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FINANCE AND PUBLIC ADMINISTRATION LEGISLATION
COMMITTEE

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SENATE FINANCE AND PUBLIC ADMINISTRATION

LEGISLATION COMMITTEE

Thursday, 25 November 2010

Members: Senator Polley (*Chair*), Senator Fifield (*Deputy Chair*) and Senators Faulkner, Kroger, Siewert and Stephens

Participating members: Senators Abetz, Adams, Back, Barnett, Bernardi, Bilyk, Birmingham, Bishop, Boswell, Boyce, Brandis, Bob Brown, Carol Brown, Bushby, Cameron, Cash, Colbeck, Coonan, Cormann, Crossin, Eggleston, Ferguson, Fierravanti-Wells, Fielding, Fifield, Fisher, Forshaw, Furner, Hanson-Young, Heffernan, Humphries, Hurley, Hutchins, Johnston, Joyce, Ludlam, Macdonald, McEwen, McGauran, Marshall, Mason, Milne, Minchin, Moore, Nash, O'Brien, Parry, Payne, Pratt, Ronaldson, Ryan, Scullion, Siewert, Sterle, Troeth, Trood, Williams, Wortley and Xenophon

Senators in attendance: Senators Fifield, Mason and Polley

Terms of reference for the inquiry:

To inquire into and report on: Australian privacy amendment legislation

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Committee met at 5.03 pm**ALSTON, Mr Bruce Lambert Sinclair, Senior Legal Officer, Australian Law Reform Commission****CROUCHER, Professor Rosalind Frances, President, Australian Law Reform Commission***Evidence was taken via teleconference—*

CHAIR (Senator Polley)—The Senate Finance and Public Administration Legislation Committee will now commence its hearing for the inquiry into the exposure drafts of the Australian privacy amendment legislation. I welcome witnesses from the Australian Law Reform Commission. Information on parliamentary privilege and the protection of witnesses and evidence has been provided to you. The committee has your submission. I invite you now to make a short opening statement. At the conclusion of your remarks, I will invite members of the committee to put questions to you.

Prof. Croucher—I am very grateful for this opportunity to speak with your committee. We have made a written submission, as you mentioned. Consistent with the practice of the ALRC with respect to making submissions to inquiries, we welcome the opportunity but we necessarily confine our remarks to matters upon which we have provided reports, presented reports to the Attorney and that have been tabled in parliament. In that light, I would like to commend the initiative of the Australian privacy principles. They certainly are consistent with and flow from the recommendations that the ALRC made in *For your information*, the mega-report, the three-volume report, on privacy that was produced in May 2008.

The remarks in the submission that we made are confined to areas where we consider particularly that there are divergences from the recommendations that we made and to commend to the committee the tenor of recommendations that the ALRC made that the committee might wish to consider afresh. The ones that I thought would be of particular interest to the committee were the ones in relation to the exemptions for small business, for political parties and for employee records.

But the gist of the privacy principles is a very good one. It places the idea of privacy principles as a unified presentation. We congratulate the initiative and encourage the implementation of those privacy principles as a national initiative as a priority.

In the opening of the remarks I made in the submission, I particularly commended the introduction, or the inclusion as a first principle, of the open and transparent management of personal information. It brings it up to the front as the first principle and provides, as I described it in the submission, a conceptual mirror to the idea of openness that is captured in the freedom of information legislation. That is a good initiative and we commend the introduction of the principles in that fashion. We also commend the language. Australian privacy principles, we thought, was a very elegant formulation for the ideas that were recommended in the ALRC's big privacy report.

Perhaps that is enough as an opening statement. I look forward to any questions or comments that the committee members would like us to make.

CHAIR—Thank you for those opening remarks. Senator Mason?

Senator MASON—Could I ask a couple of questions that relate to your submission and then perhaps more general questions relating to the privacy principles themselves. Is that all right?

Prof. Croucher—I am in your hands.

Senator MASON—That is what I like! Not all witnesses are so cooperative.

Prof. Croucher—I have senior legal officer Bruce Alston with me. We have certain technology issues, so it is a bit like passing the relay baton, but if I am unable to immediately reply then I will call on Bruce Alston's assistance. If neither of us feels immediately able to provide a fulsome response, we might take some answers on notice if that is all right with you.

Senator MASON—Sure. Could I just go to the exemptions in your submission. The first exemption you mention—and this is important because these are in a sense exempted from much of the operation of the legislation—is the small business exemption. When this legislation first came in, you say, in the third paragraph on the third page of your submission:

The exemption was explained, at that time, by the desire to achieve widespread acceptance for privacy regulation from the private sector, and a reluctance to impose additional compliance burdens on small businesses.

You go on to say that this is an exceptional exemption and that you could well contemplate that exemption going but that, if it does go, perhaps some assistance should be given to business in terms of compliance. That is right, isn't it?

Prof. Croucher—Broadly speaking, yes.

Senator MASON—At the top of page 4 of your submission, you mention some costs. In a sense they would be compliance costs with the legislation. That is right, isn't it?

Prof. Croucher—That information was drawn from an independent study that was commissioned at the time.

