IN THE MATTER OF THE ROYAL COMMISSION INTO FAMILY VIOLENCE

ATTACHMENT DW-3 TO STATEMENT OF DAVID WATTS

Date of document: 31 July 2015
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[redacted]

This is the attachment marked '**DW-3**' produced and shown to **DAVID WATTS** at the time of signing his Statement on 31 July 2015.

Before me: .. [redacted]

[redacted]

An Australian legal practitioner
within the meaning of the
Legal Profession Uniform Law (Victoria)

I hope that by Friday, 20 June, the Redbacks will be inspired by the Socceroos' performance in Brazil against Chile and the Netherlands and that the Redbacks women's state league 2 team can reach the top spot on the ladder, whilst the state league 3 team can cap off the breast cancer charity night with a glorious win. It is a great club, it is a great event and I hope everyone who is available can attend.

Malvern Primary School

Mr O'BRIEN (Treasurer) — Last Friday I was pleased to join with the Minister for Education to visit Malvern Primary School in Tooronga Road in my electorate. Malvern Primary School is a fabulous school, very well led by principal Richard Bennetts and school council president Jodi Fullarton-Healey. However, the school did not receive any capital funding from the state government during the entire 11 years of the Labor government. That is absolutely appalling. That is why it is so good that we could deliver $3.9 million in this 2014–15 budget.

The SPEAKER — Order! The time for making statements by members has now expired.

PRIVACY AND DATA PROTECTION BILL 2014

Statement of compatibility

Mr CLARK (Attorney-General) tabled following statement in accordance with Charter of Human Rights and Responsibilities Act 2006:

In accordance with section 28 of the Charter of Human Rights and Responsibilities Act 2006 (the 'charter act'), I make this statement of compatibility with respect to the Privacy and Data Protection Bill 2014 (the bill).

In my opinion, the Privacy and Data Protection Bill 2014, as introduced to the Legislative Assembly, is compatible with human rights as set out in the charter act. I base my opinion on the reasons outlined in this statement.

Overview

The key purposes of the bill are to:

combine the provisions of the Information Privacy Act 2000 (IP act) and the Commissioner for Law Enforcement Data Security Act 2005 (CLEDS act), modified as necessary to create the new office of the Privacy and Data Protection Commissioner;

introduce legislative provisions that fulfil the government's announced commitment to the implementation of a new Victorian protective data security regime; and

introduce two mechanisms (public interest determinations and information usage arrangements (IUAs) to provide some limited flexibility in the application of certain of the existing information privacy principles (IPPs) and (in the case of IUAs) certain information handling provisions in other acts.

Human rights issues

Relevant charter act rights

Section 13 — a person has the right not to have his or her privacy unlawfully or arbitrarily interfered with.

The explanatory memorandum to the charter act stated that it was that act's intention that the right to privacy it contained be interpreted consistently with the existing information privacy and health records framework in Victoria to the extent that it protects against arbitrary interference.

In *WBM v. Chief Commissioner of Police* [2012] VSCA 159 (WBM), the Victorian Court of Appeal considered but did not need to choose between two competing interpretations of 'arbitrary' for the purposes of this right. The first was the 'ordinary' or dictionary meaning: a decision or action, which is not based on any relevant identifiable criterion, but which stems from an act of caprice or whim (WBM, [99]).

The second interpretation of 'arbitrary' was broader and was described by Bell J in *PJB v. Melbourne Health* [2011] VSC 327 [84] as follows:

"[arbitrary']...extends to interferences which, in the particular circumstances applying to the individual, are capricious, unpredictable or unjust and also to interferences which, in those circumstances, are unreasonable in the sense of not being proportionate to a legitimate aim sought".

In *WBM*, the Court of Appeal did not decide which interpretation was correct, but the broader meaning was preferred in obiter dicta by Warren CJ ([104] and Hansen JA [133] and adopted by Bell AJA).

In my opinion, nothing in this bill creates an arbitrary interference with privacy on either interpretation of the word.

The right to privacy is enhanced by the bill's substantive provisions in relation to:

protective data security (in part 4);

law enforcement data security (in part 5) (based on the CLEDS act); and

the information privacy provisions (in part 3) which are unchanged from the IP act, including:

its scope of application in respect of privacy to public sector organisations;

the IPPs set out in schedule 1 of the bill; and

the exemptions for certain organisations, such as courts and tribunals and law enforcement agencies in specified circumstances, from the application of some or all of the IPPs, on public interest grounds.

A table of re-enacted provisions is included in part 9 — Consequential Amendments.

Part 3 of the bill introduces two new mechanisms not contained in the IP act:

public interest determinations;

information usage arrangements (IUAs);

which allow for dispensations from the IPPs or approved codes of practice and (in the case of IUAs) allow for specified practices to be treated as authorised by information handling provisions in other acts.

