

Submission

to the

Inquiry into the Privacy Act 1988

by the

Senate Legal and Constitutional Committee

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1. Introduction

The *Privacy Act 1998* (Cth) has done much to protect the privacy of Australians and the associated *Privacy Amendment (Private Sector) Act 2000* (Cth) has extended those protections to the private sector.

On 9 December 2004, the Senate asked the Legal and Constitutional References Committee to conduct an inquiry into the Privacy Act 1988 with the following terms of reference:

- (a) the overall effectiveness and appropriateness of the Privacy Act 1988 as a means by which to protect the privacy of Australians, with particular reference to:
 - (i) international comparisons,
 - (ii) the capacity of the current legislative regime to respond to new and emerging technologies which have implications for privacy, including:
 - (A) ‘Smart Card’ technology and the potential for this to be used to establish a national identification regime,
 - (B) biometric imaging data,
 - (C) genetic testing and the potential disclosure and discriminatory use of such information, and
 - (D) microchips which can be implanted in human beings (for example, as recently authorised by the United States Food and Drug Administration), and
 - (iii) any legislative changes that may help to provide more comprehensive protection or improve the current regime in any way;
- (b) the effectiveness of the Privacy Amendment (Private Sector) Act 2000 in extending the privacy scheme to the private sector, and any changes which may enhance its effectiveness; and
- (c) the resourcing of the Office of the Federal Privacy Commissioner and whether current levels of funding and the powers available to the Federal Privacy Commissioner enable her to properly fulfil her mandate.

This submission addresses the first term of reference, namely the overall effectiveness and appropriateness of the Privacy Act 1988 as a means by which to protect the privacy of Australians, with particular reference to the effect on marriage, family and community relationships.

2. Current Privacy Regime

2.1 Duty to care

Australia has recognised both through the signature of international conventions,¹ and through enacting domestic legislation,² that the family is the fundamental unit of society, and is worthy of legal protection. The *Family Law Act 1975* (Cth) also specifically identifies the responsibility of the family and the parents in promoting the welfare of children.³

Protection of this traditional family unit can generally occur in two ways. The first is legislative recognition and protection of privileges of those couples who willingly enter into marriage. The second is ensuring that the parents are legally supported in their duty to properly protect and provide for their children.

It is therefore consistent with international obligations and the principles in Australian legislation to protect the rights of parents and the position of the family. The proposals below would strengthen the position of spouses and parents under the *Privacy Act 1988* (Cth), and therefore protect the family unit.

2.2 Duty of privacy

National Privacy Principle (NPP) 2.1 provides that an organisation,⁴ may not disclose personal information about a natural person unless one of several options are satisfied.⁵ Personal information includes any information or opinion about a person whose identity is known, or could reasonably be determined from that information.⁶ There are several exceptions, such as in the case of a small business, or in the case of an individual collecting and using information for personal, family or household affairs.⁷

However NPP 2.4 provides that an organisation that offers some form of health care is allowed to disclose personal information in some circumstances. Disclosure is permitted in favour of a spouse, de facto spouse or parent where the individual is incapable of giving or communicating consent to the disclosure.⁸ However this option to disclose is limited to the person who is providing the health service being satisfied that the disclosure is necessary for care and treatment, and the individual has not made any wish to the contrary.⁹ Even in this case, the disclosure is limited to the extent reasonably necessary.¹⁰

2.3 An experience of privacy law

The following account, supplied by a supporter of Festival of Light Australia, illustrates how the Privacy Act is affecting the everyday life of ordinary Australians.

My wife and I visited our local doctor together about a medical problem affecting my wife. We were both present at the consultation because of the potential seriousness of the problem. The doctor decided to refer my wife to a specialist and said he would write a reference letter that would be ready within a few days.

Some days later while I was at home the phone rang. After answering it a voice said, "May I speak to Mrs X (my wife) please?"

I asked who was calling, as is my usual practice when someone calls without giving their name. The voice said, "I'm sorry but I can't tell you."

"Why not?" I replied.

"Because of privacy laws," the voice answered. I then explained that it was not my usual practice to call my wife to the phone to speak to a person who refused to give their name. The voice then said, "You can tell her it is the surgery."

I then asked whether it was the "M Surgery" (our local medical centre). The voice said, "I'm sorry but I can't tell you."

"Why not?" I asked again.

"Because of privacy laws," the voice answered again.

