

Employee records exemption

Introduction

3.1 Clause 7B (3) of the Bill provides that an act done, or practice engaged in, by an organisation that is, or was, an employer of an individual, is exempt for the purposes of the Bill if the act or practice is directly related to:

- (a) a current or former employment relationship between the employer and the individual; and
- (b) an employee record held by the organisation and relating to the individual.

3.2 'Employee record' is defined in clause 6 (1) as follows:

employee record, in relation to an employee, means a record of personal information relating to the employment of the employee. Examples of personal information relating to the employment of the employee are health information about the employee and personal information about any or all of the following:

- (a) the engagement, training, disciplining or resignation of the employee;
- (b) the termination of the employment of the employee;
- (c) the terms and conditions of employment of the employee;
- (d) the employee's personal and emergency contact details;
- (e) the employee's performance or conduct;
- (f) the employee's hours of employment;
- (g) the employee's salary or wages;

- (h) the employee's membership of a professional or trade association;
- (i) the employee's trade union membership;
- (j) the employee's recreation, long service, sick, personal, maternity, paternity or other leave;
- (k) the employee's taxation, banking or superannuation affairs.

Rationale for the exemption

3.3 In his Second Reading Speech on 12 April 2000, the Attorney-General, the Hon Daryl Williams AM QC MP, said that the definition of 'employee record' was designed to 'capture the types of personal information about employees typically held by employers on personnel and other similar files.'¹ The Attorney-General went on to state that:

While this type of personal information is deserving of privacy protection, it is the government's view that such protection is more properly a matter for workplace relations legislation.²

3.4 The Attorney-General also went on to note that the exemption is 'limited to collection, use or disclosure of employee records where this directly relates to the employment relationship.'³ This is designed to preclude, he said, an 'employer selling personal information contained in an employee record to a direct marketer, for example.'⁴

3.5 Coles Myer Ltd,⁵ the Western Australian Chamber of Commerce and Industry⁶ and the Australian Chamber of Commerce and Industry (ACCI)⁷ all supported the government's view that workplace relations legislation is the appropriate setting for issues of privacy in the employment context. Coles Myer Ltd stated that some evaluative records would present a difficulty for employers if employees had ready access to them, such as career progression information.⁸

1 The Hon Daryl Williams AM QC MP, Attorney-General, Second Reading Speech, 12 April 2000, House of Representatives, *Hansard*, p.15077.

2 *Ibid.*

3 *Ibid* – see also *Explanatory Memorandum* page 60.

4 *Ibid.*

5 Coles Myer Ltd, *Submissions*, p.S39.

6 West Australian Chamber of Commerce and Industry, *Submissions*, p.S209.

7 Australian Chamber of Commerce and Industry (ACCI), *Submissions*, p.S565.

8 Coles Myer, *Submissions*, pp.S41-42.

3.6 ACCI stated that employment records are almost always maintained by employers to comply with statutory requirements of some kind, the objects of which seek to protect employees.⁹ They also submitted that the maintenance of such records does not involve any invasion of privacy and should be understood and accepted as a precondition of employment.¹⁰ Further, such records are maintained to protect the interests of both employers and employees and privacy regulation with regard to employee records is already covered under workplace relations legislation.¹¹

Current coverage of employee privacy

3.7 Despite ACCI's view that privacy regulation with regard to employee records is already covered under workplace relations legislation, it is clear from the evidence received by the Committee that current coverage of employee privacy in the workplace relations context is, in fact, minimal.

3.8 Mr Robin Stewart-Crompton of the Department of Employment, Workplace Relations and Small Business (DEWRSB) drew the Committee's attention to Regulations 131K and 131L made under section 353A of the *Workplace Relations Act 1996*.¹² These regulations permit employees to access and copy employee records and to correct them.¹³ However these provisions were described as 'time and wages' records¹⁴ and concern a limited range of matters such as name, date of birth, leave, remuneration, superannuation and termination.¹⁵ They do not cover the broad range of other matters listed in the definition of 'employee record' in clause 6(1) of the Bill and do not permit disclosure of the information to anyone other than the employee or former employee to whom the record relates, an inspector or an authorised officer. Mr Stewart-Crompton confirmed that the *Workplace Relations Act* would not prevent an employer from disclosing employee information.¹⁶