Senator MASON—How accurate is that? It does not seem like a lot of money to me. I just want to scope out the exemptions. We will deal with registered political parties in a minute and then employee records but, for the moment, just on small business exemption, in terms of compliance costs do you have any information other than what you are drawing on there on page 4 at the top?

Prof. Croucher—Perhaps I could refer you to the report itself, which provides the basis of the analysis of those amounts. As I recall—and it is a large report and I am doing this off the top of my head—the reason for some of the discrepancies between the study that the ALRC commissioned and the one that the Office of Small Business commissioned was that I think the OSB submission on costing factored in things that we considered at the time, through the independent study were unnecessarily factored in. So it might have been the purchase of certain equipment that might be considered office standard and not necessarily to be purchased for the purpose of compliance with this exemption, but there is quite a fulsome consideration of that, I believe, in the report itself and certainly there was the independent study to back it up. The gist of it is that the cost of compliance, while a real thing, was not perhaps as fearsome or as large as might have been initially thought.

Senator MASON—In your submission, you say that the European Union—

Prof. Croucher—Senator, I am sorry, I did not hear the first half of that comment.

Senator MASON—I have one of the loudest voices in the Senate—the chairman will agree with me on that I am sure—and, Professor, people can always hear me from all around the building—

Prof. Croucher—It is no comment on the quality of your voice, Senator; it is the quality of your recording equipment.

Senator MASON—Okay.

CHAIR—I will just take the opportunity that we do sometimes have difficulties with these microphones. Could you please speak into it, Senator Mason, to assist.

Senator MASON—Thanks, Chair. Can you hear me, Professor?

Prof. Croucher—Absolutely.

Senator MASON—You say why this is so important is because:

... the European Union specifically has cited this unusual exemption as a major obstacle to Australia being granted 'adequacy' status under the European Union Directive on the Protection of Individuals with Regard to the Processing of Personal Data and on the Free Movement of Such Data (the EUDirective).

So the argument really is that the costs ultimately to the economy and to business could well and truly offset the compliance costs for business. Is that your argument in a sentence?

Prof. Croucher—I was just seeking some assistance from my wingman here, and the view is that it is not about the compliance costs as such but the first principles of privacy protection. My colleague has got an excellent statement on this. I will just pass my microphone to him to give you that statement, and then he will give it back to me.

Mr Alston—I do not know about an excellent statement, but beginning from first principles there is no logical reason why somebody whose personal information is held by a small business should have less privacy protection than somebody who works for a larger enterprise. I would rather put the emphasis on privacy. As a right, obviously, all rights have to be balanced, including against economic and financial considerations, but that was always where our emphasis lies. We are not an economics body like the Productivity Commission, so we are not capable of doing detailed costings and, even so, you are balancing incommensurables if you are talking about rights.

Senator MASON—I accept that that is correct, but parliamentarians have to make those balances. We have to—

Prof. Croucher—I have just got the phone back, Senator. We absolutely appreciate that. Our task is to put that for you in the most reasoned way that we can on the basis of our extensive consultations and the deliberations with our stakeholders.

Senator MASON—Putting it bluntly: you think that the small business exemption should go—is that right?

Prof. Croucher—That was our recommendation, Senator.

Senator MASON—Right. The compliance costs may not be as significant as once thought and in any case the EU directive would indicate that the cost to business—I am trying to help you here, Professor—overall, if small business was not to comply, for example, with this in the short to medium term, could be greater because we could have difficulties with compliance with the EU. That is correct, isn't it?

Prof. Croucher—That is the context in which we placed that recommendation. The costs as presented to us at the time and as analysed by our own independent research study were not as great as were suggested, and the international context and the standing of our business community within the context of the European directive was such that retaining the exemption, we thought, was not justified.

Senator MASON—Right. You see, Professor, what I have to do and what parliamentarians have to do is try to explain to small business why they should not be exempted. One of the reasons would be that, in the medium term at least, it could cost you more business than you would lose otherwise, and you might cost your business in, for example, trade and other things with the European Union. Does that make sense?

Prof. Croucher—It sounds like a good argument, but it is not an argument that the ALRC would make in the context of considering law reform. That is a business argument.

Senator MASON—It is an argument that the politicians would be interested in, Professor, that is all.

Prof. Croucher—Well, I will leave it to you to make.

Senator MASON—Can we move on to registered political parties, which are also exempt. Is that all right?

Prof. Croucher—Yes. My colleague has suggested that he could add a piece of information, so I will give the phone to Mr Alston again.

Mr Alston—Regarding the EU, with the theoretical consequence of lack of equivalence with EU data protection standards, the main implication is for transborder data flows. That is not something that most small businesses would engage with, so they would not necessarily have a direct detriment. The Australian economy as a whole could, but I would think it would be more something that does not concern small business. But it is relevant that the EU criticised Australian law for having such an exemption.

Senator MASON—What about high tech—people involved in data communications and so forth? That could be small business, couldn't it?

Mr Alston—It is possible. I think the main consequences are for bulk customer data, so we are talking about big telecoms, big banks and the finance industry rather than small enterprises. I would need to look carefully at the definition of small business again. It is \$3 million turnover or something.

Senator MASON—Let us look at registered political parties. They are also exempt. I notice that, fortuitously, just this week, on 23 November, there was an article in the *Melbourne Age* on page 1 saying that secret files were kept on voters. Did you see that, Professor?

