

CHAPTER 7

THE COMMITTEE'S CONCLUSIONS

7.1 The committee is concerned that the Privacy Act is not proving to be an effective or appropriate mechanism to protect the privacy of Australians. The committee considers that a combination of factors are undermining the Privacy Act, including lack of consistency with other legislation; the challenges of emerging technologies; the numerous exemptions under the Privacy Act; lack of resourcing of the OPC; and lack of effective complaints handling and enforcement mechanisms.

A comprehensive review

7.2 The committee therefore considers that there is considerable merit in the recommendation by the OPC that the Australian Government undertake a wider review of privacy for Australians in the 21st century. Some of the matters that should be considered by this review will be discussed further in this chapter. For example, the committee believes that the review should include a 'stock take' of emerging technologies and their privacy implications, and ways in which privacy regulation could be improved to deal with these technologies.

7.3 The committee believes that the most appropriate body to conduct this review is the Australian Law Reform Commission (ALRC), as independent statutory corporation with responsibility for, and a proven track record in, reviewing areas of Commonwealth law reform as referred by the Attorney-General. In particular, the committee notes that, under the *Australian Law Reform Commission Act 1996*, the functions of the ALRC in reviewing Commonwealth law include to simplify the law; remove obsolete or unnecessary laws; eliminate defects in the law; and to ensure harmonisation of Commonwealth, state and territory laws where possible.¹ The committee notes that the ALRC also has extensive experience in undertaking thorough public consultation with key stakeholders. The committee also recognises that the ALRC has relevant technical expertise, having conducted previous inquiries relevant to privacy legislation, including the recent inquiry into the protection of genetic information, and also the 1983 privacy inquiry which became the foundation for the *Privacy Act 1988*.²

Recommendation 1

7.4 The committee recommends that the Australian Government undertake a comprehensive review of privacy regulation, including a review of the *Privacy Act 1988* in its entirety, with the object of establishing a nationally

1 *Australian Law Reform Commission Act 1996*, s. 21.

2 The Law Reform Commission, *Privacy*, ALRC Report No. 22, 1983; and see also *Privacy and the Census*, ALRC Report No. 12, 1979.

consistent privacy protection regime which effectively protects the privacy of Australians.

Recommendation 2

7.5 The committee recommends that the Australian Law Reform Commission undertake the review proposed in recommendation 1 and present a report to Government and to Parliament.

Consistency

7.6 The committee is greatly concerned at the significant level of fragmentation and inconsistency in privacy regulation. This inconsistency occurs across Commonwealth legislation, between Commonwealth and state and territory legislation, and between the public and private sectors. As mentioned above, the committee believes that this inconsistency is one of a number of factors undermining the objectives of the Privacy Act and adversely impacting on government, business, and mostly importantly, the protection of Australians' privacy. The ALRC review proposed above should consider this issue.

Recommendation 3

7.7 The committee recommends that the review by the Australian Law Reform Commission, as proposed in recommendations 1 and 2, examine measures to reduce inconsistency across Commonwealth, state and territory laws relating to, or impacting upon, privacy.

7.8 Another key area of inconsistency is within the Privacy Act itself – in the two different sets of privacy principles, the IPPs and NPPs, applying to the public and private sectors respectively. The committee agrees that there is no clear policy reason for having two separate sets of principles applying to these two sectors, and it simply creates unnecessary confusion and inconsistency. The committee supports the recommendation by the OPC that the Australian Government consider a systematic examination of both the IPPs and the NPPs with a view to developing a single set of consistent principles to be applied to both the public and private sector. The committee considers that the development of such principles could be undertaken by the ALRC as part of the review proposed in recommendations 1 and 2. However, the committee considers that it is crucial to ensure that there is no lowering of the standards currently applied by the IPPS and NPPs.