I explained that my wife and I had recently consulted a doctor at the M Surgery who said he would write a letter referring my wife to a specialist and we were awaiting the letter. I asked whether the call was to advise that the letter was ready. "I'm sorry but I can't tell you because of privacy laws," came the refrain.

At this stage I was becoming quite frustrated. My wife and I have been happily married for many years. We share all the intimate details of our lives. We had consulted the doctor together so that, whatever the

outcome, we could face the future together. Now I was finding that privacy laws were intruding into our marriage and preventing us from functioning as an intimate team.

I explained to the voice that my wife couldn't come to the phone at present because she was at work. The voice then asked whether it would be possible to phone her at work. I explained that it was not my practice to give my wife's phone number to strangers who refused to identify themselves. "Could she phone you?" I asked.

"Certainly," replied the voice.

"Could you please give me your phone number then?" I asked. She gave me the number, which I immediately recognised as the phone number of the local M Surgery. "So it is the M Surgery!" I said, "I recognise the number."

"I'm sorry but I can't confirm that," came the reply.

Exploring possibilities, I said, "If it is the reference letter, it would not be convenient for my wife to collect it but it would be convenient for me to do so, since the M Surgery is close to our home. Would that be possible?"

"Yes," said the voice. "Your wife could authorise us by phone to do that. Then you could just come into the surgery with your Medicare card."

"Unfortunately I can't bring our Medicare card today," I explained, "because we share a single Medicare card and my wife has it today. Would my name be sufficient?" I asked.

"We don't ask patients their name at reception any more," the voice explained. "We are following advice from the AMA about the new privacy law and we don't ask patients their name at reception in case someone else hears."

"How do you identify patients?" I asked.

"We ask them for their Medicare care and we can see their name there," came the reply.

"What about regular patients whom you know well. Don't you ever greet them by name?"

"We used to," said the voice. "We used to say 'Good morning Mrs Smith' or 'Good afternoon Mr Jones' to patients we know well. But we have been told not to do that any more. We just ask them for their Medicare card."

"That's not very friendly," I suggested. "I've even heard the local greengrocer greet customers that way. 'Hello Mrs Brown, how are you today?' he might say."

"I know," said the voice. "But with the new privacy law we've been told we're not allowed to greet people like that any more."

"But," I protested, "When the waiting room is full of people and the doctor comes in and calls for the next patient, he calls out the person's name in a loud voice so everyone can hear."

"I know," said the voice. "But with the new privacy law we've been told that at reception we're not allowed to greet people by name any more."

It is clear from this account that an effect of the Privacy Act on ordinary people in some situations is to cause significant disruption of family and community life. It can isolate husbands and wives from each

other; it can isolate parents from their children; it can isolate people from their neighbours. In short it tends to create an atomistic society that fragments marriages, families and communities.

3. Legislative Proposals

3.1 Provision of information to a husband or wife about their spouse

3.1.1 *And they will become one flesh*

At common law a husband and wife are legally considered to be one person,¹¹ which led to consequences such as the legal inability of a wife to own property. While the doctrine that a married couple are legally one person has been removed in that case,¹² the doctrine still justifies a compensation payment in the event of death of a spouse.¹³

The nature of marriage is still that the husband and wife have entered into a relationship that is largely a matter of unification. A man and woman give a public pledge to become one entity, and enter into a partnership for life, for which the legal term is *consortium vitae*.

3.1.2 *Presumption of disclosure*

As a husband and wife are still *prima facie* legally one person, and have voluntarily entered into a relationship for life,¹⁴ there should be a presumption that information about each other is shared between them. The nature of the marriage relationship is such that it is characterised by the sharing of all parts of life.

This sharing should include personal information about each other, for that is the nature of the life that has been entered into by each married partner. While circumstances do arise where it is appropriate to conceal personal information from a spouse, such as for protection in an abusive situation, this should not be the presumption.

Privacy law should allow a person to revoke this presumed sharing easily, without requiring courts or legal advice, by a simple instruction to those who hold that information. This preserves a person's capacity to order their own affairs, but presumes that a couple who have engaged in the life sharing social institution of marriage would also want to share information about each other, regardless of the mental capacity of each spouse.

Of course, a presumption of free disclosure of information to a spouse would require an appropriate implementation. Controls would be needed to ensure that such information would be provided only to the spouse and only if the presumption had not been revoked.

