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Senate Legal and Constitutional Legislation Committee

Consideration of legislation referred to the Committee

Inquiry into the Provisions of the Privacy Amendment (Private Sector) Bill 2000

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REPORT SUMMARY

RECOMMENDATIONS

The Committee recommends as follows:

(a) that the small business exemption under the Bill be retained as amended by the Government;

(b) that a sunset clause in the Bill allow the exemption of employee records to operate for 2 years, while analysis is undertaken by relevant agencies to ascertain whether existing workplace and State and Territory legislation is adequate to protect their privacy;

(c) that the Bill retain the Government's amendments in relation to the media exemption introduced by the Government;

(d) that should any evidence of abuse of the political acts and practices exemptions emerge, the Government refer the exemptions to the Joint Standing Committee on Electoral Matters for further consideration or ensure that the exemptions are reviewed as part of the broader review of the Bill that is to occur in two years' time; and

(e) that the views of the European Union with regard to the operation of the Bill be considered as part of the broader review of the legislation which is to occur in two years' time.

Senator Marise Payne

CHAIR

October 2000

CHAPTER ONE

INTRODUCTION

Background

1.1 The *Privacy Amendment (Private Sector) Bill 2000* ('the Bill') was introduced into the House of Representatives on 12 April 2000. The Attorney-General wrote to the House of Representatives Committee on Legal and Constitutional Affairs on 12 April 2000, referring the Bill for inquiry and report. The House of Representatives Committee published its *Advisory Report on the Privacy Amendment (Private Sector) Bill 2000* in June 2000.[1]

1.2 The Senate agreed to refer the provisions of the Bill to the Legal and Constitutional Legislation Committee ('the Committee') on 16 August 2000, for inquiry and report.[2] The date for reporting was set at 5 October 2000.[3] The Committee subsequently received from the Senate on 5 October 2000 an extension of the reporting date to 10 October 2000.

1.3 The Committee has been tasked with an inquiry that examines the exemptions from the proposed national co-regulatory privacy scheme[4] for the private sector outlined in the legislation, and the protection of genetic privacy under this Bill.

The Government's response to the Bill

1.4 On 7 September 2000, the Government responded to the House of Representatives Committee's Advisory Report on the Bill and tabled in Parliament a number of amendments.[5]

1.5 The Committee was greatly assisted by the report of the House of Representatives Committee and the response of the Government and has endeavoured to take both of them into account.

Earlier Inquiry into Privacy Amendment Bill 1998

1.6 On 14 May 1998, the Senate had referred to the Legal and Constitutional References Committee ('the References Committee') an inquiry into privacy protection in Australia, linked to consideration of the measures contained in the Government's *Privacy Amendment Bill 1998*, which proposed to extend the operation of the *Privacy Act 1988* to businesses performing work outsourced by the Commonwealth. The terms of reference of this earlier

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1 The Parliament of the Commonwealth of Australia, *Advisory Report on the Privacy Amendment (Private Sector) Bill 2000*, June 2000

2 Hansard, pp 16486 -90

3 The Selection of Bills Committee recommended that the reporting date be 29 August 2000, but the Senate agreed that it should be a date to be determined after consulting with the Legal and Constitutional Committee. On 29 August 2000, the Senate agreed to the report being presented by 5 October 2000. See Hansard, p 16823

4 In broad terms, a co-regulatory scheme refers to a legislative framework within which self-regulatory codes of practice can be given official recognition. See Explanatory Memorandum, p 17

5 The Government's amendments to the Bill are discussed in detail in Chapter Two

inquiry included a broad consideration of existing privacy protection in the private sector, as well as other issues including Australia's international obligations and the need for legislative backing for any privacy protection.

1.7 In March 1999, the References Committee published the findings of its inquiry in the report titled *Privacy and the Private Sector – Inquiry into Privacy Issues, including the Privacy Amendment Bill 1998*. The majority of the References Committee concluded that that Bill, although a useful response to the erosion of existing privacy protection caused by the outsourcing of government services, did not go far enough in extending privacy protection across the private and the 'not for profit'/charitable sector. Recommendations of that report of particular relevance to the present inquiry include the following:

- that the Government introduce legislation to provide privacy protection uniformly covering the public, private and the charitable and 'not for profit' sectors. The coverage of the bill should be as broad as possible and minimise the extent of any exemptions;
- that creation of a co-regulatory model incorporate a comprehensive review of the *Privacy Act*; and
- that in the development of more effective privacy legislation, as recommended in the report, consideration be given to the relationship between existing laws regulating employer records (in terms of maintenance and access and disclosure) and proposed legislation which would seek to cover employee data (by protecting personal information of employees).

Genetic privacy

Genetic Privacy and Non-Discrimination Bill 1998

1.8 On 11 March 1998, Senator Natasha Stott Despoja, the Deputy Leader of the Australian Democrats, introduced the *Genetic Privacy and Non-Discrimination Bill 1998* (the Genetic Privacy Bill) as a stand-alone scheme, though heavily reliant on the existing structure of the Privacy Commissioner and the Human Rights and Equal Opportunity Commission. Senator Stott Despoja differentiated between genetic privacy and general information privacy.[6]

Senate Committee Inquiry

1.9 The Genetic Privacy Bill was subsequently referred to the Senate Legal and Constitutional Legislation Committee for inquiry and report. The Committee's report of March 1999 made the following recommendations:

- The creation of a national working party. The appropriate Commonwealth departments would be tasked with the administration of the consultation process, and the establishment of a working group including State and Territory representatives, experts and representatives of stakeholder groups.

6 Senator Natasha Stott Despoja, Press Release, 29 November 1998

- Consideration by the Commonwealth Government of a reference to the Senate Legal and Constitutional References Committee to undertake a thorough examination of the issues relating to genetic privacy and discrimination.
- An ongoing responsibility for the appropriate Commonwealth departments to monitor developments, with a view to drafting any future legislation as required.[7]

1.10 The Committee recommended, therefore, that the Bill not proceed, pending the further examination of the issues as recommended above and the development of appropriate amendments to existing legislation in relation to genetic privacy and discrimination.[8]

Government response

1.11 On 9 August 2000 a joint news release of the Attorney-General and the Minister for Health announced that they had discussed the complex and significant human rights, privacy and discrimination issues posed by advances in gene technology.[9]

1.12 The Attorney-General and the Minister stated that they shared the community's concern that genetic information should be treated sensitively to prevent the potential for abuse or discrimination on the basis of actual or imputed genetic characteristics.

1.13 The press release announced that the Australian Law Reform Commission and the Australian Health Ethics Committee of the National Health and Medical Research Council would be asked to jointly inquire into these issues. The terms of reference would be settled shortly. It is intended that the two bodies will engage in extensive consultation with the public and interested parties throughout the inquiry.

Conduct of the present inquiry

1.14 The Committee wrote to a range of organisations and individuals on 25 August 2000 inviting submissions. The terms of reference of the inquiry were advertised in the national press on the weekend of 26/27 August 2000. The Committee received 28 submissions including supplementary submissions. Twenty-seven submissions have been made public; one submission is confidential. The published submissions are listed at Appendix 1.

1.15 The Committee held a hearing in Canberra on 8 September 2000. A list of witnesses at this hearing is at Appendix 2.

Note on references

1.16 References to submissions are to individual submissions as received by the Committee, and not to a bound volume. References to the Hansard transcripts are to the proof Hansard. Page numbers may vary between the proof and the final Hansard transcript.

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7 Senate Legal and Constitutional Legislation Committee, Recommendation 1, *Consideration of legislation referred to the Committee: Provisions of the Genetic Privacy and Non-discrimination Bill 1998 (as introduced in the 38th Parliament)*, March 1999, p vii

8 Recommendation 2, *Provisions of the Genetic Privacy and Non-discrimination Bill 1998*, p vii

9 Commonwealth Attorney-General, the Hon Daryl Williams AM QC MP, and the Minister for Health and Aged Care, the Hon Dr Michael Wooldridge MP, Joint News Release, *Gene Technology*, 9 August 2000

CHAPTER TWO

THE BILL

Overview

2.1 The Bill seeks to establish national standards for the handling of personal information by the private sector.[1]

2.2 The Attorney-General in the Second Reading Speech described the Bill as "the most significant development in the area of privacy law in Australia since the passage of the *Privacy Act* in 1988".[2] Its introduction followed more than 12 months of intensive consultation with Australian businesses, consumers and privacy advocates.[3]

2.3 In the Government's view, by providing a national, consistent and clear set of standards to encourage and support good privacy practices, the Bill will give consumers and the international community confidence in Australian business practices.[4]

Objectives of the legislation

2.4 The Bill is described as one element of the strategy to ensure that Australian business and consumers take full advantage of the opportunities presented by electronic commerce and the information economy. It seeks to allay concerns about the security of personal information when doing business online and provides a framework within which Australian business can address these concerns effectively and efficiently.[5]

2.5 The Bill also seeks to ensure that Australia is in a position to meet international obligations and concerns and is not disadvantaged in the global information market.[6]

Details of the Bill

2.6 The Second Reading Speech highlights the following aspects of the Bill.

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1 Attorney-General, the Hon. Daryl Williams AM QC MP, Second Reading Speech, Hansard, 12 April 2000, p 15749

2 Second Reading Speech, Hansard, p 15749

3 Second Reading Speech, Hansard, p 15749

4 Second Reading Speech, Hansard, p.15749

5 Second Reading Speech, Hansard, p 15749

6 Second Reading Speech, Hansard, p 15749

International obligations

2.7 The Bill draws on the 1980 Organisation for Economic Development (OECD) Guidelines for the Protection of Privacy and Transborder Flows of Personal Data. It also seeks to implement certain obligations under Article 17 of the International Convention on Civil and Political Rights (ICCPR). The Attorney-General expressed confidence that the Bill met the requirements of the 1995 European Union directive on the protection of individuals with regard to the processing of personal data and on the free movement of such data.[7]

Interaction with private sector organisations

2.8 The Government states that the Bill has been developed in a highly interactive way. It is based on National Principles for the Fair Handling of Personal Information ("the National Privacy Principles" or "NPPs") developed by the Privacy Commissioner after extensive consultation with business, consumers and other stakeholders.

2.9 The Bill aims to encourage private sector organisations and industries that handle personal information to develop privacy codes of practice providing at least the same level of protection as the NPPs and including complaint handling procedures meeting specific standards as to independence, transparency, fairness and accessibility. In the absence of such privacy codes of practice or complaint handling procedures, the NPPs apply or the Privacy Commissioner deals with complaints.[8]

2.10 The Privacy Commissioner will have a significant role in working with the private sector, including the development and issue of best practice guidelines, in order to improve industry practice over time.[9]

Health information

2.11 The NPPs have been modified to accommodate the particular sensitivities surrounding the collection, use and disclosure of personal health information. The modified principles are designed to arrive at an appropriate balance between privacy interests and public interests, such as the promotion of research and the effective planning and delivery of health services. The Bill provides that health information can only be used or disclosed for a secondary purpose of research or compiling statistics with the consent of the person concerned or, where this is not practicable, in accordance with the Privacy Commissioner's guidelines. Further, researchers are required to take reasonable steps to de-identify personal information before the results of research can be disclosed.[10]

Small businesses

2.12 In order to avoid unnecessary costs to small businesses (defined as those with an annual turnover of $3 million or less), only small businesses that pose a high risk to privacy will be required to comply with the legislation.[11] All other small businesses will be exempt.