Recommendation 4

7.9 The committee recommends the development of a single set of privacy principles to replace both the National Privacy Principles and Information Privacy Principles, in order to achieve consistency of privacy regulation between the private and public sectors. These principles could be developed as part of the review by the Australian Law Reform Commission, as proposed in recommendations 1 and 2.

Emerging technologies

7.10 The committee is particularly concerned that the Privacy Act is simply not keeping up with the privacy challenges posed by new and emerging technologies. While the Privacy Act may have been an appropriate mechanism to respond to the technologies of the 1970s and 1980s, technology has moved at a rapid pace in the past few decades, and the Privacy Act has not been updated accordingly. The committee considers that the introduction of other legislation to deal with the emerging technologies, such as the *Spam Act 2003*, is a clear demonstration of the failure of the Privacy Act to adequately respond to new technologies.

7.11 The committee acknowledges calls for the Privacy Act to remain 'technology neutral'. Indeed, the committee considers that it is desirable for the Privacy Act to remain as 'technology neutral' as possible. However, the committee believes that it is possible update the Privacy Act in a 'technology neutral' way to reflect the technological changes that have occurred and to enable the Privacy Act to deal with these new technologies.

7.12 As mentioned above, the committee proposes that the ALRC review at recommendations 1 and 2 should examine ways to improve privacy regulation to improve its capacity to respond to emerging technologies. At the same time, the committee also agrees with some of the suggestions that were put forward during this inquiry. In particular, the committee considers that the Privacy Act should be amended to set out a statutory process for the conduct of privacy impact assessments in relation to new proposals which may have a significant impact on privacy. This assessment process could be a transparent and accountable way of ensuring that privacy concerns are addressed. The committee notes that privacy impact assessments are being conducted in relation to some new proposals such as biometric passports. However, the committee is concerned that these assessments are not being conducted in an open and transparent manner. The committee considers that such assessments need to involve full public consultation and should be occurring in a transparent and accountable manner. The committee considers that the details of this statutory privacy impact assessment process could be developed by the Australian Law Reform Commission as part of the review proposed in recommendations 1 and 2.

Recommendation 5

7.13 The committee recommends the Privacy Act be amended to include a statutory privacy impact assessment process to be conducted in relation to new projects or developments which may have a significant impact on the collection, use or matching of personal information.

7.14 The committee recognises suggestions that the definition of 'personal information' be updated to deal with new technologies and new methods of collecting information. In particular, the committee believes that consideration should be given to extending the definition to include information that enables an individual not only to be identified, but also contacted. This is also matter which should be examined by the review proposed at recommendations 1 and 2.

Recommendation 6

7.15 The committee recommends that the review by the Australian Law Reform Commission, as proposed in recommendations 1 and 2, examine the definition of 'personal information' in the *Privacy Act 1988*, and also any amendments to the definition which may reflect technological advances and international developments in privacy law.

Genetic information

7.16 In relation to the potential disclosure and discrimination use of genetic information, the committee endorses the recommendations of the report by the ALRC and NHMRC on the protection of human genetic information.³ The committee notes that this report has been favourably received around the world, and indeed, established Australia as a world leader in relation to these issues. However, the committee considers the government's failure to date to respond to the report's recommendations is somewhat embarrassing. As a result, Australia is now starting to lag behind many other countries in dealing with this issue, to the possible detriment of many individual Australians.

7.17 The committee welcomes the recent budget announcement that funding will be provided for the establishment of a human genetics advisory committee as a principal committee of the NHMRC. The committee is disappointed that this does not fully match the ALRC and NHMRC's recommendations of an independent human genetic commission, but nevertheless welcomes any progress in addressing these issues and implementing the ALRC and NHMRC's report. However, the committee considers that the other recommendations in the ALRC and NHMRC's report should be implemented in full as a high priority.

Recommendation 7

7.18 The committee recommends that the Australian Government responds to, and implements, the recommendations of the *Essentially Yours* report into the protection of genetic information by the Australian Law Reform Commission and the Australian Health Ethics Committee of the National Health and Medical Research Council, as a high priority.

