Australian government proposes comprehensive national privacy laws

Australia's Federal Government proposes to extend the Privacy Act to the private sector, announced Daryl Williams, Commonwealth Attorney-General, at the launch of the discussion paper *Privacy Protection in the Private Sector* in September 1996. There follows an edited version of his statement based on a report in *Privacy Law & Policy Reporter*.

A survey conducted by Price Waterhouse of 120 large businesses showed that two-thirds of respondents favoured the introduction of comprehensive national privacy legislation. In response to their concerns, the Government now believes that a *unified and national approach is needed,* and has announced that, as a priority, it will work with industry and the States to provide a co-regulatory approach to privacy within the private sector in Australia, comparable with best international practice.

Privacy in other Pacific countries

A number of Australia's Pacific neighbours have recently introduced comprehensive privacy protection laws for personal information held within the public and private sectors.

In 1993, **New Zealand** enacted privacy legislation for the public and private sectors which establishes a broad set of Information Privacy Principles. The legislation also provides for codes of practice to be developed for specific industries, professions, organisations, activities or types of information (PL&B April '96 p. 18).

In Asia, **Hong Kong** introduced similar legislation in July 1995 (PL&B Dec '95 p.2). **Taiwan** also introduced privacy legislation in mid-1995 with information privacy principles for the public and private sectors.

Further, in October 1995, the **European Union** passed a Directive on data protection which has received considerable coverage in the Australian financial press. The terms of the Directive restrict transborder flows of personal data to non-European Community nations without an "adequate level" of data protection, with some exceptions (PL&B Apr '95 p.15).

Good privacy is good management

The challenge ahead is to develop a regime which is appropriate for Australian conditions while at the same time remaining comparable with the best international practice.

The broad approach suggested in the discussion paper involves the establishment of statutory Information Privacy Principles (see box p.4).

There is widespread international acceptance of standards based on the 1980 OECD Guidelines, and the recent EU Directive. The standards all reflect a general principle of openness about personal information practices. Apart from being good privacy principles, they would also appear to be good management principles.

Scope for Codes of Practice

While these principles underpin the basic standards of a privacy regime, there would be a possibility for codes of practice to be developed. These codes would be based on the principles and would apply instead of them. They could be developed for a particular industry sector, activity or type of information.

A code would be able to tailor the principles to the particular circumstances of the sector, which has the advantage of providing the level of flexibility required to apply to the private sector.

The Privacy Commissioner would issue codes of practice, which, although they could be developed on the Commissioner's own initiative, would usually be developed at the initiative of a particular part of the private sector. Irrespective of the impetus for the development of a code, the development process would include public consultation. Where a code was not issued the principles would apply.

Specific conditions for transferring data abroad

Concern has been raised about the global operations of multinational corporations and the ease with which personal information collected in Australia can be transferred overseas. In addition to being required to comply with the Information Privacy Principles, the transfer of personal information out of Australia to countries with inadequate levels of privacy protection would only be permitted where:

- the individual concerned had consented;

- the transfer was necessary for the performance of a contract between the individual and the record-keeper and/or necessary for the performance of a contract in the interests of the individual between the record-keeper and a third party;
- the record-keeper believed on reasonable grounds that the disclosure was necessary to prevent or lessen a serious and imminent threat to the life or health of the individual concerned or of another person;
- the disclosure was required or authorised by or under law;
- the disclosure was reasonably necessary for the enforcement of the criminal law or of a law imposing a pecuniary penalty, or for the protection of the public revenue; or
- the record-keeper had in place adequate contractual safeguards to protect the privacy of the information;
- where the information was transferred to another Australian resident, individual or organisation in a country with an inadequate level of privacy protection, for any purpose, that individual would be subject to the Information Privacy Principles in relation to storage and security, access and correction and use and disclosure of that information;
- where the information was transferred to a non-resident in a country with an inadequate level of privacy protection, the Australian individual or organisation that transferred the information would be liable for breach of the Information Privacy Principles in relation to storage and security and use and disclosure of the information by the non-resident;
- countries would be specified by regulation as having adequate levels of privacy protection where it was believed that there was in force in that country a law which was substantially similar to, or served the same purpose as, the Australian privacy regime and taking into account any reciprocal specification by the other country of Australian privacy laws.

The regime should include a mechanism to ensure that the protection it affords cannot easily be circumvented by transferring information out of Australia. This would mean that personal information held by the Commonwealth public sector and the private sector would be afforded similar privacy protection.

Likely exemptions

Clearly we will need to give careful consideration as to whether there should be any exemptions. It does not seem necessary for any regime to apply to information collected or held by individuals regarding their personal, family or household affairs.

The new law may also need to include transitional arrangements and possibly a delayed enforcement mechanism. This is so as to distinguish between information collected before and after the commencement of the regime, and then to allow time, where necessary, for codes of practice to be developed.

Role of the Privacy Commissioner to expand

The Commonwealth Privacy Commissioner, who holds an independent statutory office under the Privacy Act, has been very effective in relation to the Commonwealth public sector and the credit reporting industry.

The functions and powers of the office of Privacy Commissioner would be adapted to cover the regime for privacy protection in the private sector generally. As in the current regime, regarding the Commonwealth public sector and the credit reporting industry, the Commissioner would have an important function in promoting an understanding and acceptance of the objects of the privacy regime.

A broad educational function would be essential to the establishment of a privacy culture in the private sector and more particularly, the establishment of good systems and work practices.