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7 Second Reading Speech, Hansard, p 15749

8 Second Reading Speech, Hansard, p 15750

9 Second Reading Speech, Hansard, p 15750

10 See the Bill, Schedule 1, Item 2.1 (d) (i) – (iii)

11 Such small businesses listed in the Bill are those that provide a health service to another individual and hold health information except in an employee record; disclose personal information about another

Small businesses coming within the Bill will not be subject to the legislation for a period of 12 months after it comes into force.[12]

Other exemptions

2.13 The Bill includes an exemption for the collection, use or disclosure of *employee records* where this relates directly to the employment relationship,[13] as, in the Government's view, privacy protection of such personal information is more properly a matter for workplace relations legislation.[14]

2.14 In order to achieve a balance between free flow of information to the public and the individual's right to privacy, the Bill does not apply to acts and practices of *media organisations* in the course of journalism.[15]

2.15 The Bill includes an exemption for *political representatives* where acts or practices are related to participation in the political process, including referendums and elections.[16]

Review

2.16 The Attorney-General undertook to ask the Privacy Commissioner to conduct a formal review of the operation of the legislation, and of all the exemptions, in consultation with the key stakeholders after it has been in operation for two years.[17]

Report of the House of Representatives Committee Inquiry

Small business exemption

2.17 The House of Representatives Committee noted that the need for a small business exemption had been questioned and that there had been criticism of the turnover threshold as an inappropriate measure in the context of privacy. While accepting the use of an annual turnover threshold to determine small businesses for exemption, the House of Representatives Committee also commented on the complexity of this exemption and suggested that the Government consider the appropriateness of the use of an annual turnover threshold calculated on the basis of *A New Tax System (Goods and Services Tax) Act 1999*.[18]

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individual to third parties for a benefit, service or advantage; provide a benefit, service or advantage to collect personal information about another individual from third parties, are contracted to provide a service to the Commonwealth; or are prescribed by regulation as being covered by the Bill. Clause 36 of the Bill, proposed subsection 6D(4) and section 6E

12 Second Reading Speech, Hansard, p 15752; Bill, Clause 54, proposed section 16D

13 Second Reading Speech, Hansard, p 15752; Clause 42 of the Bill, proposed sub section 7B(3)

14 Second Reading Speech, Hansard, p 15752

15 Second Reading Speech, Hansard p 15752;Bill, clause 42, proposed sub section 7B(4)

16 Second Reading Speech, Hansard, p 15753; Bill, clause 42, proposed section 7C

17 Second Reading Speech, Hansard, p 15753

18 The Federal Privacy Commissioner had pointed out to the House of Representatives Committee that the Goods and Services Tax in calculating annual turnover excludes supplies that are 'input taxed'. Some organisations, because of the nature of their businesses, will be almost entirely input taxed. Such businesses include those in the financial sector such as banks. Therefore, the use of the methodology set out in the Goods and Services Tax may have unintended consequences as some large businesses that are

2.18 The House of Representatives Committee considered that an exempt small business that wishes to comply with privacy standards and come within the jurisdiction of the Privacy Commissioner should be able to do so.[19]

2.19 Therefore, the House of Representatives Committee recommended that the Bill include a mechanism to allow otherwise exempt small businesses to opt-in to the coverage of the Bill and be subject to the jurisdiction of the Privacy Commissioner or an approved code adjudicator (ie, for dealing with complaints).[20]

2.20 However, given the sensitive nature of the information held by medical practices and similar providers, the House of Representatives Committee was concerned that the 12-month delayed application of the Bill to small businesses not exempt from the legislation, included health service providers.

2.21 For this reason, the House of Representatives Committee recommended that the Bill be amended so that the delayed application of the NPPs does not apply in relation to small businesses that provide a health service.[21]

2.22 The House of Representatives Committee was also concerned to ensure that any small business engaged in the practice of collecting or disclosing personal information, whether for financial benefit or not, will be subject to the NPPs unless it has the consent of the individual concerned to collect or disclose the information. The Committee recommended that the Government clarify this issue in the Bill.[22]

Employee records exemption

2.23 The House of Representatives Committee was not satisfied that existing workplace relations legislation provides sufficient protection for the privacy of private sector employees and held grave concerns about exempting employee records. It was not persuaded that there is any clear need for employees to be without privacy protection under the Bill in relation to their workplace records.[23]

Media exemption

2.24 While accepting the need for the media to be treated differently with respect to privacy regulation in some circumstances because of the competing public interest in maintaining press freedom, the House of Representatives Committee recommended that, for journalists or media organisations to obtain the benefit of the media exemption, they must

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input taxed could fall within the small business exemption by being considered to have a turnover of less than $3 million. It was beyond the scope of the House of Representatives Committee's inquiry to conduct an analysis of input taxed enterprises. See *Advisory Report on the Privacy Amendment (Private Sector) Bill 2000*, p 13

19 *Advisory Report on the Privacy Amendment (Private Sector) Bill 2000*, p 10

20 Recommendation 1, *Advisory Report on the Privacy Amendment (Private Sector) Bill 2000*, p 17

21 Recommendation 2, *Advisory Report on the Privacy Amendment (Private Sector) Bill 2000*, pp 19-20

22 Recommendation 4, *Advisory Report on the Privacy Amendment (Private Sector) Bill 2000*, p 22

23 *Advisory Report on the Privacy Amendment (Privacy Sector) Bill 2000*, p 33

subscribe to a code developed by a media organisation or representative body or a model code prepared by the Privacy Commissioner.[24]

Political acts and practices/political parties exemptions

2.25 The House of Representatives Committee contended that arguments against these exemptions must be balanced against the imperative to ensure that Members of Parliament can appropriately serve their electorates.[25]

2.26 If the aim of the exemptions is to target the proper functioning of the democratic system, it needs clearly to indicate the intention that it be used for legitimate purposes such as serving the constituents and not, for example, for commercial interests.[26]

2.27 The House of Representatives Committee's recommendations in this context included the insertion of a new provision to clarify that the exemption does not extend to the sale or disclosure of information, collected by a political party or political representative in the course of their duties, to anyone not covered by the exemption.[27]

Health information

2.28 The House of Representatives Committee commented that the inclusion of health information had been the most contentious aspect of the Bill. Submissions generally concentrated on two issues: first, whether health information should be covered by the Bill at all and, secondly, the more specific issue of individuals' access to their own health information.[28]

2.29 The House of Representatives Committee concluded that health information should remain subject to the Bill in the interests of protecting consumers in the private health sector. However, it was concerned about the "resulting plethora of principles"[29] that would then apply across the public and private health sectors if the health provisions in the Bill retained their current form.

2.30 Therefore, the House of Representatives Committee recommended that the Government encourage all relevant parties to agree on the major issues raised in the evidence to the House of Representatives' inquiry, such as the harmonisation of privacy principles applicable to the public and private sectors, as a matter of urgency.[30]

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24 Recommendation 9, *Advisory Report on the Privacy Amendment (Privacy Sector) Bill 2000*, p 49

25 *Advisory Report on the Privacy Amendment (Privacy Sector) Bill 2000*, p 54

26 *Advisory Report on the Privacy Amendment (Privacy Sector) Bill 2000*, p 61

27 Recommendations 11, 12, 13, *Advisory Report on the Privacy Amendment (Privacy Sector) Bill 2000*, pp 61-62

28 *Advisory Report on the Privacy Amendment (Private Sector) Bill 2000*, p 63

29 *Advisory Report on the Privacy Amendment (Private Sector) Bill 2000*, p 72

30 Recommendation 14, *Advisory Report on the Privacy Amendment (Privacy Sector) Bill 2000*, p 73. Recommendation 15 (at p 73) stated that health information be included in Bill subject to the Committee's comments in Chapter 7 of the Report

Patient access to medical records

2.31 The House of Representatives Committee accepted a general right of patients to access their medical records and did not agree that a useful distinction could be drawn between working notes and considered therapeutic opinion. The House of Representatives Committee was concerned that the access principle in the Bill contains a large number of exceptions that have the potential to deny individuals access to their health records. The range of exceptions may be too broad.[31]

2.32 The House of Representatives Committee proposed that access to medical records in the private sector be on equivalent terms to the access currently available in the public sector (as well as the private sector in the ACT). It recommended that the basis for this harmonisation be the access standards set out in the ACT *Health Records (Privacy and Access) Act 1997*.[32]

Other Issues

2.33 The House of Representatives Committee recommended that NPPs apply to *tenancy databases* from the date of commencement of the Bill, and that the Government ensure that tenancy databases not gain the benefit of the small business exemption.[33]

The Government's response

2.34 The amendments to the Bill moved by the Government on 7 September 2000 in response to the House of Representatives Committee's report may be summarised as follows.

Small business exemption

Definition

2.35 In general, a business' annual turnover calculated according to the new definition will equal the total of the instalment income the business notifies to the Commissioner of Taxation on its Business Activity Statement during a financial year.[34]

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31 *Advisory Report on the Privacy Amendment (Private Sector) Bill 2000*, pp 85-86. NPP 6, which covers access to and correction of personal information including health information, contains a number of exceptions to the general right of access including some of a general nature that apply to personal information as a whole, eg NPP 6.1(d) allows denial of access to information if the request for access is 'frivolous or vexatious'; NPP 6.1(f) denies access if access would reveal the intentions of an organisation in relation to negotiations with the individual in such a way as to prejudice those negotiations. See *Advisory Report*, pp 76-77, 79

32 Recommendation 16, *Advisory Report on the Privacy Amendment (Private Sector) Bill 2000*, p 73

33 Recommendation 19, *Advisory Report on the Privacy Amendment (Private Sector) Bill 2000*, p. 98. The House of Representatives Committee argued that the owners of databases would have at least 12 months to prepare and to revisit their policies and procedures. It also noted that a number of submissions expressed concern that tenancy databases could fall within the small business exemption as they are likely to have turnovers of less than $3 million and may be structured so that they do not receive a benefit, service or advantage when disclosing information about tenants. See *Advisory Report*, p 20

34 Section 6D of the Bill has been amended to include a definition of 'annual turnover' of a business for a financial year as the total that is earned in the year in the course of business of proceeds of sales of goods and/or services; commission income; repair and service income; rent, leasing and hiring income; government bounties and subsidies; interest, royalties and dividend; other operating income

Threshold

2.36 Any criteria for determining a threshold raise issues of how to deal with entities either falling just under or just over the threshold. There is also the difficulty of assessing in relation to the threshold criteria a business that is just starting up.

2.37 Amendments to the Bill seek to deal with these matters. An entity will not be a small business if it carries on a business with an actual annual turnover exceeding $3 million in the previous financial year.