Prof. Croucher—No, I did not see that.

Senator MASON—You do not read the *Melbourne Age*? Senator Fifield does.

Senator FIFIELD—Not by choice; just because I have to.

Prof. Croucher—I am sure it is an excellent paper.

Senator MASON—Not for my sort of politics! In your argument you are very direct. You conclude by saying that the ALRC concludes that the exemption for registered political parties should be removed—

Prof. Croucher—Yes.

Senator MASON—although you do note that political parties are exempt in the United States and Canada. That is right, isn't it?

Prof. Croucher—Yes, but not exempt in the other places that we identified—the United Kingdom, New Zealand and Hong Kong.

Senator MASON—The *Age* article was on the front page, actually, on Tuesday of this week. Madam Chair, this is not a partisan point; it is about Labor Party files. We have a similar thing in the Liberal Party. Ours is called ‘feedback’ and the Labor Party’s is called something different. Basically, it tags voters with certain information. The article says:

The ALP has secretly recorded the personal details of tens of thousands of Victorians - including sensitive health and financial information - in a database being accessed by campaign workers ahead of this Saturday’s state election.

In a rare insight into personal profiling by the major parties, The *Age* has gained access to the database used by the ALP to tailor its telephoning and door-knocking of individual voters in key marginal electorates.

And then it says:

The Coalition has a database capable of similar profiling of voters ...

This is not a partisan point. Is that the sort of mischief that you seek to remove by removing the exemption for registered political parties? Is that the sort of issue you are trying to overcome?

Prof. Croucher—Yes. The fundamental principle is the importance of the protection of personal information. Consistent with the very first principle identified in the Australian Privacy Principles, the ‘open and transparent management of personal information’, there should not be an exemption of the kind that is contemplated by the political party exemption.

Senator MASON—What about the argument—I am just putting the argument; of course I cannot possibly take a side!—that these databases enhance the electoral and political process? What about that? These databases enhance the democratic system. What about that argument? This was put years ago, you see. Just a few years ago, this was the argument put by political parties.

Prof. Croucher—But how does that fit within that first principle about open and transparent management of personal information? It is the first principle in the Privacy Principles, but it is essentially the underlying premise of the entire privacy report.

Senator MASON—Sure. I am not even sure how you would correct the information—in other words, change the information—if the information were incorrect. I am not even sure how that can be done. Is there capacity for that?

Prof. Croucher—The idea is the responsible management of personal information. Viewed through that lens, one has to ask: why should a registered political party be exempt from that?

Senator MASON—Well, Professor, we are going to have to think about that.

Prof. Croucher—May I commend this to you: in chapter 41 of the report, there is a consideration of that exemption and why it should not be retained, looking at things like the implied freedom of political communication and a whole lot of other elements. It is a considerable chapter and very worthy reading.

Senator MASON—Yes, in this very delicate and short report of yours, Professor.

Prof. Croucher—It is delicate—

Senator MASON—If not short, certainly delicate.

Prof. Croucher—and given the significance of the issues—

Senator MASON—Elegant.

Prof. Croucher—I know it is in three volumes, but perhaps sometimes important and delicate issues require that extensive a consideration.

Senator MASON—Absolutely. Of course I agree. Okay, I understand that. Did any of my colleagues have questions, Chair, about the political party exemption? This is a big debate in public policy. Politicians like it but I am not sure the public does, Madam Chair.

CHAIR—No, I think you still have the call, Senator Mason. I do not see anyone else seeking the call.

Senator MASON—All right. Professor, can we move on then to the next exemption: employee records. Is that all right?

Prof. Croucher—Yes, certainly.

Senator MASON—Again, you think that the employee records exemption should be removed.

Prof. Croucher—Yes.

Senator MASON—Why is that?

Prof. Croucher—The same lens—the fundamental premise is the protection of personal information. If that is your overarching principle, and the Australian Privacy Principles suggest that it is, the responsible management of personal information should not have exemptions of this kind.

Senator MASON—There is already a difference between the treatment by public sector and private sector employees, isn't there, and you think that that, again, is an inconsistency that cannot be justified?

Prof. Croucher—Yes, in a word.

Senator MASON—All right. I have no more questions on those exemptions.

Prof. Croucher—Thank you for your questions, Senator.

Senator MASON—I think the ALRC has done very well to put the onus back on the parliament to justify why those exemptions should be there, Professor.

Prof. Croucher—Thank you. Then we have discharged our duty—

Senator MASON—Absolutely.

Prof. Croucher—and our charter under our own act.

Senator MASON—Is your funding being cut?

Prof. Croucher—I did not think that that was a matter for inquiry today, Senator.

Senator MASON—It is not, Professor, but I just thought I would be provocative. It is the last day of sittings; that is all.

Prof. Croucher—I understand that the Senate has initiated a review of such matters, and perhaps that will be the occasion to talk about such things.

Senator MASON—I am sure it will.

CHAIR—I will remind you, Senator Mason, of the terms of reference for the hearing today.

Senator MASON—It is the last day of sittings, Chair, and I am getting a bit frisky; that is the problem.

