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**THE LEGISLATIVE ASSEMBLY FOR THE  
AUSTRALIAN CAPITAL TERRITORY**

**WORKPLACE PRIVACY AMENDMENT BILL 2016**

**EXPLANATORY STATEMENT**

**Presented by  
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## **WORKPLACE PRIVACY AMENDMENT BILL 2016**

This explanatory statement relates to the Workplace Privacy Amendment Bill 2016 (the Bill) as presented to the Legislative Assembly. It has been prepared in order to assist the reader of the Bill and to help inform debate on it. It does not form part of the Bill and has not been endorsed by the Assembly.

The statement is to be read in conjunction with the Bill. It is not, and is not meant to be, a comprehensive description of the Bill.

### **Overview**

#### **Purpose of the Bill**

In February 2016, the Minister for Justice, Shane Rattenbury MLA, will table a report on the review of the *Workplace Privacy Act 2011* (the WPA). The purpose of the review was to identify any need for legislative changes to improve the operation of the WPA, which recognises an employer's need to take reasonable steps to protect their business and monitor their workplace without unreasonably impinging on a worker's right to privacy.

This Bill contains legislative amendments required to implement the review recommendations.

The Bill will:

- a) amend the WPA to:
  - i) transfer responsibility for enforcement of the WPA from ACT Policing to the ACT Work Safety Commissioner;
  - ii) extend the powers of authorised inspectors appointed under the *Work Health Safety Act 2011* (the WHS Act) to offences under the WPA;
  - iii) allow employers to apply to the Magistrates Court for an authority to conduct surveillance of employees outside the workplace;
  - iv) remove notice requirements for tracking devices where it would be unduly difficult to affix a notice to the device, and where the employer has taken appropriate action to notify workers of the device's tracking capability;
- b) amend the WHS Act to include WPA-related matters as matters on which the Work Safety Council may advise the Minister; and
- c) amend the *Magistrates Court Act 1930* to grant the Industrial Court jurisdiction to hear and decide a proceeding under the WPA.

## **Human Rights Implications**

The Bill limits the following rights contained in the *Human Rights Act 2004* (HRA):

- Section 12 – Privacy and reputation; and
- Section 11 – Protection of family and children.

### **Limitations on human rights– Section 28 (2) of the HRA**

The preamble to the HRA notes that few rights are absolute and that they may be subject only to the reasonable limits in law that can be demonstrably justified in a free and democratic society. Section 28 (2) of the HRA contains the framework that is used to determine the acceptable limitations that may be placed on human rights.

Section 28 requires that any limitation on a fundamental right must be authorised by a Territory law, be based on evidence, and be reasonable to achieve a legitimate aim. Whether a limitation is reasonable depends on whether it is proportionate. Proportionality can be understood and assessed as explained in *R v Oakes*. A party must show:

*First, the measures adopted must be carefully designed to achieve the objective in question. They must not be arbitrary, unfair or based on irrational considerations. In short, they must be rationally connected to the objective. Second, the means, even if rationally connected to the objective in this first sense, should impair “as little as possible” the right or freedom in question. Third, there must be a proportionality between the effects of the measures which are responsible for limiting the Charter right or freedom, and the objective which has been identified as of “sufficient importance”<sup>1</sup>.*

### **Section 12 – Right to privacy**

Section 12 of the HRA states that –

*Everyone has the right:*

- (a) not to have his or her privacy, family, home or correspondence interfered with unlawfully or arbitrarily; and*
- (b) not to have his or her reputation unlawfully attacked.*

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<sup>1</sup> *R v Oakes* [1986] 1 S.C.R. 103.

### ***Nature of the right affected:***

The right to privacy in the HRA is based on the right to privacy set out in Article 17 of the International Covenant on Civil and Political Rights ('ICCPR'). As international case law does not exhaustively define 'privacy' or 'private life', the European Court of Human Rights applies a general test of whether there is a reasonable expectation of privacy in order to determine if the right to privacy is engaged<sup>2</sup>.

The UN Human Rights Committee, commenting on the right to privacy, has noted that 'as all persons live in society, the protection of privacy is necessarily relative. However, the competent public authorities should only be able to call for such information relating to an individual's private life the knowledge of which is essential in the interests of society...'<sup>3</sup> The right to privacy is hence not absolute and may be reasonably limited by laws which can be demonstrably justified in a free and democratic society<sup>4</sup>.

