THE PARLIAMENT OF THE COMMONWEALTH OF AUSTRALIA

SENATE STANDING COMMITTEE ON
LEGAL AND CONSTITUTIONAL AFFAIRS

UNAUTHORISED PROCUREMENT AND DISCLOSURE OF INFORMATION

June 1991

MEMBERS OF THE COMMITTEE

Senator Barney Cooney (ALP, Vic), Chairman
Senator Amanda Vanstone (LP, SA), Deputy Chair
Senator Patricia Giles (ALP, WA)
Senator Rod Kemp (LP, Vic)
Senator William O'Chee (NP, Qld)
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Senator Sid Spindler (AD, Vic)
Senator the Hon Peter Walsh (ALP, WA)

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TERMS OF REFERENCE

The question of whether there are effective legal and administrative deterrents to prevent the unauthorised procurement and disclosure of information, as discussed on pages 14 to 16 of the Privacy Commissioner's 1989-90 Annual Report.

(Journals of the Senate, No 83, 7 May 1991, pp 975-6)

RECOMMENDATION

The Committee recommends that:

the government provide as a matter of urgency its response as to action it has taken, is taking or intends to take in relation to the matters raised in this report, in particular:

- sanctions against public servants who disclose personal information held by a government agency without authorisation;

- the criminal law as it applies to those who procure the unauthorised disclosure of personal information held by a government agency; and

- the coverage of the Privacy Act in relation to the Privacy Commissioner's power

  (a) to investigate the unauthorised procurement and disclosure of personal information held by a government agency; and

  (b) to award damages to those who have been harmed by the unauthorised disclosure of personal information held by a government agency.

(para 26)

ABBREVIATIONS

Evidence	Transcript of the Committee's public hearing to discuss its terms of reference with the Privacy Commissioner
PP	Parliamentary Paper
The Committee	Senate Standing Committee on Legal and Constitutional Affairs

THE UNAUTHORISED PROCUREMENT AND DISCLOSURE OF INFORMATION

Terms of reference

1 On 7 May 1991, on the motion of Senator Kay Patterson, the Senate resolved as follows:

> That the following matter be referred to the Senate Standing Committee on Legal and Constitutional Affairs for inquiry and report on or before 30 September 1991:
>
> > The question of whether there are effective legal and administrative deterrents to prevent the unauthorised procurement and disclosure of information, as discussed on pages 14 to 16 of the Privacy Commissioner's 1989-90 Annual Report.[1]

2 Senator Patterson gave notice of the motion on 16 April 1991.[2] She had foreshadowed it on several previous occasions when she spoke in the Senate on the Privacy Commissioner's 1989-90 annual report.[3]

Privacy Commissioner's 1989-90 annual report

3 In his annual report for 1989-90,[4] the Privacy Commissioner discussed the problem of corrupt disclosure of personal information by officers of

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1 *Journals of the Senate, No 83, 7 May 1991, pp 975-6.*

2 *Journals of the Senate, No 80, 16 April 1991, p 943.*

3 *See Senate, Hansard, 21 February 1991, p 1049; 7 March 1991, p 1474; and 11 April 1991, p 2369.*

4 *Second Annual Report on the Operation of the Privacy Act - For the Period 1 July 1989 to 30 June 1990; tabled in the Senate 13 February 1991; PP 21/1991.*

Commonwealth agencies. He highlighted recommendations he had made in his annual report for the preceding year, and action which had been taken by government.[5]

4 In his first annual report, the Privacy Commissioner recommended that, to tackle the problem of corruption in the form of unauthorised disclosure of personal information by (often junior) Commonwealth officers, the government consider amending:

> 1. If necessary, the criminal law, to enable those that are parties to these transactions to be prosecuted and possibly to place some direct liability on the principals.
>
> 2. The Privacy Act to allow the Privacy Commissioner to investigate the entire circumstances in which these events occur.
>
> 3. The Privacy Act so as to impose on those that procure the improper disclosure of personal information liability in damages.[6]