3.1.3 *Marriage only*

Although it could be argued that both married and unmarried couples form families, this proposal deals only with couples who are married, and for good reason. When a couple decides to marry, they enter into a public pledge in a form that can be registered within the appropriate state. Any person is therefore either married or not married, and the government maintains a register of people who are married.¹⁵

Whether a person is married or not is therefore legally certain and the results of legislation in relation to marriage are predictable. Whether a relationship is considered to fulfil the requirements for a *de facto* relationship is a matter for determination by a court, not a person deciding whether or not to give out personal information. There should be no presumption of shared information in the case of *de facto* partners.

Recommendation

The Privacy Act should be amended to include a presumption that private information about a married person is legally available to the person's spouse, unless the person has directed otherwise.

3.2 Provision of information to parents about their minor children

3.2.1 Parental responsibility for children

When Australia signed the *International Covenant on Civil and Political Rights*, it signified an intention to respect the religious and moral convictions of parents in relation to the education of their children.¹⁶ This sentiment is mirrored in the *International Covenant on Economic, Social and Cultural Rights*, which Australia has also signed.

These human rights instruments affirm the parental right to determine the best interests of and the protection of their children. However, the adoption by the United Nations General Assembly of the *Convention on the Rights of the Child* in November 1989 was surrounded by controversy, as was its ratification by the Hawke government just before Christmas 1990.¹⁷ Parent groups opposing the Convention pointed out that Articles 12-16 purported to give children unfettered rights - such as privacy, freedom of assembly and association, freedom to read and view what they like - while Article 5 gives parents only qualified rights to guide their children.¹⁸

The Vatican only signed that convention on the basis that it did not interfere with the right of parents to raise their children.¹⁹ While Australia did not make this reservation, it nevertheless does not hesitate to accord the responsibility for the welfare and actions of children to their parents. There are numerous pieces of legislation that apply responsibility to the parents.²⁰ Further action is contemplated in South Australia, as the state government considers applying a fine to parents whose children do not go to school.²¹

3.2.2 Dangers of excessive privacy

While privacy forms an important part of life in a free democratic country, the traditional form of rights of non-interference of personal life have always included a provision for just cause. The common law right to privacy was never absolute.

On the ABC TV program *7.30 Report* on 22 December 2004, presenter Maxine McKew told how an estimated 22,000 people in Australia go from doctor to doctor under false pretenses in an effort to get prescription drugs to support a drug habit.²² In 1997, the federal government introduced a shopping hotline to allow GPs to access their patient's prescription history. Over the next five years, it proved an outstanding success. Then in 2002, privacy reasons, the service was stopped with the result that prescription shopping began rising again.

A casualty of this privacy policy was George Shoobridge, who had been an asthma sufferer from childhood and who had become addicted to a combination of heavy-duty painkillers and benzodiazepines or sedatives. He went to Cairns, north Queensland, to begin a course in tourism. Over a six month period, he consulted 22 doctors, concealing from each his full drug intake. In December 2002 he died from a lethal cocktail of drugs, including legally prescribed methadone.

Between 1997 and April 2002, doctors could simply ring a doctor-shopping hotline to find out what drugs, if any, a patient was being prescribed by any other doctor across Australia. However, in May 2002, just as George Shoobridge arrived in Cairns, the federal government closed down the hotline, citing privacy issues. Dr John Anderson, whom George Shoobridge saw several times, became suspicious of his patient's request for drugs. He rang the doctor-shopping hotline only to hear a recorded message saying the hotline had been closed.

The damage was caused by assuming privacy to be an absolute right. Although the doctor-shopping hotline has been re-established,²³ it was too late for George Shoobridge.

A further example is provided by the death of a 16-year-old girl in New Zealand who died in May 2002 following the supply and use of some birth-control pills obtained confidentially without the knowledge of her parents or her doctor.²⁴ In January 2002 Stacey Brindle had visited the Hamilton Family Planning Clinic, where she asked for and obtained the oral contraceptive Estelle. She died after a blood clot travelled through her blood stream and lodged in her lungs. Her mother learned only after her death that she had been on the pill.

Stacey began to have difficulty breathing on 28 May. She was taken on 30 May to the family doctor, who could find no explanation for the symptoms. Stacey died the following day. The coroner said that Stacey's life may have been saved if her doctor had know she was taking Estelle. The pill came with consumer information advising users to "tell your doctor immediately or go to casualty at your nearest hospital" if experiencing symptoms of a blood clot, including "difficulty in breathing or coughing for no apparent reasons."

The examples show how important it is to balance privacy considerations against other important rights. It is dangerous to consider privacy an absolute right.

