

CLAW3207 Final Exam Notes – by topic

The Application of Anti-Discrimination Laws: One Page Summary

The Application of Anti-Discrimination Laws

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Privacy Laws: One Page Summary

- Technical innovations
- Privacy Act 1988
 - Extended to cover the private sector from 2001, but only businesses with an annual turnover of at least \$3 million
 - Except where they are in the business of dealing with health information or distributing personal information for gain
 - Sets out the National Privacy Principles (NPP)
 - S7B(3) employee record exemption
 - S61(1) employee record is 'a record of personal information relating to the employment of the employee' including health information, terms of employment and termination
 - But unsuccessful job applicants and contractors are still covered, the employee record exemption doesn't apply to them
 - Arguments this be abolished
 - Political landscape: introduced with aim to be legislated by work legislation specifically, but this never happened
- Other statutes
 - Workplace surveillance
- Role of common law
- Role of implied contractual obligations
- Role of statute
- Readings
 - Selection tests and indirect discrimination
 - Privacy is a legal avenue to challenge
 - Employee records
 - Howard governments role
 - Limitations of current privacy landscape
 - UK approach
 - EU approach
 - Proposed changes

Privacy laws

Readings

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Workplace surveillance

In some jurisdictions the only regulation deals with 'listening devices', although some States have enacted more general statutes.

Workplace Surveillance Act 2005 (NSW) does include video cameras, through computers and tracking devices. It proscribes surveillance of change rooms or bathrooms and surveillance of employees whilst they are away from the workplace. It also prevents employers from blocking email or internet access other than in accordance with a formal policy that has been communicated to the workforce and requires that employees are notified of the use of surveillance.

Surveillance Devices Act 1999 (VIC) only restricts surveillance of private areas such as bathrooms or change rooms.

FW Act s27(2)(m) – outlines that workplace surveillance is a non-excluded matter of the Act.

Statute

- **Freedom of Information Act 1982 (Cth)**
 - Requiring agencies to publish information
 - Providing for a right of access to documents
- **Privacy Act 1988 (Cth)**
 - See page 25
- **Privacy and Personal Information Protection Act 1988 (NSW)**
- **Information Privacy Act (VIC)**
 - S1
 - To establish a regime for the responsible collection and handling of personal information in the Victorian public sector
 - Provide individuals with rights of access to information about them held by organisations
 - Provide individuals with the right to require an organisation to correct information about them
 - Provide remedies for interferences with the information privacy of an individual
 - Provide for the appointment of a Privacy Commissions
- **Fair Work Act 2009 (Cth)**

Lecture Slides/Lecture Notes

Scope

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Workplace Surveillance Act 2005 (NSW)

1. Regulates surveillance by video cameras, through computers and by tracking devices
2. Proscribes surveillance of change/bathrooms and while employees are away from their workplace
3. Prevents employers from blocking email or internet access other than in accord with a formal, communicated policy
4. Requires employees to be notified of surveillance

Surveillance Devices Act 1999 (VIC)

1. Offence to install/use an optical surveillance or listening device to record private activities
2. BUT, doesn't apply where the employee has agreed to surveillance
3. AND only applies where conversations etc ought reasonably expected to be 'private'
Email monitoring or biometrics is not covered.

Employers can compile/retain large amounts of personal information regarding current and former employees because of a lack of scope of the **Privacy Act 1988 (Cth)**.

The current position at common law

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Implied contractual obligations

Duty to respect confidentiality – this applies to personal information

It is possible that an employer conducting secret video/phone surveillance or private emails/browsing logs without consent could be found to be in breach.

Also possibly the obligation of 'trust and confidence' between the parties to an employment relationship

Privacy Act 1988

Section 2A – objects of the Act (summarized)

- a) Promote the protection of privacy
- b) Balance protection of privacy of individuals with the interests of entities
- c) National consistent regulation of privacy and handling of personal information
- d) Promote responsible and transparent handling of personal information**
- e) Efficiency
- f) Facilitate the free flow of information
- g) Provide a means for individuals to complain
- h) Implement Australia's international obligations

It has now been extended to the private sector (previously only covered the public sector), but only business with annual turnover of \geq \$3 million (except when in the business of health or personal information distribution).

The Privacy Act covers the National Privacy Principles (NPP's) which cover collection, storage, use, disclosure, accuracy and security of personal information (with special provisions for 'sensitive' information such as health)

S7B – employee record exemption**

S7B(3) exemption for any act or practice that is 'directly related' to an employee record

S6(1) 'employee record' = a record of personal information regarding the employment of the employee

Therefore includes their health, terms of employment, training, termination etc.

B v Cleaning Company

The cleaning company disclosed the address, financial details and more about a former employee to a debt collection agency. It was held that the person information **was not** an employee record, so the act of disclosing it was not 'directly related' to the employment relationship and therefore Cleaning Co had interfered with the complainant's privacy.

Criticisms of employee record exemption

Otlowski 2001 (and others)

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Pyman et al (2008)

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Other measures which regulate employee privacy

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Lecture Notes

Privacy essentially doesn't exist in a workplace context because of the gaps in the laws and the way it is regulated. It is very difficult to take a common law case as the position at common law is it would be very difficult and not generally worth your time, stress, cost or remedies.

The Privacy Act – does barely anything applying to employment as employee records are exempted, but it applies generally. If you are a prospective employee then you have more protection under the Act than current/former employees. Overall very poor coverage.

They exempted employment records with the assumption that laws would later get passed that were employment specific, but that never happened.

Discussion/Questions Raised

What approach is applied in Europe vis-à-vis privacy in employment?

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What qualifies as a listening device? Do emails count?

Linkages

Online privacy policies -> could help employers justify dismissals of workers who misuse facilities

Unfair dismissal: Byrne and Frew, they were being monitored and caught pilfering from someone's bags then caught and sacked. They applied for unfair dismissal and won. But the courts made no mention of the surveillance measures used.

Indirect discrimination: in the US you can challenge selection tests based on the rights to privacy

Discrimination: there are difficulties for complainants to establish discrimination as they are complaints based in nature and lack access to information, therefore may be difficult to prove that you were discriminated against based on a lack of privacy.

FREEDOM OF ASSOCIATION

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Torts Law

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CLAW1001 – Negligence

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Elements of Negligence

1. **Is there a duty of care (Is it an established case?)**
2. **Is there a breach of that duty (Standard of Care)**
3. **Causation and Damage**
4. **Remoteness of Damage**

Established Categories

Breach of Duty of Care

3 Issues to Consider:

THREE-PRONGED TEST (Civil Liability Act s 5B(2))

Causation

Remoteness of damage

Recognised Category of Damage:

Defences

Vicarious Liability

Vicarious liability makes an employer punishable for the negligence of an employee, making the employer negligent even if they were not personally negligent (**Hollis v Vabu 'Crisis Couriers'**)

Must distinguish between an Employer & Employee relationship and an Independent Contractor

2 Issues:

- i) Are they an employee?
- ii) Was the negligent act committed 'in the course of employment'?

1. Multi-Indicia Test (Stevens v Broadribb Sawmilling)

1. Was the negligent act committed in the 'scope of employment'?