5 In his second annual report, the Privacy Commissioner referred to these recommendations, and wrote:

> No action has yet been taken on proposals 2 and 3. As to proposal 1, there has been a limited but important response.[7]

6 The Privacy Commissioner pointed out that

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5 *PP 21/1991, pp 14-16.*

6 *First Annual Report on the Operation of the Privacy Act - For the Period 1 January 1989 to 30 June 1989, PP 392/1989, p 28.*

7 *PP 21/1991, p 15.*

> [t]he Social Security Act has been amended to incorporate a new offence provision which makes it an offence for a person either directly or through an agent or employee, to solicit, receive, use or disclose information concerning a client without lawful excuse or authority. Offering to, or holding oneself out as being able to supply protected information is also an offence (see Social Security Act, s.19(6) to (17), inserted in 1989).[8]

7 The problem of corrupt disclosure had continued to arise, the Privacy Commissioner wrote. He expressed the view that

> once personal information obtains the protection of the Privacy Act by being given to or obtained by a Commonwealth agency, normally it should retain that protection wherever it goes after that. (This point is also relevant to lawful disclosure practices where information is given to a non-Commonwealth body and it is then misused.)[9]

8 The 'penalty hierarchy' in public service discipline matters was also noted by the Privacy Commissioner:

> Officers against whom a finding of misconduct is made may be fined up to $500, but then the next penalty is dismissal. Faced with this choice, perhaps not surprisingly, tribunals err on the side of a fine. A wider range of penalty options would assist in avoiding the impression that corrupt disclosure cases are not dealt with strongly by tribunals.[10]

9 On Wednesday 29 May, the Committee met with the Privacy Commissioner to discuss the matters he had raised in his annual reports and,

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8 *PP 21/1991, p 15.*

9 *PP 21/1991, p 16.*

10 *PP 21/1991, p 16.*

pursuant to its terms of reference, to consider whether there were effective legal and administrative deterrents to prevent the unauthorised procurement and disclosure of information. Three main topics were discussed: a perceived weakness in the range of disciplinary sanctions against public officials; the adequacy of the criminal law, especially in relation to the position of the procurer of the information; and the adequacy of the Privacy Commissioner's powers to deal with the problem under the Privacy Act 1988.

10 In his introductory comments to the Committee, the Privacy Commissioner described the genesis of the concerns that he had noted in his annual reports. He referred to discussions with the Department of Social Security in 1989 when it had been indicated to him that problems had been experienced in relation to employees 'giving out information for a price'. Departmental officials had also at that time expressed anxiety in relation to the department's 'ability to use disciplinary provisions effectively to deal with the employees'. In addition, the Privacy Commissioner himself had been concerned about the capacity, or lack thereof, of the Privacy Act to provide remedies 'against the relevant officer and against the person who may have procured the disclosure'.[11]

11 The Privacy Commissioner described three kinds of situations which had been identified in which information was 'leaked' by individuals:

- in exchange for money - that is, a bribe;
- the 'quid pro quo' situation - that is, in exchange for other information (often referred to as 'the club'); and
- because of ignorance of the law.[12]

11 *Evidence, pp 3-4.*

12 *Evidence, pp 19-20.*

12 The Privacy Commissioner said that, as far as he was aware, the problem had been restricted to one-off transactions where Commonwealth agencies had offices distributed across the country and many officers had access to the information stored by the agency. He had no knowledge of any disclosure of 'job lots' of information which could conceivably have a commercial value, for example, to insurance companies or those who had something to sell. He did not doubt that agencies were serious in seeking to prevent such activity and that they had a great ability to do so given the bulk of information that would be involved. He pointed out that most officers' access would be restricted to the information they needed for the particular transactions they conducted, and they would not have access to information otherwise. Nevertheless, the problems raised in relation to one-off transactions would also apply to bulk transactions, should they occur.[13]

13 The Privacy Commissioner also referred to both the advantages and disadvantages of computerised systems of data management. He pointed out that they gave rise to the possibility of many more users on a distributed network than would be possible with a manual system. At the same time, they provided the facility to audit or track transactions to an extent not possible with paper files, and this was helpful in detecting improper behaviour.[14]

