2014

THE LEGISLATIVE ASSEMBLY
FOR THE AUSTRALIAN CAPITAL TERRITORY

INFORMATION PRIVACY BILL 2014
Amendments to be moved by the Attorney-General

SUPPLEMENTARY EXPLANATORY STATEMENT

Presented by
Simon Corbell MLA
Attorney-General

Information Privacy Bill 2014
Overview and Purpose

The main purpose of the Information Privacy Bill 2014 is to introduce ACT privacy legislation to regulate the handling of personal information (other than personal health information) by public sector agencies in the Territory.

The amendments moved by the Attorney-General provide an additional, express exemption for acts or practices done by ACT public sector agencies in relation to the handling of records received from, or disclosed to, specific Commonwealth enforcement and intelligence agencies from the requirements of compliance with the TPPs.

Background

ACT privacy legislation

The Attorney-General introduced the Information Privacy Bill 2014 into the Legislative Assembly on 20 March 2014.

The debate of that Bill was adjourned.

The Australian Security and Intelligence Organisation (ASIO) subsequently provided advice that the Bill could potentially prevent timely disclosure of personal information to it.

Human rights considerations
Right to privacy – section 12 Human Rights Act 2004

Privacy is a quality that emphasises human desire for personal autonomy, dignity and freedom from arbitrary or unreasonable or oppressive interference and intrusion into an individual's personal sphere.

The right to privacy and reputation is set out in section 12 of the *Human Rights Act 2004*. That section states that -

Everyone has the right—

(a) not to have his or her privacy, family, home or correspondence interfered with unlawfully or arbitrarily; and

(b) not to have his or her reputation unlawfully attacked.

The right to privacy in the Human Rights Act is based on the right to privacy set out in Article 17 of the International Covenant on Civil and Political Rights ('ICCPR'). The UN Human Rights Committee ('UNHRC'), commenting on the right to privacy, noted that 'as all persons live in society, the protection of privacy is necessarily relative. However, the

competent public authorities should only be able to call for such information relating to an individual's private life the knowledge of which is essential in the interests of society...'[1]

The UNHRC has stated that, in the context of the right to privacy set out in Article 17unlawful, "means that no interference can take place except in cases envisaged by the law. Interference can only take place on the basis of law, which itself must comply with the provisions, aims and objectives of the Covenant".[2]

The protection from arbitrary interference with privacy means that the State cannot randomly or capriciously interfere with an individual's privacy in a manner that is unrestrained or not based on demonstrable evidence. The UNHRC has stated that an interference that is lawful can be arbitrary if it is unreasonable in the circumstances.[3] Reasonableness implies that any interference with privacy must be proportionate to the end sought and must be necessary in the circumstances of any given case.[4]

The Information Privacy Bill supports and enhances the right to privacy by ensuring that there is a clear framework setting out how ACT public sector agencies collect, use, disclose and otherwise manage personal information.

Ensuring there is a comprehensive and clearly identifiable privacy regime in the ACT means that individuals are protected from arbitrary or unlawful breaches of an individual's right to privacy. If breaches do occur, the Information Privacy Bill establishes mechanisms for the independent investigation and resolution of complaints and an avenue for redress through the courts.

As set out in the Explanatory Statement to the bill, part 4 of the Act may impose a limitation on the right to privacy by exempting some public sector agencies from the operation of the Act. The right to privacy is not absolute and may be reasonably limited by laws which can be demonstrably justified in a free and democratic society.

In relation to this amendment, s 25 provides an exemption in situations where information is received from or must be disclosed to Commonwealth enforcement or intelligence agencies. This is necessary to ensure the intelligence and enforcement agencies identified can perform their role effectively in the interests of national security and safety.

