

1986

THE PARLIAMENT OF THE COMMONWEALTH OF AUSTRALIA

HOUSE OF REPRESENTATIVES

PRIVACY BILL 1986

PRIVACY (CONSEQUENTIAL AMENDMENTS) BILL 1986

EXPLANATORY MEMORANDUM

(Circulated by the authority of the Honourable Lionel Bowen, M.P.,
Deputy Prime Minister and Attorney-General)

GENERAL OUTLINE

Privacy Bill 1986

The Privacy Bill 1986 will establish rules of conduct, called Information Privacy Principles (IPPs), for the collection and retention of, access to and correction, use and disclosure of personal information about individuals. The IPPs will apply to Commonwealth departments and agencies.

The IPPs are based on a recommendation of the Law Reform Commission in its Report No. 22 entitled "Privacy" (ALRC 22) and presented in December 1983. They elaborate the obligations accepted by Australia under Article 17 of the International Covenant on Civil and Political Rights. Enactment of the IPPs will also implement the Recommendation of 23 September 1980 of the Organisation for Economic Co-operation and Development, which Australia has adopted, that member countries take into account in their domestic legislation the principles concerning the protection of privacy and individual liberties set forth in the Guidelines (OECD Guidelines) annexed to the Recommendation.

A breach of the IPPs is deemed to be an interference with privacy. Commonwealth agencies are required to avoid doing things that amount to an interference with privacy, although

interferences with privacy do not give rise to any civil liability in damages or criminal penalty.

An individual alleging an interference with privacy will be able to complain to the Data Protection Agency (DPA) to be established by the Australia Card Bill 1986 which is already before the Parliament.

The DPA will be authorised to investigate complaints by agencies and will be required to report to the Minister where it concludes that there has been an interference with privacy. The DPA will have power to advise and issue guidelines to agencies on compliance with the IPPs. On application by an agency it will have the power to determine that an act or practice that is inconsistent with the IPPs is substantially more in the public interest than compliance with them. In that event the act or practice will not be regarded as an interference with privacy.

The Bill also provides for certain limited extensions of the law of confidentiality.

Privacy (Consequential Amendments) Bill

The Privacy (Consequential Amendments) Bill 1986 will make amendments to the Freedom of Information Act 1982 to require that, where reasonably practicable, a person whose personal affairs are dealt with in a document to which another person

has sought access is to be consulted before access is granted. That firstmentioned person will be able to object to provision of access (i.e. the amendments will confer "reverse FOI" rights on that person).

The Bill will prevent Departments claiming exemption under the Act from disclosure of a document to a person, insofar as it deals with that person's personal affairs, merely on the ground that document is covered by a general secrecy provision in legislation.

The Bill will make amendments to the Ombudsman Act 1976, Merit Protection (Australian Government Employees) Act 1984 and the Human Rights and Equal Opportunity Commission Bill 1986 to require the Ombudsman, HREOC and the Merit Protection and Review Agency to refer complaints made to them to the DPA where they conclude that the complaints are in effect complaints of interference with privacy and the DPA could better deal with them. Under the Australia Card Bill 1986 and the Privacy Bill, the DPA will also be empowered to transfer complaints to the above three bodies where it considers it appropriate.

STATEMENT OF FINANCIAL IMPACT

The legislation is expected to come into operation in the current financial year. Under staggered commencement

provisions, complaints would not be able to be made to the DPA until early in the 1987-88 financial year.

The proposals contained in the Privacy Bill and the Privacy (Consequential Amendments) Bill are expected to have a direct cost to the Government of \$800,000 in a full-year operation.

There may be some additional costs to Departments and authorities in responding to inquiries by the DPA under the Bills and in undertaking a review of information collecting and handling procedures. These costs are not expected to be great, having regard to the fact that Departments already have appropriate administrative procedures, under the FOI Act and Public Service Board directions, for providing access to and handling personal records.

NOTES ON CLAUSES

PRIVACY BILL

Preamble

The preamble formally links the Bill to the obligations taken on by Australia in adhering to the International Covenant on Civil and Political Rights, Article 17 of which provides -

"1. No-one shall be subjected to arbitrary or unlawful interference with his privacy, family, home or correspondence, nor to unlawful attacks on his honour and reputation.

2. Everyone has the right to the protection of the law against such interference or attacks."

2. The preamble also links the Bill to the Recommendation adopted by the OECD, to which Australia has subscribed, that member countries take into account in their domestic legislation the Guidelines (OECD Guidelines) annexed to the Recommendation.

PART I - PRELIMINARY

Clause 1: Short title

3. This clause sets out the short title to the Bill.

Clause 2: Commencement

4. The Bill will come in to operation on a day to be fixed by Proclamation. To enable agencies to consult the DPA on the conformity of their acts and practices with the IPPs, the DPA will not be able to investigate complaints of acts or practices done or engaged in earlier than 6 months following the commencement of the Bill.

Clause 3: Saving of certain State and Territory laws

5. This clause affirms the intention of the Bill to preserve any State or Territory law that makes provision with respect to interferences with privacy and which is capable of operating concurrently with the legislation.

Clause 4: Act to bind Commonwealth

6. This Bill binds the Crown in right of the Commonwealth.
Cl.16 imposes a mandatory obligation on Commonwealth agencies to comply with the IPPs.

Clause 5: Interpretation of Information Privacy Principles

7. Cl.5 requires the IPPs to be interpreted in the same way as any other provisions in the Bill.

PART II - INTERPRETATION

Clause 6: Interpretation

8. Cl.6(1) provides for the interpretation of a number of expressions used generally throughout the Bill. The more substantial ones are explained below.