14 The essence of the Privacy Commissioner's arguments was that, although deterrents existed, the existing law was not as tight as it could be in relation to unauthorised disclosure by individuals as distinct from agencies which followed particular practices in relation to the disclosure of information.[15] The possible solutions he presented were seen as parallel remedies which covered a range of different circumstances.[16]

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13 *Evidence, pp 25-7 (Senator Patterson, Mr O'Connor).*

14 *Evidence, p 13.*

15 *Evidence, pp 6-7.*

16 *Evidence, pp 8-9.*

Sanctions

15 The Privacy Commissioner was questioned in regard to the kinds of sanctions which could be imposed on a public servant found guilty of misconduct on account of unauthorised disclosure of information.[17] He said there were deterrents, especially for departmental officers who acted outside the scope of their duties, but there were weaknesses in the disciplinary measures available. It was put to him that, whereas a $500 fine might be appropriate for a lesser offence, given the trust placed in public servants by the public, their security of tenure, and the seriousness of any deliberate fraud on the taxpayer, a penalty of dismissal might be appropriate in other cases. The Privacy Commissioner acknowledged the argument but noted also the argument that tribunals might deal leniently (for example, a $500 fine) with some cases which deserved something more than that but less than dismissal, if there was no middle ground. A greater range of sanctions would allow the tribunal to take into account factors such as expressions of remorse in sentencing, and leave open the possibility of transfer to a position where the danger of such corruption was less likely to arise. He stressed that, in making these suggestions, he was attempting to balance the position of the individual who had transgressed against the need for the law to be seen to be upheld.[18]

16 Penalty provisions may also have deterrent value if their existence is publicised. The Privacy Commissioner referred to two agencies in particular that had put a great deal of effort into counselling staff and informing them of the serious consequences that could result from unauthorised disclosure. One was the Australian Taxation Office and the other the Department of Social Security, representing a total of more than 30 000 employees. Each of these agencies has set up a privacy branch within its administration. The Privacy Commissioner referred to the 'constant education

17 *Evidence, pp 3, 21-4.*

18 *Evidence, pp 23-4.*

campaign' that was conducted in relation to departmental officers.[19] He stressed, however, that his concern was more in relation to outsiders than departmental officers.[20]

Criminal law

17 The main concern in relation to the criminal law is that those who procure misconduct (ie the unauthorised disclosure of personal information) are not always 'easily able to be effectively prosecuted'.[21] Changes to the law to meet these concerns could either be in the form of general provisions applying to all Commonwealth agencies or 'case-by-case' provisions such as section 19 of the Social Security Act.

18 Section 19 of the Social Security Act provides for substantial penalties to apply not just to departmental officers but also to third parties 'who may seek to persuade or corrupt departmental officers in ways which would involve unlawful disclosure'.[22]

19 The Privacy Commissioner expressed a clear preference for a general provision 'that reflected the thinking that is in the social security amendment' (ie section 19).[23] He also mentioned provisions in the Crimes Act dealing with computer crime that may be relevant.[24]

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19 *Evidence, pp 20-1; see also Senate Estimates Committee C, Hansard, 16 April 1991, p C67 (Mr Volker, describing publicising the need to abide by section 19 (as to which see paras 6, 17 and 18) and staff training).*

20 *Evidence, p 21.*

21 *Evidence, p 5.*

22 *Senate Estimates Committee C, Hansard, 16 April 1991, pp C66 (Mr Volker).*

23 *Evidence, p 7.*

24 *Evidence, p 27.*

The Privacy Act

20 The limitations of the Privacy Act in protecting individuals from unauthorised disclosure of personal information were brought to the Committee's attention. Provided the agency from which the information is obtained has a proper system of procedures and disciplines in place, the Privacy Commissioner, pursuant to the Privacy Act, is unable to assist an individual who may have suffered harm as a consequence of the unauthorised release of that information.