CHAIR—I think you have had enough entertainment for the day, if we could return to the terms of reference.

Senator MASON—All right. Can we move to the principles themselves—is that all right?

Prof. Croucher—Yes.

Senator MASON—We will just have a quick look at them. I have an overall question, if I might. Let me just quote from the *Companion Guide: Australian Privacy Principles*. It says:

The Australian Privacy Principles are not like other types of legislation. The Australian Privacy Principles are principles-based law. The best regulatory model for information privacy protection in Australia is this type of law.

By continuing to use high-level principles, the Privacy Act regulates agencies and organisations in a flexible way.

Do you think overall, Professor, that the new Privacy Principles have improved privacy protection in Australia? Have they enhanced it?

Prof. Croucher—That is a very big question, hence my hesitation.

Senator MASON—It is the question, isn't it—or it is one of the questions?

Prof. Croucher—Yes. Privacy is one of those very nebulous areas where it can be used as an excuse for access to information as well as facilitating the protection of information. I think what has been confusing in the landscape is the fact that there are two sets of principles. Where you have two sets of principles, there is an opportunity for confusion about what, for instance, government agencies and also those employers covered by the existing principles have to do, and where there is confusion there is the possibility of an imperfect protection and an imperfect respect for the fundamental protection of personal information. In that context, the development of a unified set of principles would only improve the ability for those governed by it to discharge the responsibility under them. Was your question about the existing principles or the proposed new ones?

Senator MASON—The proposed new ones—whether they offer a greater web of protection for privacy.

Prof. Croucher—I suppose my answer then is really an appropriate response to that—that there is the opportunity for a much better enforcement and understanding of principles where the areas of confusion by having two sets of principles are reduced.

Senator MASON—Are merged into one, yes—although that does not quite tell the committee, Professor, with the greatest respect, whether privacy protection is enhanced. That is a slightly different question. I accept that confusion may be diminished, Madam Chair, but it does not necessarily mean that protection has increased. They are slightly different issues. Is that right, Professor?

Prof. Croucher—Yes, that is a fair comment, but, if I may say so in response, at least when you are starting with the same clear set of rules there is more of an opportunity for the protection to be enhanced than there is when you have two sets of rules which have arguable differences in them which may lead to confusion.

Senator MASON—That is fair—

Prof. Croucher—At least you are playing by the same code.

Senator MASON—Okay. It is a very general question, but it is perhaps the ultimate question. It is a difficult one. Perhaps only—

Prof. Croucher—I am also reminded by my colleague that there is also a range of suggestions for improvement of the principles themselves, not just an amalgamation into one set but some incremental improvements, and many of those have been captured in the recommended new set of Australian Privacy Principles.

Senator MASON—Can we go to the principles themselves now. I just have a couple of general questions on a few of the principles—is that all right? I am not an expert in these new principles at all, but after just having had a quick flick through them in the last couple of days there are a couple of issues that have been sparked in my mind. I am sure that you will be able to explain to the committee how these principles would work. Can we just go to Australian Privacy Principle 1, ‘open and transparent management of personal information’. In subsection (2) there, it says:

An entity must take such steps as are reasonable in the circumstances to implement practices, procedures and systems relating to the entity’s functions and activities ...

Do you think that the language ‘steps as are reasonable in the circumstances’ is sufficiently prescriptive?

Prof. Croucher—I think it is necessary to distinguish between the function of this high-level statement of principle and how it becomes implemented at an operational level. I would see, for example, that the establishment of the Office of the Australian Information Commissioner, with the other offices sitting within that overall portfolio, provides the basis upon which some of the operational-level material can be developed and overseen at a very high level. So you have your high-level principles and then you are stepping down to how they get implemented in practice, and the establishment of the Information Commissioner’s office gives a vehicle through which compliance can be monitored and also best practice embedded at an operational level.

Senator MASON—Do you see the Information Commissioner as providing highly detailed and prescriptive rules—I do not know if that is the right word; it should be ‘procedures’, perhaps—for entities to observe?

Prof. Croucher—The role of the Information Commissioner is a separate matter, and the brief of the Information Commissioner is set out through his—I will say ‘his’, because it is a he: Professor McMillan—own establishing legislation. I would imagine that within the area of his role it would develop in the way that he sees fit. I would suggest that the guidance for how prescriptive that may be will lie within the development of that office and the constraints of the office’s own legislation.

Senator MASON—That is fair enough, but, given the generality and the principle-based—or nearly conceptual-based—arrangement of the APPs, what you are telling the committee is that it will be necessary for the Information Commissioner to produce some, in some cases, highly prescriptive rules or procedures for entities. That is right, isn’t it?

Prof. Croucher—I am not suggesting that—

Senator MASON—I am not saying you have to tell Professor McMillan how to do his job; that is not my point. It is just that we need something more than what we have here. That is my point.

Prof. Croucher—That is correct. The protection of personal information needs more than privacy principles, but the Privacy Principles are an excellent starting point at that high level of principle which is a

backbone—I am hesitating to use the word ‘principle’ again. I suppose the analogy that is sitting in my mind is the Ten Commandments, which are a backdrop of high-level principle upon which the operational level of detail then can hang.

Senator MASON—I quite like that analogy. Senator Fifield is somewhat of a biblical scholar.