2.38 A formula is also set out to project the annual turnover of a new business in operation for only part of a financial year.[35]

Opt-in/opt-out mechanism

2.39 The Government has accepted the House of Representatives Committee's recommendation that a mechanism be included in the Bill to allow otherwise exempt small businesses to opt-in to the coverage of the Bill and be subject to the complaints jurisdiction of the Privacy Commissioner or an approved code adjudicator. As the mechanism is based on voluntary, rather than mandatory, compliance with the scheme, the mechanism also enables the small business opting-in to subsequently opt-out of the scheme.[36]

Trading personal information

2.40 Two of these exceptions are intended to deal with the situation where the business is 'trading' personal information. To ensure that it is not confined to situations where the information is only traded for money, the provision in the Bill refers to collection or disclosure of personal information "for a benefit, service, or advantage".

2.41 The Government has responded to a concern of the House of Representatives Committee that the application of the Bill to small businesses trading in personal information did not take account of situations where collection or disclosure may have been authorised by the individual concerned, or required or authorised by or under legislation.[37] The Bill has been amended to clarify that a small business that collects or discloses personal information for a benefit, service, or advantage but in circumstances where it is with the individual's consent, or required or authorised by legislation, will not lose the benefit of the small business exemption.

Employee records

2.42 The Government has not accepted the recommendations of the House of Representatives Committee in respect of employee records.

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35 If a business has been carried on for only part of a financial year, the inserted clause has a formula for working out the amount based on annual turnover if the part were a whole financial year, multiplied by the number of days in the financial year divided by number of days in the part

36 The amendment inserts clause 70B, "Application of this Part to former organisations"

37 The House of Representatives Committee believed that the motive for a collection or disclosure of personal information is irrelevant to the question of privacy protection. See *Advisory Report on the Privacy Amendment (Private Sector) Bill 2000*, paragraph 2.67, p 22

2.43 The Government considers that 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. It considered that an attempt to deal with employee records comprehensively in the Bill would result in an unacceptable level of interference with those State and Territory laws and create a confusing mosaic of obligations.[38]

2.44 The Government considers, therefore, that privacy issues in relation to employee records are more appropriately considered in relation to workplace relations legislation.

2.45 The Attorney-General's Department, moreover, pointed out that the exemption in the Bill for acts and practices in relation to employee records does not give employers the ability to do whatever they like with such records. The Department states that the employer must be dealing with the employee records in the context of a current or former employment relationship if it is to be exempted. Therefore, there is no scope for an employer to sell or otherwise take commercial advantage of the personal information contained in the employee records held.[39]

Tenancy databases

2.46 The Government has not accepted the House of Representatives Committee's recommendation in relation to tenancy databases. The Attorney-General's Department advises that the Government does not see sufficient justification for singling out these databases for removal from the small business exemption.[40]

2.47 The Department states that organisations that use tenancy databases rely on a flow of personal information to and from organisations maintaining these databases. Where this flow of personal information occurs between organisations for a "benefit, service or advantage", such organisations would not be able to avail themselves of the small business exemption in any event.[41]

Media exemption

2.48 The Government has introduced an amendment that deletes the definition of "journalism" in the Bill in order to limit the scope of the exemption to activities of mainstream media organisations, thereby, in the Government's view, making it more difficult for some on-line organisations to take advantage of the exemption.[42]

2.49 Another amendment relating to this exemption requires media organisations to have publicly committed themselves to observing published privacy standards before the acts and practices done or engaged in by the organisation in the course of journalism are exempt.[43]

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38 *Government Response*, 7 September 2000, p 4

39 Attorney-General's Department, *Introductory Statement*, tabled at the hearing of 8 September 2000, p 4

40 *Introductory Statement*, p 4

41 *Introductory Statement*, p 4

42 *Introductory Statement*, p 5

43 Amendment 9

2.50 The Government has accepted the House of Representatives Committee's recommendation that the operation of this exemption be monitored and specifically reassessed in the next review of the legislation.[44]

Political acts and practices exemption

2.51 The Government has not accepted the House of Representatives Committee's recommendations in relation to the political acts and practices exemption in the Bill. The first of these recommendations was for the exemptions of political representatives and contractors of registered political parties and political representatives to be limited to acts and practices connected with elections, referenda and participation in the parliamentary or electoral process (instead of other aspects of the political process). In the House of Representatives Committee's view, this would clarify that the exemption would be only used for such legitimate purposes as serving constituents.[45]

2.52 However, the Government has received legal advice that incorporating the recommended terminology of the Bill would probably narrow the exemption significantly. The Government does not consider that this is an outcome that the House of Representatives Committee intended. The Government understands that by its recommendations the House of Representatives Committee was intending to achieve consistency with terminology used in the parliamentary entitlements context.[46]

2.53 The House of Representatives Committee's second recommendation in this regard was that a new provision be inserted to provide that a political party or political representative would not be allowed to sell or disclose personal information collected by the political party[47] or political representative in the course of their duties to anyone not covered by the exemption. The Government acknowledges that the political acts and practices exemption is not expressed to restrict the disclosure or sale of personal information to anyone not covered by the exemption. However, the Government considers that the exemption already operates 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.[48]

2.54 The Government states that the Bill applies to "organisations".[49] The acts and practices of registered political parties, including the sale and disclosure of personal

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44 The Government comments that, upon introduction of the Bill, it had indicated that it would ask the Privacy Commissioner to conduct a formal two-year review of the operation of the legislation

45 *Advisory Report on the Privacy Amendment (Private Sector) Bill 2000*, p 61

46 *Government Response*, 7 September 2000, p 6

47 The Committee understands that this recommendation does not refer to information collected by a registered political party directly but only to information collected on its behalf by a contractor, a subcontractor or a volunteer

48 *Government Response*, p 7

49 Political parties registered under Part XI of the *Commonwealth Electoral Act 1918* are exempted from the operation of the Bill altogether. The definition of 'registered political party' is contained in clause 6(1) of the Bill. Clause 6C(1) excludes registered political parties from the definition of 'organisation'. Clause 7C also exempts the political acts and practices of political representatives (consisting of a member of a Parliament or a councillor of a local government authority) and their agents at Commonwealth, State and local level in relation to their participation in elections, referenda or other

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.[50]

2.55 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 Act 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 for commercial purposes enrolment information obtained under the Act.[51]

Health information

2.56 The Government has not accepted the House of Representatives Committee's recommendation in regard to harmonisation of access to health records. The Government believes that the issue of access to medical records is adequately dealt with by NPP 6 (governing access and correction rights). It does not accept that the basis for harmonisation of public and private health sector privacy principles should be the ACT *Health Records (Privacy and Access) Act 1997*. The Government argues that adopting this 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.[52]

aspects of the political process. The exemption applies to contractors of political representatives, subcontractors and volunteers for registered political parties

50 *Government Response*, p 7

51 *Government Response*, p 7

52 *Government Response*, p 9

CHAPTER THREE

THE ISSUES

The exemptions

Small business

3.1 The Government's intention in exempting small business under the Bill has been to reduce red tape and minimise compliance costs for small business. However, several submissions to the present inquiry have taken issue with this approach. The matters raised relate to the number of small businesses exempted, the extent of the burden to which non-exempt small businesses would be subject and the complexity of the small business test. The opt-in provision was generally applauded and the Committee welcomes the Government's acceptance of the House of Representatives Committee's recommendation in this regard.

3.2 With regard to the number of small businesses exempted, the Australian Privacy Charter Council argues:

> The evidence that was given to the House of Representatives Committee by [a] Government spokesman indicated that something in the order of 93 per cent plus of all businesses would effectively be exempted under the definition and provisions in the Bill. Clearly, that would be regarded as laughable by most Australian citizens seeking privacy protection. There is nothing inherent in size that makes organisations more or less privacy invasive. In fact, some of the worst abuses are likely to be carried out by small businesses, perhaps in the private detective or debt collecting areas. Therefore, size should not be in any sense a threshold.[1]

3.3 The Privacy Commissioner was concerned with the suggestion raised in other submissions to this committee and others looking at e-privacy that quite a large percentage of small businesses may fall out of the Bill's coverage because they are under the $3 million threshold.[2]

3.4 The Department of Employment, Workplace Relations and Small Business gave evidence, based on data derived from the Australian Bureau of Statistics (ABS), that the $3 million threshold would exempt 1,040,000 businesses, or 98.9 per cent of small businesses as defined by the ABS as being businesses with fewer than 20 employees. It said that the $1 million figure, included in the discussion paper issued by the Attorney-General in December 1998, would have effectively exempted 94 % of all small businesses.[3]

3.5 The Department also noted that, although the number of small businesses is high, the amount of business activity that they represent is estimated by the ABS at only 30 per cent. Therefore, a minimum of 70 per cent of business activity would be included in the legislation. In any case, the Department pointed out that a number of small businesses would fall within

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1 *Transcript of evidence,* Australian Privacy Charter Council, Proof Hansard, p 9

2 *Transcript of evidence,* Office of the Federal Privacy Commissioner, Proof Hansard, p 42

3 *Transcript of evidence*; Department of Employment, Workplace Relations and Small Business, Proof Hansard, p 50

the provisions of the Bill because they either buy and sell personal information, or are health service providers and hold health information. In addition, the Attorney-General could propose regulations covering classes of small businesses where this appeared to be in the public interest.[4]

3.6 With regard to the extent of the burden of compliance on non-exempt small businesses, the Australian Privacy Charter Council describes the exemption as a "blatant political expedient,"[5] arguing that:

> As for the question of political expediency, the timing of this legislation is unfortunate in the sense that it comes at a time when the Government has placed considerable burdens on the small business sector and it is obviously desperate not to impose yet another burden as they see it.[6]

3.7 The Committee notes, however, that the government had clearly set out its intentions in relation to the small business exemption from September 1999 when the Attorney-General's Department released its Information Paper which stated:

> In developing the legislative scheme, the question of compliance costs for small business will be closely considered. The Government is committed to ensuring that unnecessary costs are not imposed on small business. . .[7]

3.8 In the view of the Australian Consumers' Association (ACA) the Bill does not place an onerous compliance regime on small businesses.[8]

3.9 In this context, the ACA supports the House of Representatives Committee's recommendation, accepted by the Government, that an opt-in mechanism be included in the Bill to allow businesses to choose to be covered by the legislation. The ACA sees this as a valuable mechanism that could lead to businesses 'badging' themselves as privacy compliant, although policing it may present difficulties.[9] The Privacy Commissioner also supports the opt-in mechanism and sees it as helping small businesses cope with the complexity of the threshold.[10]

3.10 The Department of Employment, Workplace Relations and Small Business also addressed the matter of the compliance costs of the legislation. Its view was that there is both an actual cost for a small business in meeting its obligation under the Bill, as well as an opportunity cost in terms of time taken away from the business in familiarising itself with the obligation, preparing privacy statements and notifying customers. The Government had

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4 *Transcript of evidence*, Department of Employment, Workplace Relations and Small Business, Proof Hansard, p 51

5 Submission No 1, Australian Privacy Charter Council, p 4

6 *Transcript of evidence*; Australian Privacy Charter Council, Proof Hansard, p 9

7 Attorney-General's Department, Information Paper, The Government's proposed legislation for the protection of privacy in the private sector, September 1999

8 *Transcript of evidence*; Australian Consumers' Association, Proof Hansard, p 19

9 *Transcript of evidence*; Australian Consumers' Association, Proof Hansard, p 20

10 *Transcript of evidence*, Office of the Federal Privacy Commissioner, Proof Hansard, p 42

sought to find a balance between these costs and its explicit policy of reducing the regulatory burden and the compliance costs.[11] The Department stated:

> That balance is reflected in the legislation by saying that there are certain types of business and certain types of personal information which should always be covered, irrespective of the size of the business. For other businesses, the balance is such that, in the Government's judgment, it is not appropriate to bring them within this regime at this time, because the compliance cost outweighs the public benefit.[12]

3.11 Having considered the evidence, the Committee is satisfied that the amendments introduced by the Government achieve an adequate balance between concerns about the coverage of the exemption and the intention not to impose too great a burden on small businesses. In any case, there will obviously be an opportunity to review the position in two years' time.