Clauses 5 to 15 of the Bill may limit the right by amending part 4 of the WPA to allow employers to apply to the Magistrates Court for an authority to conduct covert surveillance of an employee outside the workplace ('external covert surveillance'). Clause 4 of the Bill may also limit the right to privacy by amending section 17 of WPA Act to allow for tracking of equipment provided by the employer without a notice in limited circumstances.

### ***Importance of the purpose:***

Provision for an employer to apply for, and exercise, an external covert surveillance authority is necessary for the purpose of gathering evidence where the employer reasonably believes an employee is committing an offence against a law of the Territory where it is directly related to a workplace issue. This limitation assists employers to protect themselves against false claims and consequent increases in insurance and public administration costs.

Removing notice requirements in limited circumstances for tracking devices addresses feedback that in some cases it is not reasonably practicable to affix a notice to such devices or objects, and hence comply with the WPA. This limited exemption is designed to reduce unreasonable practical burdens of compliance on employers.

### ***The nature and extent of the limitation:***

Where human rights are limited by law, it is necessary in a free and democratic society for reasonable limitations to be accompanied by adequate and effective safeguards that protect against arbitrary interferences with the right to privacy<sup>5</sup>.

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<sup>2</sup> *Halford v United Kingdom* (1997) 24 EHRR 523 at [45].

<sup>3</sup> UN Human Rights Committee, *General Comment 16: The right to respect of privacy, family, home and correspondence, and protection of honour and reputation (Art 17)*, UN Doc CCPR General Comment 16 (1988), para 7.

<sup>4</sup> Section 28, *Human Rights Act 2004*.

<sup>5</sup> *Klass v Germany* (1978) 2 EHRR 214 at [50].

Previously, an employer could only apply for a covert surveillance authority within the workplace. Clause 7 of the Bill amends section 26 (1) to allow an employer to apply for a covert surveillance authority outside the workplace. To ensure that such an authority is proportionate in all circumstances, clauses 7 to 12 impose constraints on when such an application can be made, the factors the court must consider before granting such an authority and conditions for exercising that authority.

An employer may only apply to the Magistrates Court for a covert surveillance authority if they *reasonably believe that the relevant employee is committing an offence against a law of the Territory*. A reasonable suspicion is insufficient for this purpose. The unlawful activity must also be related to the worker's work for the employer or the workplace (cl 7).

The Bill confines a Magistrate's discretion in determining an application for an external covert surveillance authority. Section 28 (2)(b) requires the Magistrate to consider and balance factors, including the seriousness of the unlawful activity in which the worker is reasonably believed to be engaged, whether surveillance will be undertaken in a place in which the worker would have a heightened expectation of privacy, and the existence of other more appropriate means to determine if the worker is engaged in unlawful activity (cl 9).

The Bill also imposes limits on the exercise of external covert surveillance. Only visual surveillance is permitted and surveillance may only be undertaken from a public area. Images may only be taken of an area visible from a public place and surveillance of activities within residential premises will not be allowed (even if visible from the public area) (cl 11). This prohibits surveillance of persons inside a residence and within an enclosed yard of a residence. Under section 28(5)(b), a covert surveillance authority may only authorise surveillance to be undertaken in a private or sensitive place (comparable to prohibited non-work areas in s 41) where the Magistrates Court is satisfied that there are exceptional circumstances justifying surveillance in that place.

In relation to notice requirements for tracking devices, under section 17 an employer may only conduct surveillance of a worker that involves the tracking of a vehicle or other thing if there is a clearly visible notice that the vehicle or thing is being tracked. Clause 4 amends section 17 to exempt an employer from this requirement only if they can establish that it would be unduly difficult to attach a notice to the device and that they have taken appropriate action to notify the worker of the device's tracking ability.

***Relationship between the limitation and its purpose:***

Allowing covert surveillance outside the workplace where an employee would arguably have a reasonable expectation of greater privacy directly facilitates the limitation's purpose – to allow an employer to gather evidence of an employee's work-related unlawful activity outside the workplace. Where an employee is absent from the workplace (for instance, on worker's compensation leave), the employer does not have a legitimate means to gather evidence of work-related unlawful behaviour. By introducing a process for covert surveillance outside the workplace, the Bill assists employers to mitigate any additional costs they incur as a result of

employees' unlawful behaviour, such as increased premiums, administrative costs and replacement of resources.

