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NATIONAL REPORT – AUSTRALIA

Theme II: Labour Law and the Fundamental Rights of the Person

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1 FUNDAMENTAL RIGHTS AND THE LEGAL SYSTEM

I. Recognition and Legal Effects of the Fundamental Rights

1 How does your legal system define fundamental rights?

Largely as a consequence of the historical development the use of the expression “fundamental rights” is quite ambiguous in the Australian legal system. Certainly the expression “fundamental rights” is not defined or used in any fixed or rigid way in the Australian legal system. Indeed it is probably more accurate to say that the Australian legal system does not define “fundamental rights” at all.

The fundamental law in the Australian legal system is the *Australian Constitution* (which came into effect in 1901) and so the first place to look for “fundamental” rights is that document. However, the *Australian Constitution* contains few express “rights” and certainly nothing that resembles a “Bill of Rights”. The term “rights” can only be loosely used when looking at the *Australian Constitution*. In the *Australian Constitution* rights are more understood as constraints on governmental power, emanating either from the nature of the institutions of government from the federal nature of the Australian community.

Australia is a federation and each of the Australian States also has its own Constitution, which is subject to the *Australian Constitution*. However, State Constitutions also do not generally contain provisions protecting fundamental rights, with the exception of some limited recognition of civil and political rights.

It is often said that constitutionally Australia places its trust in political processes to protect the rights of the people. It is thus to legislation that one must look for the protection of so-called “fundamental rights” in Australia. However, because there is no guarantee that such legislation will be enacted or because legislation can be subject to repeal the description “fundamental” is not particularly apt here.

In Australia there is also sometimes reference made to common law rights as “fundamental”, but this too can be misleading because it is recognised that statutes may override the common law.

It is more likely these days that the term “fundamental rights” invokes for Australians a reference to something beyond the Australian legal system, to international law.

The relation between Australian and international law is complex. The Australian legal system is premised on the dualist theory, thus international law as contained in treaties and conventions does not apply automatically upon signature or ratification by Australia but requires domestic legislative implementation. In many instances the meaning of “fundamental rights” as used in statute law in Australia is taken from that established in international covenants or conventions that the statute is intended to implement (see eg the definition of “human rights” in s3 *Human Rights and Equal Opportunity Commission Act 1986* (Cth), and s9(2) *Racial Discrimination Act 1975* (Cth) which uses the term to apply to those human rights and fundamental freedoms in the political economic social cultural spheres of life as specified in Article 5 of the *International Convention on the Elimination of all Forms of Racial Discrimination*). In Australia it is also the case that where there is any ambiguity in the interpretation of a domestic legislative text, it is recognised that international law may play a role in resolving it: it is a common law presumption that legislation is not intended to be contrary to international law. It has also been recognised that Australia’s obligations vis a vis “fundamental rights” at international law may give rise to a “legitimate expectation” in its citizens that the Australian government respects these rights in its decision making processes.

2 *Has your legal system a catalogue of fundamental rights for the purposes of legal interpretation? If it does, how is it established? (eg by constitution, or by laws, caselaw, international and supranational sources, or by a combination of the former).*

It is not strictly accurate to say that Australia has something in the form of a catalogue of fundamental rights for the purposes of legal interpretation. However, as indicated in answer to question 1, there are a number of sources of law that may be considered as dealing with “fundamental rights” in Australia. These include the *Australian Constitution*, statute law, the common law and international law.

In the *Australian Constitution* there is an irregular assortment of ‘rights’ or guarantees. Any so-called “rights” within the *Australian Constitution* are more properly considered either to be constraints on governmental power or to arise from the federal nature of the Australian community. The *Australian Constitution* does not contain any “fundamental rights” as generally understood in Western jurisprudence, that is as rights that belong to, or are inherent in, the individual and held against the whole world.

Because the *Australian Constitution* establishes a system of representative and responsible government for Australia, it is taken to imply a very limited number of ‘rights’ in relation to political matters. For instance, freedom of political communication cannot be infringed by legislation or government action. Likewise there is undoubtedly a freedom of political association in Australia. However, such freedoms are not ‘rights’ of individuals, but operate as constraints on legislation or other government action that would infringe them. These freedoms are also limited in nature – it is a freedom in respect only of political, not all, communication or association.

The *Australian Constitution* also protects ‘rights’ to a fair trial arising from the nature of the judicial power exercised by the courts and reserves exclusively to the courts the power to convict and imprison a person for breach of the criminal law.

Some of the other constitutional rights that may be considered ‘fundamental’ in Australia have a federal flavour. Thus the *Australian Constitution* guarantees that its citizens can trade and move freely across State borders within Australia and that they cannot be discriminated against on the basis of their residence in a particular State.

The *Australian Constitution* makes reference to only a few other ‘rights’. One of these is that the Commonwealth (ie the federal) Parliament in Australia is constitutionally prohibited

either from making laws that would establish or prohibit the free exercise of a religion or from imposing a religious test as qualification for public office. However, this freedom of religion is again limited: it is not a general right in the individual to freedom of religion, but operates as a constraint on the Commonwealth Government. Significantly this freedom of religion does not apply to constrain the legislatures or governments of the various Australian States.

There are few rights included in State Constitutions in Australia. Those that do exist relate primarily to political matters. Thus, for instance, the *South Australian Constitution Act* provides that women may not be excluded from the vote. However, in Australia the status of State Constitutions is usually no different from ordinary legislation and thus it is difficult to describe them as containing “fundamental rights”.

At both Commonwealth and State level within Australia there are a variety of statutory provisions that regulate matters relating to “fundamental rights”. These include the rights of individuals not to be discriminated against on the basis of race, colour, national origin, sex, sexuality, marital status, pregnancy, potential pregnancy, family responsibilities, age, disability, religious or political opinion. Statutes often seek to implement (at least to some extent) international declarations and conventions. The declarations and conventions which have received some legislative implementation in Australia include the following: *ILO Convention Concerning Discrimination in Employment and Occupation*, the *International Covenant on Civil and Political Rights*, the *Declaration of the Rights of the Child*, *Declaration on the Rights of Mentally Retarded Persons*, *Declaration on the Rights of Disabled Persons*, the *International Convention on the Elimination of All Forms of Racial Discrimination*, the *International Convention on the Elimination of All Forms of Discrimination against Women*, *ILO Convention concerning the Termination of Employment at the Initiative of the Employer*.

In Australian legislation governing the workplace, there is also protection of freedom of association and the right of individuals to join or not join trade unions. There is also provision for collective bargaining.

II Effectiveness of Fundamental Rights

- 3** *If your constitution recognises the existence of fundamental rights, can they be directly exercised by individuals or do they call for further implementation through legislative action? How are the fundamental rights guaranteed by the constitution vis a vis further legislative action? Does the definition of “fundamental rights” imply a threshold of rights that cannot be undermined by legislative regulation? If such a threshold exists, how is it understood?*

As will be evident from the answers to questions 1 and 2 there is no explicit mention of “fundamental rights” in the *Australian Constitution*. Such ‘rights’ as are included in the *Australia Constitution* are not generally able to be directly exercised by individuals, although one exception is the right of individuals not to be discriminated on the basis of their residence in a particular State (see s117).

In so far as “fundamental rights” can be established in Australia through legislative action, for example through the implementation of international conventions, there is nothing in the *Australian Constitution* that mandates any such enactment.

Where the Australian Constitution guarantees some fundamental civil and political rights, such as the freedom of political communication, it does so by constraining the power of the Parliament to legislate in any way to undermine them. The test applied to determine the validity of legislation and to ensure the protection of the freedom is one of “reasonable proportionality”.

- 4** *If your constitution does not include a catalogue of fundamental rights (or your country does not have a written constitution) what is the position of fundamental rights in your overall legal system? On what bases are some rights defined as “fundamental” vis a vis other rights that do not enjoy an equal or similar recognition? Do fundamental rights enjoy some form of reinforced guarantees that other rights do not enjoy? If they do, what kind of guarantees do they enjoy?*

As noted above, there is no clear catalogue of fundamental rights in Australia and the expression “fundamental rights” is quite an ambiguous one when used in relation to the Australian legal system. Such “fundamental rights” as exist within Australia are protected in various ways but generally no differently from the ways in which other legal rights are

protected. The only exception is those “fundamental rights” included in the *Australian Constitution*.

Where “fundamental rights” are protected under the *Australian Constitution* their effectiveness is ensured and secured through the jurisdiction of the courts, especially the High Court of Australia. Constitutional guarantees or ‘rights’ cannot be overridden by legislation, nor undermined by the common law.

It is often commented that the Australian Constitution is notorious in leaving the protection of rights to the political rather than the legal process. It is to legislation that one must look for any protection of “fundamental rights” in Australia.

Where rights are established by statute in Australia it is in some senses difficult to attach the description “fundamental” to them for there is nothing particular within the legal system that gives them a status over and above any other rights. Attempts to reinforce the protection of legislated “fundamental rights” by the inclusion of provisions requiring a special parliamentary majority to vote in favour of any legislation that would diminish those “fundamental rights” are not legally effective, although this is not to deny that they might have some practical or political impact. Such provisions are, however, rarely relied upon in Australia.

Legislation establishing fundamental rights in Australia is often expressed to override other inconsistent legislation. For example, s10 *Racial Discrimination Act 1975* (Cth) makes provision for equality before the law notwithstanding anything to the contrary in another law. As a matter of strict legal principle such provisions are not effective against an explicit later legislative statement indicating a contrary intention, but they can nonetheless have a political impact by inhibiting the enactment of any later contrary legislation.

Long-standing principles of the common law are sometimes referred to as “fundamental rights”. The “right to bodily integrity”, for example, may be discerned as a “right” protected by the common law that makes unlawful any bodily contact to which an individual does not give consent. The common law also often operates as a presumption in the interpretation of statutes. For example, there is a common law presumption that legislation is not intended to be retrospective. However, the common law can always be overridden by statute where the words are clear. Because “fundamental rights” which are a part of the common law have no special protection and can be overridden by statute the description “fundamental” is somewhat misleading.