9. "agency" defines the range of Commonwealth bodies and persons to whose "acts" and "practices" the Bill applies in varying degrees (as to which, see paras 24-28 below). Cl.16 forbids "agencies" to do acts or engage in practices that are an interference with privacy.

10. The definition includes Ministers, Departments, bodies and tribunals established under Commonwealth Acts, bodies established administratively by the Commonwealth Government, Commonwealth statutory office-holders, Commonwealth administrative appointees, Federal and ACT Courts, the Defence Force and the Australian Federal Police (AFP). Incorporated companies, societies and associations, trade unions and the ACT Law Society are specifically excluded.

11. A person is not to be regarded as an "agency" under the Bill where he or she collects personal information in his or her capacity as a judge or magistrate or member of a tribunal prescribed under the Bill or as the holder or occupier of an office prescribed under the Bill or s.4(3)(b)(i) of the FOI Act or an office established under a Commonwealth enactment for the purposes of an agency (cl.6(4)).

12. "Commonwealth officer" includes persons permanently or temporarily employed by an "agency" (paras 9-11 above) and members of the Defence Force and the AFP. It specifically excludes NT and Norfolk Island Public Service employees.

13. "Department" is defined to exclude the Parliamentary Departments. As a consequence, "agency" excludes those Departments (para 10 above).

14. "Determination" refers to a determination under Part V by the DPA that an act or practice that breaches the IPPs is in the public interest.

15. "Document" is defined to make it clear that it includes such things as punch cards, magnetic ink messages, floppy disks, tapes, &c.

16. "Generally available publication" means a magazine, book, newspaper or other publication that is or will be generally available to the public.

17. "Medical research" is to include epidemiological research.

18. "Personal information" is defined to include any opinion as well as any information - whether true or not - about a natural person whose identity is apparent or can reasonably be ascertained from the information or opinion. The range of information/opinion coming within the definition is infinite and would include, for example, information relating to the person's physical description, residence, place of work, business and business activities, employment, occupation, investments and property holdings, relationship to other persons, recreational interests and political, philosophical or religious beliefs. The definition applies to such information or opinion whether recorded in a material form or not. However, except for IPPs 1-3 relating to collection of personal information, the remaining IPPs are confined to the handling and use of personal information contained in a record. IPPs 1-3 are concerned with the collection of information for inclusion in a record (or in a generally available publication).

19. "Record" as used throughout the IPPs (see para 18 above) is defined as a document (see para 15 above) and a photograph, painting or drawing of a person. The definition specifically excludes -

- . generally available publications (see para 16 above);

- . collections of libraries, art galleries and museums;
- . Commonwealth records in open access in the Australian Archives;
- . documents in the Australian War Memorial Collection other than those placed there by Commonwealth agencies; and
- . mail in the course of transmission by post.

20. When the Bill speaks of using information, "use" does not include mere disclosure of information but does, however, cover including it in a publication.

21. Cl.6(2) confirms that "breach" of an IPP means contrary to or inconsistent with it.

22. Cl.6(3) affirms that references to "person" in the Bill other than when qualified by "natural" are references to persons as defined in the Acts Interpretation Act 1901, s.22(a), viz, a body politic or corporate as well as an individual.

23. Cl.6(4) - see para 11 above.

Clause 7: Acts and practices of agencies

24. Cl.7 defines the range of activities to which the Bill will apply. Cl.7 establishes when "acts" and "practices" amount to interferences with privacy. Cl.16 forbids agencies to do acts or practices that are such interferences with privacy. The DPA's functions are, amongst other things, to investigate acts and practices that may interfere with privacy (cl.19).

25. The acts and practices onto which the provisions of the Bill referred to fasten are those done or engaged in by a Commonwealth agency in the course of collection or handling of personal information.

26. The effect of cl.7 is that references to acts and practices are to those done or engaged in by -

- . Commonwealth Departments and agencies other than the exceptions referred to below;
- . the Federal and ACT Courts and the industrial tribunals referred to in Schedule 1 of the FOI Act in respect of administrative matters;
- . agencies listed in Part II of Schedule 2 of the FOI Act, which are Commonwealth agencies engaging in

commercial type activities (e.g., Albury-Wodonga Development Corporation, Australian Apple and Pear Corporation, Australian Broadcasting Corporation), other than in respect of records of their commercial-type activities;

Ministers in relation to the affairs of agencies or agency records in their possession in their official capacity.

27. The Bill will not apply at all to acts or practices of the following, namely, the bodies listed in Part 1 of Schedule 2 to the FOI Act (e.g., Aboriginal Land Councils, Australian National Airlines Commission, Commonwealth Bank, National Labour Consultative Council, ASIO, ASIS, ONA), DSD and JIO in the Department of Defence, the National Crime Authority, Parliamentary Departments and Royal Commissions.

28. Thus it will be seen that the widest application of the Bill through these two definitions is to Commonwealth agencies and Departments not mentioned in any of the qualifications or exclusions. Because the definition of "agency" (para 9 above) is confined to Commonwealth bodies, there is no need to exclude State or NT Government agencies from the definitions of "act" and "practice".

Clause 8: Acts and practices of and disclosure of information
to staff of agency, &c

29. This clause complements the effect intended by cls.9 and 10 (paras 31-33 below). Thus any act done or practice engaged in by or information disclosed to a person who is employed by or is in the service of an agency (as defined in cl.6(1)) shall be deemed to have been done or engaged in by or disclosed to the agency. Corresponding provision is made in cl.8(1)(c) and (d) in regard to the acts and practices of members of the AFP and the Defence Force.