Other technologies

7.19 The committee notes the evidence received in relation to the privacy implications of smartcard technology, and that such technology can be either privacy enhancing or privacy invasive. The area of most immediate concern to the committee is the Medicare smartcard. The committee heard evidence of the lack of wider public consultation in relation to the privacy implications of the Medicare smartcard. Indeed, the committee is disturbed that it appears that key stakeholders were not consulted

3 ALRC and NHMRC, *Essentially Yours: Protection of Human Genetic Information in Australia*, ALRC 96, 2003, available at: <http://www.austlii.edu.au/au/other/alrc/publications/reports/96/>

prior to the introductory trial of the Medicare smartcard. The committee is also concerned about the potential for function creep in the use of the Medicare smartcard.

7.20 The committee is similarly concerned about the lack of public consultation, and indeed, the lack of publicly available information, in relation to the government's proposed national document verification service.

7.21 The committee also acknowledges concerns raised in submissions and evidence in relation to the privacy implications of biometric technology and the proposed biometric passports. The committee also notes the evidence of DFAT that a privacy impact assessment is being prepared in relation to the proposed biometric passports, in consultation with the OPC. However, once again, the committee is concerned that the privacy impact assessment does not appear to be being conducted in a particularly open or transparent manner.

7.22 The committee notes with concern the recent authorisation by the US FDA of human microchip implants. However, the committee was reassured to learn from relevant government departments that there are no similar proposals currently planned here in Australia. Nevertheless, the committee considers that this is an issue that has significant privacy implications, and that such microchip implants should be properly regulated here in Australia.

7.23 The committee also notes the extensive list of other technologies raised in submissions to the inquiry, including, but not limited to: RFID; spyware; location-based services; electronic messaging; and other telecommunications technology. The committee considers that the ALRC review should examine the privacy implications of these technologies, and whether appropriate regulatory measures are in place to ensure that privacy is adequately protected in relation to these technologies. Such regulatory measures should also be consistent and as technologically neutral as possible.

Recommendation 8

7.24 The committee recommends that the review by the Australian Law Reform Commission, as proposed in recommendations 1 and 2, include consideration of the privacy implications of new and emerging technologies with a view to ensuring that these technologies are subject to appropriate privacy regulation.

7.25 The committee notes in particular the recommendations of the OPC to address the issue of inconsistency between the Privacy Act and the Telecommunications Act. However, the committee considers that further measures could be taken, and therefore recommends that the ALRC review include a detailed examination of the interaction between the Privacy Act and the Telecommunications Act. This should include consideration of measures to reduce any inconsistency between these pieces of legislation and to ensure that privacy is adequately protected in the telecommunications area.

Recommendation 9

7.26 The committee recommends that the review by the Australian Law Reform Commission, as proposed in recommendations 1 and 2, consider the interaction of the *Privacy Act 1988* and the *Telecommunications Act 1997* with a view to recommending measures to reduce inconsistency between these pieces of legislation and to ensure that privacy is adequately protected in the telecommunications area.

Private sector provisions

7.27 The committee notes and endorses the findings and recommendations made by the OPC in its review of the private sector provisions of the Privacy Act. However, the committee considers that the OPC could have gone further in many of its recommendations. Further, the committee disagrees with the Privacy Commissioner's conclusions that the private sector provisions are 'working well'. Nevertheless, the committee recommends that the Australian Government responds to, and implements, the recommendations of OPC review as a high priority.

Recommendation 10

7.28 The committee recommends that the Australian Government responds to, and implements, the recommendations of the review of the private sector provisions by Office of the Privacy Commissioner as a high priority.

Exemptions

7.29 However, the committee notes that the OPC review's terms of reference were limited by the Attorney-General. The OPC review therefore failed to consider a number of relevant, and problematic, aspects of the private sector provisions, such as the exemptions for employee records and for political acts and practices. Hence, the committee repeats the need for the comprehensive review of the Privacy Act as proposed at recommendations 1 and 2.

