

GOVERNMENT RESPONSE

**HOUSE OF REPRESENTATIVES
STANDING COMMITTEE ON LEGAL AND
CONSTITUTIONAL AFFAIRS**

**ADVISORY REPORT
ON THE
PRIVACY AMENDMENT
(PRIVATE SECTOR) BILL 2000**

SEPTEMBER 2000



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HOUSE OF REPRESENTATIVES STANDING COMMITTEE ON LEGAL AND CONSTITUTIONAL AFFAIRS ADVISORY REPORT ON THE PRIVACY AMENDMENT (PRIVATE SECTOR) BILL 2000

Recommendation 1

The Committee recommends that a mechanism be included in the Bill to allow otherwise exempt small businesses, if they choose, to opt-in to the coverage of the Bill and be subject to the jurisdiction of the Privacy Commissioner or an approved code adjudicator.

Accept.

While there is nothing to prevent an exempt small business from choosing to abide by the National Privacy Principles or an approved privacy code, the Bill does not currently allow such a small business to subject itself to the jurisdiction of the Privacy Commissioner. The Government proposes to amend the Bill to rectify this. In addition, it is proposed that the Bill be amended to provide that a small business that opts-in to the coverage of the Bill will be able, if it chooses, to opt-out and reassert its exempt status. The Bill will also be amended to preserve the Privacy Commissioner's jurisdiction to investigate alleged breaches of privacy for any period that a small business opts-in to the coverage of the Bill.

Recommendation 2

The Committee recommends that clause 16D be amended so that the delayed application of the National Privacy Principles does not apply to small businesses that provide a health service.

Accept.

Requiring health service providers to comply with the legislation from the outset reflects the different treatment of health information under the Bill generally. This is

consistent with the view in the community that health information is particularly sensitive.

Recommendation 3

The Committee recommends that a new subclause be inserted after subclause 6D(4) of the Bill which clarifies that the small business exemption does not extend to acts or practices of a small business operator in relation to an employee record.

Not Accept.

The Government's position is discussed further in relation to Recommendation 7 below.

Recommendation 4

The Committee recommends that the Government clarify that, in respect of the small business exemption, to collect or disclose personal information for any motive, including for example a malicious or altruistic motive, without the consent of the individual concerned should attract the application of the National Privacy Principles.

Not Accept.

The practical effect of this recommendation would be to severely curtail the scope of the exemption. The Government remains committed to the need to minimise small business compliance costs. It therefore considers it important to maintain the exemption for small business unless the business engages in an act or practice that poses a particular threat to the privacy of the individual. The Government will, however, refine the exemption to assist small businesses and consumers to determine who is covered by the legislation.

Recommendation 5

The Committee recommends that the current definition of 'employee record' (which will be given the protection of the NPPs) in section 6(1) read: 'employee record', in relation to an employee, means a record of personal information relating to the employment of the employee other than an exempt employee record. Examples of personal information relating to the employment of the employee are health information about the employee and personal information about all or any of the following (a) the terms and conditions of employment of the employee; (b) the employee's personal and emergency contact details; (c) the employee's hours of employment; (d) the employee's salary or wages; (e) the employee's membership of a professional or trade association; (f) the employee's trade union membership; (g) the employee's recreation, long service, sick, personal, maternity, paternity or other leave; (h) the employee's taxation, banking or superannuation affairs.

Not Accept.

The Government's position is discussed further in relation to Recommendation 7 below.

Recommendation 6

The Committee recommends that a new definition of 'exempt employee record' be inserted in clause 6(1) reading as follows: 'exempt employee record' in relation to an employee, means a record of personal information relating to the employment of the employee and consisting of the following: (a) the engagement, training, disciplining or resignation of the employee; (b) the termination of the employment of the employee; (c) the employee's performance or conduct.

Not Accept.

The Government's position is discussed further in relation to Recommendation 7 below.

Recommendation 7

The Committee recommends that clause 7B(3) be amended as follows: 'An act done, or practice engaged in, by an organisation that is or was an employer of an individual, is exempt for the purposes of paragraph 7(1)(ee) if the act or practice is directly related to: (a) a current or former employment relationship between the employer and the individual; and (b) an exempt employee record held by the organisation and relating to the individual.'

Not Accept.

The suite of recommendations dealing with employee records effectively stand or fall together. The regulation of employee records is an area that intersects with a number of State and Territory laws on workplace relations, minimum employment conditions, workers' compensation and occupational health and safety, some of which already include provisions protecting the privacy of employee records. The Government considers that to attempt to deal with employee records in the Bill might result in an unacceptable level of interference with those State and Territory laws, and a confusing mosaic of obligations.