3.12 The Committee therefore **recommends** that the small business exemption under the Bill be retained as amended by the Government.

Employee records

3.13 Support for the Government's position on the exemption of employee records from the operation of the Bill is found in the ACCI submission which argues that:

- The maintenance of [employee] records does not involve any invasion of privacy and unlawfulness and should be viewed as a mutually understood and accepted precondition of employment; and
- Privacy regulation with regard to employee records is already covered under workplace legislation, therefore there is no need for any further regulation [of] employee records.[13]

3.14 Apart from administrative problems in the introduction of a set of categories of employee records that would be covered under the legislation, ACCI contends that the House of Representatives Committee's recommendations would also introduce inconsistencies between the requirements of the *Privacy Act* and the existing scheme under the Workplace Relations Act for the keeping and updating of, and access to, records.[14]

3.15 However, a number of submissions oppose the exemption of employee records. The Australian Council of Trade Unions (ACTU) supported the recommendation of the House of Representatives Committee that there should not be a complete exemption for employee records, and that significant areas should be protected, including information relating to health, trade union membership, salary and wages and personal financial and other information.

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11 *Transcript of evidence*, Department of Employment, Workplace Relations and Small Business, Proof Hansard, pp 53-4

12 *Transcript of evidence*, Department of Employment, Workplace Relations and Small Business, Proof Hansard, p 54

13 Submission No 22, Australian Chamber of Commerce and Industry, p .3

14 Submission No 22, Australian Chamber of Commerce and Industry, p 3

3.16 The ACTU commented on the Government's rejection of the recommendation:

> We were astounded that the sole reason given for rejecting the recommendation … was that these matters are dealt with in state legislation and it would result in some inconsistencies. From reading the report … of the Committee, there is no indication that the existence of State and Territory legislation was put to that Committee by either the Attorney-General's Department or the Department of Employment, Workplace Relations and Small Business. In fact, in the Second Reading Speech and the Explanatory Memorandum, it was made clear that the reason for the employee exemption was that, in the Minister's view, this ought to be a matter that is dealt with in workplace relations legislation.[15]

3.17 In the ACTU's view, the *Workplace Relations Act* does not deal adequately with privacy issues, and there is no indication of an intention by the Minister for Workplace Relations to legislate in this respect. The ACTU notes that the workplace relations regulations provide no protection against disclosure, the key area of privacy protection. To the best of its knowledge, State legislation only extends to the keeping of certain records and does not, to any great degree, include privacy matters.[16] The ACTU draws the obvious conclusion that removal of the exemption for employee records would not impinge on State laws or be in conflict with the Workplace Relations legislation.[17]

3.18 The Australian Privacy Charter Council,[18] the Investment and Financial Services Association (IFSA)[19] and the Privacy Commissioner[20] argued along the same lines as the ACTU. The Privacy Commissioner also commented that it is unclear how the *Workplace Relations Act 1996* would protect personal information held in employee records. The Privacy Commissioner argues that, if the Government's objective in exempting employee records is not to leave it unprotected but rather to ensure that only one piece of legislation applies to protect this information, there is a need for a detailed analysis of the adequacy of the law that currently applies to protect the personal information in employee records.[21]

3.19 The Privacy Commissioner believes that such a review needs to be undertaken by an agency fully familiar with Federal and State workplace relations law. In order to allow time for a thorough review, the Privacy Commissioner suggests that the current form of the employee exemption be subject to a sunset clause of one year. With expiry of the sunset period, the exemption would only apply to those records established by the analysis as given protection equivalent to that in the NPPs.[22]

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15 *Transcript of evidence*, Australian Council of Trade Unions, p 35

16 *Transcript of evidence*, Australian Council of Trade Unions, p 35

17 *Transcript of evidence*, Australian Council of Trade Unions, pp 36-7

18 Submission No 1, Australian Privacy Charter Council, p 3

19 Submission No 13, Investment and Financial Services Association Ltd, p 2

20 Submission No 14, Office of the Federal Privacy Commissioner, pp 5-6

21 Submission No 14, Office of the Federal Privacy Commissioner, pp 5-6

22 Submission No 14, Office of the Federal Privacy Commissioner, p 6

3.20 The Committee is yet to be persuaded that the evidence shows that workplace relations or State or Territory legislation provides adequate protection of employee records from their access and disclosure.

3.21 The Committee **recommends** a sunset clause in the Bill to allow the exemption to operate for 2 years, while analysis is undertaken by relevant agencies to ascertain whether existing workplace relations and State and Territory legislation is adequate to protect the privacy of employee records.

Media

3.22 The provision for an exemption for the media under the Bill was welcomed by the Australian Press Council.[23]

3.23 Regarding the form of the exemption, the Australian Press Council is satisfied with the Government's acceptance of the House of Representatives Committee's recommendation that journalists and media organisations who subscribe to codes of practice dealing with privacy should be covered by the exemption. It noted that the print media in Australia is subject to codes of privacy through either its own organisation, its own internal codes or through its subscription to the Australian Press Council code.[24]

3.24 The Press Council also noted that as a result of the Government's decision to delete the definition of journalism from the Bill, a narrow reading of the Bill could limit journalism to the "occupation of writing for, editing and conducting newspapers and other periodicals". This would deny internet publishers the benefit of the exemption.

3.25 In this context, the Australian Press Council noted that it has recently decided to accept complaints about net publications of its members, as well as continuing to take complaints from the full range of the print media. Such publications will include cases where members, all the major newspaper organisations in Australia, have placed material on the internet without having published it in hard copy. However, the Press Council will continue to exclude from its jurisdiction news sites not owned by its members, and for whom there is at present no oversighting mechanism.[25]

3.26 The view of the Privacy Commissioner is that requiring a media organisation or journalist to subscribe to a code developed by a representative body would ensure some level of independent scrutiny and accountability. However, allowing a media organisation to develop its own code as proposed in the recommendation may not achieve that goal.[26]

3.27 The Australian Privacy Charter Council believes that the proposed media exemption is far too broad. The Council comments:

> Our main concern is that the way the Bill approaches this issue is to basically give a very broad exemption to virtually anything that is published. That leaves open not only a lot of infotainment type activities of the media where some of the worst

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23 *Transcript of evidence*, Australian Press Council, Proof Hansard, p 1

24 *Transcript of evidence*, Australian Press Council, Proof Hansard, p 1

25 *Transcript of evidence*, Australian Press Council, p 2

26 Submission No 14, Office of the Federal Privacy Commissioner, p 6

> privacy abuses take place, but also opens up the possibility of a loophole whereby other organisations can avoid the effects of the Act simply by publishing information which they have been mistreating.[27]

3.28 The Attorney-General's Department was asked to clarify the extent to which the exemption applies to means of journalism other than print media news reporting, in light of the Government's decision to remove the definition of 'journalism' from the legislation.

3.29 The Department said that the Government had relied on the way journalism itself may change in nature, and on the *Explanatory Memorandum,*[28] to convey its intention that the media exemption capture the range of activities of different forms of media. The scope of the exemption will be limited through self-regulation of media organisations. With regard to the situation of 'infotainment', the Department stated that:

> It would depend on whether that was considered to be in the course of journalism . . .But what the Government has done to ensure that the exemption is no wider than it needs to be to protect the legitimate activities of the press in informing the public about news and other current affairs matters is to require media organisations to comply with a code.[29]

3.30 The Committee is satisfied that the Government's amendments sufficiently address the issues of concern in respect of the media exemption and **recommends** that they be retained.

Political acts and practices

3.31 Some submissions to the inquiry have suggested that the exemptions for political acts and practices and political parties place political representatives and registered political parties in a privileged position. For instance, the Australian Privacy Charter Council argues:

> Even if there is an overriding public interest in exempting political parties and representatives from some of the principles – such as the collection, use and disclosure principles (which we refute), there can be no good reason for exempting them from the need to comply with the other principles, such as those requiring data quality, openness, security, etc. There can also be no objection to the right of access, which becomes all the more important as a safeguard if the effect of some of the principles is limited.[30]

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27 *Transcript of evidence*, Australian Privacy Charter Press Council, p 9

28 The Explanatory Memorandum for the Government Amendments states:

'2. . . . The definition of journalism is omitted so that the ordinary meaning of the word will apply. The ordinary meaning of journalism is relevant in determining the scope of the exemption in sub-clause 7B(4) of the Bill for acts and practices done, or engaged in, by media organisations in the course of journalism.

3. The definition previously included at Item 18 would have covered activities beyond the commonly understood activities of journalism . . .

4. The term "journalism" is intended to apply in a technology neutral way . . .The term is also intended to cover the dissemination of material to the public.'

29 *Transcript of evidence*, Attorney-General's Department, Proof Hansard, p 58

30 Submission No 1, Australian Privacy Charter Council, p 5

3.32 Similar points are made by the Australian Consumers' Association (ACA)[31] and the Office of the Federal Privacy Commissioner.[32]

3.33 The Government response to the House of Representatives Committee's report expresses the view that insertion of a statement that the exemptions do not permit a political party or political representative to sell or disclose personal information to anyone not exempted is unnecessary because the Bill as it stands "would operate in a manner that would address the [House of Representatives] 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".[33]

3.34 The Committee notes the observation of the House of Representatives Committee that it did not receive evidence of instances where politicians or political parties have misused personal information provided to them by their constituents.[34] This Committee similarly has received no evidence of misuse by politicians or political parties of personal information provided by their constituents. However, the issue is so grave that potential abuse of these exemptions should be monitored by the Government.

3.35 Therefore, the Committee **recommends** that, should any evidence of abuse of the political acts and practices exemptions emerge, the Government refer the exemptions to the Joint House of Representatives Committee on Electoral Matters for further consideration, or ensure that the exemptions are reviewed as part of the broader review of the Bill that is to occur in two years' time.

Health information

3.36 Some submissions express concern at the 'generosity' of the exemption of personal health information under the Bill in respect of management and research uses without consent or safeguards or comment on the complexity of the various provisions concerning sensitive and health information.