III Judicial Protection of Fundamental Rights

5 *In your legal system how are fundamental rights protected by the judiciary? Besides ordinary judicial control, do these rights benefit from a special judicial procedure? If they do, how is such a procedure organised? (for example a summary procedure)*

In the Australian legal system “fundamental rights” are protected through the ordinary judicial process. The Australian legal system is a common law system. This means it is an adversarial system in which cases are presented and argued before the courts by the opposing parties. The courts adjudicate the issues arising in the case as presented but take no role either in the initiation of cases or the investigation of matters pertinent to a case. The High Court is the ultimate court of appeal from all other courts in Australia and it is also the court primarily responsible for the authoritative interpretation of the *Australian Constitution*. There is no special procedure in the ordinary courts (including the High Court) to deal with matters concerning fundamental rights.

Although there is no special judicial procedure to deal with disputes in relation to fundamental rights in Australia, there are established under various statutes special tribunals that can hear complaints where there has been a breach of “fundamental rights” through discriminatory conduct. These tribunals operate at both Commonwealth and State level. The most significant of these tribunals is the Commonwealth’s Human Rights and Equal Opportunity Commission (the HREOC). There are also specialist tribunals that deal with labour and industrial matters. At Commonwealth level there is the Australian Industrial Relations Commission and each of the States also has an equivalent body.

In most instances matters are brought to tribunals through a system of individual complaint, but the procedure that has been set up in these tribunals is generally more flexible than that which operates within the judicial system. Sometimes the tribunal can take an investigative role in relation to a matter of complaint. Tribunals may mediate or conciliate the matter and only where these processes are not successful will it determine the matter. The rules of evidence are usually more flexible than those that operate in a court of law. One advantage of the tribunal system is that it usually offers a speedier determination of matters than that available through the usual judicial avenue.

In some instances tribunals also have the power to investigate issues relating to fundamental rights in a more general sense and may make recommendations to government.

However, at the federal level the decisions of tribunals are not conclusive, as their jurisdiction may be subject to judicial review.

6 *In your legal system, what judiciary organs are entrusted with the protection of fundamental rights (eg ordinary tribunals, or labour courts, according to the substance of the issue at stake)? Is your constitutional tribunal (if such an organ exists) entrusted with the responsibility of guaranteeing such protection? To what extent are fundamental rights also protected by international and supranational courts of justice, whose decisions have binding effect on national legal systems? (eg the ECJ in the case of European Union members, or the European Court of Human Rights in the case of countries that have ratified the European Convention of Human Rights).*

In the Australian legal system the protection of “fundamental rights”, as with all rights, is a matter for the ordinary courts, including the Supreme Courts of the various States, the Federal Court, the Federal Magistrates Court, and ultimately the High Court. Some specialist courts operate at State level, such as the Industrial Relations Court of South Australia and other similar bodies in other States. In addition, there are specialist tribunals some of which operate at the federal level, such as the Australian Industrial Relations Commission and the Human Rights and Equal Opportunities Commission, and some of which operate at the State level, including the Equal Opportunities Commission and Tribunal of South Australia and other like bodies in other States. The jurisdiction of the tribunals is subject to judicial review in the ordinary courts.

The High Court of Australia is the body entrusted with the interpretation of the Australian Constitution and it is also the court of ultimate appeal from all other courts in Australia.

There are no judicial bodies at the international or supranational level that make decisions binding in Australia. Australia is a party to the *First Optional Protocol on the International Covenant on Civil and Political Rights* and as a consequence individual Australians may appeal to the Human Rights Committee as the body responsible for monitoring the ICCPR. However, the outcome of its deliberations is a non-binding recommendation. Similarly as a member of the International Labour Organisation, cases involving Australia may be heard by various committee of the ILO, such as the ILO’s Committee on Freedom of Association, but again these decisions are in the nature of recommendations and do not bind domestically.

IV Fundamental Rights and the Contract of Employment

7 *In your legal system have the fundamental rights or some of them, any legal effect in the relations between private actors, and therefore on the contract of employment?*

In the Australian legal system the fundamental rights established by the *Australian Constitution* usually operate as constraints on government rather than by conferring rights on individual or private actors.

However, those rights which may be considered as “fundamental” and which in the Australian legal system are established by legislation usually do bind private actors and so also have an impact on the contract of employment. In the case of any particular piece of legislation everything depends on its wording. For example, all anti-discrimination legislation in Australia is applicable to the contract of employment (and indeed often covers other categories of workers, including those who are known as commission agents, independent contractors, those in partnerships of more than six persons and also those who would join trade unions).

The general principles of the common law (such as the right to bodily integrity) are also relevant to the relations of private actors and, therefore, on the contract of employment.

8 *In case they have what is the relevant legal source? (eg it may be the constitution, or a law, or case law, or for some other countries, eg EU members, a supranational legal source, or a combination of them).*

Statute law or the common law is the usual relevant legal source. The Australian Constitution is not concerned with “fundamental rights” between private citizens.

9 *Has the exercise of the fundamental rights of the worker's person (v II I a) the same effectiveness in the contract of employment as it has in the relations between the citizens and the public authority, or is it subject to modalities? What modality if any can the parties autonomy (ie the collective agreement or the individual contract of employment) impose on such exercise? (for example modalities derived from the principles of equity or good faith).*

In Australia, the exercise of the fundamental rights of the worker's person (v II I a) generally has the same effectiveness in the contract of employment as it has in the relations between the citizens and the public authorities.

10 *Do the judges in your country have an active or a passive role in the protection of fundamental rights of the workers person? What legal reasoning is followed while on the application of these fundamental rights? (for example "reasonability" "rationality" or "proportionality" tests).*

The Australian legal system is a common law system. This means it is an adversarial system in which cases are presented and argued before the courts by the opposing parties and the courts adjudicate the matter but take no role either in the initiation of cases or in the investigation of facts or issues pertinent to a case. In Australia, the judges thus have what is best described as a passive role in the protection of fundamental rights of the worker's person. The Australian legal system's understanding is that the judicial function is not to make the law but to interpret and apply the existing law, whether the existing law be the *Australian Constitution*, statutes or the common law. However, this cannot mask the fact that the judicial process of constitutional or statutory interpretation is in its nature a creative one and, indeed, in so far as the common law is judge-made law it is the creation of the judges.

Because fundamental rights within the Australian legal system are derived from a range of sources there is no single approach contained in the reasoning of the cases. In relation to some of the "fundamental rights" protected under the *Australian Constitution* the courts have applied a "reasonable proportionality" test, similar to that used in European jurisprudence. In cases where a fundamental right has its source in legislation, then everything depends on the wording used in the statute. For instance, in relation to the concept of "indirect discrimination" as it is incorporated in anti-discrimination statutes, a test of "reasonableness" is applied. The judges, however, have also adopted the approach that where legislation is protective of fundamental rights it ought be interpreted expansively and not in a narrow fashion.

11 *What kind of legal remedies exist under your legal system to provide redress when the worker's fundamental rights have been violated by the employer? For example, what redress exists when an individual dismissal is held to be in breach of a fundamental right?*

There is a range of remedies that are available when a worker's "fundamental rights" have been breached. In Australia everything depends on the source of the "fundamental right" and

usually it is statute. Sometimes the penalties may be imprisonment, or a monetary fine. At common law the remedies are generally damages, although sometimes, but more rarely, there can be an equitable remedy such as specific performance or an injunction.

In Australia when a worker is dismissed in breach of a “fundamental right” the matter is most often covered by legalisation that provides a range of remedies that are hierarchically ordered. Re-employment in the same position is the primary remedy, followed by re-employment in a position as near as the former position in terms of pay and status, and lastly compensation. Where the dismissal also involves discriminatory conduct, the remedies may include obtaining a public apology, or order to the employer to implement systems to ensure that further breaches of fundamental rights do not occur in the future.

II FUNDAMENTAL RIGHTS OF THE INDIVIDUAL WORKER

V Equal Treatment

12. In your legal system, is prohibition of discrimination recognised as an autonomous right, different from the principle of equal treatment?

The principle of equal treatment is not one that is well articulated in Australian law. While it is constitutionally recognised that the judicial process requires that all are treated equally before the law, this principle of equal justice does not extend further so as to constrain the exercise of legislative power by the Commonwealth and various State Parliaments. Thus the Australian legal system does not explicitly define “equal treatment” or generally place positive obligations on persons, such as government or employers, to ensure equality of opportunity.

However, the Australian legal system has a separate (or autonomous) and comprehensive set of legislative enactments that prohibit discriminatory behaviour, especially in the provision of services, in education, and in relation to employment. In these statutes a negative approach is taken, imposing liability on persons, such as employers, for certain conduct or decisions that discriminate unlawfully. This anti-discrimination legislation, both at Commonwealth and State level, defines discrimination in terms of equal treatment: that is, an aggrieved person is discriminated against when they are treated less favourably on one of the prohibited grounds, such as sex, race, disability etc.

This approach to the definition of discrimination can be found in the following provisions of Australian statutes: *Human Rights and Equal Opportunity Commission Act 1986* (Cth) s3; *Racial Discrimination Act 1975* (Cth) s9(1); *Disability Discrimination Act 1992* (Cth) s5(1); *Sex Discrimination Act 1984* (Cth) s5, 6, 7; *Equal Opportunity Act 1984* (SA) s29, 51, 66; *Equal Opportunity Act 1984* (WA) s8, 9, 10, 36, 53, 66A; *Equal Opportunity Act 1995* (Vic) s8(1); *Anti-Discrimination Act 1991* (Qld) s10; *Discrimination Act 1991* (ACT) s8; *Anti-Discrimination Act 1977* (NSW) s7(1), 24(1), 38B, 39, 49B, 49T, 49ZG, 49ZYA; *Anti-Discrimination Act 1998* (Tas) s14(2); and *Anti-Discrimination Act 1992* (NT) s20(1)&(2).

13. Does your legal system enounce the grounds for discrimination? If it does, is this made by a general provision or through a list?

In Australian anti-discrimination statutes the specific grounds of prohibited discriminatory conduct are listed.

In the Commonwealth arena there are three main statutes prohibiting discrimination. The *Sex Discrimination Act 1984* (Cth) prohibits discrimination on the basis of sex, marital status, pregnancy or potential pregnancy, and family responsibilities. The *Racial Discrimination Act 1975* (Cth) prohibits discrimination on the basis of race, colour, descent or national or ethnic origin. The *Disability Discrimination Act 1992* (Cth) prohibits discrimination on the basis of disability which is defined quite broadly as meaning:

- (a) total or partial loss of the person's bodily or mental functions; or
 - (b) total or partial loss of a part of the body; or
 - (c) the presence in the body of organisms causing disease or illness; or
 - (d) the presence in the body of organisms capable of causing disease or illness; or
 - (e) the malfunction, malformation or disfigurement of a part of the person's body; or
 - (f) a disorder or malfunction that results in the person learning differently from a person without the disorder or malfunction; or
 - (g) a disorder, illness or disease that affects a person's thought processes, perception of reality, emotions or judgment or that results in disturbed behaviour;
- and includes a disability that:
- (h) presently exists; or
 - (i) previously existed but no longer exists; or
 - (j) may exist in the future; or
 - (k) is imputed to a person.