Recommendation 8

The Committee recommends that the operation of [the media] exemption be monitored and specifically reassessed in the next review of this legislation.

Accept.

Upon introduction of the Bill, the Government indicated that it would ask the Privacy Commissioner to conduct a formal two year review of the operation of the legislation, in consultation with key stakeholders. The Government indicated that it would intend this review to cover all of the exemptions in the Bill, including the media exemption.

Recommendation 9

The Committee recommends that, in order for a journalist or media organisation to obtain the benefit of the media exemption under this legislation, he, she or it must subscribe to a code developed by a media organisation or representative body or, in the absence of such a code, a model code prepared by the Privacy Commissioner.

Accept in part.

The Government accepts that media organisations should be required to satisfy an additional condition before they are covered by the media exemption in the Bill, but does not accept the exact terms of the condition recommended.

The Government agrees that journalists and media organisations who subscribe to codes of practice that deal with privacy should be covered by the exemption in respect of their acts and practices in the course of journalism. It notes that many journalists and media organisations are already covered by various codes of practice developed by representative bodies of the media industry.

The Government also agrees that a journalist or media organisation that operates independently of existing representative bodies should be able to develop its own code. This approach is consistent with the Government's commitment to promoting effective self-regulation and co-regulation of the information and communications industry sector. The Government does not consider it appropriate, however, to require independently operating journalists or media organisations to subscribe to a model media code developed by the Privacy Commissioner in order to have the benefit of the exemption.

Recommendation 10

The Committee recommends that the Privacy Commissioner conduct an education campaign to inform the public about the special provisions applying to the media.

Accept in principle.

The Government acknowledges the importance of the public being informed about all aspects of the legislation, including its application to media organisations. One of the

Privacy Commissioner's current functions under the *Privacy Act 1988* is to promote the protection of individual privacy and undertake educational programs about how the legislation operates. The performance of this function is a matter for the Privacy Commissioner, as an independent statutory office holder.

Recommendation 11

The Committee recommends that clause 7C(1)(c) be amended by deleting '...another aspect of the political process' and replacing it with '...in parliamentary or electoral matters.'

Not Accept.

The Government's position is discussed in response to recommendation 12.

Recommendation 12

The Committee recommends that clause 7C(2)(b)(iii) be amended by deleting 'the participation in another aspect of the political process...' and replacing it with 'the participation in the parliamentary or electoral process.'

Not Accept.

The Government notes that the Committee concluded that the exemption appropriately addresses the proper functioning of Australia's democratic system. However, the Government has received legal advice that incorporating the recommended terminology in Clause 7C of the Bill would have the probable effect of significantly narrowing the scope of the exemption. The Government does not consider that this is an outcome that the Committee intended. The Government understands that by Recommendations 11 and 12 the Committee was intending to achieve consistency with terminology used in the parliamentary entitlements context.

Recommendation 13

The Committee recommends that a new provision be inserted to provide that clause 7C does not allow a political party or political representative to sell or disclose personal information collected by the political party or political representative in the course of their duties to anyone not covered by the exemption.

Not Accept.

The political acts and practices exemption in Clause 7C of the Bill is not expressed to restrict the disclosure or sale of personal information to anyone not covered by the exemption. The Government considers, however, that the exemption would operate in a manner that would address the Committee's concern because it covers only acts and practices connected with an election, a referendum or participation in another aspect of the political process.

This exemption will not apply where a political representative and other persons and bodies of the type described in Clause 7C sells or discloses personal information for any purpose unconnected with an election, a referendum or participation in another aspect of the political process.

The Bill applies to "organisations". The acts and practices of registered political parties, including the sale and disclosure of personal information, are exempt from the Bill because registered political parties are excluded from the definition of "organisations". The Government considers that this exemption is important to preserve the operation of the electoral and political process in Australia, including freedom of political communication.

The Government notes that the *Commonwealth Electoral Act 1918* already places limitations on what registered political parties can do with personal information on electoral rolls. The permitted uses of electoral roll information supplied to political parties under the *Commonwealth Electoral Act 1918* are specified in that Act, and severe penalties apply if the information is used or disclosed for other purposes. In particular, it is an offence to misuse enrolment information obtained under the Act for commercial purposes.

Recommendation 14

The Committee recommends that the Government encourage all relevant parties to reach an agreed position on the major issues raised in the evidence to this inquiry, such as the harmonisation of privacy principles applicable to the public and private sectors, as a matter of urgency.

Accept.

The Government recognises the importance of cooperation between all jurisdictions in relation to health privacy. Through initiatives such as the adoption of a national approach to electronic health records, the Commonwealth is taking a proactive role in working towards resolution of the issues identified in the Report. The harmonisation of public and private health sector privacy principles is a goal that the Government is encouraging through discussions with relevant stakeholders.