Senator FIFIELD—It works for me.

Senator MASON—Yes. Okay, I understand that.

Prof. Croucher—If I may, I will just add that my colleague has directed me to the fact that in the report there is quite a lot of comment about things like industry codes. There is a great field of best practice out there which can be used as examples and which translates high-level principles down to the detail of operational practice.

Senator MASON—That is an analogy I can understand. Thank you for that. I will just go to principle 3, the collection of solicited personal information.

Prof. Croucher—Oh, I see. It is awkward, because section 4 is Australian Privacy Principle 3. It is Privacy Principle 3.

Senator MASON—Yes, the collection of solicited personal information. Do you think the protection in that principle is stronger than the National Privacy Principles of old?

Prof. Croucher—We would have to take that on notice. That requires some quite detailed comparison with the principle of old, and it will be considered in detail in the report, but, given the time of day in your calendar as well as ours, it may be one where, if you would like further information on it, we could have a look at that and give you a more considered response, which is really a ‘before and after’ check.

Senator MASON—Subsection 1 states:

- (1) An entity must not collect personal information ... unless the information is reasonably necessary for, or directly related to, one or more of the entity’s functions or activities.

Prof. Croucher—The idea behind that, I would say, is fairly clear. It is to stop the kind of umbrella collection of information that really is unnecessary. My colleague is suggesting it is probably the same as the NPP, but off the top of my head I would not like to give you a definitive answer because I would need to make the specific comparison.

Senator MASON—Let’s go to Australian privacy principle 5, the notification of collection of personal information, which is again an important issue. Regarding the definition of consent, there have been suggestions that that definition of consent should be expanded.

Prof. Croucher—What are you referring to?

Senator MASON—Maybe I have the wrong section. I would not want to do that.

Prof. Croucher—In the report, while you are having a look, there is a chapter on consent and a consideration of whether there should be a separate privacy principle dealing with consent. But I think on balance our conclusion was that there did not need to be a separate principle of that kind.

Senator MASON—How do you give consent?

Prof. Croucher—How do you give consent? I guess it depends on the kind of information that is being collected and the context. In the high-level principles it is left as a proposition or principle of consent, but the detail probably depends on the nature of the information that is being collected as well. If it is a finance company, there may be different considerations from if it is a telephone salesperson. There are different considerations for different things.

In our report we recommended that the Office of the Privacy Commissioner should develop and publish guidance about what is required of agencies and organisations to obtain an individual’s consent. This guidance should, for instance, address a number of the things that I am grabbing at—the factors to be taken into account by agencies and organisations in assessing whether it has been obtained, which is kind of what you are asking about in asking how. It should cover express and implied consent as it applies in various contexts and include advice on when it is and is not appropriate to use the mechanism of bundled consent—in other words, a consent to general use. So we do consider that in the report. I suppose the simple answer is that it depends on the context, but we have suggested that the Office of the Privacy Commissioner, which now sits under the Information Commissioner’s office, might be the appropriate agency through which such guidance could be developed.

Senator MASON—I will just give you an example. I know that often, particularly with government, you sign a waiver. I am not sure if that is the technical term. Maybe it is not a waiver, but you are told that this information may be used for other purposes. If I go to the video store and hire certain videos, do you foresee that in the future there will have to be some sort of privacy waiver in order to join a video club?

Prof. Croucher—There is some regulation—

Senator MASON—I hope I am not getting too abstract here, but you see my point. I am just thinking about the coverage of this sort of potentially personal information, or at least information that could be embarrassing. It might not technically be personal information within the act.

Prof. Croucher—Many such businesses are already covered. Just speaking in abstract terms—which I appreciate was what you were doing—the fundamental premise is that there should be a responsibility on every business that is collecting personal information to handle it appropriately. The gist of the principles and the level of protection that is required is to handle that information appropriately. What is appropriate may depend on the context, and that is where we suggest there is a place for officers like the Office of the Privacy Commissioner, through the industry codes, to assist businesses as to the level of protection and appropriate response that is consistent with the kind of business that they run but also respectful of that idea that it should not be an undue burden to expect that businesses or anybody receiving personal information has a responsibility to handle it in a particular way.

Senator MASON—You are quite right. I am just drawing on my own personal experience in recent weeks, when I joined this very trendy art house video club.

Prof. Croucher—Thank you for sharing that with me.

Senator MASON—I am sure that when I signed up there was no privacy waiver or any indication at all about how that information on the DVDs that hire might be used for other purposes. It is just an example; that is all. It is just a commonplace example.

Prof. Croucher—I do not think it is appropriate for me to comment on your video hiring practices, Senator. But if there were no comment in the forms you signed, perhaps that business at the moment is covered by the small business exemption, in any event. The fact that you are thinking about such questions suggests that you recognise that the privacy principles may have a role to play in business practice, even to the level of the kinds of video stores that you may join.

Senator MASON—That is my point: that the information potentially could be sensitive, could it not?

Prof. Croucher—That is for you to say, Senator.

Senator MASON—We will speak no further on the DVDs. I would like to have a look at some of these other principles. There is so much here. There is direct marketing as well. Direct marketing applies to organisations, does it, and not to entities?