3.9 It also appears clear that, as submitted by the Australian Council of Trade Unions (ACTU), privacy protection is not an 'allowable matter' for the purposes of subsection 89A(2) of the *Workplace Relations Act 1996*. That

9 ACCI, *Submissions*, p.S563.

10 Ibid, p.S563.

11 Ibid, p.S563.

12 DEWRSB, *Transcript*, pp.210-211.

13 Ibid, *Transcript*, pp.210-211.

14 ACTU, *Transcript*, p.251.

15 Workplace Relations Regulations 1996, Regulations 131D – 131J.

16 DEWRSB, *Transcript*, pp.212-213.

privacy is not a matter in relation to which the Industrial Relations Commission has jurisdiction to make an award.¹⁷

- 3.10 The ACTU further submitted that, while privacy protection issues could be included in agreements made under the *Workplace Relations Act*, this is not generally the case.¹⁸ In oral evidence, the ACTU also stated that there are substantial areas of the workforce not covered by enterprise bargaining.¹⁹
- 3.11 As the Federal Privacy Commissioner, Mr Malcolm Crompton noted, even where the potential exists to have privacy issues dealt with under workplace relations arrangements, it is
- ...still not clear that all employees will be in a position to negotiate consistent and fair arrangements for the protection of their personal information.²⁰
- 3.12 Both the ACTU and the Federal Privacy Commissioner expressed concern at the potential for 'serious inequities'²¹ at worst and significant gaps and inconsistent outcomes at best²² if inclusion of privacy issues in workplace arrangements is the principal way in which the privacy of employee records is expected to be protected. The Committee believes that significant gaps and inconsistencies are likely to be the result of leaving privacy issues to be governed by workplace arrangements.
- 3.13 As was submitted by the Privacy Commissioner:
- ...in the absence of other regulations on these matters and given the limited scope of this power to make regulations it is unclear how the *Workplace Relations Act* will address issues in relation to the collection, use, disclosure and correction, of employees' personal information.²³
- 3.14 The Committee notes that the Government has not indicated any plans to extend privacy protection provisions in the *Workplace Relations Act*. The Committee was disappointed that the DEWRSB appeared not to have addressed the issue of the privacy of employee's personal information and was unable to enlighten the Committee as to the significant issues that arise in this context.

17 ACTU, *Submissions*, p.S107.

18 Ibid, p S107.

19 ACTU, *Transcript*, p.248.

20 Federal Privacy Commissioner, *Submissions*, p.S387.

21 Ibid, p.S387.

22 ACTU, *Submissions*, p.S107.

23 Federal Privacy Commissioner, *Submissions*, p.S387.

- 3.15 The Committee also noted that there is no exemption for employee records in the existing *Privacy Act 1988* which applies to the public sector.²⁴
- 3.16 The ACTU argued that there is already substantial abuse of the privacy of employees in the workplace as a result of the monitoring of health information, emails and telephone calls.²⁵ They further noted that it is in the area of prospective employment (specifically provided for in the exemption) where privacy is often breached as a result of prospective employers contacting past employers and seeking (and receiving) information concerning, for example, leave, health records or pay information.²⁶
- 3.17 The Committee 's view is that privacy is a right and therefore it should not be the subject of negotiation in the employment context. Employees usually have no effective choice but to give significant personal information, often of a very sensitive nature, to their employers. The fact that this has resulted in breaches of employee privacy is borne out in the submission of the Federal Privacy Commissioner. He stated that alleged interferences with individuals' privacy in the workplace make up a significant number of privacy complaints in the federal public sector where the existing Privacy Act applies (about 16% of all complaints concerning the Information Privacy Principles received in his office and a significant proportion of all general privacy inquiries).²⁷ Privacy NSW also claimed that the exemption would run
- ...counter to widely held expectations in relation to privacy and transparent processes in the workplace which are reflected by complaints and inquiries to my office.²⁸

Consequences of the exemption

- 3.18 In the light of this current situation, great concern was expressed about the potential consequences of the exemption. DEWRSB acknowledged that the words 'relating to employment' of an employee in the definition of 'employee record' clearly has a wide meaning.²⁹ Mr Stewart-Crompton of DEWRSB said he would interpret it as meaning a 'material relationship'

24 See also paragraph 3.24.

25 ACTU, *Transcript*, p.248.

26 *Ibid*, pp.248-249.