Recommendation 15

The Committee recommends that health information be included in the Bill subject to its comments in Chapter 7.

Accept in principle.

The Governments response in relation to Chapter 7 of the Report appears below.

Recommendation 16

The Committee recommends that the basis for this harmonisation be the access standards set out in the ACT Health Records (Privacy and Access) Act 1997. That is, a patient should have a right of access to his or her medical records unless:

- *the provision of the information would constitute a significant risk to the life or health of any person;*
- *the provision of the information would contravene a law of the Commonwealth, State or Territory or an order of a court of competent jurisdiction; or*
- *the record is subject to an obligation of confidentiality.*

Not Accept.

The Government believes that the issue of access to medical records is adequately dealt with by National Privacy Principle 6. The Government does not accept that the basis for the harmonisation of public and private health sector privacy principles should be the ACT *Health Records (Privacy and Access) Act 1997*. Adopting the Committee's recommendation would create inconsistencies between the regime for access to medical records in the private sector and that which currently operates in the Commonwealth and the majority of State and Territory public sectors pursuant to freedom of information legislation. This would run counter to the Government's commitment to encourage the harmonisation of health privacy regulation across the public and private sectors.

Recommendation 17

The Committee recommends that as from the date of commencement of the legislation a further period of grace of three years be extended to holders or users of existing information in respect of information held at that time.

Not Accept.

The Government considers that the policy rationale for limiting the application of the NPPs in relation to existing information is sound and will remain relevant after the

legislation comes into effect. The Government anticipates that, in practice, the longer the period after the legislation comes into effect the less likely organisations will differentiate between personal information collected before the date on which the legislation came into effect and that collected after that date and the same standards will be applied to all personal information held. This was the Commonwealth's experience following the commencement of the *Privacy Act 1988* in relation to Commonwealth Departments and agencies despite the fact that similar limitations were applied in relation to the application of the Act to information collected before the legislation commenced.

Recommendation 18

If, at the conclusion of three years, organisations have not used that information, the Committee recommends that they should be required either to delete it or seek explicit consent from the subject of the information to continue to hold it.

Not Accept.

The Government does not consider it desirable to impose an obligation to destroy personal information regardless of the nature of the information concerned, the organisation holding it or the purpose for which it was collected. The recommendation does not take account of the many reasons why an organisation may continue to hold personal information for longer than three years without actively using it. In some cases there are legal requirements to do so. In others, retention would be within the reasonable expectation of the individual and destruction of the information, such as old banking or medical records, could prove detrimental to the interests of the individual.

Recommendation 19

The Committee recommends that the National Privacy Principles apply to tenancy databases from the date of commencement of the Bill and the Government ensure that tenancy databases do not gain the benefit of the small business exemption.

Not Accept.

The Government does not believe there is sufficient justification for singling out tenancy databases from the small business exemption.

Recommendation 20

The Committee recommends that the Bill be amended to make clear that every time personal information is used for the secondary purpose of direct marketing the organisation must provide an opportunity for the individual to opt-out of further communications. The offer to opt-out must:

(a) be prominently placed on the direct marketing material;

(b) be accompanied by a street address and telephone number in Australia;

(c) be accompanied by an email address if the original communication was made via email; and

(d) if the organisation sending the material has them, be accompanied by its ACN and ABN numbers.

Accept in part.

The Government will introduce amendments to the Bill to give effect to paragraphs (a), (b) and (c) of this recommendation. In relation to paragraph (d), the Government is of the view that as ACN and ABN numbers must be displayed by businesses on their correspondence, specific provision in the Bill to require it is unnecessary.

Recommendation 21

The Committee recommends that the Privacy Commissioner establish guidelines for use by companies in determining the extent of information they should provide to consumers pursuant to National Privacy Principle 1 about the nature of their corporate groups and the information that will be shared with the members of that group.

Accept in principle.

The Government anticipates that the Privacy Commissioner will actively pursue the making of such guidelines in consultation with relevant stakeholders. However, the performance of this function is a matter for the Privacy Commissioner as an independent statutory office holder.

Recommendation 22

The Committee recommends that clause 13B of the Bill be amended to ensure that if an organisation that is not required to comply with National Privacy Principle 1 discloses personal information to a related body corporate, the collecting organisation is required to comply with National Privacy Principle 1 prior to disclosure.

Accept.

The Government will introduce amendments to the Bill to give effect to this recommendation.

Recommendation 23

The Committee recommends that clause 18BF (1)(b) be amended to require that Privacy Commissioner to consult with all affected stakeholders before making guidelines relating to making and dealing with complaints under approved privacy codes.

Accept in principle.

The Government will introduce amendments to the Bill to give effect to this recommendation.

