Glazer
11. Douglas Wood
12. Mahmoud Abbas
13. Pius IX and St Peter
14. Ibrahim Jaafari
15. Australia and Antigua