7.30 In particular, the committee is concerned that the many exemptions under the Privacy Act are undermining the operation of the Privacy Act and adding to the problem of inconsistency across jurisdictions and sectors. Of particular concern to the committee are the small business exemption, employee records exemption and the political acts and practices exemption. The committee considers that a wider range of activities should be protected under the Privacy Act 1988, and is not convinced of the need for such broad exemptions.

Recommendation 11

7.31 The committee recommends that the review by the Australian Law Reform Commission, as proposed at recommendations 1 and 2, examine the operation of, and need for, the exemptions under the Privacy Act 1988, particularly in relation to political acts and practices.

Small business

7.32 The committee recognises that the Office of the Privacy Commissioner made a number of recommendations to address concerns about the small business exemption, including modifying the definition of small business so that it is based on the number of employees, rather than annual turnover. However, the committee is concerned that regulating some small businesses, such as in the areas of tenancy databases and telecommunications, but not others, will simply add to the complexity of the legislation. Indeed, the committee questions the need to retain the small business exemption at all. The committee recognises the evidence of organisations such as EFA and APF that the exemption is too broad and too complex. In particular the committee notes that evidence of EFA that 'privacy rights do not disappear just because a consumer happens to be dealing with a small company.'⁴ Similarly, the APF pointed out that some of the 'most privacy intrusive activities are carried out by very small companies and even sole traders.'⁵

7.33 Further, the committee considers that protecting the privacy of personal information also makes good commercial sense for all businesses, large and small. The committee notes that the privacy regimes of other jurisdictions, such as New Zealand, operate effectively without any small business exemption. Finally, the committee received evidence that the small business exemption is one of the key outstanding issues in negotiations with the European Union for recognition of Australia's privacy laws under the EU Data Protection Directive. Therefore, notwithstanding the proposed ALRC review, the committee recommends that the small business exemption be removed altogether from the Privacy Act.

Recommendation 12

7.34 The committee recommends that the small business exemption be removed from the *Privacy Act 1988*.

Employee records

7.35 In relation to the employee records exemption, the committee notes that a review of the employee records exemption was being undertaken by the Attorney-General's Department and the Department of Employment, Workplace Relations and Small Business. Indeed, this was the justification for excluding that exemption from the OPC's review of the private sector provisions. However, the progress of the review of the employee records exemption is unclear. The committee is disappointed at the slow progress of this review, and considers that this review should be finalised, and the results released, as a matter of urgency.

7.36 In any case, the committee notes with concern the evidence received that current workplace relations legislation does not adequately protect privacy in the

4 *Submission 17*, p. 34.

5 *Submission 32*, p. 14.

workplace. The committee agrees with the evidence of the Australian Law Reform Commission that the most appropriate place to protect employee privacy is in the Privacy Act, not workplace relations legislation. The committee also notes that state governments are acting to fill the legislative gaps by regulating workplace surveillance, but is concerned that this will only add to problems of inconsistency and fragmentation. The committee considers that employee records deserve appropriate and adequate privacy protection, and therefore recommends that the Privacy Act be amended to cover employee records.

Recommendation 13

7.37 The committee recommends that the privacy of employee records be protected under the *Privacy Act 1988*.

Recommendation 14

7.38 The committee recommends that the review by the Australian Law Reform Commission, as proposed at recommendations 1 and 2, should examine the precise mechanisms under the Privacy Act to best protect employee records.

Direct marketing

7.39 The committee again supports the recommendations of the OPC review in relation to direct marketing, particularly the proposal to amend the Privacy Act to require an organisation to take reasonable steps, on request, to advise an individual where it acquired the individual's personal information.⁶ The committee also supports that the establishment of a national 'Do Not Contact' register. However, the committee suggests that the ALRC review proposed at recommendations 1 and 2 also consider the possibility of an 'opt in' regime for direct marketing in line with the *Spam Act 2003*.