(*Disability Discrimination Act 1992* (Cth) s4(1)).

Another Commonwealth Act, the *Human Rights and Equal Opportunity Commission Act 1986 (Cth)* allows the Human Rights and Equal Opportunity Commission (the HREOC) to conciliate disputes arising from behaviour which impairs equality of opportunity or treatment in employment or occupation on all the above mentioned grounds. Other Commonwealth statutes also prohibit discriminatory treatment in relation to specific actions. Thus for instance, the *Workplace Relations Act 1996 (Cth)* prohibits the termination of employees on grounds race, colour, sex, sexual preference, age, physical and mental disability, marital status, family responsibilities, pregnancy, religion, political opinion, national extraction or social origin. This legislation also prohibits termination of an employee because of absence from work during maternity or parental leave, temporary absence from work because of illness, trade union membership or participation in trade union activities, or non-membership of a trade union.

In Australia, State and Territory anti-discrimination legislation often covers a wider range of grounds than covered under the Commonwealth Acts - for example, in the Northern Territory, a person shall not discriminate against another on the ground of any of the following attributes: “race; sex; sexuality; age; marital status; pregnancy; parenthood; breastfeeding; impairment; trade union or employer association activity; religious belief or activity; political opinion, affiliation or activity; irrelevant medical record; irrelevant criminal record; or association with a person who has, or is believed to have, an attribute referred to in this section (*Anti-Discrimination Act 1992 (NT) s19(1)*). In Victoria discrimination on the grounds of the following attributes is prohibited: “age; breastfeeding; gender identity; impairment; industrial activity; lawful sexual activity; marital status; parental status or status as a carer; physical features; political belief or activity; pregnancy; race; religious belief or activity; sex; sexual orientation; or personal association (whether as a relative or otherwise) with a person who is identified by reference to any of the above attributes.” (*Equal Opportunity Act 1995 (Vic) s6*)

The lists of grounds on which discrimination is prohibited contained in Australian legislation are closed – that is, unless a matter can be brought within one of the listed grounds there is little chance of securing a remedy against discrimination under Australian law. In addition, it is usually necessary to fit a complaint into one of the listed categories, which can be in many cases difficult as in effect it erases some aspects of the violation of the worker’s rights (an instance of discrimination might be based equally upon race and sex grounds).

14. Does your legal system recognise the notion of indirect discrimination?

Indirect discrimination is prohibited by all anti-discrimination legislation in Australia, that is at both Commonwealth and State level. However, the prohibition against indirect discrimination does not extend to every ground of discrimination. Thus for instance, the prohibition against discrimination on the basis of family responsibilities is generally limited to direct discrimination, the only exception being the following statutes: *Anti-Discrimination Act 1977* (NSW) s49T(1)(b)) and *Discrimination Act 1991* (ACT) (s7(e) read with s8) and *Equal Opportunity Act 1995* (Vic) (s6(ea) read with s9). In some statutes there is no explicit mention of indirect discrimination however this has not been treated as always significant. In the *Human Rights and Equal Opportunity Commission Act 1986* (Cth) the definition of discrimination in s3 also does not expressly refer to indirect discrimination, however Katz J of the Federal Court in *Commonwealth of Australia v Human Rights and Equal Opportunity Commission and Hamilton* [2000] FCA 1854 held that s3 encompasses both direct and indirect discrimination. Undoubtedly this interpretation is justified by the fact that the HREOC's role is explicitly to implement international conventions and other Commonwealth anti-discrimination statutes that do include indirect discrimination. The Northern Territory's *Anti-Discrimination Act 1992* (NT) does not specifically prohibit indirect discrimination, but some commentators have noted that it was the intention of the Northern Territory Government at the time of enactment to include this type of discrimination.

The relevant indirect discrimination provisions in Australian legislation include the following: *Racial Discrimination Act 1975* (Cth) – s9(1A); *Disability Discrimination Act 1992* (Cth) – s6; *Sex Discrimination Act 1984* (Cth) – s5(2), 6(2), 7(2); *Equal Opportunity Act 1984* (SA) s29(2), 51, 66; *Equal Opportunity Act 1984* (WA) s8(2), 9(2), 10(2), 36(2), 53(2), 66A(3); *Equal Opportunity Act 1995* (Vic) s9; *Anti-Discrimination Act 1991* (Qld) s11; *Discrimination Act 1991* (ACT) s8; *Anti-Discrimination Act 1977* (NSW) s7(1)(c), 24(1)(b), 38B(1)(b)&(c), 39(1)(b), 49B(1)(b), 49T(1)(b), (3), 49ZG(1)(b), 49ZYA(1)(b); and *Anti-Discrimination Act 1998* (Tas) s15.

15. In your legal system, what are the main means of protection against discrimination? While on litigation, when a worker claims to have been a victim of discrimination, does your law provide for some relief of the burden of proof? (for example reversal of onus probandi, or the proof by presumptions).

An important method of protecting against discrimination is to ensure that the rules governing the workplace do not in themselves incorporate discrimination. The *Workplace Relations Act 1996* (Cth) provides that one of its objects is to "...prevent and eliminate discrimination ...".

Thus the Australian legal system at Commonwealth level has instituted mechanisms to ensure that industrial awards and agreements are not discriminatory. The Australian Industrial Relations Commission, which is the Commonwealth body set up under the *Workplace Relations Act 1996* (Cth) and responsible for making industrial awards and certifying collective agreements under Australian law, is required to ensure that all awards comply with the principles embodied in the *Racial Discrimination Act 1975* (Cth), the *Sex Discrimination Act 1984* (Cth) and the *Disability Discrimination Act 1992* (Cth), and that collective agreements likewise do not in any way discriminate against certain groups of workers. These measures are most effective in ensuring that there is no direct discrimination. They are less successful when it comes to the problem of indirect discrimination. The *Workplace Relations Act 1996* (Cth) also provides that individual statutory agreements (known as Australian Workplace Agreements or AWAs) must include an anti-discrimination clause and cannot discriminate against an employee (s170LU(5)).

There are no positive obligations to implement procedures to eradicate unlawful discrimination in the workplace under any of Australia's anti-discrimination statutes, with the exception of the *Equal Opportunity for Women in the Workplace Act 1999* (Cth) (s6). Under that legislation, employers with 100 or more employees and also higher educational institutions that are employers are required to develop and implement equal employment opportunity (EEO) programs both to eliminate discrimination and to ensure the implementation of measures to secure equal opportunity. Assistance is provided by HREOC and other State anti-discrimination commissions. Most larger businesses have developed anti-discrimination and sexual harassment policies to be implemented at the workplace. Policy statements signed by the Chief Executive Officer of the business organisation are usually issued to inform employees of the organisation's EEO program and its commitment to this program. Usually these policies set out a mechanism for dealing with any instances of unlawful anti-discriminatory behaviour in the workplace.

In Australia where unlawful discrimination occurs, individual complainants may apply in writing to the HREOC or relevant State Commissioner for relief under anti-discrimination legislation. This is the main method of protecting individuals from unlawful discrimination in Australia.

The HREOC will investigate the complaint and attempt to conciliate. If this is unsuccessful, the complainant may choose to take the matter to the Federal Court or Federal Magistrates Service. If a complaint is made under the *HREOC Act* and conciliation fails, the HREOC may report the matter with recommendations for action to the Commonwealth Attorney-General

and this report will be tabled in the Commonwealth Parliament. The complainant is unable to take the matter any further.

At the State level, the relevant State Commissioner will follow the same process of investigation and conciliation, but if conciliation is unsuccessful, the complainant may apply to be heard by the relevant Anti-Discrimination/Equal Opportunity Tribunal.

In instances where the discriminatory behaviour results in dismissal, the worker also has the option of making a complaint under labour and industrial relations legislation. At Commonwealth level this is the *Workplace Relations Act 1966* (Cth) where section 170CK sets out the grounds where termination is unlawful. These includes race, colour, sex, sexual preference, age, physical or mental disability, marital status, family responsibilities, pregnancy, religion, political opinion, national extraction or social origin (s170CK(2)(f)). Some of the States have a counterpart to this legislation.

Under Australian anti-discrimination legislation, there is no relief of the burden of proof in cases of direct discrimination and in many cases of indirect discrimination. The respondent bears the onus of proof only when relying on an exemption or exception (eg if the respondent would face unjustifiable hardship by accommodating the complainant's disability under the *Disability Discrimination Act 1992* (Cth) s11), or in some cases of indirect discrimination (see s7C *Sex Discrimination Act 1984* (Cth), or in proving that their conduct was reasonable (eg *Discrimination Act 1991* (ACT) s8(2)). Under the *Workplace Relations Act 1996* (Cth), where a worker alleges that they were dismissed for an unlawful reason that includes discrimination, then the employee does not have the onus of proof, but the employer may establish a defence by proving that they did not terminate the employment for a proscribed reason (see s170CQ(b) *Workplace Relations Act 1996* (Cth)) Similar provisions apply under the employee and industrial relations legislation of States.

VI Ideological and Religious Freedom

16. *Does your legal system limit or prevent the employer (or certain intermediaries in employment such as employment agencies) investigating the political opinion or religious beliefs of his/her workers?*

In relation to public sector employment, the *Australian Constitution* (s116) prohibits the Commonwealth of Australia from instituting any religious test as a qualification for any office

or public trust under the Commonwealth. The Commonwealth as employer is thus precluded from any action that can be construed as breaching this constitutional guarantee.

In relation to the private sector, discrimination on the grounds of religious belief or political opinion is not generally prohibited under Commonwealth anti-discrimination legislation. However, the *Workplace Relations Act 1996* (Cth) does make it unlawful to dismiss an employee because of their religion or political opinion (s170CK(2)(f)). In addition, the Human Rights and Equal Opportunity Commission (the HREOC) has power under s31 *Human Rights and Equal Opportunity Commission Act 1986* (Cth) to inquire into practices, including systemic practices, that may constitute discrimination on the basis of religion and political opinion and to conciliate where complaints are made regarding religious or political discrimination in employment matters. However, if conciliation is not successful, the only course open to the HREOC is to make a report to the Commonwealth Attorney-General, which is then tabled in the Commonwealth Parliament.

