



**Australian
Privacy
Foundation**

post: GPO Box 1196
Sydney NSW 2001
email: mail@privacy.org.au
web: www.privacy.org.au

Review of Secrecy Laws ALRC Discussion Paper 74

<http://www.alrc.gov.au/>

Submission to the Australian Law Reform Commission

August 2009

The Australian Privacy Foundation

The Australian Privacy Foundation is the main non-governmental organisation dedicated to protecting the privacy rights of Australians. The Foundation aims to focus public attention on emerging issues which pose a threat to the freedom and privacy of Australians. Since 1987, the Foundation has led the defence of the right of individuals to control their personal information and to be free of excessive intrusions. The Foundation uses the Australian Privacy Charter as a benchmark against which laws, regulations and privacy invasive initiatives can be assessed. For further information about the Foundation and the Charter, see www.privacy.org.au

Input to the Review

We note that the Advisory Committee for this Inquiry has relatively limited privacy expertise – members Moira Paterson and Peter Timmins both have good knowledge of privacy but are primarily FOI experts, and there is, surprisingly, no representative of any of the Australian Privacy Commissioners offices. We acknowledge however that many of the ALRC staff engaged in this review have worked recently on the Commission's Privacy reference and will therefore be sensitive to privacy issues. We suggest however that it would be helpful even at this late stage of the review to seek more specific privacy expertise for the Advisory Committee.

We are aware that the Commission does not routinely publish submissions to its Issues and Discussion Papers. We nevertheless take this opportunity to again express our concern about this practice. It is now common and recommended practice for submissions to government inquiries to be published, subject to any well-grounded claims for confidentiality. Public availability of submissions assists public debate, and we do not think that the Commission should be the sole judge of which parts of submissions received to make public by citation in its reports. We call on the Commission to change its practice and to routinely publish submissions received, including for this review.

Objectives

We note that the Commission has identified at least 507 provisions in 175 laws including 358 distinct offences – with wildly inconsistent wording and penalties.

We are sympathetic to the overall aims of favouring access to government information; limiting secrecy provisions to where disclosure would result in harm to specific public interests (including personal privacy) (but only to the extent that justifies suppression of some or all of the information), and reducing complexity and inconsistency.

One possible downside of repealing secrecy provisions in individual laws and relying on a

single provision in the Criminal Code is that the secrecy 'mandate' is less visible/transparent to anyone reading a particular law. But on balance it should be possible to compensate for this with education, confidentiality agreements, contractual provisions etc. We submit that the Commission should recommend vigorous promotion of generic secrecy obligations to Commonwealth public servants by all relevant means.

Scope and Application

We support the definition of 'Commonwealth officer' to cover all employees, contractors, persons performing functions etc (Proposal 8-1), but seek confirmation in the Commission's recommendations that this would include Ministerial and MPs staff. There has been far too much evasion of 'normal' public service standards by largely unaccountable political staffers.

We note that the Commission accepts exclusions for judicial officers and MPs who are not Ministers (Proposal 8-2) – presumably for constitutional reasons? We submit however that these exclusions should be as limited as is absolutely necessary for those reasons – there may be circumstances, and 'capacities' in which both judges and MPs can and should be subject to secrecy provisions.

Sanctions

We note that the proposed new offences are limited to serious harms – in the case of personal privacy the public interest is specified as '*substantial adverse effect on privacy*' (Proposal 7-2). Penalties for disclosures that breach the privacy test would be either:

if caused or reasonably likely to have the '*substantial adverse effect on privacy*' (strict liability - intent irrelevant) – max 2 yrs imprisonment and/or 120 penalty units (Proposal 9-3(a)); or

if officer knows, or is reckless as to whether, or intends the disclosure to have the '*substantial adverse effect on privacy*' – in a second tier category where the penalties would be max 5 yrs imprisonment and/or 300 penalty units (Proposal 9-3(b))

We question whether 'substantial' is too high a threshold, and submit that 'material' or 'significant' may be a more appropriate 'qualifier'. It would be unfortunate if agencies and public servants were encouraged to think that breaches of privacy were only a matter of concerns if the adverse effect was 'substantial' (and they themselves were left to form a subjective judgement as to what constituted 'substantial').