Prof. Croucher—There is a distinction made between organisations and entities but I think the overall approach is that similar principles should apply. There is a distinction between public and private sector. It necessarily is that way, and that is partly because of the constitutional backdrop. The idea is that there should be similar obligations with respect to all.

Senator MASON—Would you criticise the principle for it not being more broadly cast to include, for example, all entities? That is a broader group, is it not?

Prof. Croucher—I do not feel in a position to be able to give an immediate answer to that. I would need to go back and have a look at the arguments that were made about that in the report. My colleague, Mr Alston, would like to comment.

Mr Alston—Senator, is your point that the direct marketing principle applies only to organisations in the private sector and contracted service providers and so on? So there is an extension to that. The coverage of that principle will be discussed in detail in the relevant chapter of the report.

Senator MASON—So it potentially might be expanded?

Mr Alston—When looking at whether it should include agencies—that is, Commonwealth government agencies—we obviously rejected that idea and instead went for organisations with an extension to contracted service providers, in the same way a lot of other Commonwealth laws reach out and cover people providing services to the Commonwealth as well as to agencies.

Senator MASON—Okay; that makes sense. My question goes to Privacy Principle 8—cross-border disclosure of personal information. This might, again, Professor, draw upon a similar approach to our discussion before. It says in subsection (1):

... the entity must take such steps as are reasonable in the circumstances to ensure that the overseas recipient does not breach the Australian Privacy Principles ... in relation to the information.

Again, what is reasonable? Would that be for Professor McMillan to decide?

Prof. Croucher—I would suggest it is not a matter necessarily for Professor McMillan to decide. However, an office such as his might assist in the process of determining what is reasonable, in conjunction with the kinds of other steps that we have suggested before. There are other sources of best practice. The advantage of an information commissioner's office is that it is a central repository and a high-level federal government agency that can assist in the process of making these high-level principles more operationally effective in the interests underpinned by the principles.

Senator MASON—Sure. This is not a criticism of Professor McMillan or his office, but what experience does the office have in doing that?

Prof. Croucher—I would suggest that that is a question you should put to the Office of the Privacy Commissioner.

Senator MASON—I only ask, Professor—and not in any sense to be rude—because so much hangs on the capacity of that office to generate sufficient guidelines that are workable, both for business and the public sector.

Prof. Croucher—The advantage of such offices is not that they necessarily have vast experience in doing that themselves but that those sorts of offices are set up in order to facilitate the development of principles at a more operational level or at the level of practice guides. They are not there necessarily to determine them but to assist in the formulation of those, in conjunction with the various industries—and there are best practice codes out there. It is really a coordinating function to assist in the development of things that would work operationally, consistent with the principles that underpin that exercise.

Senator MASON—I am not a very good lawyer. In fact, I am a very bad lawyer—unlike you, professors. But is it, in a sense, like regulations made pursuant to an act? Is that a fair analogy?

Prof. Croucher—The principles are the high-level thing, as I described them before—like the Ten Commandments: making them work in practice is then for the priests in the parishes, so to speak. I should not extend the analogy; because I was a teacher, I always sort of grab at analogies to try and illustrate my arguments. But you take it down to the level of detail in conjunction with the relevant people. So the privacy principles stand as the high-level aspirations and the embodiment of the things that are regarded as the necessary tools to provide or facilitate the protection of personal information at that operational level.

CHAIR—Senator Mason, I draw your attention to the time. Could you finalise your question. I am sure that we will be able to place questions on notice.

Senator MASON—Sure; thank you, Chair. Just to recapitulate: as to the Office of the Information Commissioner, the guidelines would not be set in stone; they would be, in effect, evolutionary, and would evolve according to common sense and practice.

Prof. Croucher—There are different kinds of codes for different industries; in some, they are mandatory.

Senator MASON—That is my point.

Prof. Croucher—But I would see—and really this is just an observation drawn from our experience in our work in this area in the privacy report and our work on freedom of information—that, as to the recommendation for the establishment of that office, the office provides a place through which the development of codes and practice guides at the operational level can be facilitated, and monitored.

Senator MASON—And monitored, yes.

Prof. Croucher—My colleague has directed me to chapter 48 in the report, which discusses the Privacy Commissioner's powers in relation to codes and so on. There is quite a lot of detail. There are some examples of prescribed industry codes under the Trade Practices Act, industry codes and standards in the Telecommunications Act and a range of other such matters.

Senator MASON—I assume though, Professor, that there would be more flexibility. Some of these industry codes cannot be amended with the alacrity required some times.

Prof. Croucher—They are very flexible. The whole point about the privacy principles is to state it at the highest level and to let the codes and the practice at the operational level have the flexibility that is required to manage those obligations in the day-to-day running of businesses and organisations.

CHAIR—Professor Croucher and Mr Alston, thank you both for giving evidence this afternoon and thank you for your submission. Questions on notice may be forwarded to you and we would appreciate your response.

Prof. Croucher—Thank you. Senators of the committee, thank you for your consideration of our submission. We look forward to any questions on notice that you may consider appropriate to give us.

