

A PRIVACY ACT FOR VICTORIA?

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Privacy has already been penetrated in more subtle, complex ways. This assault on privacy, invisible to most, takes place in the broad daylight of everyday life. The weapons are cash registers and credit cards. When Big Brother arrives, don't be surprised if he looks like a grocery clerk, because privacy has been turning into a commodity courtesy of better and better information networks, for years.¹

Introduction

Thank you for the opportunity to speak at the Australian Institute of Administrative Law on the issue of privacy law. We live in a world in which the advantages and pitfalls of the anticipated Information Age are constantly being debated and assessed. An exemplary comment concerning this state of affairs is found in the US Government's latest draft of *The Framework for Global Electronic Commerce*:

The Global Information Infrastructure (GII), now less than a decade old, is already transforming our world. Over the next decade, whole populations once separated by distance and time, will find almost every aspect of their daily lives - their education, health care, work, and leisure activities - affected by advances on the GI.²

The convergence of telecommunications, information and mass media industries is transforming our industrial economy into an information economy.³ This transformation will usher in a brave new world of technological opportunities and social change. We see it in factories with fitters and turners needing qualifications in computer programming. Unfortunately we also see it in redundancies, as middle managers lose their jobs to computer software taking over their analytical work.

The speed of this change is even more amazing when we consider that only a decade ago businesses with a fax number on their letterhead were thought to be technological wizards! While information is already regarded as the 'critical force' shaping the world's economic systems, it has been predicted that in the next century 'the speed with which information is created, its accessibility, and its myriad use will cause even more fundamental changes in each nation's economy'.⁴

In my own political life, the transformation in working styles as a result of the new technologies has been amazing. Collaboration on issues such as parliamentary protection of human rights and regulatory reform⁵ involves colleagues in Paris, Ottawa and Washington DC. While face-to-face contact remains crucial, finding the faces of people interested in specialist fields is no longer restricted to finding those who have published journal articles or hold a chair with an appropriate title.

Many people in the Australian community (and indeed, the international community) understand that much work needs to be undertaken so as to ensure a future which protects our humanity while harnessing the economic and social

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advantages to be gained from the Information Age. It is clear that the changes introduced by the Information Age will impact upon the home, business, transport, education, medicine, economics, media etc. But crucially, and perhaps of most immediate significance to both the individual and the corporation, is the way in which the issues of data protection and privacy are addressed.

It is clear that new technological developments contain the potential to impact profoundly upon the privacy of individuals. They may produce a society, which is more intrusive and surveillance-oriented. Alongside this concern is the importance of finding the right balance between privacy and the free flow of information so as to provide confidence in the use of new technologies to ensure their commercial success. Without the establishment of this trust and confidence in the use of electronic services their potential use will remain just that a *potential* use. A key objective in the development of an effective privacy regime must be to provide the bedrock upon which electronic commerce and other innovative information technology projects may be built.

'Victoria 21 - into the Information Age: the Connected Community'

The Victorian Government is committed to the Information Age. Victoria's Minister for Multimedia, Alan Stockdale, was the first such minister in the world. The policy statement entitled 'Victoria 21 - into the Information Age: the Connected Community', explicitly promotes innovative and practical approaches to the adoption of new technologies. In addition it takes a pro-active stance to encourage the further development of an information industry and multimedia base in Victoria. The Victoria 21 policy underpins the Government's current activities and provides the long term planning framework for information technology development into the 21st century.

A range of projects have been, and are being, developed from the Victoria 21 policy including the Electronic Service Delivery project which aims to provide a single integrated electronic face of government using multiple delivery channels; the Wide Area Network (WAN) which aims to create a state-wide computer services network that will provide services to government initially but once established will also be used to provide services to regional and rural businesses, councils and the like; and a 'telemedicine' project using multimedia which is administered by the Department of Human Services.

However, in developing this infrastructure the Victorian Government has recognised that new technology creates new situations which existing law cannot control. While it has been argued that at times law creates 'a roadblock to progress' by its inability to adapt to these new situations, it is nevertheless indisputable that the law has an important role to play.⁶ It will be the primary means by which the community can be reassured that its interests, for example in the area of privacy, are balanced against competing government or commercial interests. Privacy regimes must therefore form part of the infrastructure of our new information-based society.