Discrimination in employment on the grounds of religious belief or political opinion is prohibited under the legislation of all Australian States, except New South Wales and South Australia.

The provisions in State legislation prohibiting discrimination on the ground of religious belief are as follows: *Equal Opportunity Act 1984* (WA) s53; *Anti-Discrimination Act 1991* (Qld) s7(1)(i); *Discrimination Act 1991* (ACT) s7(1)(h), 8(1); *Anti-Discrimination Act 1992* (NT) s19(1)(m); *Equal Opportunity Act 1995* (Vic) s6(j); and *Anti-Discrimination Act 1998* (Tas) s16(o)&(p).

The provisions in State legislation prohibiting discrimination on the ground of political opinion are as follows: *Equal Opportunity Act 1984* (WA) s53; *Anti-Discrimination Act 1991* (Qld) s7(1)(j); *Discrimination Act 1991* (ACT) s7(1)(h), 8(1); *Anti-Discrimination Act 1992* (NT) s19(1)(n); *Equal Opportunity Act 1995* (Vic) s6(g); *Anti-Discrimination Act 1998* (Tas) s16(m)&(n).

While there is no statutory requirement that employers or their intermediaries, such as employment agencies, must not enquire into the political opinion or religious beliefs of workers, if they do so, they risk being susceptible to discrimination claims if the worker is treated in an adverse fashion, for instance if dismissed or refused benefits. In general under the State legislation it is sufficient to establish a claim of unlawful discrimination to show that the prohibited reason was merely one of the reasons behind any adverse treatment. In the case of promotion, the employee has a valid discrimination claim if they can prove that the reason

for non-promotion was based at least partially on the alleged ground of discrimination. In the case of non-promotion, a complainant need only prove that the respondent discriminated in the selection process. It is not necessary to prove that the complainant would have otherwise been promoted (*Box Hill College of TAFE v Fares* (1992) EOC 92-464, (1992) EOC 92-391).

17. Does your legal system accept in general that an employee may, for moral reasons, refuse to discharge duties he /she is to discharge pursuant to his/her contract of employment, or is the so-called “clause of conscience” foreseen only with respect to certain categories of workers? (for example health staff or media professionals). In case the “clause of conscience” exists in your legal system, how are its personal scope and actual contents legally organised? (persons who can claim it, and persons or entities before which it can be invoked, and contents and extent of this right).

At common law, there is a general duty implied into every employment contract that the employee obey the employer’s lawful and reasonable directions (*R v Darling Island Stevedore & Lighterage Co Ltd; Ex parte Halliday and Sullivan* (1938) 60 CLR 601 at 621-2). Also, an employee is subjected to a broader duty to co-operate. This extends to avoiding conduct that undermines the employer’s business. Employees in Australia have no general right to refuse to discharge duties unless they are not “lawful” or “reasonable” in the circumstances. Continual refusal to perform certain duties may be viewed as repudiation of contract and lead to summary dismissal. In so far as a worker’s moral viewpoint may be grounded in a religious belief or political opinion the worker may be protected from such action by anti-discrimination legislation.

In the case of medical practitioners, the Australian Medical Association produced a *Code of Ethics* in 1996. This Code represents the core principles that should guide doctors in their professional conduct. The Code covers respect for patients, standards of care, clinical research and teaching, the dying patient, professional conduct and the role of the doctor in society. Section 1.3.9 specifically states: “When a personal moral judgement or religious belief alone prevents you from recommending some form of therapy, inform your patient so that they may seek care elsewhere.” Thus a doctor may refuse to treat a patient for moral reasons provided that the patient is given the opportunity to seek such treatment elsewhere.

18. *What are the legal contents of the freedom of religious belief within the scope of an employment relationship? Is the employer only obliged to observe neutrality vis a vis his/her employee's religious beliefs, or must he/she additionally accommodate the organisation of work to the workers religious practices? (for example, by permitting the worker to participate in religious service, or by adapting the worktime to the worker's religious holidays).*

Under the *Human Rights and Equal Opportunity Commission Act 1986* (Cth) and State anti-discrimination legislation, an employer who does not accommodate the worker's religious practices may face a claim of indirect discrimination. Such a claim, however, is bounded by the "inherent requirements" of the particular job: an employee must be able to fulfil the "inherent requirements" of their job before allowance for religious practices will be given.

If an employee's religious group can be classified as a "racial" or "ethnic" group, protection from discrimination and vilification is also available under the *Racial Discrimination Act 1975* (Cth) (s9), including protection from indirect discrimination (s9(1A)).

Most State and Territory anti-discrimination statutes require reasonable accommodation of a worker's religious practices. For example, the *Discrimination Act 1991* (ACT) (s11) makes it unlawful to refuse a worker permission to observe religious practice during working hours where the religious practice is recognized as necessary or desirable by persons of the same religious conviction of the employee, or where it is reasonable having regard to the circumstances of the employment and will not cause the employer unreasonable detriment. The Western Australian anti-discrimination legislation contains a similar provision. (s54(3)).

Other States and Territories deal with the issue in a negative way, by proscribing that it is not discriminatory to fail to accommodate, *inter alia*, a worker's religious practice if it is unreasonable to do so. (eg *Discrimination Act 1991* (ACT) s8(2)).

- 19 *Does your legal system recognise the so-called "tendential establishments"? If it does, how is the potential conflict, between the worker's freedoms and the protection of the organisations tendency, legally reconciled? How are the establishment and further development of ideologically or religious employment relationships legally regulated? (eg with respect to questions such as selection of candidates, testing of the aptitude of the worker to perform the work, the employer's power to direct and control the employee, a possible change of the worker's ideology, the termination of employment).*

In some cases the worker's rights are unaffected by the nature of the employer. For example, the worker's rights not to be assaulted are equally protected no matter what the nature of their employment. However, in Australia, where the employer is a religious institutions it is often exempted from anti-discrimination legislation. The exemptions are not available in relation to all anti-discrimination legislation: for example, religious organisations are not exempted from adhering to the requirements in the *Racial Discriminations Act 1975* (Cth) or the *Disability Discrimination Act 1992* (Cth).

However, religious bodies are exempted (by s37) from the provisions of the *Sex Discrimination Act 1984* (Cth) governing work, in relation to the ordination of clergy, the training and education of persons for ordination, the selection and appointment of persons to perform functions relating to the practice of religion, or any practices conforming to the doctrines, tenets or beliefs of the religion. Some State anti-discrimination legislation provides a similar exemption in relation to all the forms of discrimination covered by it (see for example *Equal Opportunity Act 1984* (SA) s50, *Equal Opportunity Act 1995* (Vic) s32 and *Anti-Discrimination Act 1997* (NSW) s56. Provisions under the *Workplace Relations Act 1996* (Cth) which prohibit the termination of employment on a discriminatory basis do not apply to religious organisations where the termination is "in good faith to avoid injury to the religious susceptibilities of adherents of that religion or creed" (s170CK(4)). There is thus less protection for employees who are employed by these religious organisations from discrimination where such discrimination is in conformity with religious teachings.

VII Privacy

20. How can the right to privacy be legally defined?

There is no answer provided to this question by Australian law and most official bodies in Australia dealing with privacy issues tend to avoid asserting a definition of privacy that could be construed as the "legal definition. In a speech entitled "What is privacy?" (*Privacy and Computer Security in the Information Age Conference* (16 August 2001) <http://www.privacy.gov.au/news/speeches/sp51.pdf>) the Federal (ie Commonwealth) Privacy Commissioner, Malcolm Crompton, cited several authoritative definitions provided by international commentators, such as Westin, as well as the results of surveys conducted in Australia. While he did not offer a conclusive definition of privacy, the Federal Privacy Commissioner did say that "at a fundamental level privacy is about personal autonomy and

underpins human dignity” and he also suggested that a legal definition of the right to privacy should recognise the importance of individual choice and consent.

The Federal (ie Commonwealth) Privacy Commissioner has stressed that to the extent that Australian law addresses privacy, it does so by being based on *OECD Guidelines on the Protection of Privacy and Transborder Flows of Personal Data*. In so doing, Australian law seeks to give effect to the notion of an individual’s “control over privacy” through implementing mechanisms that enable choice and consent. It could be suggested, therefore, that the best practice would be for the onus for establishing a legal definition of privacy to fall upon countries collectively through international treaties and agreements. Arguably, global uniformity in the notion of privacy would be desirable given the increasing development of international business and global technologies.

There is no constitutional or common law right to privacy in Australia. In Australia, some issues relating to privacy are now regulated by statute. The Office of the Federal Privacy Commissioner states “your new privacy rights come in the form of ten National Privacy Principles”

At Commonwealth level, between 1988 and 2001 privacy legislation was applicable only to the Commonwealth and Australian Capital Territory (ACT) government departments and agencies (see *Privacy Act 1988* (Cth)). In 2000 coverage of this legislation was extended to private sector organisations, including partnerships, trusts and individuals, by the *Privacy Amendment (Private Sector) Act 2000* (Cth) which came into operation at the end of 2001. However, a private sector organisation, which is a small business, is exempt from the legislation. This is an organisation with an annual turnover of \$3 million or less and not associated with any other business with an annual turnover of \$3m or more. However, under the definition in s4 of small business operator it does not include the following which are, therefore, covered by the *Privacy Act*:

“an individual, body corporate, partnership, unincorporated association or trust is not a small business operator if he, she or it:

- (a) carries on a business that has had an annual turnover of more than \$3,000,000 for a financial year that has ended after the later of the following:
 - (i) the time he, she or it started to carry on the business;
 - (ii) the commencement of this section; or
- (b) provides a health service to another individual and holds any health information except in an employee record; or
- (c) discloses personal information about another individual to anyone else for a benefit, service or advantage; or

- (d) provides a benefit, service or advantage to collect personal information about another individual from anyone else; or
- (e) is a contracted service provider for a Commonwealth contract (whether or not a party to the contract).

Other exempt bodies include registered political parties, Commonwealth government agencies, and State or Territory authority or prescribed instrumentality.

Importantly there are also exemptions regarding certain kinds of information, including “employee records” (see below – question 21).