***Less restrictive means reasonably available to achieve the limitation's purpose:***

While there is existing provision for covert surveillance within the workplace, such surveillance has demonstrated limited effect in gathering evidence that an employee is committing an offence against the law of the Territory while outside the workplace. Given the extent of constraints on this power and absence of viable alternatives, any limitation on the right to privacy is reasonable and proportionate to this purpose.

**Section 11 – Right to protection of the family and children**

Section 11 of the HRA states that –

- (a) The family is the natural and basic group unit of society and is entitled to be protected by society.*
- (b) Every child has the right to the protection needed by the child because of being a child, without distinction or discrimination of any kind.*

***Nature of the right affected:***

General comment 19 from the UNHRC, which describes the right to the protection of the family at article 23 of the ICCPR, notes that when read with article 17 (right to privacy), the right to protection of the family establishes a prohibition on *arbitrary or unlawful interference* with the family unit<sup>6</sup>. The right to protection of the family and children is therefore not absolute. Article 3 (1) of the UN Convention on the Rights of the Child states that 'in all actions concerning children ... the best interests of the child shall be a primary consideration'.

In achieving the purpose of the Bill, part 4 has the potential to engage, and limit, the right to protection of the family and children, for example where covert surveillance is conducted in the vicinity of an employee's private residence and images of family members are captured in the course of surveillance.

***Importance of the purpose:***

As above, lawful external covert surveillance is necessary to allow employers to take reasonable steps to gather evidence and protect themselves against false claims, and consequential increases in premiums and operating costs. External covert surveillance by employers outside the workplace will, in appropriate circumstances, be necessary to identify an employee's unlawful activity.

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<sup>6</sup> 13 Office of the United Nations High Commissioner for Human Rights, Human Rights Committee, 1990 'General comment 19: Protection of the family, the right to marriage and equality of spouses, para 1. Available: [http://www.unhcr.ch/tbs/doc.nsf/\(Symbol\)/6f97648603f69bcdc12563ed004c3881?Opendocument](http://www.unhcr.ch/tbs/doc.nsf/(Symbol)/6f97648603f69bcdc12563ed004c3881?Opendocument)

***The nature and extent of the limitation:***

It is possible that during the course of external covert surveillance the subject employee may be photographed in close proximity to members of their family, including their children. This limitation is a possible consequence of allowing for employers to conduct surveillance outside the workplace. This limitation however is incidental and will not be an inevitable occurrence in all instances of covert surveillance outside the workplace.

The Government considers this limitation to be sufficiently qualified and subject to appropriate safeguards as to be proportionate to its purpose. Clause 12 requires an employer to ensure that any images taken in the course of external covert surveillance that contain third parties, including children, are either destroyed or obscured as soon as possible after the image is taken. Equally, if the surveillance is outsourced to a third party, the third party will be required to comply with the provisions of the WPA, including the destruction or obscuring of images of third parties, and any other applicable privacy laws (ie those in the *Information Privacy Act 2014*). Under existing provisions in the WPA, any information collected may not be later used for another purpose and, if not used in proceedings against the employee, must be destroyed three months after collection.

***Relationship between the limitation and its purpose:***

As an employee is likely to have a reasonable expectation of greater privacy outside the workplace, external covert surveillance directly facilitates the limitation's purpose – to allow an employer to gather evidence of an employee's work-related unlawful activity outside the workplace. Without the ability to conduct covert surveillance outside the workplace, employers are not able to defend false claims or mitigate increased costs resulting from such claims.

***Less restrictive means reasonably available to achieve the limitation's purpose:***

There are no less restrictive means available to allow employers to gather evidence outside the workplace of workplace-related unlawful activity. Any limitation on this right is proportionate given the protections relating to destruction or obscuring of any record of third parties.



## CLAUSE NOTES

### Clause 1 Name of Act

This clause provides that the name of the Act is the *Workplace Privacy Amendment Act 2015*.

### Clause 2 Commencement

This clause provides for the commencement of the Act. The Act will commence on a day to be fixed by the Minister by written notice.

### Clause 3 Legislation Amended

This clause identifies the Acts amended by the Bill - the *Workplace Privacy Act 2011*, *Work Health and Safety Act 2011* and the *Magistrates Court Act 1930*.