Context

What I have to say today is informed and coloured by my experiences as a state parliamentarian with a commitment to protect human rights.⁷ I have chaired an investigation into the cutting edge of data protection and privacy, and I have been required to justify my views concerning the most appropriate regulatory regime for Victoria.

My invitation to speak on the topic of 'Privacy in a Federation' must be put in the context of the appointment of the Data Protection Advisory Council (DPAC). This Victorian Government initiative assembled a council of experts to

appraise issues relating to privacy and data protection with a view to providing a recommended regulatory regime for Victoria.

Our terms of reference required us to report on the:

most appropriate regulatory regime for Victoria governing collection, storage and transfer of information, particularly information held by public sector organisations and in so doing:

- 1 to have regard to the models, principles, and experience of data protection or privacy regulation schemes however called in other jurisdictions such as in other Australian States, in New Zealand and in the European Union; and
- 2 to consider the desirability of regulation covering the private sector, in light of the Commonwealth Government's activity in the area; and
- 3 make recommendations on the most appropriate regulatory regime for Data Protection and Privacy in Victoria.

The Council met from August to December 1996 and, as required, a report was presented to the Minister for Multimedia, on 20 December 1996. As Chairman of the DPAC I had a terrific opportunity to review and canvass local and international data protection and privacy issues. I had the opportunity to attend the Privacy and Data Protection Conference in Ottawa attended by almost all the privacy commissioners of the world. I talked through the issues with people as varied as the Cancer Council and the Victorian Police.

As it is a report to government, the Council's report will not be made public until Cabinet has approved an appropriate legislative response. However, it is no secret that we have made recommendations for a state based privacy statute to regulate the public sector. We have given advice that, as far as possible, the private sector regime should be achieved with maximum national uniformity.

Importantly for the purposes of this twilight seminar, we have recommended a redrafting of the privacy principles in plain English to take account of the developments of the decade since the Commonwealth Information Privacy Principles (IPPs) were drafted. I note that in her speech, Moira Patterson accepts the fact that the IPPs are outmoded but rejects redrafting as a lengthy process which will delay the implementation of a private sector law.⁸ I point out to you that the form of the Australian IPPs is so daunting that the preservation of them will make general understanding of the principles of the law impossible to achieve.

Privacy: A hot topic at the end of the 20th century

While privacy is certainly a hot topic for citizens and states in this late part of the 20th century, it has been noted that over 100 years ago, in 1890, two learned American jurists published a respected report on 'the Right of Privacy'.⁹ However, the issues of privacy and data protection have really become topical in the last couple of decades. A landmark was the issuing of the OECD Guidelines at the beginning of the 1980s, and in 1983, after an arduous inquiry, recommendations from the Australian Law Reform Commission formed the basis of the Commonwealth Privacy Act 1988.¹⁰

In May 1990, after another long inquiry, the Legal and Constitutional Committee of the Victorian Parliament tabled its report entitled 'A Report to Parliament Upon Privacy and Breach of Confidence'. The Report rejected the ALRC recommendations, and instead advocated the introduction of wide-ranging and comprehensive data protection legislation in Victoria.¹¹ In March 1992, the then Attorney-General, Jim Kennan, tabled a single page response to the Committee's recommendations in the Victorian Legislative Assembly and the Legislative Council.¹² Parliament was advised that the matters raised by the Legal and

Constitutional Committee were to be then referred to the Victorian Law Reform Commission ("the VLRC").¹³ The VLRC were directed to report on the 'introduction of comprehensive information privacy/data protection legislation for Victoria and to provide a draft Bill in plain English to implement recommendations made by the Commission'. The Attorney-General reported that the VLRC had advised that it would submit its report early in 1992, which would then be considered by the Government with a view to the introduction of legislation as soon as possible.¹⁴

However, in a much delayed discussion paper released in October 1992, the VLRC commented that the 'simplest and most cost effective method of protecting the privacy of government-held information in Victoria is to amend the *Freedom of Information Act (Vic) 1982*'.¹⁵

The VLRC was abolished and replaced by the Victorian Parliamentary Law Reform Committee, which I chair, and the Attorney-General's Law Reform Advisory Council, chaired by the Chief Justice.

In 1997, clearly there is a pressing need to determine appropriate state and federal government policy.