We support the proposal for both a primary offence and a secondary offence of 'subsequent disclosure' of information known to have been initially disclosed in breach of the primary offence provision (Proposal 9-4 in respect of the privacy grounds).

The Commission proposes to leave 'lesser' transgressions to administrative obligations with the sanction of Public Service disciplinary action. Subject to our views about the threshold, this approach is reasonable in principle, provided disciplinary action is an option for all categories of individuals to whom the obligations applied, including Ministers, Ministerial and MPs staff, employees outside FMA, contractors, volunteers, (and MPs and judges to the extent that they can and should be covered – see above)

However, the recommended Public Service Regulation is only to sanction unauthorised disclosure of information: 'where the disclosure is reasonably likely to prejudice the effective working of government' (Reg 2.1(b) – Proposal 13-1)

This introduces a further very wide 'excuse' which would relieve individuals' actions of any consequences. It would appear that unauthorised disclosure which may breach personal privacy but falls short of the 'substantial adverse effect' test for criminality, and which is not considered to be prejudicial to workings of government, without any sanction against the officer concerned?

(although the agency may still be liable for breach of a privacy principle). If this remains the case it would be a major ‘gap’ which should be filled.

Injunctions

We support the proposed injunction power to restrain disclosure in contravention of the secrecy provision (Proposal 9-6), but seek confirmation that this would also apply to further disclosure of info already disclosed – compare this with the proposed defence if information is already in public domain but only if as a result of a ‘lawful’ disclosure (Proposal 9-1(c))) It is important that any injunction could apply not only to the person who committed the original breach, but also to all other relevant persons in any use or disclosure ‘chain’.

Exceptions

We also seek confirmation that the ‘already in public domain’ exception would apply to the same information in a different format? The exception should also be worded to include ‘other than as a result of the disclosure in question’, i.e. the information would have to already be, separately, in the public domain.

We submit that the proposed exception for disclosure ‘in the course of an officer’s functions or duties’ (Proposal 9-1(a)) is dangerously broad – who defines functions or duties? We submit that some qualification such as ‘duly authorised’ would be desirable.

We submit that the exception for disclosures ‘authorised’ and ‘certified as in the public interest’ by the relevant agency head or minister (Proposal 9-1(b)) is also dangerously broad. Firstly, it is not clear if this would be limited to where authorised in advance? (otherwise would allow retrospective immunity) and certified ‘in writing’? (otherwise no record/proof). Secondly, the principle of unlimited exception by ad hoc authorisation is itself obnoxious. A facility for exemption certificates is highly likely to be abused, particularly for political reasons (such as to avoid political embarrassment) and if required at all needs to be subject to objective public interest criteria, adequate controls, and reporting requirements. At the very least, Ministers and Agency heads should have an express obligation to report the details of all such authorisations and certifications to the Parliament, for public display, and be subject to express sanctions in the event that they fail to do so within a reasonable time.

Reviews

We support the Commission’s proposals for systematic review of all existing specific secrecy provisions to justify why they are necessary over and above the proposed new general provision (Proposals 12-3 & 12-4. However we would be very concerned if there were no timescales attached – leaving timing to agencies would invite lengthy delays.

Information Sharing

We support the Commission’s proposal for MoUs for information sharing (Proposal 15-3) but there is no mention of these MoUs being made public – we submit that they should be. We are also very disappointed that the opportunity has been missed to promote the use of Privacy Impact Assessments (PIAs) and compliance with Data-matching guidelines. We submit that the Commission should be consistent with the recommendations of its own recent privacy review (Report 108) by recommending the use of these additional techniques in the context of information sharing arrangements.

For further contact on this submission please contact Nigel Waters, Board Member E-mail: Board5@privacy.org.au

Please note that postal correspondence takes some time due to re-direction – our preferred mode of communication is by email, which should be answered without undue delay.