27 Privacy Commissioner, *Submissions*, p.S387.

28 Privacy NSW, *Submissions*, p.S293.

29 DEWRSB, *Transcript*, p.213.

with the employment of the employee but acknowledged the potential breadth of the exemption.³⁰

- 3.19 The ACTU submitted that, as a result of the exemption, an employer would be able to obtain information about sensitive issues such as health, criminal convictions or trade union membership from a previous employer or some other person without the employee being informed.³¹ This could also include information about disciplinary matters, financial records or health records. As a result of the exemption employers would also be virtually free to disclose this data to other persons other than for commercial purposes.³² A consequence of this is that employees could be disadvantaged through the collection and/or disclosure of sensitive and possibly inaccurate information about them without their knowledge or consent.³³ In the Committee's view it is also important to note that, while the terms of the exemption offer some protection against disclosure by employers of employee information for commercial purposes, employee information may be disclosed to organisations for other reasons. An employer could, for example, provide personal information on all its employees to a superannuation fund for the purposes of securing superannuation benefits for its employees.
- 3.20 The Privacy Foundation argued in oral evidence that the exemption could be very prejudicial to employees and cited as an example the instance of an employer ordering employees to undergo health tests because they suspected there might be a problem with exposure to toxicity or carcinogens. If the outcome was that there had, in fact, been such exposure the employees would have no right to see their records.³⁴ The Privacy Foundation argued that such a situation 'flies in the face of any sense of what is reasonable and what is decent in the workplace.'³⁵
- 3.21 Privacy NSW expressed concern that the exemption will in fact have 'a much broader impact on employees expectations of privacy than may appear at first sight.'³⁶ They argued that, because of the way technology in the workplace is generating increasing quantities of information about employee behaviour, it is also an area that is capable of infinite expansion.³⁷

30 DEWRSB, *Transcript*, p.213.

31 ACTU, *Submissions*, p.S108.

32 Ibid, *Submissions*, p.S109. See also *Explanatory Memorandum* p.80.

33 ACTU, *Submissions*, p.S109.

34 Privacy Foundation, *Transcript*, p.105.

35 Ibid, p.105.

36 Privacy NSW, *Submissions*, p.S293.

37 Ibid, p.S293.

Arguments for the deletion of the exemption

3.22 The majority of the submissions to the inquiry that discussed this exemption expressed strong opposition to the exemption and urged the Committee to recommend its deletion. The deletion of the exemption would lead to employee records being given the same protection as all other information under the National Privacy Principles. The Victorian Government did not support the exemption on the basis that employee records are one of the most sensitive categories of personal information.³⁸ The Australian Privacy Charter Council also submitted that the handling of employment records is:

...one of the areas where individuals are most in need of safeguards provided by accepted privacy principles – given the serious consequences that can flow from inappropriate practices.³⁹

3.23 This concern was also supported by the Privacy Foundation which believes that the proposed exemption is ‘against the public interest’⁴⁰ because of the special relationship of trust between employers and employees which allows an employer to collect and use a significant amount of sensitive and personal information about an employee.⁴¹ The exemption, in their view, sends a message to employers ‘that their use or misuse of this personal information is not a matter of public concern.’⁴² The Communications Law Centre likewise submitted that:

Privacy in the workplace is a serious concern and individuals have a right to expect that appropriate standards and practices will govern the handling of employee records.⁴³

3.24 Professor Greenleaf of the University of New South Wales claimed that because public sector employment information is already covered by the existing Privacy Act the exemption of private sector employees from similar protection is discriminatory.⁴⁴

3.25 The Federal Privacy Commissioner, Mr Malcolm Crompton, urged great caution in relation to the exemption.⁴⁵ The Commissioner submitted that the proposed exemption ‘potentially allows an employer to collect, use and disclose this type of information where it is not specifically prevented

