

SENATE STANDING COMMITTEE ON LEGAL AND CONSTITUTIONAL AFFAIRS
AUSTRALIAN LAW REFORM COMMISSION

Question No. 11

Senator Barnett asked the following question at the hearing on 19 October 2009:

In as much detail as possible, before the relevant Bill is introduced, can you provide better particulars as to the reasons and concerns the Commission may/may not have with respect to the Government's response to the recommendations arising from the Commission's Privacy Report?

The answer to the honourable senator's question is as follows:

The Australian Law Reform Commission (ALRC) has no direct role in implementing its recommendations, and there is no statutory requirement for the Australian Government to respond to ALRC reports. Implementation of ALRC recommendations is always a matter for the Australian Government. However, the ALRC has a strong record of having its advice taken up—over 85 percent of the ALRC's reports have been either substantially or partially implemented.

The ALRC welcomed the first stage of the Australian Government's formal response to *For Your Information: Australian Privacy Law and Practice* (ALRC 108). The response considered 197 of the 295 recommendations made by the ALRC, accepting approximately 90 percent of them. However, the Australian Government response proposes a slightly different approach to the ALRC's recommended regulatory model and does not accept the ALRC's recommendations relating to the privacy of deceased individuals. The ALRC understands that the remaining 98 recommendations will be considered in stage two of the Government's response in the coming year.

Regulatory framework

Central to the ALRC's recommendations, was the ALRC's 'principles-based' approach to the regulation of information privacy in Australia. In the ALRC's view, a 'principles-based' approach provides greater flexibility in comparison to rules, allows for a greater degree of 'future-proofing' and enables the regime to respond to new issues as they arise without having to create new rules. This approach was supported by a large number of stakeholders and is outlined in Chapters 4 and 5 of the Final Report (ALRC 108).

However, the ALRC did not recommend the adoption of a pure form of principles-based regulation. Public sector agencies and private sector organisations operating in industries where more prescriptive regulation is necessary—such as credit reporting and health—would be subject to the *Privacy Act 1988* (Cth), including the privacy principles (referred to in the Report as 'Unified Privacy Principles' (UPPs)), and to any further rules specified in regulations. The ALRC therefore recommended that the Governor-General should be able to make regulations that modify the operation of the UPPs to impose different or more specific requirements, including imposing more or less stringent requirements, on agencies and organisations than are provided for in the principles.

The first stage of the Australian Government's formal response to *For Your Information: Australian Privacy Law and Practice* (ALRC 108) accepted the principles-based approach outlined by the ALRC, and agreed that the UPPs would need to be modified in some circumstances. However, it did not accept the ALRC's recommendation that regulations should modify the operation of the UPPs. In the Australian Government's view, this modification should, wherever possible, be contained in the *Privacy Act* itself to ensure that Parliament has a more active role in determining

whether changes are made to fundamental privacy protections. Further, the Australian Government stated that this approach would reduce any complexity and confusion that could result from having multi-layered regulation of privacy as proposed by the ALRC.

In line with this response, the Australian Government stated that credit reporting information should continue to be regulated primarily under the *Privacy Act*, with provision for specific regulations to be made where necessary. The ALRC had recommended that the existing credit reporting provisions of the *Privacy Act* should be repealed and credit reporting regulated under the general provisions of the *Privacy Act*, the UPPs, and new *Privacy (Credit Reporting Information) Regulations*. The ALRC notes, that, while a number of stakeholders supported the ALRC's approach, other stakeholders (such as the Australian Retail Credit Association and the Australian Financial Conference) expressed a preference for implementing new credit reporting rules through a code, developed by industry and approved by the Office of the Privacy Commissioner. Other stakeholders, such as the Cyberspace Law and Policy Centre, were concerned that privacy protections should not be downgraded by regulations.

The Australian Government's response also states that the substantive rights and obligations in relation to the handling of health information, and other personal information, should be set out in primary legislation. The ALRC had recommended that health information should be regulated under the general provisions of the *Privacy Act*, the UPPs, and new *Privacy (Health Information) Regulations*. This approach was intended to ensure that the UPPs remained as brief, general and accessible as possible for those agencies and organisations that do not handle health information. The ALRC report acknowledged that this approach has advantages and disadvantages, and noted that it had received a mixed response in submissions from stakeholders. While a number of stakeholders supported the approach, others expressed the view that it had the potential to lead to confusion, as agencies and organisations handling health information would be required to consider both the privacy principles and regulations.

Deceased Individuals

Regarding deceased individuals: The *Privacy Act*, generally, does not provide protection for the personal information of deceased individuals. There are sound public policy reasons to provide protection for this kind of information and, in ALRC 108, the ALRC recommended that some of the UPPs should be extended to do this [see Recs 8-1, 8-2 and 8-3]. The protection provided by the *Privacy Act* is analogous to the protection provided by legal duties of confidentiality, that do survive the death of the individual. The recommendations were intended to ensure that living individuals are confident to provide personal information, including sensitive information, in the knowledge that the information will not be disclosed in inappropriate circumstances after they die. The provisions are also intended to protect living relatives and others from distress caused by the inappropriate handling of a deceased individual's personal information, and to provide a right of access to that information for family members and others where such access is reasonable.

The recommendations were limited to private sector organisations on the basis that, in the public sector, the *Freedom of Information Act 1982* (Cth) and the *Archives Act 1983* (Cth) provide some protection for the personal information of deceased individuals. Currently, personal information of deceased individuals held in the private sector may be subject to state or territory legislative requirements, legal duties of confidentiality or simply dealt with as a matter of organisational policy. The recommended amendments were intended to introduce a level of consistency in the way this information is handled across the private sector and to allow the Privacy Commissioner to become involved where there was a dispute about the handling of such information.

In its Final Report, the ALRC identified certain constitutional limitations that would impact on the ability of the Australian Government to make these changes and suggested that, in order to avoid uncertainty, it may be preferable to seek a referral of power from the states under s 51(xxxvii) of the *Australian Constitution*. In its response, the Australian Government indicated that, because of the constitutional constraints, it was not prepared to accept the ALRC's recommendations in relation to the personal information of deceased individuals. Although in the ALRC's view it would be possible to address these limitations, particularly in the context of working with the states and territories towards greater national consistency, this is a matter for the Australian Government.