This limit is proportionate and justifiable under section 28 of the Human Rights Act. The importance of allowing Commonwealth agencies to perform security and intelligence functions is necessary for the maintenance of a safe and peaceful community. The proposed

[1] UN Human Rights Committee, *General Comment 16: The right to respect of privacy, family, home and correspondence, and protection of honour and reputation (Art 17*), UN Doc CCPR General Comment 16 (1988), para.7
[2] Ibid, para.3
[3] Ibid, para.4
[4] Toonen v Australia, Communication 4888/1992, UN Doc CCPR/C/50/D/488/1992 (1994), para 8.3.

ACT provisions are similar to section 7 of the *Privacy Act 1988* (Cwlth). The Australian Law Reform Commission, after considerable discussion about the handling of personal information by intelligence agencies in Chapter 34 of its review of the Privacy Act in 2008 found that these exemptions should be maintained [at 34.94]. There are clear protections for information collected under security and intelligence legislation to provide assurance that the information will not be misused or abused. The functions of Commonwealth enforcement and intelligence bodies are entrusted to them by the Australian Parliament and serve a purpose which can be demonstrably justified in a free and democratic society such as the ACT.

Clause Notes

Clause 1 Exempt acts or practices

This clause substitutes the existing heading with the heading ‘Exempt act or practices’.

Clause 2 Proposed new clauses 25(1)(ea) and (eb)
This clause inserts 2 proposed clauses 25(1)(ea) and 25(1)(eb) to provide an additional, express exemption for acts or practices done by ACT public sector agencies in relation to the handling of records received from, or disclosed to, specific Commonwealth enforcement and intelligence agencies from the requirements of compliance with the TPPs.

This clause provides that the Act does not apply to:

(ea) an act done, or a practice engaged in, by a public sector agency in relation to a record that has originated with, or has been received from, a Commonwealth enforcement or intelligence body;

(eb) an act done, or a practice engaged in, by a public sector agency that involves the disclosure of personal information to a Commonwealth intelligence body.

The exemptions for agencies relating to dealings with Commonwealth enforcement or intelligence bodies are designed to facilitate information sharing between ACT agencies and national security bodies, to support the operation of their investigative and intelligence functions in the national interest.

These exemptions set out in section 25 (1) (ea) and (eb), reflect those in the Commonwealth Privacy Act 1988 which has applied in the ACT since 1994 and as modified in 2000. They address concerns that privacy legislation may prevent the sharing of information necessary to promote and protect the interest in Australia's national security. Including the express exemption for Commonwealth enforcement or intelligence bodies will clarify the previously unclear application of provisions allowing for information sharing with Commonwealth intelligence agencies.

The Act defines Commonwealth enforcement body or intelligence body as:

(a) a Commonwealth intelligence body;

(b) the Office of National Assessments established under the Office of National Assessments Act 1977 (Cwlth), section 4;

(c) that part of the Defence Department known as the Defence Intelligence Organisation;

(d) that part of the Defence Department known as the Defence Imagery and Geospatial Organisation;

(e) the Integrity Commissioner appointed under the Law Enforcement Integrity Commissioner Act 2006 (Cwlth), section 175;

(f) a staff member of the Australian Commission for Law Enforcement Integrity (within the meaning of the Law Enforcement Integrity Commissioner Act 2006 (Cwlth));

(g) the Australian Crime Commission established under the Australian Crime Commission Act 2002 (Cwlth), section 7;

(h) the board of the Australian Crime Commission established under the Australian Crime Commission Act 2002 (Cwlth), section 7B.

The Act defines Commonwealth intelligence body as:

(a) the Australian Security Intelligence Organisation continued in existence under the Australian Security Intelligence Organisation Act 1979 (Cwlth), section 6;

(b) the Australian Secret Intelligence Service continued in existence under the Intelligence Services Act 2001 (Cwlth), section 16;

(c) the Defence Signals Directorate of the Defence Department.

The Act defines ‘Defence Department’ as the Commonwealth department that deals with defence and that is administered by the Commonwealth Minister administering the Defence Act 1903 (Cwlth), section 1.