30. Cl.8(2) provides that where the agency deemed under cl.8(1) to have done an act or engaged in a practice is deemed not to be the record-keeper under cl.10, the act or practice is to be deemed to have been done or engaged in by the agency that is deemed to be record-keeper under cl.10. For example, if an officer of the Australian Archives does an act in contravention of the IPPs to a record in its custody, under cl.8(1) that act would be deemed to have been done by the Archives. However under cl.10(4) the agency that placed the record in Archives' custody is deemed to be the record-keeper. Accordingly, cl.8(2) deems that agency to have done the act in question.

Clause 9: Collectors

31. For the purposes of the Bill the general rule will be that an agency that collects personal information shall be taken to be the collector in relation to that information. So, where, a person who collects personal information in the course of employment or service with an agency, the agency shall be taken to be the collector in relation to that information. Where personal information is collected for the purposes of an unincorporated body that is deemed to be part of an agency for the purposes of the FOI Act, the agency is to be taken to be the collector in relation to that information (cl.9(3)).

Clause 10: Record-keepers

32. For the purposes of the Bill, the general rule will be that an agency that is in possession or control of a record of personal information is the record-keeper in relation to that record. In the same way as in cl.9 dealing with the definition of "collector" (para 31 above), where a person is in possession or control of a record in the course of employment or service with an agency, the agency is to be the record-keeper in relation to that record. Where the record of personal information concerned is in the possession or under the control of a person on behalf of, or for the purposes of, an unincorporated body that is deemed to be part of an agency for the purposes of the FOI Act, the agency is to be taken to be the record-keeper of that record (cl.10(3)).

33. Where records of personal information are in the custody of the Australian Archives or the custody or collection of the Australian War Memorial (not being administrative records of those bodies), the agency that placed those records there is deemed to be the record-keeper of those records.

Clause 11: Application of Information Privacy Principles to agency in possession

34. This clause will have the effect that an agency in the possession of a record which is in the control of some other agency is bound by the duties imposed by the IPPs on record-keepers only to the extent of the obligations owed by the agency as possessor of the record to the controller of the record. Thus, in some circumstances there may be 2 record-keepers of a record where different persons have control and possession respectively of a record.

Clause 12: Soliciting of information

35. The duties of collectors under IPPs 2 and 3, relating to collection of information, and of record-keepers under IPPs 10 and 11, relating to use and disclosure of information, are confined to information that was "solicited". Cl.12 defines solicited as supplied by a person in response to a request made to him or her for the information supplied or for information which included the information supplied.

PART III - INFORMATION PRIVACY PRINCIPLES

Clause 13: Information Privacy Principles

36. This clause sets out the IPPs which will regulate information collection and handling practices that are required to be observed by Commonwealth agencies. The question whether acts or practices transgress the IPPs can be the subject of investigation and report by the DPA under cl.19.

37. The IPPs are intended to be a self-contained code of conduct which speaks for itself, subject to referring to the definitions of "collector" (cl.9), "personal information" (cl.6(1)), "record" (cl.6(1)), "record-keeper" (cl.10), "information-subject" (cl.6(1)) and "solicited" (cl.12). Accordingly, the succeeding paragraphs will be confined to drawing attention to certain less obvious features of the IPPs.

Principle 1

Manner and purpose of collection of personal information

38. This principle applies to collection of information by whatever manner, viz solicitation from the information-subject or from another source or passive receipt of unsolicited information e.g. Ministerial letters, tip-offs by informers. A lawful purpose would be any purpose which is not prohibited by law.

Principle 2

Solicitation of personal information from information-subject

39. This principle only applies to solicitation of information by the collector from the information-subject i.e., it does not apply to collection by passive receipt from the information-subject or third parties or solicitation from third parties. The right of the information-subject to know about that 3rd party-supplied information about him is catered for in IPPs 5 and 6 concerning information about records held by record-keepers and access to those records.

40. It is expected that there would be circumstances in which a collector would not need to take any steps to ensure that the information-subject was aware of matters under para (c), (d) or (e) when soliciting the personal information from that person. For instance when an agency responsible for paying welfare benefits has received a benefit application from the information-subject and asks the information-subject to provide personal details clearly relevant to that application, the agency would not, in normal circumstances, need to take any steps to confirm the information-subject's awareness of the purpose of collection of the information (para (c) of the IPP).

41. Likewise, where, for instance, information is requested from time to time from the Australian Taxation Office by another agency which is authorised by law to be able to seek

disclosure of that information in certain circumstances, e.g., to investigate certain offences, the ATO would not be required under IPP 2(e) at the time of collection of such information from all taxpayers to make each and every taxpayer aware that that information may be passed on to the requesting agency in such limited circumstances.

Principle 3

Solicitation of personal information generally

42. This principle is confined to information solicited from the information-subject and 3rd parties, i.e., it does not extend to information received without solicitation by the collector. So far as unsolicited information is collected, IPP 8 requires accuracy etc. of unsolicited, as well as solicited, information to be checked in the event that it is to be put to use.

Principle 4

Storage of personal information

43. This principle, together with IPPs 5-9, applies to records of personal information however collected, i.e., whether solicited from the information-subject or a 3rd party or passively received. One of the DPA's powers under the Bill is to prepare guidelines for the avoidance of breaches of the IPPs (cl.19) and it may be expected that DPA will exercise that power to prescribe guidelines on limiting physical means

of access to personal information records, protecting them from destruction, categories of containers that are safe for paper records, &c.