38 Victorian Government, Department of State and Regional Development, *Submissions*, p.S199.

39 Australian Privacy Charter Council, *Submissions*, p.S249.

40 Privacy Foundation, *Submissions*, pp.S516-517.

41 Ibid, pp.S516-517.

42 Ibid, pp.S516-517.

43 Communications Law Centre, *Submissions*, p.S335.

44 Professor Greenleaf, *Submissions*, p.S305.

45 Privacy Commissioner, *Submissions*, p.S387.

from doing so by an award or employment contract'.⁴⁶ The Commissioner points out that the:

...proposed exemption ...is also not consistent with the proposed treatment of sensitive information, including health information, proposed elsewhere in the Bill. This follows from the definition of "employee record" as including, for example, trade union membership, membership of professional or trade associations and aspects of employee health information.... Sensitive information and more particularly health information are given more specific levels of protection in the Bill. I strongly support this approach. I do not support proposals that might then weaken that protection for the many Australians who are employees.⁴⁷

3.26 Rothschild Australia Asset Management Ltd expressed a specific concern about this exemption (along with that relating to small business). They submitted that, as a provider of superannuation, they considered information about clients' accounts may form part of the employee records in a business of any size.⁴⁸ This:

...makes the exposure or inappropriate transmission of such data more possible, and we would wish this avoided in the interests of clients having full confidence in privacy protection.⁴⁹

3.27 The Australian Privacy Charter Council also expressed their concern about the effect of the exemption in the context of, for example, a choice of superannuation fund.⁵⁰ In that context, the Council said that one of their greatest fears about employee records was commercialisation.⁵¹ They argued:

Employee records are actually gaining a deal of commercial value, and seeing them exempt from the Privacy Act would send a signal to employers that this might be something they could make money from.⁵²

3.28 Particular concern was also expressed about the employee records exemption in the context of health information in particular. The Health Issues Centre submitted that employers not infrequently hold extensive health information regarding staff in their personnel files.⁵³ Examples

46 Privacy Commissioner, *Submissions*, p.S388.

47 Ibid, p.S388.

48 Rothschild, *Submissions*, p.S430.

49 Ibid, p.S430.

50 Privacy Charter Council, *Transcript*, p.165.

51 Ibid, p.165.

52 Ibid, p.165.

53 Health Issues Centre, *Submissions*, p.S356. See also AMA, *Submissions*, p.S268.

include comprehensive health status assessments and histories obtained as a condition of employment.⁵⁴ The Centre argued that:

There is no reason to assume less potential for misuse of personal information health records obtained via an employer than those obtained direct from the health care practitioner who created them.⁵⁵

Conclusions

- 3.29 In the light of the evidence it has received, the Committee is not satisfied that existing workplace relations legislation provides enough protection for the privacy of private sector employee records and has grave concerns about the inclusion of the employee records exemption in the Bill. It has not been persuaded that there is any clear need for employees to be without privacy protection in relation to their workplace records.
- 3.30 The need for protection is particularly evident when the kind of information held by employers is considered. Employers frequently hold more information in relation to their employees than almost anyone else those employees will come into contact with. Further, this information can be extremely sensitive, even intimate. It may include sensitive health information ranging from genetic test results to medical records. It may also include banking, superannuation and other financial details, family details and the results of psychological testing conducted prior to employment.
- 3.31 The Committee accepts that there are competing considerations. There is some information that an employer should be able to disclose to future employers. This would consist of more performance related information such as confidential references.
- 3.32 This suggests to the Committee that there is a distinction that can be drawn in the nature, though not the sensitivity, of the information that may be held in employee records. In that light it does not appear to the Committee to be appropriate that this wide range of information should all be subject to such a sweeping exemption, especially one that leaves the employee with no right to see or correct information and with no protection from (or even knowledge of) its release. The Committee emphasises its concern at the potential for disclosure of such information as a consequence of this exemption.

54 Health Issues Centre, *Submissions* p.S357.

55 *Ibid*, p.S357.