3.37 For instance, the Consumers' Health Forum (CHF) states:

> CHF understands that the Commonwealth Government is taking a unique approach by including health information in this broad Bill, rather than introducing separate legislation for the health sector, which would cover both public and private sector health care providers. Unfortunately for health consumers, the result is that, if the Bill is passed in its current form, the rules in the private health care sector will differ significantly from those applying to the public sector. This would simply add further complexity to the current patchwork of laws and codes covering privacy in the health sector, making it even more difficult for consumers to understand their privacy rights.[35]

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31 Submission No 7, Australian Consumers' Association, pp 2-3

32 Submission No 14, Office of the Federal Privacy Commissioner, p 8

33 Government Response to Advisory Report on the Privacy Amendment (Private Sector) Bill 2000, p 7

34 Advisory Report on the Privacy Amendment (Private Sector) Bill 2000, p 62

35 Submission No 17, Consumers' Health Forum, pp 2-3

3.38 The Australian Consumers' Association raises particular concerns with regard to the practicality of seeking the consent of individuals to the disclosure of personal health information. The ACA comments:

> *[T]he Individual is not given this same absolute right of control over their information* [italics in original] as is bestowed on the organisational custodian of their data. We regard this as a fundamental flaw, perpetuating the power imbalance consumers face, which this Bill should remedy by giving consumers such control. …
>
> We feel that the same tests should apply to health information as general personal information since the test for general personal information is stronger. … In addition, we feel it is important that the individuals have guaranteed access to their own data.[36] …

3.39 The Australian Medical Association (AMA), by contrast, argues that the Bill imposes an excessive burden on medical practitioners who are already obliged by law and committed under professional ethics to protect the privacy of their patients.

3.40 On the other hand, the Privacy Commissioner strongly supports the Bill's protection of personal health information. The Commissioner, in close consultation with both health professionals and health consumer groups, proposes to develop guidelines on the application of the NPPs in a health context and particularly on the access of individuals to their own health information.[37]

3.41 The Committee is satisfied that the Government's response adequately meets concerns expressed in relation to the exemption of personal health information.

International obligations

3.42 Some submissions to the inquiry suggest that the Bill does not achieve its object of meeting "international concerns and Australia's international obligations relating to privacy".[38] Referring to the compatibility of the Bill with the European Union's Privacy Directive, the Australian Chamber of Commerce and Industry (ACCI) submitted:

> … ACCI is concerned by the comments made in the EU's submission to [the] inquiry by the House of Representatives Committee … into the [Bill] and subsequent public statements by the EU that the [Bill] may not be given an 'adequacy' finding by the EU.[39]

3.43 The European Union's comments to the House of Representatives Committee relate to:

- the exclusion of small business, where the concern lies in the ability to identify small business operators before exporting data to Australia;

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36 Submission No7, Australian Consumers' Association, p 4

37 Submission No 14, office of the Federal Privacy Commissioner, Attachment, pp 14-5

38 Bill, paragraph 3(b)(i)

39 Submission No 22, Australian Chamber of Commerce and Industry, p 5

- the exclusion of employee records, where there is concern about the level of protection accorded to European citizens when their data is exported from Australia;
- the lack of correction rights for European citizens under NPPs 6 and 7 (referring to access and correction, and identifiers); and
- how data sharing between body corporates and partnerships will operate.

3.44 The Australian Privacy Foundation states that the Bill "comprehensively breaches the standards set two decades ago by the OECD Guidelines",[40] while the Australian Privacy Charter Council states that:

> In our view it [the Bill] would neither meet the benchmark of the International Covenant on Civil and Political Rights nor meet the standard of adequacy likely to be required by the European Union in relation to data transfers from Europe.[41]

3.45 At the hearing, the Attorney-General's Department was asked whether it was satisfied that the Bill satisfied the matters raised by the European Union. The Department indicated that talks with the European Commission had been going on for some time and were expected to continue into 2001. The Department's representative also stated that:

> My own view is that we can satisfy the European Commission but there is still a long way to go in terms of negotiation and so on. … I cannot say that they are satisfied on everything – obviously, they are not – and that is public from the terms of their submission. We are addressing each of the points in the submission and I believe there are answers to each of those.[42]

3.46 The Department tabled at the hearing a comparative table of the NPPs and the United States 'Safe Harbor Privacy Principles', on which the US had been able to satisfy the European Commission. The Department believed that the US principles were less stringent than the NPPs.[43]

3.47 The Committee notes the advice of the Department and awaits with interest the results of continuing negotiations with the European Commission.

3.48 The Committee **recommends** that the views of the European Commission with regard to the operation of the Bill be considered as part of the broader review of the legislation which is to take place in two years' time.

Tenancy databases

3.49 The protection of the privacy of tenancy databases had been raised in the course of the References Committee's previous inquiry into privacy issues in early 1999.[44] The House of Representatives Committee recommended that tenancy databases not gain the benefit of

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40 Submission No19, Australian Privacy Foundation, p 1

41 *Transcript of evidence*, Australian Privacy Charter Council, Proof Hansard, p 12

42 *Transcript of evidence*, Attorney-General's Department, Proof Hansard, p 52

43 *Transcript of evidence*, Attorney-General's Department, Proof Hansard, p 52

44 See paragraph 1.5 above

the small business exemption.[45] The Government's response was that it did not believe that there was sufficient justification to single out tenancy databases.[46]

3.50 Professor Graham Greenleaf submitted that there would be other uses of personal information which are as potentially prejudicial as tenancy databases.[47] Asked if the Bill protected tenancy databases, the Privacy Commissioner said that it would depend on the size of the company holding the database and whether it was trading in or selling the information collected. The Commissioner pointed out that if problems were identified, he could approach the Attorney-General for a regulation to be made to bring certain organisations under the Bill.[48]

3.51 The Committee is satisfied that the matter can be left in the hands of the Privacy Commissioner.

Genetic privacy

3.52 The consensus of submissions to the inquiry was that particular care should be taken to protect the privacy of genetic information as one of the most sensitive areas relating to the health and personal profile of an individual and that the proposed inquiry into gene technology was welcome.[49]

3.53 The major issue was whether genetic information was adequately protected for the time being by concepts like medical information. For example, the Australian Privacy Charter Council commented:

> We do feel that genetic information is of a different order because of its long-term implications not only for individuals but also for other members of their families. It does require a special regime of protection. … [A]t the very least, it ought to be clearly defined in this Bill as a particular category of sensitive information, subject to the same safeguards that have been provided for the other categories of sensitive [information].[50]

3.54 A similar point was made by the Australian Consumers' Association (ACA)[51] and the Australian Medical Association.[52]

3.55 On the other hand, the Investment and Financial Services Association (IFSA) argued that the creation of a regime for genetic information separate from that for health information would be confusing for consumers and difficult to implement.[53]

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45 Advisory Report on the Privacy Amendment (Private Sector) Bill 2000, recommendation 19

46 Government response to Advisory Report on the Privacy Amendment (Private Sector) Bill 2000, p 11

47 Submission No18, Professor Graham Greenleaf, p 19

48 *Transcript of evidence*, Office of the Privacy Commissioner, Proof Hansard, p 48

49 See, for example, *Transcript of evidence*, Australian Private Charter Council, Proof Hansard, p 13; Office of the Federal Privacy Commissioner, Proof Hansard, p 41

50 *Transcript of evidence*, Australian Private Charter Council, Proof Hansard, p 13

51 Submission No 7. Australian Consumers' Association, p 5

52 Submission No 16, Australian Medical Association, p 6

3.56 The Insurance Council of Australia[54] and the Privacy Commissioner[55] consider that the Bill is adequate to deal with the protection of genetic information, pending the report on gene technology.

3.57 The Committee is satisfied that there is no present need for amendments to the Bill in relation to genetic information and welcomes the Government's proposed referral of gene technology to the Australian Law Reform Commission and the National Health and Medical Research Council.

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53 Submission No 13, Investment and Financial Services Association Ltd, p 7

54 *Transcript of evidence*, Insurance Council of Australia, Proof Hansard, p 23

55 *Transcript of evidence*, Office of the Federal Privacy Commissioner, Proof Hansard, p 41

DISSENTING REPORT OF LABOR SENATORS

BACKGROUND

Labor members of the Committee recognise the Privacy Amendment (Private Sector) Bill 2000 as a final capitulation on the 1996 Coalition parties election commitment to extend the provisions of the Privacy Act to the private sector. That pre-election promise was alive when the Attorney General, Mr Daryl Williams, on 12th September 1996, released a discussion paper which set out a privacy scheme based on the then existing Information Privacy Principles of the Privacy Act 1988.

However, Mr Williams's quest to honour the election promise was quashed a short time later when Prime Minister Howard, on 21st March 1997, announced that the Privacy Act would not be extended in accordance with Coalition policy. The reasons given for breaking the promise were vague and unclear.

The Government introduced the Privacy Amendment Bill 1998 into the House of Representatives in early 1998 and after less than 3 hours debate at the second reading stage, the Bill passed its third reading on 1st May 1998.

Senate References Committee

The Senate, on 14 May 1998, referred the Bill to the Senate Legal and Constitutional References Committee for inquiry and report to the Senate by 12th August 1998. The reporting date was extended on a number of occasions and after the intervening election, the report was finally presented to the Senate on 25 March 1999.

The Senate Committee received 69 submissions (including supplementary submissions) to the inquiry. The Committee conducted four public hearings, in Brisbane, Sydney, Melbourne and Canberra, at which 24 individuals, organisations; Companies and other representatives gave evidence on the public record.

The Committee produced a detailed and extensive report. The report contained 11 recommendations for change and additional comments from Government and Democrat members of the Committee that generally supported the thrust of the recommendations. The report, including appendices, was over 230 pages long.

Government Reaction

The Government has ignored the report and all those who contributed to it.

The Attorney General has not bothered to respond to the report. Opposition members of the Committee are becoming used to this treatment from an Executive that is becoming more contemptuous of the parliamentary process and of public views that differ from their own.

This attitude is again reflected in the Governments response to the House of Representatives Standing Committee on Legal and Constitutional Affairs Advisory Report on the Privacy Amendment (Private Sector) Bill 2000.

House of Representatives Committee

The Attorney referred the Bill to the House of Representatives Committee on 12th April 2000, the same day that the Bill was introduced into the House. The Committee received 130 submissions and it held four public hearings (Canberra -2, Sydney and Melbourne) where some 20 representatives of organisations and business gave evidence.

The Committee presented its report to the House on 26th June 2000. The report ran to some 150 pages and contained 23 recommendations. It was a unanimous report by the Committee that contains 6 Government members and only 4 members of the opposition. The Committee chair is a Government member, Mr Kevin Andrews.

Government's Response

The Government responded to the report, in the briefest and most perfunctory manner possible, on 7th September 2000.

In its response, the Government indicated that it was only accepting 5 of the Committee's 23 recommendations. Others were accepted in part or in principle. Minimum argument was given in the scant response for the rejection or acceptance of the recommendations. One wonders why the Attorney gave the inquiry on the Bill to the Committee in the first place.

Senate Committee's Reaction to Report

Opposition members of the Senate Committee, like the Government members, found the report of the House of Representatives Committee to be most helpful in our deliberation on the Bill. We appreciate the time, effort and energy that members of that Committee put into the development and preparation of their report. We are of the view that their report was not given due and proper consideration by the Attorney General, his Department or the Government. Members of that Committee will now have some appreciation of how submitters and witnesses to the earlier Senate inquiry feel after they, their views, suggestions and opinions, were disregarded and ignored by the Government.