Principle 5

Information relating to records kept by record-keeper

44. IPP 5 applies to all categories of personal information - whether solicited or passively received. Clause 1 of this Principle is intended to give effect to the "openness principle" that is found in the OECD Guidelines. This provides that "There should be a general policy of openness about developments, practices and policies with respect to personal data. Means should be readily available of establishing the existence and nature of personal data, and the main purposes of their use, as well as the identity and usual residence of the 'data controller'".

45. The main Commonwealth law providing for access to documents and to which clause 2 of IPP 5 refers is the FOI Act. Commonwealth agencies are obliged by the FOI Act to publish information concerning their purposes and functions and the type of information held by them.

Principle 6

Access to records containing personal information

46. This principle applies to all categories of personal information - whether solicited or passively received. The

main Commonwealth law to which the right of access is made subject is the FOI Act.

Principle 7

Alteration of records containing personal information

47. This principle applies to all categories of personal information - whether solicited or passively received. Para (b) of clause 1 recognises that information held about a person, e.g., for the purpose of dealing with a compensation claim for a work-related injury, might be up-to-date as regards that purpose without being up to date for other purposes, e.g., as regards subsequent non work-related disabilities. Thus relevance, up-to-dateness, &c. is determined by reference to the purpose of collection (as to which, see IPP 1).

Principle 8

Record-keeper to check accuracy, &c. of personal information before use

48. This principle applies to all categories of personal information - whether solicited or passively received.

Principle 9

Personal information to be used only for relevant purposes

49. This principle applies to all categories of personal information - whether solicited or passively received. It

imposes an unqualified obligation to ensure relevance of the information to the use.

Principle 10

Limits on use of personal information solicited from information-subject

50. This principle is restricted to information that was solicited from the information-subject. IPP 2 required the collector to have taken any reasonable steps to see that the information-subject was aware of the purpose of collection at the time of collection of information to which this IPP applies. Therefore this IPP requires that the information-subject's consent must be obtained to use for a different purpose, unless one of the exceptions in paras (b) to (e) applies.

Principle 11

Limits on disclosure of personal information solicited from information-subject

51. This principle is restricted to information that was solicited from the information-subject. At the time of collection of this category of information, IPP 2 required the collector to have taken any reasonable steps to see that the information-subject was aware of the disclosure practices of the collector and those of any person/body usually given such information that are known to the collector. Accordingly,

disclosure to anyone other than in accordance with those practices is not permitted without the information-subject's consent unless one of the exceptions in paras (c) to (f) applies. These are the same exceptions as in IPP 10(b) to (e).

Clause 14: Medical research guidelines

52. The clause provides that references in the IPPs to "prescribed medical research guidelines" (see IPPs 10(e) and 11(f) in cl.13) are references to guidelines issued under this clause. Cl.14(1) authorises the National Health and Medical Research Council (NHMRC) to issue guidelines, by notice in the Gazette, for the protection of privacy in the conduct of medical research. The definition of "medical research" in cl.6(1) makes it clear that epidemiological research is included. Cl.13(2) requires the NHMRC to consult with DPA on the privacy aspects of any guidelines before issuing them.

Clause 15: Application of Information Privacy Principles

53. The IPPs, in general, apply only to personal information that is collected after the commencement of the Bill. However, IPPs 5, 6 and 7 governing information about, access to and correction of personal information records will also apply to records of information collected before the IPPs commence to operate. These IPPs are consistent with the obligations of agencies under the FOI Act. IPPs 4, 8 and 9, governing respectively storage of personal information

records, the requirement for record-keepers to check accuracy of records before use and the use of information only for relevant purposes, will also apply to information collected before the commencement of the Bill.

Clause 16: Agencies to comply with Information Privacy Principles

54. Commonwealth agencies are required to avoid doing acts and practices that are an interference with privacy. What amounts to an interference with privacy is laid down in cl.17.

55. Cl.16(2) affirms that an interference with privacy by Commonwealth agencies does not of itself give rise to criminal liability or civil liability in damages. Thus cl.16(2) leaves open the right of anybody to seek mandamus, prohibition or injunction or remedies under the Administrative Decisions (Judicial Review) Act 1977 to enforce compliance with cl.16(1) by Commonwealth agencies.

56. It should be noted that cl.24 authorises the DPA, in reporting on the results of an investigation, to recommend measures for preventing repetition of an act or practice it has found to be an interference with privacy. Further the DPA may recommend measures, including payment of compensation, for making good the loss or damage suffered by reason of the interference.

Clause 17: Breach of Information Privacy Principles is interference with privacy

57. This clause establishes the ingredients of an interference with the privacy of a natural person for the purposes of the Bill, namely, the doing of an act or acting in accordance with a practice that affects the person and breach of an IPP by the act or practice. As to "breach" of the IPPs, see cl.6(2).

PART IV - INVESTIGATIONS OF INTERFERENCES WITH PRIVACY

Clause 18: Interpretation

58. This clause contains a minor definition.

Clause 19: Functions of Agency in relation to interferences with privacy

59. Clause 19 sets out the functions of the DPA in relation to privacy. These functions are additional to those given to DPA by the Australia Card Bill 1986. The functions other than reporting are -

- . to investigate acts and practices of agencies that may be an interference with privacy (as to which see cl.17) and, where it thinks appropriate, to try through conciliation to settle the matter;

- . where requested by the Minister, to examine proposed legislation that would require or authorise acts or practices which, if done now by agencies, might amount to an interference with privacy;
- . to monitor activities (including application of technological advances) overseas and in Australia that are beyond the jurisdiction of the DPA under the Bill and which might, if they did come under the Bill, amount to an interference with privacy;
- . to promote understanding and acceptance of the IPPs and their objects;
- . to prepare and publish guidelines for agencies for the avoidance of acts and practices that are an interference with privacy;
- . to collate from publicly available sources and publish information on personal information databanks covered by the IPPs; and
- . to provide advice to the Minister and agencies on any matter under the Bill.