The *Privacy Act 1988* (Cth) required compliance with 11 Information Privacy Principles (IPPs). The *Privacy Amendment (Private Sector) Act 2000* (Cth) requires compliance with 10 National Privacy Principles (NPPs), which cover the same issues as the IPPs.

Both the IPPs and the NPPs concern the use of “personal information”, which is defined as “information or an opinion (including information or an opinion forming part of a database), whether true or not, whether recorded in material form or not, about an individual whose identity is apparent, or can be reasonably ascertained from the information or opinion”. In summary the NPPs and IPPs provide for the following:

- Collection of personal information must be fair.
- Personal information should generally not be used or disclosed for any purpose (“secondary purpose”) other than that for which it was collected (the “primary purpose”) without consent.
- The organisation collecting the personal information must take reasonable steps to ensure that personal information collected, used or disclosed be accurate, complete and up-to-date.
- Organisations must take reasonable steps to protect personal information once collected and the content of “reasonable steps” is determined by the nature of the information, including issues such as the sensitivity of the information, the harm likely to be caused by a breach of security, size of the organisation and the practices used by the organisation involving the information.
- Organisations must be “open” about the collection and use of information through establishing and providing policies.
- Organisations must provide individuals from whom information is collected with means to access and correct the information.

A breach of the *Privacy Act* may be reported to the Privacy Commissioner who has the power to pursue various courses of action including investigating a complaint, taking action against

the person in the Federal Court or making a declaration. No appeal from a decision of the Privacy Commissioner is available.

There is also privacy legislation in several Australian States. In Victoria the *Information Privacy Act 2000* (Vic) is very similar to the Commonwealth legislation, although under it an appeal from a decision of the Victorian Privacy Commissioner can be made in the Victorian Civil and Administrative Tribunal. There is also privacy legislation in New South Wales, the *Privacy and Personal Information Act 1998* (NSW), which does not offer anything more to employees than the Commonwealth legislation. In Queensland the *Invasion of Privacy Act 1991* (Qld) also regulates privacy issues in that State in respect of credit reporting agents and the use of listening devices.

21. Does your legal system expressly recognise the worker's right to privacy?

The Australian legal system does not expressly recognise the worker's rights to privacy. Indeed, under Australian Commonwealth privacy legislation there is a specific exemption relating to "employee records". The Commonwealth Attorney-General, in addressing the exemption of "employee records" from the coverage of Commonwealth privacy laws, stated: "while employee records deserve privacy protection, it is the Government's view that such protection is more properly a matter for Workplace Relations legislation". But worker's rights to privacy have not yet been recognised by workplace relations legislation and is unlikely to be so in the near future. As such, Australian law does not expressly recognise the worker's right to privacy and, moreover, to the limited extent that Australian law provides protection for privacy through the Commonwealth privacy statutes, the exclusion of "employee records" entails that worker's privacy rights are to a large extent limited.

The exemption relating to "employee records" under s.7B(3) *Privacy Amendment (Private Sector) Act 2000* (Cth) covers:

"any act done or practice engaged in by an organisation that is an employer of an individual if the act or practice is directly related to:

- a current or former employment relationship between the employer and the individual and
- An employee record held by the organisation relating to the individual."

An "employee record" is defined as " a record of personal information relating to the employment of the employee". The Office of the Federal Privacy Commissioner has provided the following examples of "personal information" which would be considered part of an employee record and exempt from application of the NPPs:-

- the engagement, training, disciplining, resignation or termination of employment of an employee;
- the terms and conditions of employment of an employee;
- the employee's performance or conduct, hours of employment, salary or wages, personal and emergency contact details;
- the employee's membership of a professional or trade association or trade union membership;
- the employee's recreation, long service, sick, maternity, paternity or other leave; and
- the employee's taxation, banking or superannuation affairs. (see s6 *Privacy Amendment (Private Sector) Act 2000* (Cth))

b Protection of Privacy and Access to Employment

22. *Does your legal system impose restrictions on the employer's right to collect personal data of the workers he or she is to hire?*

Yes, the NPPs set down by privacy legislation apply to the collection of personal data from prospective employees. The employee record exemption only applies to personal information relating to a current or former employee. Information collected from a prospective employee who is subsequently hired by the organisation will no longer be covered by the NPPs once the hiring has occurred. If a prospective employee is unsuccessful, however, the information obtained through the recruitment and selection process will remain subject to the NPPs (see Armstrong & Cox, "Privacy, Health Information and Employee Records: Implications of new Commonwealth Privacy Laws" <http://www.privacy.gov.au/news/speeches/sp60note.pdf>).

The anti-discrimination and equal opportunity laws at Commonwealth level and in each State can also operate to restrict an employer's right to collect personal data. (See below – question 23)

McCallum and McCarray have also suggested that the common law may limit an employee's obligation to answer certain kinds of questions (see McCallum & McCarray, "Worker Privacy in Australia" (1995) 17 *Comparative Labour Law Journal* 1 at 34).

23. *If it does, how is the restriction formulated?*

To some extent the restriction is formulated in the negative sense. According to Schedule 3 of the *Privacy Amendment (Private Sector) Act 2000* (Cth), an organisation must not collect "sensitive information from an individual unless the individual consents to the collection of

the information, the collection is required by law, the collection is necessary to prevent a serious or imminent threat to the life or health of any individual where the individual is physically or legally incapable of giving consent to the collection or physically unable to give consent (see *Privacy Amendment (Private Sector) Act* Schedule 3 section 10(1)). Sensitive information includes information about an individual's:

- Racial or ethnic origin
- Political opinions
- Membership of a political association
- Religious beliefs or attitudes
- Philosophical beliefs
- Membership of a professional or trade association
- Membership of a trade union
- Sexual preferences or practices
- Criminal record. This is supplemented by the *Crimes Act 1914* (Cth) Part VIIC providing that an employee is not obliged to disclose upon request certain criminal convictions after ten years (or five years if the person was a juvenile offender).
- Health information that is also personal information

The NPPs also somewhat restrict an employer's collection of other information in that they require that any other information obtained relate to the primary purpose of collection. This also restricts the secondary uses to which an employer could put information that was obtained for the primary purpose of recruitment and selection.

Restrictions are also imposed by way of the application of anti-discrimination and equal opportunity laws. The extent to which the employer will be so restricted will depend upon the nature of the job the employee is applying for and the particular aspect of the recruitment process. The Human Rights and Equal Opportunity Commission has acknowledged that standard or routine questions in job applications or interviews and the use of selection tests can be discriminatory. An example is the use of a standard question such as "Have you ever had a mental illness?" could constitute unlawful indirect discrimination under the *Disability Discrimination Act 1992* (Cth) if it has the effect of excluding a person with a mental illness. The use of the question would be justified, however, if the employer's asking of the question was reasonably intended to determine how the applicant could be accommodated under equal opportunity laws and by way of adjustments to the relevant position (*Disability Discrimination Act 1992* (Cth) s.45). Similar considerations apply to questions used in selection tests and in requests for medical examinations (see eg 15(1)-(2) *Disability Discrimination Act 1992* (Cth)).

24. *Is the use of psychological tests limited in any form? What other pre-employment tests may be limited or prohibited under your national law?*

Psychological Tests

In Australia the use of psychological tests is not limited by any specific legislation, however, the prohibition in the *Privacy Act* on collection of sensitive information without consent of the individual from whom it is to be obtained would apply. Thus a question about a person's religious or philosophical beliefs, for example, would be "sensitive information". The questions in psychological tests would also be subject to anti-discrimination and equal opportunity legislation. The IPPs and the NPPs of the *Privacy Act* also apply to the use, disclosure and storage of psychological test results.

Pregnancy Tests

Anti-discrimination legislation means that pregnancy tests are generally unlawful in Australia. The position under Commonwealth law is as follows. The *Sex Discrimination Act 1984* (Cth) provides under s.14(1) that

- (1) It is unlawful for an employer to discriminate against a person on the ground of the person's sex, marital status, pregnancy or potential pregnancy:
 - (a) in the arrangements made for the purpose of determining who should be offered employment;
 - (b) in determining who should be offered employment; or
 - (c) in the terms or conditions on which employment is offered.

While "pregnancy" or "potential pregnancy" are not always explicitly mentioned as grounds of unlawful discrimination in the legislation of all Australian States, the imposition of a pregnancy test would in any event be covered by the category of "sex" in anti-discrimination legislation.

The Human Rights and Equal Opportunity Commission (HREOC) has elaborated upon the legislation explaining that an employer must not discriminate against a woman on the grounds of pregnancy or potential pregnancy in any aspect of the "recruitment process" which is defined to include the seeking of applications, the use of standard application forms, any system used for selection such as psychological testing, medical tests, the conduct of the selection process, the short-listing of applicants and the final selection and hiring. HREOC has further indicated that a request by a potential employer for a pregnancy test to be conducted for a prospective employee could be found to be discriminatory unless justified by an occupational health and safety requirement.

In some instances anti-discrimination legislation makes it clear that “the granting to women of rights or privileges in connection with pregnancy or childbirth” is not contrary to law (see s50 *Equal Opportunity Act 1984* (SA)).

Polygraph Testing

Only one Australian State, New South Wales, has specific legislation concerning the use of polygraph testing. The *Lie Detectors Act 1983* (NSW) provides that a person is guilty of an offence if the person uses an instrument or apparatus to monitor (among other things) the physiological reactions of a person for a “prohibited purpose”. The definition of “prohibited purpose” includes “matters relating to employment” which is further defined to include “an application for or offer of employment”.

25 *Can an employer make inquiries on a job applicant’s sexual orientation?*

In Australia at Commonwealth level there is no prohibition contained in the *Sex Discrimination Act 1984* (Cth) against discrimination on the basis of sexuality. However, in most States there is a prohibition on discrimination on the basis of sexuality in relation to offers of employment or the terms and conditions of employment (see, for example, ss29(1)(b) and s30(1)(a) *Equal Opportunity Act 1984* (SA)). The focus of the legislation is the prohibition of discrimination in the making an offer of employment. Strictly then this may not cover the making of enquiries. However, it is would be very difficult for an employer to provide any lawful justification for such an enquiry.

26. *Does your legal system have specific regulations that address genetic screening? Is it possible to speak about the right to “genetic privacy” in the contract of employment? How could it be defined and what would be its contents and scope?*

There are currently no specific regulations in Australia which address genetic screening. There is no implied term in the common law contract of employment regarding a right to “genetic privacy” and the possibility of such a term being recognised by the court’s does not appear to be one entertained by most commentators (see Otlowski “Employers Use of Genetic Test Information: Is there a need for regulation?” (2002) 15 *Australian Journal of Labour Law* 1 and Keays, “The Legal Implications of Genetic Testing: Insurance, Employment and Privacy” (1999) 6 *Journal of Law and Medicine* 366).