Labor Senators' Assessment of Bill

Labor senators consider the Privacy Amendment (Private Sector) Bill 2000 to be poor legislation. This report sets out why they hold that view. Indeed it is of such a quality that it ought to be withdrawn and a better bill introduced. However, on the basis that the Government will proceed with it, Labor senators have made recommendations that will at least improve its operation. We state why we consider it to be poor legislation that should be withdrawn and reintroduced only after a major overhaul. We then set out our views as to what should happen if this is not done. We make recommendations directed to at least making improvements to the present situation.

Importance of Privacy

Those who obtain, possess and control information about another person may be able to utilise it to his or her disadvantage as to the advantage of others. There is potential in this to bring injustice or unwarranted harm to people, their family, their associates and even to their community.

These matters are well known and there is a considerable history of attempts to address the issues that arise when someone's privacy is wrongly invaded by others. Article 12 of the Declaration of Human Rights signed on the 10th of December 1948 says:

> "No one shall be subjected to arbitrary interference with his privacy, family, home or correspondence, nor to attacks upon his honour and reputation. Everyone has the right to the protection of the law against such interference or attacks."

Article 17 of the International Covenant on Civil and Political Rights declares:

> "1. No one shall be subjected to arbitrary or unlawful interference with his privacy, family, home or correspondence, nor to unlawful attacks on his honour and reputation.
>
> 2. Everyone has the right to the protection of the law against such interference or attacks."

The European Community has laid great emphasis on privacy. This in part is the reason the Government introduced the legislation the Committee is considering.

Failure of Bill to Meet Need

Privacy deals with the matter of who is and who is not able to obtain control and use information about people. Possession of information about others can give a person power over them, the degree of which will vary according to its nature. The purposes of the laws of privacy include maintaining the integrity of a good society, ensuring the Community is a benign and democratic one and giving proper protection to the interests of those in respect of whom information is held by others. The legislation being considered by the Committee fails to meet those tests in the way it should and in the way it could. Accordingly, it is flawed and in our view fatally flawed.

The Bill under consideration accords privacy only moderate weight and fails to give it the importance that it warrants. The Government purports to be introducing a regime that is effective in protecting privacy but does not do so.

Example: Sensitive Information

Item 27 of Schedule 1 (see page 10 of the Bill) proposes to insert a definition of "sensitive information" into the *Privacy Act 1988*. If enacted this will limit the range of matters in respect of which protection if given. For example, the definition does not include information about a person's family or about his or her relationship with it, or about his or her friendships or about his or her recreational pursuits or dietary patterns or shopping activities or travel or preference in clothing or employment or reading or viewing habits.

Example: Privacy Codes

Item 58 of the Bill sets out Part IIIAA (page 35) which deals with approval of privacy codes. This enables organisations to develop their own program for dealing with privacy protection. Accordingly, people might well need to be familiar with a range of codes to know how they can move to protect their privacy as they go about their lives. Because one organisation with which they deal has a particular regime does not mean others they encounter will have a similar one.

Example: Some Interest Groups Exempt

There are some interest groups who are not even obliged to afford anybody any privacy. Small business is exempt from doing so and small business includes an operation with an annual turnover of up to and including $3,000,000.

Example: Subordinate not Primary Legislation: Private Codes

This Bill gives wide scope for legislation by regulation rather than by statute. Proposed subsection 6C(4) (page 16) and 6E (page 19) are examples (see pages 18 and 19 of the Bill). So is proposed section 7A (page 22). But the ability of an organisation outside Parliament and a non-elected Commissioner to determine what codes will govern the protection of people's privacy is of even greater concern (see Part IIIAA (page 35) already referred to).

People's Privacy Rights given Subordinate Status

While purporting to safeguard peoples privacy the legislation gives exemptions from its cover to a number of groups. The interests of these groups are put ahead of those who might want their privacy protected. Accordingly, small business, employers, journalists, members of a Parliament and big business if it develops its own code are exempted from the requirements otherwise imposed by the legislation. The concept behind the Bill seems to be that the protection of privacy is a good thing as long as it does not inconvenience an interest group with substantial influence in society.

This legislation is written from the point of view of the organisation who must afford privacy, not from that of the person whose privacy is threatened.

Consequences to Effectiveness of Bill

The trouble with this approach to privacy is that it weakens too greatly the protection that should be given to it and signals to the community that it is a quality that in the end does not matter much. In our view it would be better to withdraw this Bill and bring in a stronger one, rather than to allow it to become an Act which in reality gives little real protection to privacy. Legislation which purports to do something which it in fact falls well short of doing, should be seen as a veneer which may well do much more harm than good if it is enacted.

Advice of Labor Members if Legislation to Progress

Given the likelihood the Government will not withdraw the Bill, Labor senators provide our views as to how the Bill may be improved.

Small business exemption

We are concerned that the exemption, as drafted, will leave many people who have dealings with small businesses without enforceable privacy protection. Nevertheless, the Government appears determined to pursue this exemption. Further, we are mindful to ensure that small businesses do not bear an unreasonable compliance burden, particularly in circumstances where information held by them is not of a kind which gives rise to serious privacy protection issues.

While being conscious of possible compliance burdens, we are aware that good privacy practice might also be a discriminator that may provide some businesses with a competitive advantage over other businesses. For this reason, in seeking agreement to have an adequate compromise reached, Labor senators support the recommendation contained in the Advisory Report on the Privacy Amendment (Private Sector) Bill 2000 by the House of Representatives Standing Committee on Legal and Constitutional Affairs that an opt-in mechanism be included in the Bill. This provision would allow small businesses to be covered by the legislation, should they choose to do so. It would also allow those small businesses to market themselves as complying with the National Privacy Principles.

The government responded to the report of the House of Representatives Committee by announcing amendments to implement an opt-in mechanism and to also provide for an opt-out mechanism for those who would later choose to reassert their exempt status.

The Government's proposal is unsatisfactory, in our view, because it also allows for businesses to opt-out of coverage of the Act where it no longer suits them to continue to protect the privacy of information which has been collected by those businesses. This amendment would allow small business to opt-in to the Act, to collect personal information from individuals who believe that the information is subject to the full protection in the Act, then to opt-out of the Act and to make use (including to sell) that information. In our view, this is inappropriate and not in the spirit of the recommendation of the House of Representatives Committee.

Labor senators **recommend** that, once a small business has elected to be bound by the Act, that choice should be irrevocable. This will prevent the possible improper use of personal information described above. It will require, however, small businesses to have in place the appropriate privacy protection systems for administering information prior to making the decision to opt in to coverage under the Act, which is prudent privacy practice.

Employee records exemption

Labor senators share the view of the Committee that State and Territory legislation dealing with employee records does not provide adequate protection of employee records from access or disclosure. They consider they should not be exempt. However, they understand that it may take some time for employers to accommodate this position. Accordingly, Labor senators support the recommendation (3.21) for a sunset clause to allow the exemption to operate only for a period of two years.

Media exemption

While it is appropriate that the role of the media is properly recognised in Privacy Legislation and that an exemption from the provisions of the Act is necessary, Labor senators are concerned by the extent of the proposed exemption.

The government responded to the report of the House of Representatives Committee by proposing amendments to the Bill which will require media organisations to publicly commit to privacy standards in order to obtain the benefit of the exemption.

Labor senators are concerned that the proposed amendment overlooks the important role of the Privacy Commissioner in ensuring that those standards are in fact acceptable and appropriate.

For this reason, Labor senators **recommend** that, in order for a media organisation to be exempted from the provisions of the Bill, there be a requirement that the Privacy Commissioner must approve the privacy standards adopted by the media organisation. The Privacy Commissioner should only approve such standards after conducting appropriate consultation with those persons who are affected by the standards.

Labor senators are also concerned about the proposal to delete the definition of "journalism" from the Bill. We believe that this has the potential to leave the media exemption vague. Labor senators **recommend** that consideration be given to amending, rather than deleting, the definition in the Bill to ensure that the exemption is no wider than necessary.

Political acts and practices

Labor senators are of the view that, while a limited exemption with respect to political acts and practices is justified, the exemption proposed in the Bill is broader than necessary. We support the unanimous recommendations of the House of Representatives Committee with respect to the tightening of the exemption.

Reasons advanced by the government for rejecting the recommendation of the House of Representatives Committee in this respect are shallow and unconvincing. While no evidence of alleged misuse of personal information was brought before either this Committee or the House of Representatives Committee, there is a justified degree of community concern that information held by political parties or their agents should not be sold or disclosed for purposes that are not connected with the parliamentary or electoral process. Labor senators therefore **recommend** that the Bill be amended to prevent the sale or disclosure by political parties of information to bodies that do not have the benefit of the exemption.

Tenancy databases

Tenancy databases have aroused a considerable degree of community concern. For this reason the House of Representatives Committee recommended that the Bill be amended to ensure that tenancy databases do not gain the benefit of the small business exemption. The government's treatment of this recommendation in its response was cursory and dismissive.

Labor senators disagree with the view of the Committee that no special treatment of tenancy databases is required and the matter can be left in the hands of the Privacy Commissioner.

We think that it is entirely appropriate that tenancy databases be addressed specifically in the Bill. We hold this view because information on those databases, where incorrect, has the capacity to seriously harm an individual's capacity to access one of the most basic human needs, housing.

Where an increasing number of Australians are looking to rental accommodation for their long term housing needs, it is imperative that individuals be equipped with an enforceable right to access information which is held about them on tenancy databases, and to ensure that \this information is correct. This should be the case regardless of when the information was

collected – information already on tenancy databases and information that may be collected in the future.

Labor senators therefore **recommend** that the Bill be amended to ensure that organisations, which maintain tenancy databases are required to observe the National Privacy Principles with, respect to all residential tenancy information.

Senator Barney Cooney

Senator for Victoria

Senator Jim McKiernan

Senator for Western Australia

AUSTRALIAN DEMOCRATS MINORITY REPORT

SENATOR NATASHA STOTT DESPOJA

1 Introduction

The *Privacy Amendment (Private Sector) Bill 2000* is an important and historic step towards satisfying concerns relating to personal privacy by extending the application of enforceable privacy principles to the private sector. However, a number of the provisions in the Bill – such as the extent of exemptions and the lack of appropriate measures to protect genetic information – make the Bill inconsistent, complex and contrary to the Government's object of giving confidence to consumers, business and the international community[1].

The individual right to personal privacy is a fundamental platform of the Australian Democrats which has been central to our policy and parliamentary activity since the Party's inception.

The Private Members' Bills of the Australian Democrats have played an integral role in the development of the privacy debate in Australia. Former Senator Michael Macklin's Bill in 1987 instigated the debate, which culminated in the *Privacy Act 1988*. At that time, the Australian Democrats sought to extend the scope of the Bill to the private sector.

The Australian Democrats support a comprehensive regime, which extends privacy protection to the private sector. My Private Member's *Privacy Amendment Bill 1997* would have extended the *Privacy Act* in this way, and was followed by the Government's undertaking to introduce its own regime to ensure private sector privacy.

My *Genetic Privacy and Non-Discrimination Bill 1998* identifies genetic privacy as an issue for public debate and seeks to protect Australians from misuse of unique and powerful health information.

The Australian Democrats maintain that genetic information is unlike all other forms of sensitive health information, being predictive not only to the individual, but also to blood relatives. The *Privacy Amendment (Private Sector) Bill 2000* does not recognise those delineations, and therefore, does not adequately protect Australians' genetic privacy.