Clause 20: Performance by Agency of functions under para 19(a)

60. The DPA is required to investigate acts and practices of agencies that may be an interference with privacy on complaint or if it thinks it should. Under cl.20(2) it is prevented from investigating acts and practices done or engaged in earlier than 6 months from the commencement of the Bill (as to which see cl.2). Thus during the 6 months following commencement of the Bill the DPA will be confined to its functions of considering applications for determinations under Part V, issuing guidelines, advising agencies, promoting compliance with the IPPs and other non-investigative functions.

61. Under cl.2, the Bill will be brought into operation by proclamation (see para 4 above). This will enable the Government to give an appropriate opportunity after enactment for agencies and persons affected by the IPPs to become familiar with their obligations before the Bill commences operation. However, until the Bill commences, the DPA will, of course, be unable to exercise any of its powers, including the powers to give advice and make determinations. Accordingly, the 6 month delay following commencement before complaints regarding acts and practices can start has been provided for as well to enable agencies to seek guidelines, advice and any determinations from the DPA on their existing practices which they feel may possibly conflict with the IPPs.

62. The command to the DPA to investigate an act or practice in the circumstances referred to is qualified by cl.20(3) which authorises the DPA to decide not to investigate or further investigate an act or practice if the DPA is satisfied that -

- . the act or practice is not an interference with privacy;
- . no person aggrieved by the act or practice wants the investigation;
- . the complainant has not complained to the agency concerned about the act or practice;
- . the agency that did or engaged in the act or practice has dealt or is dealing adequately with the complaint or has not had an adequate opportunity to do so;
- . the complaint initiating the inquiry was made more than 12 months after the act or the last act of a practice;
- . the complaint is frivolous, vexatious, &c;
- . the complaint is being dealt with under the Australia Card Bill 1986;

- . another remedy has been or is being sought for the complaint that has adequately disposed of it or is doing so;
- . another more appropriate remedy for the complaint is reasonably available.

63. Where an act or practice under investigation or about to be investigated by the DPA is also the subject of an application under Part V for a determination that it is in the public interest, the DPA has the discretion to defer (further) investigation if the interests of persons affected would not be unreasonably prejudiced.

64. Cl.20(5) prevents the DPA from investigating an act or practice breaching IPP 7, which deals with correction of personal information records, insofar as the act or practice affects only persons who are not Australian citizens or permanent residents.

Clause 21: Application of certain provisions of the Australia Card Act 1986

65. For the purposes of the performance by the DPA of its functions under the Bill cl.21 applies provisions of the Australia Card Bill dealing with -

- . considerations to be considered when exercising powers;
- . transfer of complaints, where appropriate, to other agencies;
- . interaction with investigation by the Auditor-General;
- . manner of making complaints to the DPA;
- . conduct of preliminary inquiries and investigations by the DPA;
- . powers of the DPA in obtaining evidence and documents;
- . notifying results of certain investigations;
- . immunity of the DPA and witnesses in investigations from legal action; and
- . restrictions on production of information and documents to the DPA.

Clause 22: Provisions relating to documents exempt under the Freedom of Information Act 1982

66. In doing its functions under the Bill the DPA is to be prevented from giving to any person information about any

document that is exempt under the FOI Act. That prohibition extends to giving information as to the existence of a document if, in the event that such information were in a document, that hypothetical document would be so exempt.

Clause 23: Directions where refusal or failure to amend exempt document

67. This clause provides for the circumstances in which the DPA may direct an agency to add to a record of personal information a notation of its views on correction of that record. The power can only be exercised where the information-subject has been refused access under the FOI Act to the record, has complained to the DPA that the record is inaccurate, the DPA has recommended an amendment to the agency and the agency has, after 60 days, refused to make the amendment. The DPA may not direct a correction if the information-subject appeals to the AAT against the refusal of access to the record.

Clause 24: Reports following investigation of act or practice

68. Following an investigation of an act or practice the DPA is required to report to the Minister if -

- . the Minister has so directed;

- . it has concluded that the act or practice was an interference with privacy and conciliation failed or was not tried.

A report in the latter case must include reasons for its findings and may include recommendation for prevention of the interference and a recommendation of compensation and/or the taking of any other remedial action. A copy of such report is to go to the agency and the complainant - if the complainant was not affected by the interference, provision of the report is discretionary. Other affected persons may also be given copies.

69. If after 60 days from giving the agency a copy of such a report the DPA thinks that remedial action has not been taken, cl.24(5) requires it to give a further report to the Minister on its contact with the agency, action taken by the agency and the DPA's reasons for so thinking.

70. Where the DPA exercises its discretion to report to the Minister on an investigation where it did not reach the conclusion that there had been an interference with privacy, it is to give a copy of the report to the complainant and the agency concerned (cl.24(3)).

Clause 25: Report following examination of proposed enactment

71. Where the DPA has examined a proposed enactment pursuant to cl.19(b) and has found that it would require or authorise interferences with privacy, it shall report to the Minister and make any remedial recommendations.

Clause 26: Report following monitoring of certain activities

72. The DPA may report on its monitoring of activities and shall do so if the Minister directs.

Clause 27: Exclusion of certain matters from reports

73. In reports under cls.24, 25 and 26 the DPA may exclude a matter if it thinks desirable, having regard to such considerations as -

- . prejudice to security, defence or international relations;
- . prejudice to Commonwealth/State relations;
- . disclosure of Cabinet deliberations;
- . disclosure of confidential source of criminal law enforcement information;

- . unreasonable disclosure of personal affairs of a person.