[5.51 pm]

LYNCH, Ms Philippa, First Assistant Secretary, Government Division, Department of the Prime Minister and Cabinet

MINIHAN, Mr Colin, Senior Advisor, Privacy and FOI Policy Branch, Department of the Prime Minister and Cabinet

SHEEDY, Ms Joan, Assistant Secretary, Privacy and FOI Policy Branch, Department of the Prime Minister and Cabinet

WARD, MS Janine, Senior Advisor, Privacy and FOI Policy Branch, Department of the Prime Minister and Cabinet

CHAIR—Welcome. Information on parliamentary privilege and the protection witnesses and evidence has been provided to you. I remind witnesses that the Senate has resolved that an officer of the Commonwealth or of the state shall not be asked to give opinions on matters of policy and shall be given reasonable opportunity to refer questions asked to superior officers or to a minister. The resolution prohibits only questions asking for opinions on matters of policy and does not preclude questions asking for explanations of policies or factual questions about when and how policies were adopted. I invite you to make a short opening statement. At the conclusion of your remarks, I will invite members of the committee to put questions to you. I also remind senators that the committee has agreed that members may seek a written response to any matters not covered at today's hearings. If you have any questions on notice, please provide these to the secretariat by Thursday of next week. Would you like to make an opening statement?

Ms Lynch—We do not have an opening statement to make. We have provided the committee with the document dated 19 November, which contains some information requested at the briefing.

CHAIR—My apologies. We will have to suspend proceedings to attend a quorum in the Senate.

Proceedings suspended from 5.53 pm to 5.58 pm

CHAIR—Please accept my apologies for that. It is the second last day of sittings.

Ms Lynch—We did not have an opening statement, but we have provided some more information to the committee about the sequence of the government's proposals. We are happy to take any questions.

CHAIR—We need to have that document tabled.

Senator MASON—It is the document that outlines the process; is it?

CHAIR—Yes.

Ms Lynch—It was requested at the last hearing.

Senator MASON—Just in terms of the layout, as the professor said before, in the exposure draft Australian Privacy Principle 1 is in proposed section 2 and Australian Privacy Principle 2 is in proposed section 3. Could we align them for ease of use? What do you think?

Ms Sheedy—That is a drafting issue.

Senator MASON—Why do we do that?

Ms Sheedy—It is the way that it is drafted by the Office of the Parliamentary Counsel.

Senator MASON—We should tell OPC to do a better job, Ms Sheedy, shouldn't we? I just find the way it is drafted slightly confusing, that is all.

Ms Sheedy—Also, Senator, you have to realise that this is only the first part of a whole process. I think once the entire Privacy Act is rewritten it will flow and you will see the flow better in terms of the section numbering et cetera.

Senator MASON—Okay. Can I ask about the use of the words 'reasonably necessary'. I suspect you heard the discussion I had before with the Law Reform Commission. The secretariat very kindly passed to me the submission of the Office of the Privacy Commissioner in relation to the use of 'reasonably necessary'. The Privacy Commissioner recommends that 'reasonably necessary' be replaced with 'necessary' throughout the Privacy Principles and that, if required, it could be clarified in explanatory material or guidance that 'necessary' is intended to be an objective test. What do you think about that? There is concern with the term 'reasonably necessary'. What do you think, Ms Sheedy?

Ms Sheedy—We gave careful consideration to this when the issues were being looked at in terms of putting forward proposals and we are happy that it is an objective and practical test.

Senator MASON—You don't think that the word 'reasonably' qualifies 'necessary' inappropriately?

Ms Sheedy—Not inappropriately, no.

Senator MASON—Some of the submissions do say that, not just the Office of the Privacy Commissioner.

Ms Sheedy—Yes, we have noted that.

Senator MASON—You have had a look at all of that?

Ms Sheedy—We have noted that, yes.

Senator MASON—Do you think the use of the word 'reasonably' qualifies 'necessary' at all?

Ms Lynch—Yes, it does, but—

Senator MASON—It must, otherwise you would not have it there.

Ms Lynch—The elements of the test are cumulative. So, first, the proposed activity must, from the perspective of a reasonable person, be legitimate for the entity and the intent of purpose; and then, second, the action has to be genuinely necessary for the entity to pursue the intended function or activity. So you have to think of it in two stages. Perhaps I can repeat that.

Senator MASON—Yes, thanks. But let me just get this right: you are telling the committee this is how 'reasonably' qualifies 'necessary'?

Ms Lynch—Yes.

Senator MASON—Okay. So tell me how that works.

Ms Lynch—I apologise for reading from notes—

Senator MASON—No, that is all right; I want to get this right.

Ms Lynch—First, the proposed activity must, from the perspective of a reasonable person, be legitimate for the entity and the intended purpose.

Senator MASON—So an objective test.

Ms Lynch—And then, secondly, the action must be genuinely necessary for the entity to pursue the intended function or activity.

Senator MASON—I see.

Ms Lynch—We saw 'reasonably'—

Senator MASON—As reasonably necessary.

Ms Lynch—I am trying to avoid the weasel words—as enhancing the privacy aspects.

Ms Sheedy—Appropriately.

Senator MASON—Yes, enhancing, whereas I think the implications from—

Ms Lynch—Other people are reading it different ways.

Senator MASON—Yes. The implication from these submissions is that it would take away, that it would diminish the privacy protections. You are saying that is not the case.