Pressure comes from three separate levels:

- 1 **International.** The European Union (EU) Directive on transborder data flows (95/46/EC of 24 October 1995) demonstrates the seriousness with which the European Union views data protection and privacy issues. As of October 1998 EU Members will be prohibited from trading or dealing in personal information with outside countries that do not have 'adequate' data protection regimes in place.
- 2 **National.** The Commonwealth *Privacy Act 1988*, currently applies to

the Commonwealth public sector (but also impacts upon the private sector through its credit reporting and tax file number provisions). An attempt will be made to extend it to the private sector. An announcement about such a proposed extension was made by the Commonwealth on 12 September 1996 in the discussion paper entitled 'Privacy Protection in the Private Sector'. Both publicly and privately, the Commonwealth Attorney-General, Daryl Williams, has demonstrated a desire to introduce new privacy legislation in 1997.

- 3 **State.** As stated earlier, the Victorian Government's Victoria 21 policy outlines a number of initiatives to support the development and use of new information technologies. 'Privacy' is integral to these developments. A privacy regime is seen to provide a bedrock for the development of electronic commerce, the Electronic Service Delivery project and other projects derived from the Victoria 21 policy.

State proposals

My impression is that the states and territories are at least as committed as the Commonwealth in their desire to introduce privacy legislation covering both the public and private sectors. The most recent announcement on this front was a late January 1997 commitment by the Queensland Government to introduce its own act this year which may cover the private sector and appears to have a regime which includes a privacy commissioner.¹⁶

In NSW, the Attorney-General's Department is preparing a Data Protection Bill, covering both the public and the private sectors, which may be introduced in the Autumn session commencing in March 1997.

In South Australia, the Commonwealth IPPs have been applied by administrative

instruction from cabinet applying from 1 July 1989.

In Tasmania, an October 1996 discussion paper, 'Information Privacy Principles', has been released for consultation.

In Western Australia, in the absence of privacy legislation, the Government's Information Policy Committee has convened a Working Party chaired by the Ministry of Justice to develop a best practice set of IPPs and Guidelines.

The private sector

As far as the submissions DPAC received from the private sector were concerned, data protection and privacy are key concerns and broad support was indicated for a uniform, national, comprehensive and penalty-based privacy regime (eg ICA, ABA, CRAA, ADMA). Much of the support for a privacy regime for the private sector was explicitly positioned within an international framework. Ansett Australia, for example, stated baldly that:

If Australia is to be regarded as a leading member of the global community it must comply with international standards and it must introduce privacy legislation that complements that of its trading partners.¹⁷

In Australia these developments progress within a federal framework. Countries like Canada and Germany operate state and federal privacy regimes with a high level of co-operation. At times both sides find their federal/state counterparts a frustration, but the system seems to work.

In Australia too, the federal division of rights and responsibilities generally proceeds in a straightforward and uncontroversial manner. However, there are a number of occasions when the determination of responsibility is blurred or controversial.

Whilst interstate competition may generate benefits for the community (especially in the area of major events

(joke)), it would be short-sighted for NSW or any other state to seek to use a state private sector privacy Act to claim some short-term competitive advantage. Even if the federal parliament delays federal legislation into 1998 or 1999, state governments are in a position to legislate swiftly. In that event, DPAC would advise the Victorian Government to legislate in time to ensure no adverse impact from the European Directive. On that point, however, while the European Directive is important, the United States shows no inclination to bow to the dictates of the EU and it is troublesome to attempt to predict the international enforcement of the directive.

On the topic of privacy, it is clear that constitutional issues arise within the context of Australia's federation. In its discussion paper, 'Privacy Protection in the Private Sector', the Commonwealth announced that it would rely upon a range of Commonwealth constitutional powers, to the extent of their power, in order to extend the *Privacy Act 1988* to the whole of the private sector.

The 'range of constitutional powers' will undoubtedly be examined in considerable detail before the new privacy regime is implemented. And, of course, it is clear that responsibility for the public sector within each state lies with the relevant state government. However, there is an important issue at stake here. Namely, the positive results to be obtained for all Australians by the Commonwealth and the states taking a co-operative approach to data protection and privacy.

The question to be addressed

The question to be addressed then is quite clear: What is the best way to develop a privacy regime for Australia? I want to argue strongly in favour of regulation concerning privacy - for it is where the discourses of human rights and economics impact upon each other to the advantage of both. It is clear that privacy is not just an optional extra with which to

decorate the information superhighway, but is an integral aspect of getting the Information Age to provide the sort of future we would want for our children.