Where the DPA excludes a matter from a report it shall give the Minister a separate report and its reasons for so doing.

Clause 28: Certain reports to be laid before Parliament

74. The Minister shall table reports made to him of failure by agencies to act on recommendations.

PART V - PUBLIC INTEREST DETERMINATIONS ABOUT CERTAIN
ACTS AND PRACTICES

75. This part provides a mechanism for agencies to make an application to the DPA in order to seek a determination from DPA that an act or practice or proposed act or proposed practice which is in breach or may be in breach of the IPPs is not to be regarded as an interference with privacy because of the overriding public interest in the agency being able to do that act or practice.

Clause 29 - Interpretation

76. A person can only have standing in relation to the clearance procedure where the DPA is of the opinion that that person has a real and substantial interest in the matter.

Clause 30 - Power to make, and effect of, determinations

77. The DPA is empowered to make a determination that an act or practice of an agency which breaches or may breach an IPP is not an interference with privacy under the Privacy Act where the public interest in the doing of the act or the engaging in the practice outweighs to a substantial degree the public interest in adherence to the particular IPP. This determination only applies to acts and practices that occur while the determination is in force i.e. the determination has only a prospective effect, it does not retrospectively validate a breach of the IPPs which occurs before the date of the determination.

Clause 31 - Application by agency

78. Where an agency considers that a proposed act or practice of theirs may breach an IPP, it may apply to the DPA in writing for a determination that the public interest in the doing of the act or practice outweighs to a substantial degree the public interest in adherence to the IPP.

Clause 32 - Publication of application

79. The DPA is required to make public notice of any application by an agency for a clearance. Cl.32(2) protects the confidentiality of a document or information provided to the DPA in support of an application by requiring that DPA not

permit the disclosure of such information or document where the DPA is informed in writing by the agency that the information or document is an exempt document under the FOI Act.

Clause 33 - Determination of application

80. This provision requires the DPA to comply with the procedure set out in this Part and to make its determinations in writing.

Clause 34 - Draft determination

81. This provision requires the DPA to prepare a draft determination in relation to an application and to distribute that draft determination to all agencies or persons interested in the application. The DPA is required to provide interested agencies or persons with a written invitation to notify it, within a specified period, as to whether anyone wishes that a conference be held about the draft determination (cl.34(2)).

Clause 35 - Conference

82. The DPA is required to hold a conference where it is notified by a person or agency that a conference is requested and to inform all agencies and persons who received an invitation under cl.34 of the time and place of the meeting.

The conference will be required to be held not later than 30 days after the period for receipt of requests for a conference under cl.34 has expired.

Clause 36 - Conduct of conference

83. This clause specifies those parties who are entitled to appear before the DPA at a conference. Those parties are the agency, a person to whom an invitation was sent under cl.34 to notify the DPA of a request for a conference and any other interested person whose presence the DPA considers is appropriate. The agency may be represented by an officer or employee, and a body corporate may be represented by a director, officer or employee of the body corporate.

84. Cl.36(3) provides that a member or Associate Commissioner of the DPA may exclude from the conference a person who is not entitled to appear or represent a person at the conference, uses insulting language or disturbs the conference.

Clause 37 - Making of determination

85. The DPA is required to take account of all matters raised at the conference and all submissions that have been made about the application before making a written determination.

Clause 38 - Appeals to Federal Court

86. A determination made by the DPA under cl.31 is conclusive as to the merits of the case. This clause provides that a person affected by a determination may appeal to the Federal Court on a question of law (cl.38(1)). The Federal Court may affirm or set aside a determination and remit the matter back to the DPA - cl.38(4).

87. Cl.38(2) sets down the time limit and the manner in which an application to the Federal Court can be made.

88. Cl.38(5) provides that an appeal to the Federal Court does not affect the operation of the DPA's determination unless the Court makes an order staying the operation of the determination so that an effective hearing of the appeal may take place.

89. The DPA is required to send all documents relating to its determination to the Court and the Court is required to return those documents to the DPA at the end of its proceedings - cl.38(9).

PART VI - OBLIGATIONS OF CONFIDENCE

90. In its report on "Privacy" (para 828), the ALRC has summarised the action for breach of confidence as providing "a civil remedy for use or disclosure of information which is not

publicly known and which has been entrusted to a person in circumstances imposing an obligation not to use or disclose that information without the authority of the person from whom it has directly or indirectly been obtained". Later (para 831), the ALRC summarises the elements of a breach of confidence as follows:

- " . the information has the necessary quality of confidence about it;
- . the information is acquired in circumstances importing an obligation of confidence; and
- . there is an unauthorised use of the information to the detriment of the confider."

Clause 39: Obligations of confidence to which Part applies

91. Cl.39 provides that Part VI applies to those obligations of confidence that arise under the law of the ACT and those to which agencies (as defined in cl.6(1)) and Commonwealth officers (as defined in cl.6(1)) in their official capacity are subject. The obligations to which Commonwealth agencies and officers are subject include those arising under State law.

Clause 40: Application of Part

92. Cl.40(1) indicates that the reforms to be introduced by Part VI concerning the obligation of confidence will apply where a person owes an obligation enforceable under the existing law to another person not to disclose personal information he has about either that other person or a third person. The person owing the obligation is in Part VI termed the "confidant" and the person to whom it is owed the "confider".

Examples:

- (1) A gives information about himself to B in circumstances in which an obligation of confidence is imposed on B. A is the confider, B is the confidant.
- (2) A gives personal information about B to C, in circumstances in which an obligation of confidence is imposed on C. A is the confider, C is the confidant.