Public interest determinations

The PDP commissioner can make public interest determinations (and temporary public interest determinations) (PIDs and TPIDs), and in part 3 division 6 — Information usage arrangements (IUAs), allow for any IPP (except for IPP4 on data security and IPP6 on access and correction) or an approved code of practice to be departed from in respect of relevant organisations' proposed handling of personal information.

The authorisation by a PID or TPID or an IUA or a certification of an act or practice which may contravene an IPP need not constitute an interference with privacy under the charter act.

If a PID or TPID did authorise an interference with the privacy of an individual, such authorisation will be lawful and not arbitrary because:

persons whose interests would be affected by a PID are afforded an opportunity to be heard before a PID is made;

the PDP commissioner may only make a PID or TPID if satisfied that the public interest in the organisation engaging in the act or practice substantially outweighs the public interest in complying with the relevant IPP;

for transparency, PIDs and TPIDs must be published on the PDP commissioner's website;

an organisation subject to a PID must report on it to the commissioner at least annually and the PDP commissioner must revoke a PID or TPID where the public interest grounds are no longer met, and may revoke it if the reasons set out in the application no longer apply;

a PID and TPID may be disallowed by Parliament.

Information usage arrangements

IUAs are designed to address many aspects of information handling between the parties, not just the IPPs. Subject to commissioner's satisfaction that relevant public interest tests have been met and the approval of relevant ministers, an IUA may authorise a departure from the IPPs (except IPPs 4 and 6) or an approved code of practice and may determine that an information handling practice is permitted for the purpose of an 'information handling provision' which is a provision of an act that permits handling of personal information as required or authorised by law or by or under an act.

If an IUA did authorise an interference with privacy, such authorisation will be lawful and not arbitrary because:

an IUA must be initiated by a Victorian government organisation and must set out practices for handling personal information to be undertaken in relation to one or more public purposes including the provision of services in the public interest;

an IUA must be submitted for approval by the commissioner and relevant ministers;

the information to be provided to the PDP commissioner and ministers in a IUA for consideration is extensive, including identification of any adverse actions that may be taken by organisations as a result of the operation of the IUA;

the PDP commissioner must consider and certify that the acts and practices described in the IUA satisfy a net public interest test before any authorisation to depart from an IPP or approved code of practice or any permission for the purposes of an information handling provision is given;

the PDP commissioner must report on a draft IUA to the responsible minister/s and the report may consider the appropriateness of any aspects of the IUA;

the IUA must be approved by the responsible minister/s; and

the IUA must be published on the PDP commissioner's website (redacted or summarised as necessary) and the lead party must report on the IUA to the commissioner at least annually.

In addition, the PDP commissioner may issue compliance notices in respect of IUAs under part 3 division 9 if the terms of an IUA are not complied with by the organisations involved. Further, the responsible minister/s must revoke an IUA if the public interest tests are no longer met, or may revoke it if the reasons for application no longer apply.

Certifications by the PDP commissioner

The commissioner may also certify that a specified act or practice of an organisation is consistent with an IPP or an information handling provision or an approved code of practice. The certification process is not a means for authorising a departure from an IPP or information handling provision or an approved code of practice, but a means of providing an independent view that an act or practice is consistent with them. A person who acts in good faith in reliance on a current certificate does not contravene the relevant IPP or information handling provision or approved code of practice. Any person whose interests are affected by a certificate may seek review of the decision to issue the certificate in VCAT. VCAT or a court may set aside a certificate. Certificates must be published on the commissioner's website. In my opinion, the provision of a certificate of consistency by the commissioner, which is reviewable by a court or VCAT, does not limit the right to be free from arbitrary interferences with privacy.

Robert Clark, MP
Attorney-General

Second reading

Mr CLARK (Attorney-General) — I move:

That this bill be now read a second time.

Speech as follows incorporated into *Hansard* in accordance with resolution of house:

The reforms introduced by the Privacy and Data Protection Bill 2014 will strengthen the protection of citizens' private information that is held by the Victorian public sector.

For the first time in Victoria, the bill requires the development of a protective data security framework for monitoring and assuring the security of data held by the public sector.

The framework will address a number of the data security issues identified by the Victorian Auditor-General in his 2009 report on *Maintaining the Integrity and Confidentiality of Personal Information*.

The framework will include protective data security standards, protective data security plans prepared by public sector bodies to implement the standards, and law enforcement data security standards relating specifically to law enforcement data and crime statistics.

Alongside clear standards for ensuring the security of data, the bill will establish clear avenues for departments and agencies to seek a determination about whether a particular use of personal information that it holds is authorised or required by law.

The bill will also allow public sector organisations to apply to enter into arrangements allowing them to handle or share personal information in ways that vary the application of certain information privacy principles, if that use of the information is clearly in the public interest.

The bill also merges the existing roles of Privacy Commissioner and the Commissioner for Law Enforcement Data Security to create a single Privacy and Data Protection Commissioner with responsibility for the oversight of the privacy regime in Victoria.