Recommendation 15

7.40 The committee recommends that the review by the Australian Law Reform Commission, as proposed at recommendations 1 and 2, consider the possibility of an 'opt in' regime for direct marketing in line with the *Spam Act 2003*.

Adequacy for the purposes of the European Union

7.41 The committee notes that the EU still has not recognised Australia's Privacy Act as 'adequate' for the purposes of the EU Data Protection Directive. Notwithstanding the evidence that this has not had a significant impact on businesses trading with the EU, the committee considers it desirable for Australia's privacy laws to be recognised by the EU. The committee suggests that the issue of EU adequacy be considered by the ALRC review proposed at recommendations 1 and 2.

6 OPC review, Recommendation 24.

Recommendation 16

7.42 The committee recommends that the review by the Australian Law Reform Commission, as proposed at recommendations 1 and 2, examine measures that could be taken to assist recognition of Australia's privacy laws under the European Union Data Protection Directive.

Other aspects of the private sector provisions

7.43 The committee notes other suggestions made during its inquiry for other specific amendments to the Privacy Act and particularly NPPs. The committee recognises that many of these suggestions have merit. However, given the committee's recommendation of an ALRC review, and that the NPPs and IPPs should be merged, the committee makes no further recommendations for amendments, but rather proposes that these issues be considered as part of the review at recommendations 1 and 2, and in particular in the development of a single set of privacy principles as set out in recommendation 4 above.

Other issues

Credit reporting

7.44 The committee acknowledges the concerns raised by consumer advocates and groups in respect of the credit reporting regime established by Part IIIA of the Privacy Act. However, the committee does not see any need for review or reform of Part IIIA at this time. As noted in this report, action is being taken by industry to enhance data quality and to improve consumer engagement, including the development of better dispute resolution mechanisms.

7.45 However, the committee does consider that government action is required to maintain community confidence in integrity of the credit reporting regime. As Australia's largest credit reporting agency acknowledged, retaining the trust of individual consumers and the community at large is fundamental to credit reporting agencies' 'social licence to operate'.⁷ The principal means of generating and maintaining that trust is through the effective enforcement of statutory privacy principles and rights. Yet evidence presented to the committee indicates that industry and consumers share concerns that regulatory oversight in the area of credit reporting is lacking. There is a view that, unless the OPC is provided with greater resources to take enforcement action and then prioritises enforcement action, the legislation will remain ineffective. The committee's position – explained below – is that the government must provide additional funding to the OPC as a matter of some urgency.

7.46 The committee sees no justification for the introduction of positive credit reporting in Australia. Moreover, the experience with the current range of credit information has shown that industry has not run the existing credit reporting system as

7 Baycorp Advantage, *Submission 43*, p. 5.

well as would be expected and it is apparent that injustice can prevail. As mentioned elsewhere in this report, positive reporting is also rejected on the basis that it would magnify the problems associated with the accuracy and integrity of the current credit reporting system. The privacy and security risks associated with the existence of large private sector databases containing detailed information on millions of people are of major concern. For these reasons, the Committee's view is that positive reporting not be introduced

Recommendation 17

7.47 The Committee recommends that the Privacy Act not be amended to allow the introduction of positive credit reporting in Australia.

Health information and medical research

7.48 The committee notes evidence pointing to an urgent need for privacy laws relating to health information and medical research to be made uniform across the Australian jurisdictions. The committee accepts the view put by witnesses that the current arrangements are a failure of good government and inimical to the interests of health providers, researchers and patients in Australia. To this end, it urges the government to act on the recommendations made by the OPC in its review of the private sector provisions of the Privacy Act, especially the recommendations that a wider review of that Act be conducted and that the National Health Privacy Code be implemented as a schedule to that Act. Of particular concern to the committee is the evidence that the current privacy rules are hindering important medical research of potential benefit to all Australians.