Auditing

This process would be assisted by the Commissioner also having an audit function, so that, where necessary, he or she could ascertain compliance with the law. Auditing enables such assistance to be provided before problems arise. Part of the reason for the success of the Privacy Commissioner's role in the public sector and the credit reporting industry has been the pragmatic approach adopted in assisting agencies to comply with their obligations under the regime.

I believe that a similar approach would be an important part of the development of a privacy culture in the private sector.

Flexible complaints procedures

Complaints procedures would need to be flexible and informal. An individual could make a complaint to the Privacy Commissioner about an act or practice that might be a breach of the principles or a code of practice.

The individual or organisation complained about would be informed by the Privacy Commissioner of any investigation and would be able to put its case to the Privacy Commissioner. If a complaint had substance, the Privacy Commissioner would endeavour to secure a settlement between the parties concerned.

As part of this process, the Commissioner would make constructive suggestions with a view to resolving complaints. In some cases, it may be possible to resolve the matter by recommending systemic improvements to an organisation's information practices.

It might be appropriate to seek an assurance against repetition of any act or practice that was the subject matter of the complaint or the doing of further acts or practices of a similar kind by the individual or organisation concerned.

Settlements might include an agreement to pay compensation. Where the Commissioner had been unable to secure a settlement, or he or she considered that the matter raised public interest concerns or was not suitable for settlement, the

Australian Information Privacy Principles

1. Manner and purpose of collection of personal information. It must be
   - obtained for a lawful purpose
   - directly relevant
   - fairly and legally obtained.
2. Obtaining personal information from individuals. The individual must be aware of the purpose for which the information is obtained, and to whom it will be disclosed.
3. Obtaining personal information generally. The collector must ensure information is
   - relevant
   - non-intrusive
4. Storage and security of personal information. The keeper shall ensure
   - the record is protected against misuse
   - it is not disclosed without authorisation.
5. Information relating to records kept by record-keeper. The record keeper must
   - ascertain the existence and nature of the records entrusted to him
   - refuse access where authorised to do so
   - maintain the record
   - allow access to the public when requested, and prepare annual reports for the Commissioner.
6. The individual concerned is entitled to access to records containing personal information.
7. Alteration of records containing personal information. The record-keeper must ensure
   - accuracy and relevance
   - that corrections may be made and noted by the individual.
8. Record-keeper to check accuracy of personal information before use.
9. Personal information to be used only for relevant purposes.
10. Limits on use of personal information for other purposes, with exceptions e.g. where consent has been obtained, law enforcement, or where there is direct relevance to its original purpose.
11. Limits on disclosure of personal information, unless consent has been obtained, the disclosure is necessary for life or health, or authorised by law.
12. Limits on time for which personal information may be stored.

complainant would be able to commence proceedings in the Federal Court.

Federal Court to impose penalties

Any Federal Court action would not involve a review of the Commissioner's assessment or enforce any settlement agreed to, but would consider the matter afresh. The Federal Court would be able to order individuals and organisations to pay compensation or to refrain from acts which would constitute a breach of the information privacy principles or a code of practice. There would also be provision for significant civil penalties where there had been unauthorised disclosure of personal information for profit or where personal information had been obtained by false pretences.

Commissioner's guidelines on telemarketing and optical surveillance

While personal information is usually at the core of privacy concerns, community concerns about privacy are not limited to personal information. Physical intrusion and optical surveillance for example, has attracted considerable attention, and also the intrusiveness of some telemarketing practices.

To address these concerns, in addition to the protections afforded to personal information under this regime, the Privacy Commissioner would have the power to prepare and publish guidelines for the avoidance of acts and practices that might have other adverse effects on the privacy of individuals. This would mean that the Privacy Commissioner would be able to issue guidelines regarding matters such as telemarketing and optical surveillance, even where no record of personal information was involved.

The Commissioner would be able to receive complaints about breaches of these guidelines, investigate them and, where appropriate, make recommendations to resolve the complaints. A complainant would not, however, be able to bring proceedings in the Federal Court regarding these matters.

The non-binding nature of the guidelines would reflect their potential scope as going beyond the basic information privacy principles.

Conclusion - towards legislation in 1997

The discussion paper is a starting point from which the Government, the business sector and the community can consider the type of privacy regime that would be most effective for use in the private sector. Although the discussion paper is a detailed document, which sets out as far as possible all the elements of a private sector privacy regime, it should not be taken as an indication that the Government has taken a firm view on how these matters should be dealt with.

Through this consultative process, the Government will be better placed to understand the wide range of community issues that need to be resolved, so that a workable and effective privacy regime can be established.

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The discussion paper is available from Kathy Leigh, Senior Government Counsel, International Civil and Privacy Branch, Attorney-General's Department, National Circuit, BARTON ACT 2600, Australia
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The paper is also on the Internet at: http://www.agps.gov.au/customer/agd/clrc/privacy.htm

Australia's New Privacy Commissioner Appointed

On December 23rd, Attorney-General Daryl Williams, appointed Moira Scollay as Australia's new Federal Privacy Commissioner for a term of 5 years. Ms Scollay has held a number of positions in academia and federal departments covering industrial relations, taxation, and child support. As Kevin O'Connor came to the end of his term which began when the office was inaugurated in 1989, Williams praised his skill in working to "solve the systemic problems beyond these [1,000+] privacy complaints" in this period..."He successfully articulated privacy concerns within Government and suggested workable solutions to them."