In Australia, the focus appears to be upon the role of legislative intervention. Some limited indirect protection for genetic privacy is afforded by existing laws. The definition of “sensitive information” under the *Privacy Act*, which is information that can only be collected

with the consent of the person from whom it is sought, includes “health information” which, in turn, is defined as:

- (a) information or an opinion about:
 - (i) the health or a disability (at any time) of an individual; or
 - (ii) an individual's expressed wishes about the future provision of health services to him or her; or
 - (iii) a health service provided, or to be provided, to an individual; that is also personal information; or
- (b) other personal information collected to provide, or in providing, a health service; or
- (c) other personal information about an individual collected in connection with the donation, or intended donation, by the individual of his or her body parts, organs or body substances.

It is possible that genetic information could come under this definition and hence the employer would need to obtain the prospective employee’s consent and would have to comply with the NPPs in relation to the collection, use and disclosure of the information.

Consent would also need to be obtained to conduct any genetic testing on a prospective employee as this involves a medical procedure which under Australian common law can only be performed on a person with their informed consent (*Rogers v Whitaker* (1992) 175 CLR 479). However, there is no implied term in the contract of employment that a person must volunteer information about their genetic status particularly if they are healthy at present and will only (possibly) suffer any ill-effects in later life, because the common law contract of employment in Australia is one which requires a duty of good faith but is not based on good faith (see Otlowski above at 8).

Genetic testing may also be contrary to anti-discrimination legislation. The *Disability Discrimination Act 1992* (Cth), and also most of the various anti-discrimination statutes in each of the Australian States, prohibits discrimination against a person on the basis of disability. This is defined as “less favourable treatment in similar circumstances on the grounds of present, past, future or imputed disability” (see eg s9 *Disability Discrimination Act 1992* (Cth)). The *Anti-Discrimination Act 1977* (NSW) and the *Anti-Discrimination Act 1998* (Tas) both use the word “disability” as in the Commonwealth legislation does, but in the legislation of the other States the word “impairment” is used in place of “disability”.

There is a wide definition of disability in the *Disability Discrimination Act 1992* (Cth) where it means:

- (a) total or partial loss of the person's bodily or mental functions; or
- (b) total or partial loss of a part of the body; or

- (c) the presence in the body of organisms causing disease or illness; or
 - (d) the presence in the body of organisms capable of causing disease or illness; or
 - (e) the malfunction, malformation or disfigurement of a part of the person's body; or
 - (f) a disorder or malfunction that results in the person learning differently from a person without the disorder or malfunction; or
 - (g) a disorder, illness or disease that affects a person's thought processes, perception of reality, emotions or judgment or that results in disturbed behaviour;
- and includes a disability that:
- (h) presently exists; or
 - (i) previously existed but no longer exists; or
 - (j) may exist in the future; or
 - (k) is imputed to a person.

Although there has been no case testing the view that anti-discrimination legislation would provide protection against genetic testing, academic commentators in Australia are confident that a court would be prepared to accept that the presence of a genetic mutation would come under the definition of a “disability” and that denying employment to a prospective employee or terminating or altering the employment of a current employee on the basis of genetic test results or because of their genetic status would be prima facie unlawful discrimination (see Otlowski and Keays - see above question 26).

However, anti-discrimination legislation may have the effect of merely restricting the use to which employers put genetic information once collected rather than precluding or restricting the right of the employer to obtain the information. However, the statutes in some of the Australian States, namely the *Equal Opportunity Act 1995* (Vic) (ss100-101), the *Anti-discrimination Act 1991* (ACT) (s23), and the *Anti-Discrimination Act 1992* (NT) (s26) do go further and preclude the employer from requesting such information from prospective employees unless they can establish that the request is justified under the legislation.

In 2001 the Australian Law Reform Commission and the Australian Health Ethics Committee began conducting a joint inquiry into the issues relating to genetic testing, including those relating to privacy and the discriminatory use of such information in the workplace. An issues paper, followed by a discussion paper, has been released. The final report is due in March 2003.

Although the outcome of this inquiry is not known at the time of preparing this report, it seems that for the future, a legislative response would appear to be the most appropriate method of defining a “right to genetic privacy”, rather than leaving the matter to be

determined according to the private agreement of the parties to the employment relation through the contract of employment. A legislative prohibition on an employer seeking, obtaining and using genetic information subject to an exception where such information is necessary for limited and specified health, safety or public interest reasons is another possible approach. A legislative approach is a better way of securing the protection of the individual than the preparation of mere guidelines or the adoption of private codes of conduct. In any event, it is important to strengthen legislative requirements in relation to the obtaining of informed consent in relation to the conducting of the genetic testing including the requirement that an employer must specify the reason for requiring the test and the possible uses to which the information may be put before the employee consents.

c Computerized processing of personal data

27. *Does your national law contain norms relating to the protection of workers' privacy vis a vis automatic processing of his/her personal data?*

Australian national law does not contain norms relating to the protection of workers' privacy vis a vis automatic processing of his/her personal data. Under s7B(3) of the *Privacy Act 1988* (Cth), an organisation that is or was an employer of an individual is exempt from operation of the *Privacy Act 1988* (Cth) in regard to acts done or practices engaged in relating to the employment relationship and an employment record held by the organisation regarding the individual. An "employee record" is defined in s6 and includes health information and personal information such as engagement, training, disciplining, resignation of the employee, termination, of employment, terms and conditions, personal and emergency contact details, performance or conduct, hours of employment, salary or wages, membership of a professional or trade association, trade union membership, recreation, long service, personal, maternity, paternity or other leave, taxation, banking or superannuation affairs.

28.

n/a

d Protection of privacy and sexual harassment

29. *How is sexual harassment defined in your legal system? Has it been defined by the law of by case law?*

Sexual Harassment is defined in Commonwealth and State anti-discrimination statutes. The definition is broadly similar in all Australian legislation.

Section 28A(1) of the *Sex Discrimination Act 1984* (Cth) defines sexual harassment in the following way: a person sexually harasses another person where:

- (a) the person makes an unwelcome sexual advance, or an unwelcome request for sexual favours, to the person harassed; or
- (b) engages in other unwelcome conduct of a sexual nature in relation to the person harassed,

in circumstances in which a reasonable person, having regard to all the circumstances, would have anticipated that the person harassed would be offended, humiliated or intimidated.

Section 28A(2) specifies that:

conduct of a sexual nature includes making a statement of a sexual nature to a person, or in the presence of a person, whether the statement is made orally or in writing.

The relevant provisions containing the definitions of sexual harassment in State anti-discrimination legislation are as follows: *Equal Opportunity Act 1984* (SA) s87(11); *Equal Opportunity Act 1984* (WA) s24(3); *Equal Opportunity Act 1995* (Vic) s85; *Anti-Discrimination Act 1991* (Qld) s119; *Discrimination Act 1991* (ACT) s58; *Anti-Discrimination Act 1977* (NSW) s22A; *Anti-Discrimination Act 1998* (Tas) s17; and *Anti-Discrimination Act 1992* (NT) s22.

30. How are workers protected against sexual harassment at the workplace?

Workers are protected against sexual harassment in the workplace both under the terms of the contract of employment and through legislative provisions. The implied terms in every contract of employment include the duty of the employer to ensure the safety of the worker. However, the primary remedy available for breach of the employment contract is damages and this is not a very useful or constructive way of dealing with the problem of sexual harassment.

The employer's common law duty to take reasonable care for the health and safety of employees is also reinforced in occupational health and safety legislation that operates in each of the Australian States. However, it is the provisions regarding sexual harassment in anti-discrimination legislation that are by far the most important way of protecting workers against sexual harassment in the workplace. Employers must comply with both Commonwealth and the relevant State anti-discrimination law on sexual harassment.

Under anti-discrimination legislation the employer must take “reasonable steps” to prevent sexual harassment in the workplace if they wish to avoid vicarious liability for the behaviour of employees towards each other (see for example s106 *Sex Discrimination Act 1984* (Cth)). The employer’s duty to take reasonable steps to prevent harassment goes further than the mere announcement of a policy against sexual harassment in their workplace – the employer must ensure that the policy is actively implemented and is effective. The Sex Discrimination Commissioner, a statutory officer under the *Sex Discrimination Act 1984* (Cth), has developed a ‘Sexual Harassment Code of Practice’ to assist employers develop policy and procedures. Although this Code of Practice is not legally binding or enforceable, it contains mandatory aspects of legislation and principles from case law.

Employees who are subjected to sexual harassment may individually or jointly make a written complaint to the HREOC or to State or Territory Anti-Discrimination Commissions. The Commission will then investigate the matter and attempt to conciliate between the parties. In the Commonwealth jurisdiction, if conciliation is unsuccessful, the employee may take the complaint to the Federal Court or Federal Magistrates Service. In the various State jurisdictions, if the matter is not resolved by conciliation, the complainant may ask the Commissioner to refer the State Equal Opportunity Tribunal for a public hearing.

31. *Under what conditions and subject to what requirements can an employer undertake searches on the person or property of the worker?*

An employer must obtain the consent of an employee before searching their person, for under Australian law a search of the person against their will constitutes assault. Likewise, “unauthorised access” to an employee’s bag or personal effects, including a locker supplied by the employer, would constitute a trespass to goods. Consent may be provided through a term of the contract of employment. However, it has been pointed out by academic commentators that such a clause could be struck out by a court if “unduly intrusive, unfair or unconscionable” (see McCallum and McCarry “Worker Privacy in Australia” (1995) 17 *Comparative Labour Law Journal* 1). Legal authority to conduct searches of either the worker’s person or property may be granted through legislation or other industrial regulation (such as an award).

32(a). *What limits exist on the employer’s faculty to control the worker’s activity: by security staff (security agents or private detectives)?*

Employees in Australia have few legal rights to prevent invasions of their privacy by the activity of security staff such as private detectives. Surveillance and security checks may be

regulated by State awards. (see Creighton & Stewart, *Labour Law : An Introduction* Federation Press, Sydney, 2000, p257)

32(b) What limits exist on the employer's faculty to control workers by using electronic, visual or acoustic devices?