2 Exemptions

2.1 General

The Democrats are concerned that the exemptions in this Bill are far in excess than required for the satisfactory passage of this Bill. Privacy is by no means an absolute right and, accordingly, some exemptions are required in some circumstances. However, blanket

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[1] Attorney-General, the Hon. Daryl Williams AM QC MP, Second Reading Speech, Hansard p. 15749

exemptions that remove complete sectors of the community from the jurisdiction of the Bill rather than targeting and solving specific problems are clearly unacceptable and prevent the Bill from meeting its potential.

2.1.1 Small Business Operator

The main justification behind the Government's move to exempt small business from the application of the National Privacy Principles, is the issue of compliance costs[2]. Only limited discussion of this issue was present in submissions to this inquiry. However, previous inquiries on similar issues have considered the issue in greater detail and thus should be noted.

Of particular note is the report of the References Committee entitled *Privacy and the Private Sector: Inquiry into Privacy Issues, including the Privacy Amendment Bill 1998*. Part of this report considered the compliance cost obligations on New Zealand – a country which implemented a private sector privacy regime in 1993[3]. The inquiry noted that it was the view of the New Zealand Privacy Commissioner that net compliance costs associated with the *Privacy Act 1993* (NZ) have been low[4]. This view is also supported by a Price Waterhouse survey which was referred to in that inquiry. The report on the survey stating:

> One of the most imposing statistics that we found is the overwhelming support for the introduction of privacy legislation with endorsement by 70% of respondents. This is in contrast to the Government view that legislation would add unnecessary burden and overhead to Australian business. Of the organisations surveyed, it was found that 79% felt only minor changes would be required to their business practices in order to comply with legislation, highlighting the fact that Australian business does not believe there will be significant costs associated with applying good privacy practice.[5]

While it must be noted that the survey concentrated on major businesses, one could still argue that the evidence arising from the survey could be extrapolated to support the conclusion that compliance costs associated with the implementation of a privacy regime are quite low.

In fact, there is some evidence to suggest that costs may have actually decreased in some jurisdictions due to improved information handling procedures[6].

The lack of substantial compliance costs or other significant difficulties associated with small business may indicate why most countries that have implemented privacy regimes in the recent past do not have similar exemptions for small business. For example, New Zealand[7], Canada[8], the United Kingdom[9], Hong Kong[10] and the European Union[11] have all enacted

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[2] Second Reading Speech, Hansard, p. 15749

[3] *Privacy Act 1993* (NZ)

[4] Senate Legal and Constitutional References Committee, *Privacy and the Private Sector: Inquiry into Privacy Issues, including the Privacy Amendment Bill* paragraph 8.19

[5] Price Waterhouse, *Privacy Survey 1997*, Melbourne, p. 8; Referred to in *Privacy and the Private Sector: Inquiry into Privacy Issues, including the Privacy Amendment Bill* paragraph 8.19

[6] P Peladeau, "Data Protection Saves Money" Privacy Journal June 1995 at 3-4.

[7] *Privacy Act 1993* (NZ)

[8] *Personal Information Protection and Electronic Documents Act*

[9] *Data Protection Act 1998*

similar privacy regimes to that proposed in the Bill but none of them have similar exemptions for small business.

The compliance costs argument may also be reversed due to the complexity inherent in the definition of small business as it currently stands. At present, there is an exemption which has a series of exceptions, a phasing in period which can be stopped by a single act, arrangements dealing with related corporations and provisions allowing some businesses to opt in and out of the legislation at their leisure. As Australian Privacy Foundation said in its submission:

> [T]he Bill is extraordinarily complex. The discovery of the intended and accidental loopholes it contains will excite lawyers for many years[12].

In light of such a situation, the Privacy Commissioner has warned that such an exemption might actually increase compliance and administrative costs rather than prevent them:

> If the exemption itself is extraordinarily complex, there are going to be costs on business in working out how to comply with that and in knowing whether they will comply, and members of the community need to know which individual businesses will or will not be covered by the exemption.[13]

The Democrats are also concerned about the extent to which the small business operator exemption may apply. According to the Department of Employment, Workplace Relations and Small Business[14], around 94% of Australian businesses fall under the three million dollar threshold present under proposed section 6D. While some of these businesses may not be subject to the exemption due to exceptions such as those relating to health information, the fact that the overwhelming majority of Australian businesses are not subject to the Bill as it currently stands is clearly an issue of concern. On this issue, the Australian Privacy Charter Council argues:

> The evidence that was given to the House of Representatives committee by government spokesman indicated that something in the order of 93 per cent plus of all businesses would effectively be exempted under the definition and provisions in the bill. Clearly, that would be regarded as laughable by most Australian citizens seeking privacy protection. There is nothing inherent in size that makes organisations more or less privacy invasive. In fact, some of the worst abuses are likely to be carried out by small businesses, perhaps in the private detective or debt collecting areas. Therefore, size should not be in any sense a threshold.[15]

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[10] *Personal Data (Privacy) Ordinance*

[11] *Directive 95/46/ EC of the European Parliament and of the Council on the Protection of Individuals with regard to the Processing of Personal Data and on the Free Movement of Such Data*

[12] Submission No 19, Australian Privacy Foundation, p. 1

[13] *Transcript of Evidence*, Office of the Federal Privacy Commissioner, Proof Hansard, p. 42

[14] *Transcript of Evidence*, Department of Employment, Workplace Relations and Small Business, Proof Hansard, p. 50

[15] *Transcript of Evidence*, Australian Privacy Charter Council, Proof Hansard, p. 9

2.1.2 E-Commerce

This issue also extends quite significantly to the area of electronic commerce – an area which has been identified as central to this legislation[16]. According to the Internet Industry Association, 95% of Australian Internet businesses would not be subject to the legislation as currently presented[17]. This may give rise to uncertainty and confusion as, unless it is specifically advertised, consumers will generally have no way of knowing whether a business is subject to the National Privacy Principles. Given that personal privacy and security of data are major consumer concerns relating to the Internet and e-commerce[18], the provisions in the Bill are unlikely to give consumers confidence when dealing with personal data and the Internet.

This issue of consumer confidence was explored by Electronic Frontiers Australia in their submission to the Standing Committee where it stated:

> Both local and overseas customers will have no way of knowing what size organisation they are dealing with, and given that consumer confidence is vital in building good customer relationships, Australian traders are likely to be bypassed in favour of suppliers from countries that have introduced good privacy law. This will affect all Australian E-commerce traders, since customers will assume the worst once they learn of Australia's half-baked approach to privacy.[19]

Needless to say, the issue of consumer confidence extends to all sectors. Accordingly, Australian Consumers Association noted in their evidence:

> It is basically unclear to somebody where a business would sit in the regime. I think clarity and predicability are important. Basically, if all businesses are required to conform, there is no problem.[20]

International implications:
As well as questions of consumer confidence, the Bill raises questions relating to the confidence of the international community in Australia's laws. This is particularly relevant in terms of the European Union. Under Article 25 of the European Union Directive 95/46/EC[21] ("the EU Directive"), Member States must endeavour to prevent the transfer of data to countries with inadequate privacy standards. In their submission to the Standing Committee Inquiry, the European Commission stated the following relating to the scope of exemptions in the Australian Bill:

> The exclusion of employee data and small business will mean that these sectors cannot be included in any consideration of "adequacy" being provided by the Bill. In particular, we envisage the

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[16] See for example Attorney-General, the Hon. Daryl Williams AM QC MP, Second Reading Speech, Hansard p. 15749 and *Privacy Amendment (Private Sector) Bill 2000 Explanatory Memorandum* p. 7

[17] *Transcript of Evidence,* Office of the Federal Privacy Commissioner, Proof Hansard, p. 42

[18] *Privacy and the Private Sector: Inquiry into Privacy Issues, including the Privacy Amendment Bill* p. 180

[19] Electronic Frontiers Australia Submission to the Standing Committee Inquiry

[20] *Transcript of Evidence*, Australian Consumers Association, Proof Hansard, p. 19

[21] *Directive 95/46 / EC of the European Parliament and of the Council of On the Protection of Individuals with regard to the Processing of Personal Data and on the Free Movement of Such Data*

> exclusion of small business would be problematical, since it would be very difficult in practice to identity [sic] small business operators before exporting the data to Australia.[22]

Thus, assuming that the Bill is recognised by the European Union as being adequate (which is not a foregone conclusion), small business and employee records would be excluded from that decision[23] and thus, data restrictions would be placed on these sectors.

In the light of the above, the Australian Democrats argue that the National Privacy Principles should be considered to be fundamental principles of privacy which should be expected to be universally followed and should be legally enforceable in most circumstances. Consistent with recommendation 4 of the *Privacy and Private Sector* report, the OECD guidelines[24] and best practice elsewhere in the world, the privacy principles should have as wide an application as possible and the extent of exemptions should be minimised. Thus, a solution should be found where most businesses are subject to the *Privacy Act* as amended but undesirable consequences such as compliance costs are minimised.

The provisions in proposed Part IIIAA regarding privacy codes should not be ignored. If it can be proved that a certain class of businesses require special treatment under the amended Act, specific privacy codes can be developed for that class. Such action still ensures that small business comes under the jurisdiction of the Act but gives a degree of flexibility regarding implementation.

In essence, it does not matter how well-designed a privacy regime may be if it does not actually apply to any one. As it currently stands, the Bill will exempt over ninety percent of businesses and a reasonable percentage of business transactions[25], thus restricting the application of the National Privacy Principles to a very limited sector. Such a situation places Australia in danger of failing to fulfil its international obligations and domestic promises and should therefore be reconsidered.

2.1.3 Employee Records

The Australian Democrats support employee records being subject to appropriate levels of privacy protection. The Bill as it currently stands, includes a blanket exemption for employee records on the grounds that "such protection is more properly a matter for workplace relations legislation[26]". However, as the Australian Council of Trade Unions recognises in its submission[27], Australian Workplace Relations legislation contains only limited protection, which the Government does not appear to have any intention of augmenting.

The employee records exemption also introduces an additional layer of complexity and inconsistency into the Bill. This complexity is predominantly based around the definition of

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[22] European Commission, Submission to the Standing Committee Inquiry, p. 2

[23] European Commission, Submission to the Standing Committee Inquiry, p. 6

[24] *Recommendation of the Council Concerning Guidelines Governing the Protection of Privacy and Transborder Flows of Personal Data* (OECD)

[25] Around thirty percent according to the Department of Workplace Relations and Small Business. See *Advisory Report on the Privacy Amendment (Private Sector) Bill 2000*, p. 11

[26] Attorney-General, the Hon. Daryl Williams AM QC MP, Second Reading Speech, Hansard, 12 April 2000

[27] Submission No 15, Australian Council of Trade Unions

a "current or former employment relationship"[28]. In his Second Reading Speech, the Attorney-General argued that that the exemption is "designed to preclude an employer selling personal information contained in an employee record to a direct marketer, for example.[29]"

However, some have stated that the current wording may actually allow such uses of employee records. The Federal Privacy Commissioner, for example, submitted to the Standing Committee that the proposed exemption "potentially allows an employer to collect, use and disclose this type of information [employee records] where it is not specifically prevented from doing so by an award or employment contract[30]". But regardless of the actual extent, it appears that employee records will be left largely unprotected and vulnerable under the Bill as it stands.

