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Australia's Privacy Law Reform Process Has Been Revived, But Will The Debate Be Balanced?

By Malcolm Crompton, Managing Director of Information Integrity Solutions and former Privacy Commissioner of Australia.

The process of reviewing and reforming the main law protecting privacy in Australia, the Privacy Act 1988¹, had all but stalled by June 30 of this year.

Now the process has been revived by the Minister for Privacy, Brendan O'Connor. On July 21, 2011, he announced he would release² a discussion paper on whether to introduce a statutory cause of action for serious invasions of privacy. The debate rapidly expanded to other aspects of reform of the Act, starting with "Labor urged to comply with Privacy Act reform"³, which appeared almost immediately.

The reform process has been a long time coming.

In fact, it was initiated in 2000! The history since has been long.

That's right. In his Second Reading Speech⁴ when introducing the Privacy Amendment (Private Sector) Bill 2000⁵, the then Attorney-General accepted my previous recommendation to him by giving the following undertaking:

This bill establishes a new approach to the protection and handling of personal information in the private sector. Because our approach is unique, I believe it would be extremely useful to have a report on the operation of the legislation in due course to ensure that it is achieving all our goals. I will ask the Privacy Commissioner to conduct a formal review of the operation of the legislation, and of all the ex-

emptions, in consultation with key stakeholders after it has been in operation for two years.

The Attorney-General's successor fulfilled the undertaking in August 2004 when he announced the terms of reference⁶ for the review.

The Commissioner, my successor, Karen Curtis, in turn reported in March 2005 with her comprehensive report "Getting in on the Act"⁷.

The first and main recommendation of the review was that:

The Australian Government should consider undertaking a wider review of privacy laws in Australia to ensure that in the 21st century the legislation best serves the needs of Australia.

And in January 2006, the then Attorney-General announced the referral⁸ to the Australian Law Reform Commission (ALRC)⁹.

The resulting report by the ALRC, Report 108, "For Your Information: Australian Privacy Law and Practice"¹⁰, was released in August 2008 and was a monster.

In fact, its size has proved to be part of the problem — in all, 395 recommendations. The Special Minister of State of the day announced that the Government response would be issued in two stages¹¹.

On October 14, 2009, the then Cabinet Secretary, Senator the Hon. Joe Ludwig, publicly released the Australian Government's First Stage Response¹² to the ALRC report.

Unfortunately, some very important recommendations were left to the second stage, including the recommendations calling for:

- a statutory cause of action for serious invasions of privacy;
- reduction or elimination of various exemptions from the law, including for journalism and the media, political parties and the political process, small business and employee records; and
- data breach notification.

And from there, the process got slower. The First Stage response was further subdivided into four parts which were to be referred¹³ to the Senate Finance and Public Administration Committee¹⁴ for report by June 30, 2011. However, by that date, the Committee had received only two of the four and had reported on only one: Report Part 1 — Australian Privacy Principles¹⁵.

Need for Fact-Based and Balanced Debate

Now that the process has been revived, it will be essential that the discussion is fact-based and balanced. In particular, the media exemption, the political process exemption and the statutory cause of action all need to be considered objectively, but run the risk of not being accorded that objectivity.

Objectivity in these discussions is something I strived to achieve in my time as Privacy Commissioner between 1999 and 2004 and since, applying the same perspective equally to all political parties, the whole political process and the media.

I have not and do not single out any political party for particular attention on these matters. It is a totally apolitical perspective, taken in the best interests of Australians as private citizens and as voters in a true democracy.

I have been on the record since 2000 with the clear view that the exemptions to the Privacy Act need reconsideration. See, for example, my submission to the House of Representatives Standing Committee¹⁶ on Legal and Constitutional Affairs Inquiry into the Privacy Amendment (Private Sector) Bill 2000 in May 2000, and later my submission to the Senate Legal and Constitutional Legislation Committee¹⁷ Inquiry into the Provisions of the Privacy Amendment (Private Sector) Bill 2000 in September 2000.

I made these submissions as Privacy Commissioner when the Government of the day was the Liberal-National Party Coalition. I continue to urge the current Government of the day to reconsider the exemptions in similar terms.

The ALRC held a similar view in 2008 with Recommendation 41¹⁸ in “For Your Information”.

Part of the debate has got off to a good start, especially the opinion piece on July 23, 2011, by Peter van Onselen

in *The Australian*¹⁹, titled “Political parties violate our rights to privacy”²⁰.

It is a pity that some of the other reporting over the next few days was not as similarly objective.

Let’s ensure that the revival of the debate addresses all the issues and is balanced.

NOTES

¹ <http://www.comlaw.gov.au/Series/C2004A03712>

² http://www.ministerhomeaffairs.gov.au/www/ministers/oconnor.nsf/Page/MediaReleases_2011_ThirdQuarter_21July2011-ArighttoprivacyinAustralia

³ <http://www.theaustralian.com.au/business/media/labor-urged-to-comply-with-privacy-act-reform/story-e6frg996-1226099349750>

⁴ http://parlinfo.aph.gov.au/parlInfo/search/display/display.w3p;db=CHAMBER;id=chamber%2Fhansard%2F2000-04-12%2F0005;page=1;query=Title%3APrivacy%20Title%3A%20Title%3ABill%20Title%3A2000%20Database%3AChamber%20Title%3A%22second%20reading%22%3F%20%20Context_Phrase%3ABill%3F%20Speaker%3A%3F%20Date%3A11%2F01%2F2000%20%3E%3E%2007%2F12%2F2000;rec=11;resCount=Default

⁵ <http://parlinfo.aph.gov.au/parlInfo/search/display/display.w3p;query=Id%3A%22legislation%2Fbillhome%2FR1049%22;querytype=;rec=0>

⁶ http://pandora.nla.gov.au/pan/21248/20050722-0000/www.ag.gov.au/agd/www/ministerruddockHome.nsf/Page/MediaReleases_2004_Third_Quarter_13_August_2004_-_Review_to_ensure_Australians%26apos;_privacy_is_protected_-_1472004.html

⁷ <http://www.privacy.gov.au/materials/types/reports/view/6049>

⁸ http://pandora.nla.gov.au/pan/21248/20060722-0000/www.ag.gov.au/agd/WWW/MinisterRuddockHome.nsf/Page/MediaReleases_2006_First_Quarter_31_January_2006_-_Australian_Law_Reform_Commission_to_review_Privacy_Act_-_0062006.html

⁹ <http://www.alrc.gov.au>

¹⁰ <http://www.alrc.gov.au/publications/report-108>

¹¹ <http://www.dpmmc.gov.au/privacy/reforms.cfm>

¹² http://www.dpmmc.gov.au/privacy/alrc_docs/stage1_aus_govt_response.pdf

¹³ http://www.aph.gov.au/Senate/committee/fapa_ctte/priv_exp_drafts/tor.htm

¹⁴ http://www.aph.gov.au/Senate/committee/fapa_ctte/index.htm

¹⁵ http://www.aph.gov.au/Senate/committee/fapa_ctte/priv_exp_drafts/report_part1/index.htm

¹⁶ <http://www.privacy.gov.au/materials/types/download/8681/6521>

¹⁷ <http://www.privacy.gov.au/materials/types/download/8883/6666>

¹⁸ <http://www.alrc.gov.au/publications/List%20of%20Recommendations/part-e%E2%80%9494exemptions>

¹⁹ <http://www.theaustralian.com.au/>

²⁰ <http://www.theaustralian.com.au/national-affairs/commentary/political-parties-violate-our-rights-to-privacy/story-e6frgd0x-1226100051921>

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