3.2.3 *Presumption of disclosure to parents*

Parents have a responsibility to protect their children, but that responsibility can only be fulfilled when information is available to the parents. Accordingly it is appropriate that all personal information in relation to a minor be available to that minor's parents. Parents are incapable of protecting their children if they are kept ignorant of the challenges and situations facing those children.

Since the right of parents to care for their children is a primary right, it should not be interfered with lightly. The presumption that personal information should be available to a minor's parents should be removed only for good cause such as proven physical or sexual abuse and only by an order from the relevant court.

A minor should not be able to hide information from their parents, merely because of concerns over what response a parent would have if they were aware of what the minor was doing. Indeed it is often when the minors would be most concerned about parental response that they would most need parental guidance in their lives.

Recommendation

The Privacy Act should be amended to include a presumption that parents are entitled to private information regarding their children until they reach the age of majority, or 18 years.

The presumed access of parents to their minor children's private information should be removed only if a court determines that it is appropriate to do so for the protection of the child from physical harm.

4. Conclusion

The right to privacy contained within the *International Covenant on Civil and Political Rights* (ICCPR) is not absolute. Article 17 of the ICCPR provides for freedom from 'arbitrary interference with privacy', which should be a legal protection. However the question of arbitrariness arises.

The purpose of such a provision is to protect a person from people or organisations who want to obtain private information that is unnecessary or inappropriate for them to have. While there is a reasonable concern that a government or corporation would begin to amass detailed files on individuals, such concerns are not relevant to the family unit.

Most people gain their primary care and support from within the family unit. Husbands and wives generally provide primary care for their spouses. Parents generally provide primary care for their children. By treating family members as isolated individuals, current privacy laws are damaging or causing difficulties for functioning Australian families.

The Privacy Act should be amended to include a presumption that husbands and wives are entitled to information about their spouses unless a person instructs otherwise. The Privacy Act should also be amended to include a presumption that parents are entitled to information about their children unless a court orders otherwise.

5. References

1. *Universal Declaration of Human Rights* (1948) art 16(3).
2. *Family Law Act 1975* (Cth) s 43(b).
3. *Family Law Act 1975* (Cth) ss 43(b), 61B, 61C.
4. Which includes an individual, a body corporate, a partnership, an unincorporated association, or a trust. *Privacy Act 1988* (Cth) s 6C.
5. *Privacy Act 1988* (Cth) sch 3 (National Privacy Principles) 2.1.
6. *Privacy Act 1988* (Cth) s 6.
7. *Privacy Act 1988* (Cth) s 16E.
8. *Privacy Act 1988* (Cth) sch 3 (National Privacy Principles) 2.4.
9. *Privacy Act 1988* (Cth) sch 3 (National Privacy Principles) 2.4.
10. *Privacy Act 1988* (Cth) sch 3 (National Privacy Principles) 2.4(d).
11. Peta Spender, 'Family Companies and Women's Proprietary Entitlements' (1997) *Australian Journal of Family Law* 11.
12. *Married Women's Property Act 1893* (UK) 56 & 57 Vict, c 63.
13. See eg *Civil Liability Act 1936* (SA) s 65.
14. *Marriage Act 1961* (Cth) s 5.
15. See eg *Births, Death and Marriages Registration Act 1996* (SA) s 40, and corresponding legislation in other states.
16. *International Covenant on Civil and Political Rights* (1976) art 18(4).
17. Phillips, David, "The Risk to Family Relationships from the UN Convention on the Rights of the Child", *Light*, February 1990, pp 8-11.
18. Phillips, David, "Child vs Parent: the UN Convention on the Rights of the Child", *Light*, August 1997, pp 8-11.
19. Watson, John, *Hansard for the Australian Senate*, debate on a motion to disallow the UN Child Rights Convention from the HREOC Act, 28 September 1993; see also *Light*, November 1993, p 7.
20. See eg *Children and Young People Act 1999* (ACT); *Children and Young Persons (Care and Protection) Act 1988* (NSW) etc.
21. Christopher Salter 'Turn Up or Pay Up', *The Advertiser*, (Adelaide), 28 February 2005, 1.

22. Bannerman, Mark, "Prescription shopping on the rise", Australian Broadcasting Corporation TV program transcript of *7.30 Report* broadcast 22 December 2002, www.abc.net.au.
23. 'Line re-opened to stop doctor shopping', *Herald Sun*, (Melbourne), 12 February 2005.
24. Goodenough, Patrick, "Birth-Control Pill Suspected in Death of Teen", Crosswalk.com.