Ms Lynch—Yes.

Senator MASON—You are much better lawyers than I am so I cannot argue with you about that.

Ms Sheedy—Certainly it was never the intention to reduce the protections.

Senator MASON—All right. What about the exemptions? You heard the discussion I had with the Law Reform Commission. Do you have any comment about them?

Ms Sheedy—The current exemptions in the Privacy Act will be looked at in stage 2. They are not part of this package at all. The document that we have provided to you sets out the way it is being looked at.

Senator MASON—Yes, it does. That is a good answer.

Ms Sheedy—It is being done in two stages and the exemptions are all in stage 2, so there are no government decisions that have been taken yet in relation to those exemptions.

Senator MASON—The exemptions are not under active consideration?

Ms Sheedy—They are there and they will be part of stage 2. There will be a government response to stage 2.

Senator MASON—Could you remind me as to when that is due?

Ms Sheedy—When stage 1 is progressed.

Senator MASON—Okay. To be candid, issues relating to small business, employee records and political parties all have a certain political flavour about them—

Ms Sheedy—As does the exemption for the media as well.

Senator MASON—Indeed. We all agree on that. It is just how it is handled. But it is under consideration, that is the point.

Ms Sheedy—Yes and it will form part of stage 2.

Senator MASON—I asked this of the Law Reform Commission and I thought the professor's answer was clever but not necessarily fulsome. Do you think that the exposure draft and any privacy principles enhance privacy protection?

Ms Sheedy—Certainly it is the intention that they do. I would agree with the professor that bringing the two separate sets of principles into one is an enhancement in itself because it makes it clearer and easier for people to understand what the protections are, but there are specific examples that I would point to. One in particular is the expansion to Commonwealth agencies of the cross-border. There are, at the moment, no protections in relation to personal information that might be sent offshore by agencies.

Senator MASON—All right.

Ms Sheedy—There are examples like that throughout, but I would point to that one in particular as an enhancement.

Senator MASON—Fair enough. But there is some academic commentary—let me put it that way—that says that this exposure draft diminishes privacy protection in Australia. You are right to point to some enhancements—I agree with you, for what it is worth—but there are concerns that it is being diminished. You are obviously on top of those criticisms and you have read them all. Your judgment as a senior government lawyer is that protections are being enhanced.

Ms Sheedy—We do believe so. I think that the comments in a lot of the submissions are really around alternative ways of how it might have been done. The government has made decisions as to how this will be done as in the principles before you now. I think a lot of the discussion can be assessed as, 'You could have done it this way, but you've done it that way.' It is not really about whether or not we have necessarily got it right. There are obviously other ways of approaching it, but the way that it has been approached here we believe is not leading to any diminution of protections for privacy in Australia.

Senator MASON—And you are confident that these principles will cater for any changes in technology? That has been one of the things about privacy since the original *Harvard Law Review* articles on it 110 years ago.

Ms Sheedy—Certainly the Law Reform Commission made particular recommendations around keeping the principles and the act as such technology neutral. The government accepted those recommendations and kept it technology neutral. The recommendation from the Law Reform Commission was in fact that the whole area around technology should be the subject of guidance from the then Office of the Privacy Commissioner now the Office of the Australian Information Commissioner. Certainly the government accepted that that was the way to go and not to try to legislate for technology developments because you really cannot. As soon as you do them, you are 10 years out of date immediately.

Senator MASON—In terms of the Office of the Information Commissioner and that office's capacity to construct guidelines for public and private sectors and so forth, clearly, that is a really important part of privacy protection. It is not legislated, per se; it is going to be rolled out over time. Are there international precedents that show that approach works?

Ms Sheedy—I think there is precedence here in Australia. The Office of the Privacy Commissioner now is using a whole range of guidelines, frequently asked questions and issues papers. It is all there. If you go to their website you will see it. They give extensive guidance to the private sector and extensive coverage and guidance to the public sector. I think they are well placed to do this work.

Senator MASON—Do you think the history since 1988 has been, generally, pretty positive?

Ms Sheedy—All parts of commissioner's offices around the world do the same type of work.

Senator MASON—Do they operate in similar ways in terms of issuing directives and guidelines?

Ms Sheedy—Yes. If you go, for example, to the website of the UK Information Commissioner you will see the same sorts of guidelines, help sheets and things that our Privacy Commissioner has on their website.

Senator MASON—Because legislation, whether it is conceptual or principle based, simply is not flexible—I accept that and there is no argument about that—but it is whether the capacity lies within the office; you are saying it does. This is not a criticism of anyone.

Ms Sheedy—We certainly believe it does.

Senator MASON—With the redrafting I suppose it is an issue government whether, in fact, there is enough staff and so forth, but I suppose that is a budgetary thing. In general that mode of protection of privacy—we have had legislation with guidelines issued by the Privacy Commission, the Information Commissioner—has been successful.

Ms Sheedy—It is well tested.

Senator MASON—Thank you, that is fine. I am happy, Chair, with that.

CHAIR—I remind committee members that any further questions on notice should be provided to the secretariat by Thursday of next week. I thank the department for appearing before us and note that there may well be questions on notice put to you.

Committee adjourned at 6.12 pm