93. By virtue of cl.40(1) Part VI only applies where the obligation of confidence relates to personal information as defined in cl.6(1). Cl.40(2) restricts the Part to obligations of confidence that are legally enforceable by civil proceedings, e.g., damages or injunctions, and excludes obligations enforceable only by criminal proceedings.

Clause 41: Effect of Part on other laws

94. Cl.41 affirms that, except to the extent that it expressly or by necessary implication does so, Part VI is not intended to limit or restrict the common law (including equity) relating to the existence of the obligation of confidence or otherwise restricting or imposing civil or criminal liability for the disclosure or use of information.

Clause 42: Extension of certain obligations of confidence.

95. Cl.42 provides that an obligation of confidence continues to protect personal information even after the information has been passed on to third parties who knew or ought reasonably to know that the person from whom they got the information was bound by the obligation.

Example: A holds personal information about B and is under an obligation of confidence in respect of it (whether to B or to another confider). A passes that information on to C. C will hold the information subject to the obligation of confidence as soon as he knows or ought to know that A was subject to it. The obligation of confidence may be enforced even though C is not in the ACT.

Clause 43: Relief for breach &c., of certain obligations of confidence

96. Cl.43(1) and (2) clarify and rationalise the remedies that are now available to a confider (as defined in cl.40) for a breach of confidence by a confidant (defined in cl.40). Under present law, in some cases the only remedy available is an injunction to restrain future breaches of a duty of confidence. In other cases, damages are also available in respect of past disclosures in breach of confidence. Cl.43(1) and (2) provide that damages will be available in both cases.

97. Cl.43(3) ensures that the subject of personal information in respect of which the duty of confidence exists has a right to enforce the duty, even when he/she is not the confider.

Examples:

(1) A gives personal information about himself to B in such circumstances that B is under an obligation of confidence in relation to the information. A can enforce the obligation to prevent unauthorised disclosures of the information in breach of the obligation.

(2) A gives personal information about B to C. Under present law, A can enforce the obligation of confidence but B, the subject, cannot. Cl.43(3) gives B the right to enforce the obligation to the

same extent that A can. This will mean that B will be able to claim damages for unauthorised disclosure in the same way as A can. However, the assessment of damages will be based on B's loss, not A's (which might be negligible).

Clause 44: Jurisdiction of courts

98. Cl.44 provides that ACT courts have jurisdiction in respect of matters arising under this Part to the extent that they do not already have jurisdiction. Jurisdiction of other courts remains unaffected.

PART VII - MISCELLANEOUS

Clause 45: Regulations

99. Cl.45 enables the Governor-General to make regulations for the purposes of the legislation.

PRIVACY (CONSEQUENTIAL AMENDMENTS) BILL

PART I - PRELIMINARY

Clauses 1 and 2: Short title and commencement

100. The first two clauses of the Bill provide for the short title and commencement of the legislation. The legislation will come into operation on the day that the Privacy Bill comes into operation.

PART II - AMENDMENTS OF THE FREEDOM OF INFORMATION ACT 1982

Clause 3: Principal Act

101. Cl.3 provides that the FOI Act is the "Principal Act" in Part III.

Clause 4: Time within which formal requests to be decided

102. S.19 of the FOI Act requires an agency or Minister to make a decision on access to a document within 45 days if a written request for access is received before 1 December 1986 and in any other case within 30 days of the request. However where the request is for access to documents relating to, inter alia, the business or professional affairs of a person

or organisation, the agency/Minister may extend this period of time by 15 days where it is appropriate in order to comply with the requirements of the "reverse-FOI" rights conferred on the record-subject.

103. Cl.4 will amend s.19(4) of the FOI Act in order that this facility for extension of time will be available for dealing with requests relating to documents about the personal affairs of a person other than the applicant. The amendment is consequential upon the amendment to be made by cl.5.

Clause 5: Procedure on request in respect of document relating to personal affairs

104. Where an FOI request is made for access to a document containing information about the personal affairs of a person other than the applicant, new s.27A to be inserted by cl.5 will require, where reasonably practicable, the record-subject to be given a reasonable opportunity to argue that the document should be exempt from disclosure under s.41 and for any submissions to that effect to be considered before any decision is made to grant access. Before the obligation to provide that opportunity arises, it must appear to the person dealing with the FOI request, including the person dealing with a request to review a refusal of an original request, that the record-subject could reasonably seek to argue that

the document is exempt. The new section will apply when the record-subject has died: in that case, the opportunity is to be afforded to the legal personal representative of the deceased.

105. Where, contrary to submissions received from the record-subject, it is decided that the document is not exempt under s.41, the record-subject and the applicant for access are both to be notified of the decision, but access is not to be given to the document until the record-subject has had the required opportunity to seek a review of the decision under the proposed new s.59A and, if the record-subject has applied to the AAT, the AAT has upheld the decision. Where a document contains personal information relating to 2 or more persons, the right to be given to each person to argue that the document is exempt is confined to that part of the document containing information referring to that person.

106. Cl.5(2) provides that proposed new s.27A will apply to not only requests received after commencement of the Privacy (Consequential Amendments) Bill, but also to requests received before that commencement where a decision on the requests had not been made by the officer or Minister dealing with that request or a person reviewing a decision refusing that request.

Clause 6: Documents to which secrecy provisions of enactments apply

107. S.38 exempts from access under the FOI Act documents to which secrecy provisions in other Commonwealth laws apply, whether the prohibition on disclosure is absolute or is subject to exceptions or qualifications. Cl.6 will amend s.38 of the FOI Act to add a provision to the effect that the section does not apply in respect of a request for access to information about personal affairs by the record-subject.