### Clause 4 Additional requirements for tracking devices, New section 17 (2)

This clause inserts a new subsection to exempt an employer from the requirement to affix a clearly visible notice to a vehicle or object involved in the tracking of a worker where it is not reasonably practicable to affix such a notice and where the employer has taken reasonable steps to notify workers that the vehicle or object is being tracked.

### Clause 5 Section 24

This clause substitutes a new definition of 'covert surveillance' in section 24 to include surveillance conducted by an employer of a worker in a workplace without notifying the worker under part 3 or surveillance conducted outside a workplace. The definition does not include prohibited surveillance.

### Clause 6 Definitions – pt 4, Section 25, definition of *unlawful activity*

This clause substitutes part of a definition of 'unlawful activity' to mean an act or omission that is an offence against a law in force in the Territory.

Amendment of the definition will restrict the scope of the term 'unlawful activity' to acts or omissions that infringe the law operating in the Australian Capital Territory at the time. Clarification of this definition imports greater certainty about what constitutes 'unlawful activity'.

### Clause 7 Application for covert surveillance authority, Section 26 (1), except notes

This clause amends section 26(1) to allow an employer to apply to the Magistrates Court for an authority to conduct covert surveillance of a worker only for the purpose of determining whether the working is engaged in unlawful activity in the workplace or, if outside the workplace, the unlawful activity is work-related.

## **Clause 8 Section 26 (2) (a)**

This clause substitutes section 26 (2) (a) and introduces a new paragraph (aa) so that the requirements for an application form for covert surveillance distinguish the differing thresholds for applications to conduct surveillance within the workplace and surveillance outside the workplace.

## **Clause 9 Issuing covert surveillance authority, Section 28 (2) and note**

This clause restructures section 28 (2) to identify the factors that a Magistrate must consider when determining reasonable grounds to issue a covert surveillance authority for surveillance inside the workplace (s 28 (2) (a)) and surveillance outside the workplace (s 28 (2) (b)).

This clause also introduces two new considerations that a Magistrate must take account of when considering reasonable grounds to authorise covert surveillance outside the workplace. These are to consider whether the worker's suspected unlawful activity is directly related to the worker's work for the employer and whether surveillance of a worker will be undertaken in a place where a person would have a heightened expectation of privacy.

## **Clause 10 Section 28 (4) (a)**

This clause amends section 28 (4) to require covert surveillance authorities to state the name of the relevant worker, and the nature of the unlawful activity that that worker is either suspected of, or believed to be engaged in.

## **Clause 11 New section 28 (5) and (6)**

This clause inserts two new subsections into section 28. Subsection (5)(a) directs that a covert surveillance authority may only authorise surveillance to be undertaken from a public place and must not authorise surveillance to be undertaken in part of a premises that is being used for residential purposes; that is, part of the premises that is not a public place. The interior and enclosed yard of a residence is included for this purpose.

Subsection (5)(b) constrains a Magistrate's discretion to authorise surveillance in a place that, if it were within a workplace, would fall within the scope of a prohibited non-work area. Such areas include toilet facilities, change rooms, showers or bathing facilities, prayer rooms, sick-bays and first-aid rooms. A Magistrate may only authorise covert surveillance outside a workplace in such areas where the employer has demonstrated exceptional circumstances to justify surveillance in that place.

Subsection (6) defines 'public place' for the purposes of section 28. The definition replicates the definition of 'public place' in the *Smoke Free Public Places Act 2003*. This definition recognises that a place may be characterised as public despite access being conditional on payment, membership, entitlement or permission. The

scope of this definition aligns with the intent of other ACT legislative definitions of 'public place', for example in the *Litter Act 2004* and the *Liquor Act 2010*.

#### **Clause 12 Conditions on covert surveillance authority, New section 31 (1A)**

This clause inserts a new subsection that imposes conditions on the exercise of a covert surveillance authority, namely that any surveillance of people other than the worker is destroyed or obscured as soon as possible after it is made, and that if the surveillance is undertaken by a third party, the third party complies with the provisions of the WPA and other relevant privacy laws.

#### **Clause 13 Offence – use and disclosure of covert surveillance other than for a relevant purpose, Section 39 (3) (b) and (c)**

This clause makes a minor technical amendment to ensure consistency of language throughout the WPA and recognise the new provision for covert surveillance outside the workplace. The clause replaces the phrase 'while at work for the employer' with 'in relation to the worker's work for the employer'.