Recommendation 18

7.49 The Committee recommends that the Australian Government, as part of a wider review of the Privacy Act, determine, with appropriate consultation and public debate, what is the appropriate balance between facilitating medical research for public benefit and individual privacy and the right of consent.

Responding to overseas emergencies

7.50 The committee acknowledges concerns raised by the ARC and DFAT in relation to impediments under the Privacy Act to information sharing in emergency situations. The committee notes that the OPC review made a number of recommendations to address this situation in relation to the private sector provisions. The committee therefore again urges the Australian Government to implement the recommendations of the OPC review as a matter of priority. The committee also suggests that the government ensure that it also addresses any impediments under the Privacy Act to information sharing between government agencies in such emergency situations.

Use of the Privacy Act as a means to avoid accountability and transparency

7.51 The committee acknowledges concerns about the use of the Privacy Act as a means to avoid accountability and transparency. The use of the Privacy Act as a 'shield' to justify privacy-invasive proposals and reassure the public is particularly concerning to the committee in light of the evidence received that the Privacy Act is actually not effective in protecting Australians' privacy. The committee hopes that other reforms recommended by the committee, and the OPC review, may improve this situation. In particular, the committee considers that increasing the resourcing available to the OPC, as recommended below, should help to alleviate this problem, particularly if some of those resources are directed to increasing awareness and understanding of privacy rights and obligations. The committee also sees merit in that the APF's suggestion of empowering the Privacy Commissioner to issue 'corrective statements', to be published at the expense of the organisation involved in the misrepresentation of the Privacy Act.

Law Enforcement Issues

7.52 The committee notes concerns raised by the AFP about problems encountered accessing information from organisations subject to the NPPs in relation to law enforcement issues. The committee supports the OPC's recommendation on this issue that it will develop practical guidance to assist private sector organisations to better understand their obligations under the Privacy Act in the context of law enforcement activities. However, the committee also considers that the Australian Government should examine additional mechanisms which may resolve this problem, such as the AFP's suggestion of the use of 'notices to produce'.

Resourcing and powers of the Office of the Privacy Commissioner

7.53 The committee acknowledges the considerable evidence received in the course of the inquiry which points to a serious lack of resourcing and inadequate powers of the OPC. In relation to resourcing issues, the committee is concerned that lack of funding is inhibiting the OPC from exercising its functions to full effect. In particular, the committee is mindful that, due to resource constraints, the OPC appears to be forced to concentrate on dealing with individual consumer complaints, at the expense of other important strategic functions.

7.54 Several findings and recommendations made by the OPC in its review of the private sector provisions relate to resourcing and powers of the OPC. As noted in paragraph 7.27, the committee endorses the findings and recommendations made by the OPC in its review, however the OPC could have gone much further in many of its recommendations. While the committee encourages the Australian Government to implement the recommendations of the OPC review as a matter of priority,⁸ the committee considers that, in relation to resourcing of the OPC, an immediate

8 See OPC review, Recommendation 10, para 7.78.

allocation of additional funding is required to enable the OPC to more efficiently and effectively fulfil its mandate.

7.55 The committee also notes concerns raised by the APF in relation to the OPC review's recommendation that there be discretion not to investigate complaints where the harm to individuals is minimal and there is no public interest in pursuing the matter. The committee urges the Australian Government to consider carefully the various implications of such an approach.

7.56 Further, the committee considers that the OPC review's recommendations relating to powers of the Privacy Commissioner should be implemented as soon as possible.⁹ In particular, the committee urges the introduction of private sector auditing powers for the OPC.

Recommendation 19

7.57 The committee recommends that the Australian Government provide an immediate allocation of additional funding to the Office of the Privacy Commissioner to enable it to more efficiently and effectively fulfil its mandate and to ensure genuine and systemic improvements to its operation, both now and into the future.

Senator the Hon Nick Bolkus

Chair

9 See OPC review, Recommendation 10, para 7.78.