108. The amendment to will not affect the availability of other grounds of exemption under the FOI Act where applicable, e.g. s.37 (documents affecting enforcement of the law and protection of public safety) and s.45 (documents containing material obtained in confidence).

Clause 7: Persons may make application for amendment of record

109. S.48 of the FOI Act enables a person (referred to as the "claimant") who has been provided with FOI access to a document containing information about his/her personal affairs to request correction of alleged inaccuracies in the information. The information must have been used or be available for use for the administrative purposes of the agency or Minister concerned. The claimant must be an Australian citizen or permanent resident.

110. Cl.7(a) will correct a formal, drafting error in s.48. Cl.7(b) will remove the restriction on the right of application to documents to which access has been given under the FOI Act, i.e., the right to apply for correction will extend to any document to which the claimant has been lawfully provided with access - whether under the FOI Act or otherwise.

Cl.8: Review of certain decisions in respect of documents relating to personal affairs

111. Cl.8 inserts a new s.59A into the FOI Act to provide that where a person is informed under new s.27A that a document relating to his/her personal affairs is not to be exempted from access by another person on the grounds that its disclosure would be an unreasonable disclosure of information relating to that record-subject's personal affairs, the record-subject may apply to the AAT for a review of that decision. New s.59A(2) provides that where the record-subject makes an application to the AAT, Part VI of the FOI Act governing review of decisions (except for ss.55 and 56) applies, and the applicant for access to the document is to be informed. New s.59A(3) provides that where, after hearing from the record-subject under new s.27A, the decision is made to refuse access and the applicant for access applies to the AAT, the record-subject is to be informed of the AAT application. New s.59A mirrors the scheme of s.59 providing for reverse-FOI in respect of business affairs.

PART III - AMENDMENTS OF THE HUMAN RIGHTS AND EQUAL
OPPORTUNITY COMMISSION ACT 1986

Clause 9 - Principal Act

112. Cl.9 provides that the Human Rights and Equal Opportunity Commission Bill is the "Principal Act" in Part III.

Clause 10 - Performance of functions relating to human rights

113. Where HREOC decides not to inquire or to continue to inquire into a privacy complaint because it considers that the subject matter of the complaint could be more effectively or conveniently dealt with by the DPA, HREOC is required to transfer such complaints to the DPA. (proposed new s.20(4A) HREOC Act).

114. When transferring the complaint, HREOC is required to give notice to the complainant of the transfer and to give to the DPA any information or document that relates to the complaint that is in its possession (proposed new s.20(4B) HREOC Act).

Clause 11 - Protection from civil actions

115. Clause 11 makes a drafting amendment.

Clause 12 - Non-disclosure of private information

116. S.49 HREOC Act is designed to protect private information that comes into the hands of an authorised person, a member or a member of the staff of HREOC. Such persons are not permitted, except in the performance of their duties or the exercise of their powers under the legislation, to record, divulge, communicate or use any such information. This clause amends s.49 of the HREOC Act to permit persons to give information and documents to the DPA where HREOC has transferred a complaint to the DPA.

PART IV - AMENDMENTS OF THE MERIT PROTECTION
(AUSTRALIAN GOVERNMENT EMPLOYEES) ACT 1984

117. Provision is being made for the transfer of privacy complaints made to the Merit Protection and Review Agency (MPRA) by Commonwealth employees to the DPA.

Cl.13: Principal Act

118. Cl.13 provides that the MP(AGE) Act is the "Principal Act" in Part IV.

Cl.14: Discretion not to investigate

119. S.49(1) of the MP(AGE) Act already enables MPRA to decide not to investigate (or continue investigating) a complaint by a Commonwealth employee because, inter alia, it

concludes that the employee has a right to take the complaint to another body and that it is more appropriate for the other body to deal with the complaint. New s.49(1A) provides that where MPRA makes a decision under s.49(1) on the ground that it is more appropriate that DPA should deal with the complaint as a privacy-type complaint, MPRA is required to transfer the application to the DPA and forthwith notify the applicant.

120. New s.49(1B) requires MPRA to give to the DPA all the information and documents it has relating to a complaint transferred to the DPA under new s.49(1A).

Cl.15: Officers to observe secrecy

121. Cl.15 inserts new s.84(4A) in the MP(AGE) Act to enable information and documents in the possession of MPRA relating to an application transferred by MPRA to the DPA under new s.49(1A) to be forwarded to the DPA without violating s.84(2) of the Act which requires MPRA officers to observe secrecy.

PART V - AMENDMENTS OF THE OMBUDSMAN ACT 1976

122. Provision is being made for the transfer to the DPA of privacy-type complaints made to the Ombudsman.

Clause 16: Principal Act

123. Cl.16 provides that the Ombudsman Act is the "Principal Act" in Part V.

Clause 17: Discretion not to investigate certain complaints

124. Cl.17 will insert new s.6(4A) in the Ombudsman Act to enable the Ombudsman to decide not to (continue to) investigate a complaint if he concludes that it is a privacy-type complaint that could more conveniently or effectively be dealt with by the DPA. Where he takes this view, he is required to transfer the application to the DPA and forthwith notify the applicant. New s.6(4B) requires the Ombudsman to give to the DPA all the information and documents it has relating to a complaint transferred to the DPA under new s.6(4A).

Clause 18: Officers to observe secrecy

125. Cl.18 inserts new s.35(6A) in the Ombudsman Act to enable information and documents in the possession of the Ombudsman relating to an application transferred by the Ombudsman to the DPA under new s.6(4A) to be forwarded to the DPA without violating s.35(2), which requires the Ombudsman and his staff to observe secrecy.

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