#### **Clause 14 Section 39 (3) (d)**

This clause makes a minor technical amendment to ensure consistency of language throughout the WPA and recognise new provision for covert surveillance outside the workplace. The clause qualifies a reference to 'unlawful activity' in this section so that only that unlawful activity that relates to the worker's work for the employer and that is of a kind identified by the covert surveillance record is covered.

#### **Clause 15 Surveillance of workers not at work, New section 42 (2) (d)**

This clause inserts a new paragraph (d) into section 42 (2) to exclude surveillance in accordance with a covert surveillance authority from the offence provision in section 42 (2).

#### **Clause 16 New part 5A**

This clause inserts a new part 5A (Enforcement), which extends the existing powers of authorised inspectors appointed under the WHS Act to enforcement of matters under the WPA.

#### **New section 43A: The regulator**

This new section gives the regulator a number of functions in relation to the WPA. These include powers to advise and make recommendations to the Minister, to monitor and enforce compliance, provide advice to employers and employees, conduct and defend proceedings, and exercise any other function granted by the WPA.

The new section also grants the regulator the same powers to obtain information in relation to contraventions or that will assist monitoring and enforcing compliance under the WPA as they have under s 155 of the Work Health and Safety Act.

This section also grants the regulator the same powers as an inspector under the WPA and allows for the delegation of the regulator's powers and functions to another person.

#### New section 43B: Inspectors

This new section makes an authorised inspector appointed under the WHS Act an inspector for the purposes of the WPA.

#### New section 43C: Functions and powers of inspectors

This new section gives inspectors a number of functions in relation to the WPA. These include powers to provide information and advice about compliance, to require compliance through the issuing of notices under the Work Health and Safety Act and to investigate contraventions and assist the prosecution of offences.

This section applies provisions of the Work Health and Safety Act that impose conditions on an inspector's compliance powers and make inspectors subject to the directions of the regulator.

#### New section 43D: Securing compliance

This new section allows an inspector to exercise their powers under divisions 9.3 (Powers relating to entry) and 9.5 (Other matters) of the WHS Act for the purpose of securing compliance with the WPA.

The new section also extends the application of divisions 9.4 (Damage and compensation) and 9.6 (Offences in relation to inspectors) of the WHS Act to the exercise of these functions in relation to the WPA.

The effect of this clause is to authorise Work Health and Safety inspectors to exercise their existing powers under the WHS Act in relation to matters under the WPA. Expanding the scope of authorised inspectors' powers is designed to allow for the transfer of enforcement responsibility from ACT Policing to authorised WorkSafe ACT inspectors.

#### New section 43E: Enforcement measures

This new section extends the application of part 10 of the Work Health and Safety Act, which contains powers for the purpose of enforcing compliance, to the WPA. For the purposes of this section, reference to the Act, or a contravening provision of the Act, in a provision within the WHS Act are deemed as also being a reference to the WPA or a contravening provision of the WPA.

**Clause 17 Offences – security of surveillance records, Section 44 (2) (b)**

This clause is a technical amendment that substitutes ‘de-identify’ in section 44 (2) (b) to correct a misspelling in the current WPA.

**Clause 18 Report on covert surveillance to Legislative Assembly, Section 45**

This clause omits section 45 of the WPA to remove the requirement for the Minister to report to the appropriate Legislative Assembly committee on the number of covert surveillance authorities applied for and issued, and the kind of surveillance device authorised to be used by the issued authorities.

Commencing on 1 July 2016, reporting on covert surveillance authorisations will be included in the annual report of the ACT Government directorate with responsibility for administration of the WPA. This change will be effected through amendments to the Annual Report Direction.

**Clause 19 Dictionary, new definition of *regulator***

This clause is a technical amendment to ensure consistency of language in the legislation. It inserts a signpost definition of ‘regulator’ by reference to the Work Health and Safety Act into the dictionary.

**Clause 20 Magistrates Court Act 1930, New section 291Q (1) (a) (vi)**

This clause inserts a new sub-paragraph into s 291Q (1) (a) of the *Magistrates Court Act 1930* to grant the Industrial Court jurisdiction to hear and decide a proceeding under the WPA.

**Clause 21 Work Health Safety Act 2011, Schedule 2, part 2.1, section 2.2 (2) (i)**

This clause inserts a new paragraph (i) into section 2.2 (2) in schedule 2, part 2.1 of the WHS Act to allow the Work Safety Council to advise the Minister for Workplace Safety and Industrial Relations on the operation of the WPA.