21 The Privacy Commissioner's view is that the Privacy Act should enable remedies for unauthorised disclosure by individuals, that is when it results from 'a bad apple in the organisation' as opposed to a practice followed by the agency itself, a possibility against which no system can guard absolutely.[25] At the same time, he recognised an objection could be raised to his view concerning the extension of the Privacy Act into the domain of private individuals in receipt of confidential government information as the Act 'is basically administrative law legislation designed to discipline the conduct of official administration'.[26] Furthermore, there could be constitutional difficulties in seeking to alter the Act in the way suggested.[27] To the extent that criminal sanctions were effective, it would be likely that there would be a change in practice in the community.[28]

22 The Privacy Commissioner was questioned about the efficacy of civil law remedies under the Privacy Act for a person whose details had been disclosed. It was suggested that such remedies could be difficult to obtain because of the need to prove damage on the part of the complainant. The Privacy Commissioner pointed out that the actual embarrassment, hurt or distress would vary but could be serious. He

25 *Evidence, p 4.*

26 *Evidence, pp 5, 15.*

27 *Evidence, pp 5, 31.*

28 *Evidence, p 16.*

cited as an example of a serious case the estranged woman living alone and seeking to conceal her address for reasons of personal security.[29]

Conclusion

23 After discussing the particular issues noted above, Committee members asked the Privacy Commissioner to assess the extent of the problems he had described.[30] Although no statistics were available, the Privacy Commissioner pointed to concern expressed by senior levels of administration, to an investigation currently being conducted by the Independent Commission Against Corruption in New South Wales on the subject of unauthorised release of government information, and to an approaching prosecution in Victoria. His assessment was that few officers might be involved, 'but the scale of activity that a few officers can generate can be very high'.[31] The problem was not 'tremendous'[32] but it was there 'despite the best attempts of the administration to prevent it'. The Privacy Commissioner therefore sought

> to raise the question of whether there are further responses that can be made under Commonwealth law.[33]

24 The Committee accepts the Privacy Commissioner's evidence and shares his concern that there is a problem in relation to the unauthorised procurement and disclosure of personal information held by Commonwealth agencies. The problem may not be large at the moment, but it exists and has the potential to grow in the absence of effective legal and administrative deterrents.

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29 *Evidence, p 8.*

30 *Evidence, pp 30-1 (Chairman, Mr O'Connor).*

31 *Evidence, p 30 (Mr O'Connor).*

32 *Evidence, p 31 (Mr O'Connor).*

33 *Evidence, p 31 (Mr O'Connor).*

25 The Committee notes the Privacy Commissioner has raised these issues twice now in his annual reports to the Parliament, and it is not clear what action the government has taken to address his concerns, although the Committee understands that a review of secrecy provisions in Commonwealth legislation is currently underway.[34] The Committee has sought to amplify the concerns of the Privacy Commissioner. It notes the government's commitment to respond to committee reports within three months of them being tabled,[35] and now seeks a response from the government as to the action it has taken, is taking, or intends to take in relation to the matters raised by the Privacy Commissioner in both of his annual reports to date and before the Committee in person.

Recommendation

26 The Committee recommends that **the government provide as a matter of urgency its response as to action it has taken, is taking or intends to take in relation to the matters raised in this report, in particular:**

- **sanctions against public servants who disclose personal information held by a government agency without authorisation;**

- **the criminal law as it applies to those who procure the unauthorised disclosure of personal information held by a government agency; and**

- **the coverage of the Privacy Act in relation to the Privacy Commissioner's power**

  (a) to investigate the unauthorised procurement and disclosure of personal information held by a government agency; and

34 *See, for example, Attorney-General's Department Annual Report 1988-89, PP 273/1989, pp 27-8.*

35 *Senate, Hansard, 24 August 1983, p 141 (Senator Button).*

(b) to award damages to those who have been harmed by the unauthorised disclosure of personal information held by a government agency.

Barney Cooney
Chairman

The Senate
Canberra

June 1991