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Privacy Amendment Bill 2003

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Privacy Amendment Bill 2003

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Privacy Amendment Bill 2003

Date Introduced: 3 December 2003

House: House of Representatives

Portfolio: Attorney-General

Commencement: On Royal Assent

Purpose

To amend the *Privacy Act 1988* ('the Privacy Act') to:

- extend elements of the Act to situations where non-Australians and those resident in Australia for a legally limited time have an interest, and
- enable private organisations to have a privacy code that covers more than the specified areas nominated for coverage by privacy codes, and also
- allow for the creation of regulations which cover Commonwealth superannuation schemes as a block, rather than requiring individual consultations regarding the regulations.

Background

There has been no significant media, or other, interest in this Bill, and the modifications that it makes are mostly minor or technical in nature.

The Privacy Act came up for review on 21 December 2003. According to media reports the Federal Attorney-General is still considering the review's terms of reference — planning to take them up with the incoming Privacy Commissioner after the incumbent, Malcolm Crompton, steps down in April 2004.[1] It is at this time that we may see some more radical developments, but for now the developments are modest.

It is notable that the Department of Immigration and Multicultural and Indigenous Affairs ('DIMIA') already treats most information regarding non-citizens as if it were covered by the Privacy Act.[2] The extension of elements of the Privacy Act to non-citizens and people who are in Australia for a 'legally limited' time is, consequently, not particularly dramatic,

however the use of privacy principles in the case of refugees and asylum seekers has been a double-edged sword. When few rights are available to a class of people and yet privacy rights are given to them it can have an anomalous effect (for instance it has resulted in difficulties of access for potential legal advisers, amongst other well-wishers).

Dr Mary Crock, the author of *Immigration and Refugee Law in Australia*[3], has commented that, while privacy laws have a genuine protective purpose, the dangers of an over-zealous application of privacy law in the immigration field can result in the dehumanisation of those involved, and has already led to a dramatic decrease in the information available from DIMIA.[4] Judicial responses to the requirement that certain visa applicants not be named have also indicated a concern with the potential for impersonality, summarised by the question posed by Justice Gummow who said with respect to the plaintiff 'Why has it a number, not a human identity?'[5] In spite of these more general concerns with the role of privacy in the case of non-citizens and people here for a legally limited time, the current amendments are quite limited in scope.

Main Provisions

There are four distinct amendments made by this Bill. The first is designed to extend the coverage of National Privacy Principle 9 (NPP 9) to non-Australians and to those in Australia for a limited time period. NPP 9 limits the transborder flow of information to circumstances in which the organisation offering the information can be satisfied of certain conditions, e.g. that the relevant person consents to the transfer of information, or that the organisation getting the information is subject to effectively the same regulatory scheme which will uphold principles for the fair handling of information.

Item 1 makes this change by amending section 5B of the Privacy Act. Section 5B limits the extra-territorial operation of the Privacy Act so that it only covers information regarding Australian citizens and residents. The amendment extends this coverage more broadly so that it covers non-citizens and people who may be here for a limited time. It makes this extension with regard to NPP 9.

Another extension to the Privacy Act's coverage is achieved by **item 4** which provides that the Privacy Commissioner may investigate complaints of breaches of the Act (in relation to the correction of personal information) by anyone in the world with an appropriate interest. The current subsection 41(4) specifically excludes non-citizens and those in Australia for a legally limited time from the Commissioner's purview, and by deleting the subsection, the coverage for monitoring compliance will be expanded.

Item 6 makes provisions for privacy codes to cover a broader range of issues than previously. A privacy code can be adopted by an organisation and if the code covers areas that are an 'exempt area or practice' the amendments would ensure that the Privacy Act

applies to the code, including an exempt act or practice – thus, for instance, the otherwise exempt act or practice could be the subject of a complaint.

Finally **Part 4** operates to ensure that superannuation services, which want to share identifiers for the purposes of providing superannuation services to Commonwealth employees, can have regulations made without the Minister having to be satisfied of the more onerous provisions of section 100 of the Privacy Act. The Minister must still consult the Privacy Commissioner about such proposed regulations, but is not required to satisfy the requirements of section 100, i.e. to:

- consult the individual agencies concerned,
- ensure that they have consulted with the Privacy Commissioner, and
- ensure that use of the identifier can only be for the benefit of the individual concerned.

Endnotes

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1 The *Australian Financial Review*, 5 January 2004, p. 40.

2 This is apparent from the letter sent to media outlets by Kym Charlton, then Acting Director, Public Affairs, DIMIA in July 2003, quoting the Privacy Act as a reason why they should not publish photos of recently arrived asylum seekers, and is affirmed by conversations with the then Acting Director of the Ombudsman, Privacy and Freedom of Information section. It is also apparent throughout DIMIA's web-site: <www.immi.gov.au>.

3 Leichhardt, NSW, Federation Press, 1998.

4 Private Communication, February 2004.

5 *Plaintiff S157 of 2002 v The Commonwealth of Australia S157/2002* (19 July 2002) the transcript for which can be viewed at: http://www.austlii.edu.au/au/other/hca/transcripts/2002/S157/1.html. See also, for instance, Justice Hayne's comments at the callover of 494 Immigration Matters, 7 February 2003 (http://www.austlii.edu.au/au/other/hca/transcripts/2003/M0/1.html), or in particular Justice Gaudron's in *Applicant S275-02 v MIMIA & Anor S200/2002* (23 September 2002) http://www.austlii.edu.au/au/other/hca/transcripts/2002/S200/1.html. In the recent case of *Singh v The Commonwealth No. S441 of 2003*, the High Court allowed the applicant's name to be used rather than her anonymising number. Justice Kirby pointed out there was some doubt as to whether section 91X applied in the case. Section 91X prohibits the Federal Courts from publishing the name of applicants for protection visas. The provision's constitutionality has been queried, and Justice Gaudron has argued that, given the provision is a blanket prohibition, it cannot be called a safeguard for the applicant. See for example *Applicant S275-02 v MIMIA & Anor S200/2002 (23 September 2002)* http://www.austlii.edu.au/au/other/hca/transcripts/2002/S200/1.html.