There are few specific limitations dealing with the employer's use of electronic visual or acoustic devices in Australian law.

Technological developments have enabled employers to introduce sophisticated systems of surveillance ranging from the use of electronic trails to retrace keystrokes made by an employee on a computer keyboard to locational key-cards. While no cases concerning these matters have arisen at common law in Australia, such systems are very probably seen as a lawful part of the employers control over employees at the workplace. However, it may be that the implied duty of trust and confidence could also have implications for the employee's privacy and could possibly act as a limitation upon employers' covert use of various devices to engage in surveillance of employees. However, the approach of the courts to such an issue is by no means clear, especially given the courts' traditional reluctance to interfere with an employer's managerial prerogative. Certainly in cases where evidence of an employee's wrong-doing was gathered by some form of electronic surveillance, the courts have not passed any adverse comment (see for instance *Digital Pulse Pty Ltd v Christopher Harris & Ors* [2002] NSWSC 33). In any event there is really no adequate or appropriate remedy in such cases for breach of this implied term. Nonetheless, the wise employer in Australia will ensure that the employee is aware and consents, either expressly or impliedly, to such monitoring.

The industrial relations legislation of some States, namely New South Wales, Queensland and Western Australia specifically names "surveillance of employees" as an "industrial matter" which can be the subject of an "industrial dispute" and thus enables clauses regulating surveillance of employees to be inserted into an award. In other States too the definitions of industrial disputes are undoubtedly broad enough to enable the inclusion of such matters in awards. Likewise there is no reason why such matters could not also be regulated through collective agreements or statutory individual agreements, such as Australian Workplace Agreements, at Commonwealth or at State level.

The *Workplace Video Surveillance Act 1998* (NSW) is the only piece of legislation in Australia that places specific limitations on the employer's faculty to use video to engage in the surveillance of employees. This Act makes it an offence for an employer to engage in

covert video surveillance of an employee in the workplace unless it is solely for the purpose of establishing whether an employee is involved in any unlawful activity in the workplace and the employer has obtained a Covert Surveillance Authority (CSA) from a Magistrate (see *Workplace Video Surveillance Act 1998* (NSW) s7). Overt video surveillance by an employer is permitted under the legislation, provided that the employer informs the affected employees of the surveillance 14 days in advance of it occurring, makes the camera or camera casings visible and provides signs notifying the surveillance is occurring (see s4). The Act specifically forbids a CSA from being issued which would enable the employer to engage in performance monitoring of an employee (s9) or surveillance of employees in toilets, bathrooms or change rooms. A CSA must also not be issued unless the Magistrate has considered whether the surveillance would “unduly intrude upon the privacy of employees or any other person affected” and is satisfied that there are reasonable grounds for issuing the CSA (ss12-14).

There is legislation in each Australian State regulating the use of listening devices, however, it is not specific to the use of such devices by employers. (This legislation is discussed in more detail in question 36 below). The *Surveillance Devices Act 1999* (Vic) and *Surveillance Devices Act 1998* (WA) go somewhat further and impose limitations on the use, again by anyone and not just employers, of listening devices, optical surveillance devices and tracking devices. A person must not install, use or maintain a listening device to overhear, record, monitor or listen to a private conversation to which the person is not a party without the express or implied consent of each party to the conversation (*Surveillance Devices Act 1999* (Vic) s.6). A person must not install, use or maintain a video surveillance device to record visually or observe a private activity to which the person is not a party without the express or implied consent of each party to the activity (s7). “Private activity” is defined as an activity carried on in circumstances that may reasonably be taken to indicate that the parties to it desire it to be observed only by themselves, but does not include (a) an activity carried on outside a building or (b) an activity carried on in any circumstances in which the parties to it ought reasonably to expect that it may be observed by someone else (s3). Julian Semprill in his article “Electronic Workplace Surveillance” (2001) 14 *Australian Journal of Labour Law* 117 notes that the Explanatory Memorandum to this Act states that circumstances in which parties to an activity ought reasonably to expect that they may be observed by someone else include “activities in places accessible to the public and activities in those parts of the workplace accessible to other employees or invitees of the workplace” but not “activities in those parts of the workplace where the parties to the activity may exclude others from observing the activity; such as an office with covered windows”. Semprill argues that this means most employees, except those in high-status positions with offices which can be closed off to others, are able to be placed under visual surveillance. The Act also provides that a person must not install, use or maintain a tracking device to determine the geographical

location of a person or object without the express or implied consent of the person or the person controlling the object (s8). The Western Australian Act has very similar provisions. The *Surveillance Devices Act 1999* (Vic) also only offers a limited protection to employees: each of the possible limitations on an employer's use of visual, acoustic or electronic devices can be avoided if the employer obtains the express or implied consent of employees and employees are often not in a position where they feel powerful enough not to agree to an employer's request. As the New South Wales Law Reform Commission reported in 2001, leaving the matter of surveillance to be determined by agreement between the employer and employee is not entirely desirable (see NSW Law Reform Commission "Report 98 (2001) "Surveillance: An Interim Report", <http://www.lawlink.nsw.gov.au/lrc.nsf/pages/r98chp07>).

34. Does your law accept exceptions to the prohibition on the employer to intrude into the worker's private life (e.g. on the grounds of image or reputation of the enterprise)?

The terms implied into the contract of employment at common law, for example the employee's duty of fidelity and co-operation with the business aims of the employer, mean that where an employee's behaviour may have an impact on the business of the employer that behaviour can be controlled by the employer, even where it occurs outside the workplace.

Thus, Australian law does accept that an employer can intrude into an employee's private life on the grounds of image or reputation.

This is most obvious in situations when the employee is at the workplace of the employer. For instance, the answer to question 35 discusses how the law seems to permit the employer to impose controls on the worker's dress and grooming especially where the employee has extensive contact with clients (see *Australian Telecommunications Commission v Hart* (1982) 43 ALR 165) or there has been a complaint from clients or customers.

However, it is also accepted that an employer can impose controls upon an employee's out-of-hours conduct in order to protect the corporate image of the firm. Thus an employer can act to prohibit an employee from engaging in behaviour which would amount to harassment of a fellow employee out of hours and which would also have an impact on their relations, and thus the performance of their work, at the workplace (see for example *McManus v Scott-Charlton* (1996) 140 ALR 625). Employment contracts frequently contain terms which prohibit employees from taking other 'out of hours' employment unless with the permission of the employer. Employers could undoubtedly restrict any out-of-hours conduct that employees engage in while wearing corporate uniforms. Similarly any firm or business could

require its employee's not to engage in any activity that might bring the employer into disrepute. (on these matters see McCallum, *Employer Controls Over Private Life* (UNSW Press, Sydney, 2000), pp37-38).

35. *Does your law recognise the worker's right to his or her own image? Can the employer impose any control on the worker's outward appearance and the way he or she dresses?*

An early statement of the "traditional view" at common law is to be found in *Australian Tramways Employees Association v Brisbane Tramways Company* (1912) 6 Commonwealth Arbitration Reports 35 where Higgins J said that "a servant has to obey all lawful commands, not all commands...(T)he common law right of an employee is a right to wear what he chooses, to act as he chooses, in matters not affecting his work. Prima facie, a man may wear what he likes so long as he does not offend against decency".

The impact upon this decision by a subsequent case, *Australian Telecommunications Commission v Hart* (1982) 43 ALR 165, is a matter of some dispute. In this case Telecom issued a direction to an employee, Hart, to refrain from wearing a caftan and thongs to work and that he was "expected to maintain a standard of dress generally acceptable in the community". Hart continued to wear the caftan to work and was fined by the Disciplinary Appeals Board for "wilfully disobeying a direction". Hart sought judicial review of the Board's decision by the Federal Court of Australia. The majority of the Full Bench of the Federal Court of Australia, in upholding a decision of a statutory Disciplinary Appeals Board, established that an employer has power under the common law to direct an employee to refrain from wearing certain attire (in this case thongs and a caftan) to work. The source of the employer's power to issue such a direction was identified as the implied term existing in every contract of employment that a worker must obey their employer's lawful and reasonable commands. The Federal Court warned, however, that "if the Board had purported to find as a general proposition of law that employees of Telecom were always bound to dress to a standard acceptable to it and bound not to dress to a standard unacceptable to it, the (Board's) finding might have been wrong". As McCallum notes in his book, *Employer Controls over Private Life*, (UNSW Press, Sydney, 2000), the dicta in this case indicates that at least if an employee has extensive contact with clients, the employer would be considered to possess implied contractual powers to place "tight controls on the employee's dress, grooming and behaviour".

Unfair Dismissal decisions

A recent spate of case law suggests that the extent to which an employer may terminate the employment of a worker who fails to comply with the order, code or policy regarding dress is limited by the existence of statutory unfair dismissal legislation. In *Woolworths Ltd v Dawson* (AIRComm 185 of 1999, 1 March 1999) the Full Bench of the Australian Industrial Relations Commission upheld a decision that the dismissal of a woman, who wore three earrings in her ear in contravention of her employer's dress code requiring two or less earrings in each ear, was statutorily unfair. The Full Bench refused to make any general comments on the extent to which the dress code was unreasonable, restricting its decision to saying the application of the code in this particular case was unfair. This case was followed in *Di Bartolo v Price Attack t/as Laros* (unreported, NSWIRComm 5101 of 2000, 28 May 2001). In this case a hairdresser's employment was terminated after she refused to remove a lip stud at the request of her employer. The hairdresser had been employed for four years and worn the lip stud for twelve months. The hairdresser claimed that the dismissal was unfair under s84 *Industrial Relations Act 1996* (NSW). Counsel for the employer, citing *Hart* for support, denied that the dismissal was unfair by claiming that the employee had failed to obey a command which was lawful and, "given the mix of clientele and the need to maintain business image", reasonable. The New South Wales Industrial Relations Commission disagreed with the employer, finding that there was no valid reason, in the absence of any complaints about the lip stud from clients, for the hairdresser's dismissal and stated: "It is...in the 21st century unreasonable for an employer to demand that an employee, unless there is a safety factor involved or the item in some way may affect the nature of the business, should remove certain items of clothing and jewellery. People basically have their rights and are entitled to wear what they see fit. Simply because an individual has blue or red hair, a nose, ear, lip, belly or tongue piercing...is not sufficient reason to terminate their employment". In *Black v Happy Days Child Care Centre* ((2000) 166 QGIG 6 the dismissal of an employee for refusing to obey an order to remove her nose ring was also held to be an unfair dismissal given that there were no complaints from any of the child care centre's customers.