- 3.33 It appears to the Committee that, given employees have little choice about providing such information to their employers, they are entitled to expect that their trust will be respected and the necessary confidentiality of their records ensured.
- 3.34 The current terms of the exemption —relating to an act or practice ‘directly related to’ a current or former employment relationship and an employee record ‘relating to the individual’—seem to the Committee to be unnecessarily broad. Such terminology allows an employer to provide a great deal of potentially very sensitive information to other people, most notably, but not exclusively, future employers.
- 3.35 The Committee emphasises that such information can be released with the consent of the employee. However the exemption, as currently framed, does not import any notion of consent on the part of the employee into the release of such information. This leaves the employee exposed to the risk of information being released which could have a profoundly negative effect on his or her life and which a potential future employer may not legitimately have the right to seek.
- 3.36 The Committee does acknowledge, however, that there is a difference between health, family or financial information on the one hand and information relating to disciplinary matters or career progression on the other. The former is, in the Committee’s view, inappropriate for inclusion in the exemption and the Committee can see no reason why such information should be provided to anyone else without the consent of the employee.
- 3.37 The Committee is also strongly of the view that ‘health information’ should be removed from the definition of ‘employee record’. Given the nature of much health information, it is inappropriate for inclusion in such an exemption and inconsistent with the more specific protection given to health information and sensitive information elsewhere in the Bill.
- 3.38 The Committee is also of the view that the exemption should be confined to what is contained in paragraphs (a), (b) and (e) of the current definition of ‘employee record’ in clause 6(1). With this in mind the Committee recommends that a new definition of ‘exempt employee record’ be inserted to target more precisely that information to which the exemption should apply. The Committee recommends that a consequential amendment be made to the existing definition of ‘employee record’ and that the exemption contained in clause 7B (3) be amended to apply only to an ‘exempt employee record’. Those matters listed in the proposed definition of ‘employee record’ would be subject to the NPPs.

Recommendation 5

The Committee recommends that the current definition of ‘employee record’ (which will be given the protection of the NPPs) in section 6(1) read:

‘employee record’, in relation to an employee, means a record of personal information relating to the employment of the employee other than an exempt employee record. Examples of personal information relating to the employment of the employee are health information about the employee and personal information about all or any of the following:

- (a) the terms and conditions of employment of the employee;**
- (b) the employee’s personal and emergency contact details;**
- (c) the employee’s hours of employment;**
- (d) the employee’s salary or wages;**
- (e) the employee’s membership of a professional or trade association;**
- (f) the employee’s trade union membership;**
- (g) the employee’s recreation, long service, sick, personal, maternity, paternity or other leave;**
- (h) the employee’s taxation, banking or superannuation affairs.**

Recommendation 6

The Committee recommends that a new definition of ‘exempt employee record’ be inserted in clause 6(1) reading as follows:

‘exempt employee record’ in relation to an employee, means a record of personal information relating to the employment of the employee and consisting of the following:

- (a) the engagement, training, disciplining or resignation of the employee;**
- (b) the termination of the employment of the employee;**
- (c) the employee’s performance or conduct.**

Recommendation 7

The Committee recommends that clause 7B(3) be amended as follows:

‘An act done, or practice engaged in, by an organisation that is or was an employer of an individual, is exempt for the purposes of paragraph 7(1)(ee) if the act or practice is directly related to:

- (a) a current or former employment relationship between the employer and the individual; and**

(b) an exempt employee record held by the organisation and relating to the individual;

- 3.39 These recommendations are not intended to override the existing provisions in the Workplace Relations legislation. The Committee's recommendations would not affect those provisions. However the Committee emphasises that an employee's personal information includes more than the limited matters covered in those regulations and the Committee is seeking to ensure that the privacy of such information is properly protected.
- 3.40 In the Committee's view it is important to ensure that the privacy of an employee's personal information is protected in all employment contexts. Such information is still sensitive and its protection should not be dependent on the size of the employer. The Committee is strongly of the view that the more targeted employee records exemption recommended by the Committee also apply to employers in small business. The Committee's recommendation for achieving this is outlined in Chapter 2.⁵⁶ The Committee is confident that that this will not impose any additional burdens in terms of record keeping or compliance costs on small business.

⁵⁶ See paragraph 2.64.