This lack of protection was acknowledged by the unanimous report of the Standing Committee which stated that it was:

> not satisfied that existing workplace relations legislation provides enough protection for the privacy of private sector employee records and has grave concerns about the inclusion of the employee records exemption in the Bill. It has not been persuaded that there is any clear need for employees to be without privacy protection in relation to their workplace records.[31]

Accordingly, the Standing Committee proposed a series of recommendations[32] with the intention of bringing most employee records within the scope of the Bill.

The Australian Democrats support the predominant conclusions of the Standing Committee on this matter and support, in principle, the recommendations relating to the incorporation of employee records into the jurisdiction of the Bill.

2.1.4 Political Parties, Acts and Practices

The Australian Democrats strongly oppose the exemption in the Bill for registered political parties and political acts and practices. As a matter of policy, members of Parliament should be subject to the same legal responsibilities as any other citizen unless there is are particularly compelling reasons of public policy to the contrary. The Australian Democrats see no such reasons in present circumstances.

This view concords with the overwhelming majority of written and oral submissions which considered the political acts and practices exemption. Such evidence includes that received from the Office of the Federal Privacy Commissioner, the Australian Privacy Charter

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[28] proposed s7B(3)(a)

[29] Second Reading Speech, Hansard

[30] *Advisory Report on the Privacy Amendment (Private Sector) Bill 2000*, pp. 31-32

[31] *Advisory Report on the Privacy Amendment (Private Sector) Bill 2000*, p. 33

[32] Recommendations 5-7, *Advisory Report on the Privacy Amendment (Private Sector) Bill 2000*, pp. 35-36

Council, the Australian Consumers Association, the Australian Privacy Foundation, Privacy NSW and the Communications Law Centre.

Of particular note, is the view of the Privacy Commissioner who issued a media release on the issue:

> If we are to have a community that fully respects the principles of privacy and the political institutions that support them, then these institutions themselves must adopt the principles and practices they seek to require of others. I believe that political organisations should follow the same practices and principles that are required in the wider community[33].

Obviously, exceptions may have to be made if this Bill has the potential to create adverse effects on the political process. However, this Committee and the Standing Committee have received little evidence as to specific adverse affects and thus, the evidence presented does not constitute a reasonable justification for the blanket exemption evident in the Bill.

In the light of this, and the fact that the United Kingdom, Canada, Hong Kong and New Zealand do not have similar provisions in their privacy legislation, the Australian Democrats strongly oppose the political acts and practices exemption in the Bill and favour either a considerable restriction in application or the abolition of the exemption in total.

2.1.5 Journalism

While the Australian Democrats acknowledge the need for the media to be treated differently with respect to this legislation, it is concerned about the scope of its application and potential unintended consequences.

The Bill, as proposed to be amended by the Government, exempts acts and practices of media organisations from the operation of the National Privacy Principles if done in the course of journalism and the organisation is publicly committed to observing privacy standards.

A number of issues arise from this situation. First, is the definition of journalism. The Bill, as proposed to be amended by the Government, does not include a definition of journalism. A definition originally existed at item 18 of the Bill but is proposed to be omitted by the Government. This is mainly due to the difficulty of codifying such a concept. In oral evidence, the Press Council noted some potential unintended consequences if a court is called upon to determine the ordinary meaning of "journalism" in this context. The Press Council warned[34] that the definition may be read narrowly and prohibitively given that some dictionary definitions make direct reference to "newspapers and other periodicals".

Secondly, the issue arises as to what actually is a "media organisation". Schedule 1, item 19 of the Bill provides that a media organisation includes an organisation whose activities include making information available to the public. "Information" is not specifically defined and could be interpreted to have a very wide meaning.

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[33] Office of the Federal Privacy Commissioner, Media Release, *Federal Privacy Commissioner, Malcolm Crompton comments on private sector privacy legislation* , 12 April 2000

[34] *Transcript of Evidence*, Australian Press Council, Proof Hansard, p. 2

Thirdly, and most importantly, while media organisations are required to publicly commit to privacy standards, there is no reference to the adequacy of such standards and no external scrutiny is extended to the policies. It would, therefore, be feasible -and perfectly legal - for an organisation to publicly commit to a privacy policy that is totally inconsistent with the National Privacy Principles. The organisation could then legally publish information which would otherwise be prohibited under the National Privacy Principles by taking advantage of the exemption. The Australian Privacy Charter Council noted this anomaly in evidence, stating that the exemption:

> opens up the possibility of a loophole whereby other organisations can avoid the effects of the Act simply by publishing information which they have been mistreating.[35]

Similar jurisdictions overseas that have implemented a media exemption to privacy laws have all used different methods to define the extent of that exemption. New Zealand, for example, exempts organisations whose business includes a news activity[36]. The definition of 'news activity' is quite basic and refers predominantly to "news", "observations on news" and "current affairs".

The Australian Press Council opposes such a definition and actively argued against it both to the Attorney-General directly and to this Inquiry where its Chairman stated that the Council had:

> inquired of our colleagues in New Zealand and were told that the exemption there had been found to be too narrow and that just the way in which it was framed did not give the range of coverage that the press considered was necessary.[37]

It should be noted, however, that a recent report into the operation of the *Privacy Act 1993* (NZ) by the New Zealand Privacy Commissioner did not recommend any legislative change with respect to the exemption[38].

Other jurisdictions, such as the United Kingdom, have incorporated a public interest test into their privacy legislation. Under the *Data Protection Act 1998*[39], personal data may be processed for the purposes of journalism if:

> (a) the processing is undertaken with a view to the publication by any person of any journalistic…material,
>
> (b) the data controller reasonably believes that, having regard in particular to the special importance of the public interest in freedom of expression, publication would be in the public interest, and
>
> (c) the data controller reasonably believes that, in all the circumstances, compliance with that provision is incompatible with the [purposes of journalism].

A test of this type was supported by the Victorian Government, the Communications Law Centre and the Australian Privacy Charter Council in submissions to the Inquiry of the

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[35] *Transcript of Evidence*, Australian Privacy Charter Council, Proof Hansard, p. 9

[36] *Privacy Act 1993* (NZ) s2

[37] *Transcript of Evidence*, Australian Press Council, Proof Hansard, p. 1

[38] *Advisory Report on the Privacy Amendment (Private Sector) Bill 2000*, p. 44

[39] *Data Protection Act 1998* (UK) s32

Standing Committee on the Bill[40] but opposed by that Committee as it was "not convinced that a public interest test can be used in a way that would allow timely and efficient resolution of privacy disputes with media organisations"[41].

An alternative, but substantially more complex, option is present in the Hong Kong Special Administrative Region of the People's Republic of China under its Personal Data (Privacy) Ordinance. The Ordinance places a number of obligations on data users including data protection principles. A media exemption is present but only applies in certain circumstances. Under section 61 of the Ordinance, personal data held by a data user whose business includes a news activity[42] are exempt from provisions relating to access to and correction of personal data[43] and are free from investigation by the Privacy Commissioner[44] unless or until the data are published or broadcasted. Such media outlets are also exempt from inspection of their personal data systems.

Additionally, media outlets are exempt from principle 3 – which requires that, without alternative consent from the data user, information may only be used for the purpose it was collected for or another directly related purpose – if it is in the public interest.

The Hong Kong solution is an example of a "targeted exemption" sought by some submissions to the present inquiry. It essentially acknowledges some of the potential problems if the media was subject to the whole Ordinance and makes exemptions to specifically counteract those problems rather than providing a blanket exemption.

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[40] *Advisory Report on the Privacy Amendment (Private Sector) Bill 2000*, p. 45

[41] *Advisory Report on the Privacy Amendment (Private Sector) Bill 2000*, p. 46

[42] *Personal Data (Privacy) Ordinance*, s61(3) – definition predominantly includes news and observations on news and current affairs

[43] *Personal Data (Privacy) Ordinance*, Data Protection Principle 6 (Similar to Australian National Privacy Principle 6)

[44] *Personal Data (Privacy) Ordinance*, s38(i)

APPENDIX 1

ORGANISATIONS THAT PROVIDED THE COMMITTEE WITH SUBMISSIONS

Sub. No	Submittor	Company
1	Mr Nigel Waters	Australian Privacy Charter
2	Professor Dennis Pearce	Australian Press Council
3	CONFIDENTIAL	
4	Mr Robert Butler	Australian Dental Association
5, 5A	Ms Diane Walsh	HGSA Secretariat
6	Ms Irene Graham	Electronic Frontiers Australia
7	Mr Charles Britton	Australian Consumers' Association
8	Dr Ian Cheong	
9	Mr Patrick Gunning	Microsoft Corporation
10	Mr Robert Drummond	Insurance Council of Australia
10A	Mr Robert Drummond	Insurance Council of Australia
11	Mr Tony Hill	Internet Society of Australia
12	Dr David Knox	Institute of Actuaries of Australia
13	Ms Lynn Ralph	Investment and Financial Services Association
14	Mr Robin McKenzie	Privacy Commissioner
15	Ms Linda Rubinstein	ACTU
16	Ms Jane Ferry	AMA
17, 17A	Ms Rachel Stephen-Smith	Consumers' Health Forum
18	Professor Graham Greenleaf	

Sub. No	Submittor	Company
19	Mr Roger Clarke	Australian Privacy Foundation
20	Mr Seth Vruthan	
21	Ms Bridget Larsen	Australian Information Industry Association
22	Ms Michelle Curtis	Australian Chamber of Commerce and Industry
23	Ms Jennie Dwyer	Office of Small Business, DEWRSB
24	Mr Fergus Thomson	National Council of Independent Schools
25	Ms Gabrielle Mackey	Attorney-General's Department

APPENDIX 2

WITNESSES WHO APPEARED BEFORE THE COMMITTEE

Public Hearing, Friday 8 September 2000 (Canberra)

Professor Dennis Pearce, *Australian Press Council*

Mr Nigel Waters, *Australian Privacy Charter Council*

Mr Charles Britton, *Australian Consumers Association*

Mr Robert Drummond, *Insurance Council of Australia*

Mr Philip Maguire, *Insurance Council of Australia*

Mr David Mico, *Investment and Financial Services Association*

Miss Lynn Ralph, *Investment and Financial Services Association*

Ms Linda Rubinstein, *ACTU*

Ms Christine Cowper, *Office of the Federal Privacy Commissioner*

Ms Robin McKenzie, *Office of the Federal Privacy Commissioner*

Mr Alexander Anderson, *Legal Policy Branch, Workplace Relations and Legal Group, Department of Employment, Workplace Relations and Small Business*

Mr Thomas Fisher, *Office of Small Business, Department of Employment, Workplace Relations and Small Business*

Mr Peter Ford, *Information and Security Law Division, Commonwealth Attorney-General's Department*

Ms Gabrielle Mackey, *Information Law Branch, Information and Security Law Division, Commonwealth Attorney-General's Department*

Mr Robin Stewart-Crompton, *Department of Employment, Workplace Relations and Small Business*

Ms Rachel White, *Commonwealth Attorney-General's Department*

Ms Allison Wood, *Information and Security Law Division, Information Law Branch, Commonwealth Attorney-General's Department*