Anti-discrimination and equal opportunity law

An employer's efforts to control a worker's image may also be unlawful under Commonwealth and State anti-discrimination legislation, an employer must not directly or indirectly discriminate against an employee on the basis of sex, race, age, pregnancy or potential pregnancy, colour, national or ethnic origin, political opinion, religious or cultural beliefs, sexual preference, disability or impairment. In Victoria, discrimination on the basis of "physical attributes", including height and weight, is specifically made unlawful.

Thus even though an employer can generally make directions regarding an employee's image in so doing they must not directly or indirectly discriminate against persons on the prohibited grounds. A general requirement that all employees be neat, clean and tidy will not be considered discriminatory, for example, but a policy requiring only men to be well shaven may be. Sometimes problems may arise where a religious or cultural belief requires a certain form of dress that is prohibited by the employer. Unlawful discrimination may be established unless the employer can establish that the dress requirement was "reasonable", for example to comply with occupational health and safety requirements.

The case of *Trindorfer v The Commonwealth of Australia* [1996] HREOCA 36 provides an example of the operation of anti-discrimination legislation in relation to dress and shows that the nature of the employer's business can be significant in this. Trindorfer, an avionics fitter for the Royal Australian Air Force (RAAF), alleged that the RAAF's grooming standards were discriminatory, under section 5(1), and unlawful, under section 14(2) of the *Sex Discrimination Act 1984* (Cth) in requiring males to have short hair while females could have long or short hair. Trindorfer also complained that the requirement to have short military-style hair negatively impacted upon his private life by signposting, and thus stigmatising him, as a military person resulting in his exclusion from some social circles.

In essence, Trindorfer's complaint was that the grooming standards were an imposition on his right to choose his own image. The Human Rights and Equal Opportunity Commission held, however, that the RAAF's "legitimate objective" in projecting an image of the defence force as uniform and disciplined justified its imposition of conservative grooming standards. The Commission stated: "one thing that emerges from the opinions of the experts based on the long history of the military...is that the efficacy of an element of the defence force as a fighting unit depends upon the morale and esprit de corps of its members and that these qualities are positively affected by the uniformity of members of the unit...factors affecting the uniformity of appearance of members include not only dress but also the appearance of those variables such as cosmetics, grooming, wigs, beards, moustaches, sideburns and even rings. It follows that these are legitimate subjects of regulation".

36. *How does your law guarantee the privacy of communications in the employment relationship? Can the employer monitor telephone calls that his or her employee may make during employment?*

There is no express guarantee of the privacy of communications in the employment relationship within Australian law. Moreover, there is some uncertainty about whether various

statutes that protect privacy of communications generally apply to the employment context. In any event, consent in the contract of employment can always enable the employer to monitor the communications of the employee.

Employee Mail (excluding email)

According to the New South Wales Privacy Commissioner-Lawlink NSW report, *Privacy & Private Mail, Email, Lockers, Draws & Computers At Work*, there is no automatic legal right to privacy for personal mail delivered to work addresses. Employers legally have the right to open and inspect all mail received by employees at work although it is good practice for such mail to be opened in the presence of the employee concerned and for there to be a policy in the workplace identifying that this may occur.

Telephone calls

At the Commonwealth level, s6(1) *Telecommunications (Interception) Act 1979* (Cth) regulates the interception (listening or recording) of a communication which passes over a telecommunications system. However, the *Telecommunications (Interception) Act 1979* (Cth) exempts from its provisions any interception of calls made to or from a premises lawfully occupied by the person listening to or recording the call. Employers' monitoring and recording of employees' telephone calls are thus exempted from the provisions of this Act.

It has been suggested that the *Telecommunications (Interception) Act 1979* (Cth) covers the field in relation to the interception of telephone calls displacing any relevant State legislation by way of s.109 of the Constitution (see *Edelstein v Internal Committee of NSW* (1986) 7 NSWLR 222 at 230; *Miller v Miller* (1978) 141 CLR 269). However, if this legislation does not cover the field then there is legislation in the various States that may be relevant.

New South Wales, South Australia, Australian Capital Territory and Tasmania each has a *Listening Devices Act* which prohibits the use of a listening device to overhear, record, monitor or listen to any private conversation without the express or implied consent of the parties to the conversation (*Listening Devices Act 1984* (NSW) s.5(1) and (3); *Listening Devices Act 1972* (SA) s.4; *Listening Devices Act 1997* (ACT) s.4(1) and (3)(a); *Listening Devices Act 1991* (Tas) s.5(1) and (3)). Private conversation is defined in the South Australian Act as "any conversation carried on in circumstances that may be reasonably taken to indicate that any party to the conversation desires it to be confined to the parties to the conversation". Similar definitions are provided in the legislation of the other states. A similar provision is found in the *Invasion of Privacy Act 1991* (Qld)(s.43(1)-(2)). The *Surveillance Devices Act 1999* (Vic) provides that "a person must not install, use or maintain a listening device to overhear, record, monitor or listen to a private conversation to which the person is not a party

without the express or implied consent of each party to the conversation” (s6(1)). The definition of private conversation in this Act is “a conversation carried on in circumstances that may reasonably be taken to indicate that the parties desire it to be heard only by themselves but does not include any circumstances in which parties ought reasonably to expect that it may be heard by someone else” (s3). A similar provision exists in the *Surveillance Devices Act 1998* (WA)(s5(1) and (3)). Arguably, this definition of “private conversation” offers even less protection for employees than the listening devices legislation because in many circumstances it could be said that employees ought reasonably to expect that their conversations at work would be overheard by someone else.

37. *Is it lawful for employers to intercept email messages sent to or received by workers?*

There has been some suggestion that the interception of email messages by employers may contravene section 7 of the *Telecommunications (Interception) Act 1979* (Cth). One suggested interpretation of the legislation is that interception and copying of emails before they reach the employee would be a breach of the legislation but not monitoring or reading emails once they have been received (see Nicolee Dixon, “*Employees and the Internet – Issues for the Private and Public Sector Employees Research Brief* (Queensland Parliamentary Library, Queensland, 2001)).

According to others, the “basic legal position” is that because an employer owns the equipment through which emails are sent and received, it is lawful for the employer to access and read employees’ emails (see eg Jim Nolan, “Employee Privacy in the electronic workplace: Pt.1: Surveillance, records and emails” (2000) *PLPR* <http://www.austlii.edu.au/cgi-bin/disp.pl/au/journals/PLPR/2000/51.htm>.). The collection, storage and use and disclosure of emails may be subject to the *Privacy Act 1988* (Cth) to the extent that the information contained in the emails concerns persons who are not employees and therefore is information which would not be covered by the “employment record” exemption. Moreover, the Federal Privacy Commissioner has released *Guidelines on Workplace Email, Web Browsing and Privacy*. The guidelines do not so much restrict surveillance but regulate it, especially by ensuring workers are aware that the employer may be monitoring them. These Guidelines are not legally binding, however, they indicate the considerations the Privacy Commissioner would make upon receipt of a claim by an employee that their employer had breached the *Privacy Act*. To the extent that employers follow these Guidelines in order to avoid having to defend such a claim, it could be said that the Guidelines impose some control on employers’ interception and monitoring of emails.

VIII Freedom of Speech and Information

38 *How are freedom of speech and information legally defined in your legal system, and how is their protection organised?*

There is no general definition of freedom of speech and information in Australia.

In the Australian legal system there is no general right to freedom of speech or information. However, there is implied in the *Australian Constitution* a freedom of political communication, which renders invalid any legislation or government action that operates to inhibit that form of communication. The constitutional test used to determine the validity of legislation and ensure the protection of the freedom is one of “reasonable proportionality”.

In Australia a constraint on free speech is the law of defamation. The law of defamation in Australia is part of the common law, although modified by statute in some States, and operates in Australia to protect individual reputation.

Freedom of information is regulated in Australia by statutes in all jurisdictions, except the Northern Territory. These *Freedom of Information Acts* provide a right of access to government held information. Such legislation imposes a general duty on government to publish information about its own activities, including its internal procedures. It also gives persons a right of access to information held by government unless a particular document is exempt from disclosure. Where documents contain personal information an individual may request that the documents be amended. There is a right of appeal against a refusal to amend the documents and, regardless of the outcome of such appeal a person may request that an annotation be attached to the record whenever it is shown to another.

39 *To what extent, do the fundamental rights of freedom of expression and information have a bearing on the contract of employment? Have these been developed by national legislation?*

See the answer to question 40 relating to legislation concerning whistleblowers.

40 *What are the judicial regularity standards for the freedom of speech in labour relationships? (for instance, the company’s right to honour). And what are those of the freedom of information? (for instance, the truth of facts).*

At common law the implied terms of the contract of employment include the employee's duty of fidelity to the employer. Thus, during the employment relationship, the employee must not say anything that will damage the reputation of the employer or jeopardise their employer's interests in any communications with those outside the employers business. This means that an employee has a limited freedom of speech in matters concerning their employer. There are thus considerable constraints imposed on employees that do not operate in relation to ordinary citizens. However, an employee may raise a defence in the event they do make negative comments concerning their employer where it is in the public interest to disclose such information, certainly if the disclosure relates to some wrongdoing on the part of the employer. Disclosure must be made to an appropriate authority.

Only in South Australia is the protection of the 'whistleblowing' employee's freedom of speech extended by statute into the area of private employment relationships – see *Whistleblowers Protection Act 1993* (SA).

However, the situation in relation to employees in the public sector is slightly different. Frequently they are constrained by statute from criticising their employer. In various Australian States there has been enacted legislation to give statutory protection to public sector employees who act as "whistleblowers" to expose unlawful or corrupt practices of government agencies - see *Protected Disclosures Act 1994* (NSW); *Whistleblowers Protection Act 1994* (Qld); *Whistleblowers Protection Act 1993* (SA); *Public Interest Disclosure Act 1994* (ACT). The protection offered by such legislation does not, however, give protection to the public sector employee to make any criticism at all of their employer. For instance, the public sector employee cannot gain protection for general criticism of government policy.

41 *Is there a differential treatment in legislation or in jurisprudential interpretation as to the exercise of these freedoms by workers holding representative positions?*

The principle of freedom of association is protected under the Australian law regulating the workplace, the *Workplace Relations Act 1996* (Cth). These provisions make it unlawful to victimize an officer or member of a trade union for their lawful activities.