Privacy and the private sector

The federal government's legislation extending privacy protection to the private sector has disappointed many privacy advocates

The issue of information privacy again flared into prominence late last year with the emergence of details of the proposed Axicom Australia joint venture between Publishing and Broadcasting Limited (PBL) and the US-based information provider Axicom. The idea of a national database containing information about the personal details and spending habits of millions of Australians, collated from sources including credit companies, retailers, electoral rolls and PBL companies, alarmed many.

The story also drew attention to the long wait for private sector privacy legislation, which will now come to an end if and when the Privacy Amendment (Private Sector) Bill 2000 passes through the federal Parliament. The Bill was introduced in April and has been referred to the House of Representatives Standing Committee on Legal and Constitutional Affairs, which is to report by June.

Despite the inevitable focus on the personalities involved, the proposed Axicom database provided a compelling example of why privacy legislation covering the private sector is needed. Until there is legislation that creates enforceable standards for the handling of personal information by the private sector and that enables individuals to seek redress when those standards have been breached, we have little control over the gathering and use of our personal information.

Soon after the Axicom/PBL story broke, details of the government's proposed privacy legislation materialised. The Government sought comments on draft 'key provisions' of the legislation late in 1999. The comments sought were of a very specific nature – not on matters of policy, but only on the scope and approach adopted in the draft provisions. The process was also hasty, with the 17 January 2000 deadline for comments taking in much of the Christmas/New Year holiday period.

Under the Bill, private sector provisions will be inserted into the existing *Privacy Act 1988* (Cth). The Privacy Commissioner's 'National Principles for the Fair Handling of Personal Information' are the relevant privacy principles. Alternatively, organisations can develop their own codes of practice with equivalent levels of protection, which must be approved by the Privacy Commissioner.

The response, at least from privacy advocates, has been critical, both in relation to the details of the proposed regime and issues of process and consultation.

Key issues raised in the Communications Law Centre's submission on the draft key provisions included the Privacy Commissioner's role in relation to complaints under codes of practice; adequate opportunity to comment on the development and revision of codes of practice; public registers; and the media exemption.

Codes of practice

A major weakness of the proposed regime is the absence of any role for the Privacy Commissioner in relation to complaints involving a privacy code with a complaints handling process.

If there is no recourse beyond the complaints handling process, then the scheme resembles too strongly pure self-regulation. Experience suggests that compliance and enforcement are the weakest elements of self-regulation. Appeal to an external regulator provides an antidote to these weaknesses.

The Privacy Commissioner should have a role in relation to unresolved complaints or where code administration is defective. Consumers have little say over which arrangement applies to the organisations they deal with. They simply care about protecting their personal information and should be able to complain to the Privacy Commissioner regardless of whether a code or the National Privacy Principles apply.

The legislation should also require that privacy codes describe what remedies and sanctions are available and that code bodies publicise the existence of their codes and complaints procedures.

The Privacy Commissioner should also have the power to require development of a code where it becomes apparent that there is a need for customised provisions dealing with a particular industry or activity.

Opportunity to comment

The provision of 'adequate opportunity to comment' is a criterion for registration of codes of practice.

Public involvement in the process of formulating codes is essential if codes are to be responsive to community concerns about privacy and to enjoy the confidence of the public. However, it is necessary to give meaning to the words 'adequate opportunity to comment'. The Privacy Commissioner should develop guidelines on public consultation on proposed privacy

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codes, which would set standards for the provision of meaningful opportunities for comment.

Public registers

Neither the issues paper of September 1999 nor the Bill deal with the issue of public registers.

Individuals are usually required by law to provide the information contained in public registers and do not necessarily do so of their own accord. Technology now provides the means for governments and third parties to reconfigure and process this information in ways that exceed the purpose for which it was collected. Privacy legislation must address this issue, both in relation to the role of public sector agencies and third party access to and use of public registers.

Media exemption

The proposed media exemption raises interesting issues about the appropriate scope of the exemption and the media's response to privacy protection.

The Australian Press Council (APC) has expressed concern about the potential impact of private sector privacy legislation as an impediment to journalism and to the free flow of information generally. It claims that privacy legislation in New Zealand, even though it exempts the news media, has resulted in a loss of access to certain types of information and has made it more difficult for the press to obtain information generally.

The APC rightly makes the point that special considerations arise in relation to the issue of privacy and the media. The right to privacy must be balanced against the public interest in freedom of speech and recognition of the media's role in facilitating the free flow of information and informing the public.

An exclusion of the media from general information privacy legislation is an appropriate balancing of the competing interests. But the important principles which support the claim for such an exemption – freedom of speech, the free flow of information, the public interest – do not justify an unlimited exemption for any activities of media organisations.

The draft media exemption covers acts done, or practices engaged in, by a media organisation in the course of journalism. The definition of journalism covers the practices of collecting, preparing for dissemination or disseminating certain material for the purpose of making it available to the public. The types of material in relation to which these acts are performed include news, current affairs and documentaries and 'material having the character of ... information' and 'material consisting of ... information'.