While it may be easy to concentrate upon divisions and incompatibilities between the states and the Commonwealth, and between the states, surely the primary motivating force should be to foster privacy regimes throughout Australia which will provide secure, sophisticated and flexible privacy regimes with appropriate legislative backing. Victoria will certainly be proceeding with a privacy regime for the public sector which gives full support to the Government's Victoria 21 policy. The Victorian Government will also support the Commonwealth Government's intention to ensure that Australia is in a position to carve out a key position for itself in the global information technology market.

Conclusion: opportunities for the Information Age

The Information Age promises to change the world as we've experienced it so far, in what some academic commentators refer to as the post-modern condition.¹⁸

The Victorian Government strongly promotes a positive conception of the Information Age and its legal burdens. The most recent Annual Report of the Canadian Privacy Commissioner, Bruce Phillips, opens with a gloomy vision of the future being created through the indiscriminate implementation of new technologies. Mr Phillips speaks of the 'trail of data' citizens leave behind them, and describes 'modern urban life' as a place where 'there is nowhere to hide'.¹⁹ He asks: 'In our search for security and convenience, are we hitching ourselves to an electronic leash?'

In contrast, the Victorian Government is committed to the development of a diverse and flourishing information economy. The Victorian Government prefers to think in terms of the benefits

new technological applications may provide when pursued in tandem with a suitable legislative framework. Protection of privacy is one of the foundation stones of this economy.

Endnotes

- 1 Howard Rheingold, *The Virtual Community: Homesteading on the Electronic Frontier*, Reading, Mass., Addison Wesley, 1993.
- 2 The President's IITF, 'A Framework for Global Electronic Commerce', Dratt#9, December 11, 1996, at p 1. No single force is held to embody this trend more than the 'evolving medium known as the Internet'. http://www.iitf.nist.gov/eleccomm/glo_comm.htm
- 3 A recent *Australian Financial Review* article notes Mr Harris Miller, President of the Information Technology Association of America, as saying that '... the global village is on the verge of becoming the international metropolis' (*Australian Financial Review*, 17/2/97).
- 4 'The Global Information Infrastructure: Agenda for Co-operation', at p 3. <http://www.iitf.gov/documents/docs/gii/giiagend.html>
- 5 Law Reform homepage at <http://www.vicnet.net.au/~lawrefvc/>
- 6 Juliet M Oberding and Terje Norderhaug, 'A Separate Jurisdiction for Cyberspace?' *Journal of Computer-Mediated Communication* Special Issue 'Emerging Law on the Electronic Frontier' 2/1 (1996) at p 2. <http://jcmc.mscc.huji.ac.il/vol2/issue1/htm1#challenge>
- 7 Perton, Victor, 'Parliamentary Protection of Rights', Lecture in Constitutional Law at Melbourne University (May 1996) <http://www.vicnet.net.au/~victorph/rights1.htm>
- 8 Patterson, Moira, 'Privacy Protection in the Private Sector: The Federal Government's Discussion Paper', paper delivered at the Australian Institute of Administrative Law Twilight Seminar on Private Sector Privacy, 26 February 1997. See AIAL Forum No 12.
- 9 Legal and Constitutional Committee, Fortieth Report to the Parliament, *A Report to Parliament Upon Privacy and Breach of Confidence*, May 1990, p vii.
- 10 Legal and Constitutional Committee, May 1990, p xii.
- 11 Legal and Constitutional Committee, May 1990, p vii.
- 12 Hansard, 17 March 1992, personal communication with Peter Spratt, Senior Research Officer, Victorian Parliamentary Library, 25/2/97.
- 13 Hansard, 17 March 1992.
- 14 Hansard, 17 March 1992.

- 15 Office of the Public Advocate and the Privacy Commissioner (1993), section 4.1.
- 16 'State Bid to Toughen Privacy Legislation', *The Australian*, 20 January 1997.
- 17 Ansett Australia, Submission to the Victorian Data Protection Advisory Council, 1996.
- 18 See, for example, Jean Francis Lyotard, *The Postmodern Condition: A Report on Knowledge*. Trans. Geoff Bennington and Brian Massumi, Minneapolis: Minnesota University Press, 1984. Thomas Docherty, ed. *Postmodernism: A Reader*. New York: Harvester Wheatsheaf, 1993.
- 19 Annual Report of the Canadian Privacy Commissioner 1996.