The breadth of this latter aspect of the relevant definitions ('media organisation' is defined in similar terms) means that the exemption could extend to activities that have no relevance to journalism or the justifications for exempting it from privacy legislation.

A less prescriptive way of defining journalism would better target the appropriate policy goals. See box "right" for the CLC's suggested wording. On the one hand, the exemption must be sufficiently broad that it recognises the multiplicity of voices that contribute to journalism and is not restricted to recognised mainstream media organisations. On the other hand, it should not cover the activities of a media organisation that are not related to journalism, or the activities of an organisation which is not a media organisation and which provides information which cannot be considered journalism, for example, commercial information.

Absent from the debate about the media exemption was any reference to existing ethical and professional obligations to respect privacy. Media self-regulatory standards developed by journalists and codes of practice developed by media organisations do require respect for individual privacy and the ability to provide a public interest justification for breaches. As the CLC has previously argued, the current operation of media self-regulation needs to improve if it is to serve as a guide to conduct and decision-making that will prevent privacy breaches occurring in the first place, and as an effective avenue of complaint for those whose privacy has been breached.

Jenny Mullaly

The CLC's submission on the journalism exemption

The CLC believes the concept of 'journalism' should be defined through its ordinary meaning, together with factors to be taken into account in determining whether an activity is covered by the exemption. These factors would include:

- whether the activity is undertaken for an organisation one of whose primary purposes is the production and dissemination of news, current affairs, observations on news and current affairs, documentaries or reporting on issues of public interest;
- whether the activity is covered by an industry or professional or ethical code which deals with issues of professional and ethical conduct including privacy; and
- whether the publication occurs in the course of disseminating material to the public that relates to an issue of public interest.

Listening Act goes looking

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ss. 23 and 24 of the Act. These give the police the right to use any person's property for surveillance. There is now a positive duty on citizens to assist in the collection of evidence against suspects, and they are subjected to a criminal sanction for contravening an assistance order or even telling a close friend about the situation. The Committee found this to be an intrusion into the rights characterised as a 'right to home privacy'. The Committee also noted that assisting police with criminal investigations could potentially expose the individual to reprisal. The legislation therefore represents a shift in the balance away from the rights of individuals and the presumption of innocence "as part of making the gathering of evidence easier".

Nigel Waters, former Head of the Privacy Branch of the Human Rights and Equal Opportunity Commission of Australia, has warned of a "function creep" in the use of surveillance technology.[1] As more police surveillance activity is contracted out to private companies, the potential for the abuse of information is increased. The control of gathered information in the hands of private companies may become increasingly difficult. Secondary uses of information could be for marketing and advertising strategies through the identification of behavioural trends, or even voyeurism or blackmail, he says.

It is a matter of concern that, in the name of crime prevention, police potentially have both the technology and power to target any kind of anti-social, or even abnormal behaviour. The legislation does require that courts must take into account a number of matters, including privacy, before granting a warrant for the use of a surveillance device, and there are reporting requirements. Certainly these requirements are a safeguard against abuse of police power, but the shift in emphasis from individuals' to police rights is undeniable. This is reminiscent of George Orwell's predictions of the police state in *1984*:

> "There was of course no way of knowing whether you were being watched at any given moment...It was even conceivable that they watched everybody all the time."

In its initial submission in response to the Surveillance Devices Bill in 1998, the Australian Press Council criticised many issues.[2] Some of the criticisms remain relevant to the enacted law.

The Press Council argued there is no public interest in the introduction of legislation which regulates the news gathering activities of the media and that freedom of the press is an essential feature of democracy. Its submission noted that invasions into privacy by the media are currently regulated by the Council, citing the case of *The Daily Telegraph* and Senator Woods. Further, because the right to freedom of speech is not explicit in Australian law, new legislation restricting free speech is not subjected to appropriate judicial scrutiny.

Drawing on the role of media as the fourth estate, the Press Council called for an overriding public interest test within the legislation so that costly legal battles were not necessary to determine whether a surveillance-derived news story was in the public interest. This has not been granted.

Another criticism of the legislation is that it does not specifically address the issue of workplace surveillance. Under the legislation, employers who wish to place (hitherto legal) covert optical surveillance in the workplace must prove in court that as an employer they are either a party to all activities in their workplace (by being intrinsic to 'employment'), or that the workplace is a public space (even though it may be indoors).

While the new law does not excessively hinder the activities of businesses and the media (beyond this new onus to justify in court their optical surveillance) it does increase the power of police over individual rights. The justification for the legislation, in terms of privacy protection, is undermined by the Act itself, which makes few improvements in privacy protection.

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Notes

1. Waters, Nigel (1996) 'Street surveillance and privacy' *Privacy Law & Policy Reporter* vol 3, no 3, June, pp 48–51.

2. Australian Press Council (1998) Submission from the Australian Press Council to the Department of Justice, Victoria on its Discussion Paper Surveillance Devices Bill, July 1998: http://www.presscouncil.org.au/pcsite/fop/surveill.html.