The bill otherwise re-enacts, or re-enacts with clearer wording, many key provisions of the Information Privacy Act, notably the information privacy principles. The 'organisations' to which that act applied remain subject to the privacy provisions of this bill.

I will now outline the main provisions of the bill.

Use of public sector information

The bill provides two new avenues for a public sector agency to determine whether a particular use of personal information is authorised or required by law. [IUA as to handling provisions and certification]

The bill also provides two avenues for a public sector agency to seek to vary the application of, or not comply with, an information privacy principle, except for principles 4 and 6 relating to the security of data and access to or correction of it respectively. [IUA as to IPPs and PIDs]

PIDs and TPIDs empower the commissioner to determine that specified actions in respect of personal information that do or may contravene an IPP (other than IPPs 4 (data security) or 6 (access and correction)) or a code of conduct are not unlawful. They will not be regarded as interferences with privacy while the determination is in force.

The key functions of an IUA are to facilitate:

compliance with a law;

the performance of the functions of any Australian government agency (federal, state, territory); or

a provision of a service in the public interest to the public or a section of the public.

Victorian public sector entities may seek approval of an IUA involving as parties other Victorian public sector entities or external organisations including contracted service providers, commonwealth, state or territory government sector bodies, or private sector bodies including non-government organisations and overseas entities. External organisations will remain bound by whatever privacy obligations they have under the laws of other jurisdictions.

Significantly, an IUA is also permitted, subject to safeguards, in circumstances where: a provision in a statute or regulation other than this bill permits such collection, use or disclosure where it is 'required or authorised by law'.

The public interest in the protection of personal privacy is carefully safeguarded in respect of PIDs, TPIDs and IUAs in various ways.

Among these is the bill's specification of grounds on which PIDs and TPIDs may be revoked by the PDP commissioner. PIDs and TPIDs are also subject to being disallowed by Parliament.

For IUAs, the bill specifies in detail the procedure to apply to the PDP commissioner, parties and content, together with notification where adverse actions may be taken in consequence of the IUA, and provides for review of IUAs' operation. The PDP commissioner may issue compliance notices in respect of an IUA, and the relevant minister or ministers must revoke the IUA on specified grounds.

The most significant safeguard of the public interest is that both these mechanisms require a public interest test to be met — that the public interest in the applicant doing the acts or engaging in the practices specified in the application substantially outweighs the public interest in adhering to IPPs 1, 2, 3, 5, 7, 8, 9 or 10. For example, if an IUA provides for an organisation to transfer personal information out of Victoria, the organisation must either comply with IPP 9 (transborder data flows) or seek dispensation from IPP 9 pursuant to the IUA. Dispensation requires the PDP commissioner to certify that any such dispensation is justified on the public interest test, and the relevant minister or ministers to approve the dispensation after considering the PDP commissioner's report.

The third new mechanism is certification by the PDP commissioner that a particular act or practice is consistent with the provisions of the IP act, this bill or the IPPs. This mechanism is intended to provide certainty to organisations where there may be doubt as to the legality of a proposed action, and to afford statutory protection to persons who act in good faith in reliance on the PDP commissioner's certification while it remains in force. An individual or organisation whose interests are affected by the decision to issue the certificate may apply to the Victorian Civil and Administrative Tribunal (VCAT) for review of the decision.

The availability of these mechanisms is expected to significantly assist in the delivery of public services in the public interest, in particular in areas such as the implementation of child protection programs where multiple agencies hold information, the performance of various land management functions, and the control of organised crime.

Protective data security

Aggregating the responsibility for oversight of the Victorian privacy and law enforcement data security regimes, as well as for the implementation of a new Victorian protective data security regime, is expected to reap the benefits of consistency and coordination in this fast-moving sphere.

Part 4, Protective Data Security, is applicable to the entities set out in division 1. While the intention is that the whole of government will be covered by this regime, there are exceptions. Notable among these is the health services within the meaning of the Health Services Act 1988 that are specified in division 1 and which are governed by separate legislation.

The key protective data security provisions in the bill concern development by the PDP commissioner of the Victorian protective data security framework, and protective data security standards. These standards may be either general or customised, and must be approved by the Attorney-General and the minister responsible for whole-of-government ICT.

Within two (2) years of the issue of the standards applying to an agency or body to which part 4 applies, it must ensure that:

> a security risk profile assessment is undertaken for the agency or body; and
>
> a protective data security plan is developed that addresses the standards applicable to that agency or body.

These plans will not be subject to the Freedom of Information Act 1982.

There is provision for review of a plan if an agency or body's circumstances change, or otherwise every two years.

Because it is recognised that not all agencies or bodies subject to part 4 will have equal capacity or resources to meet their obligations under this part, the bill's regulations provision will enable differential application as required.

Law enforcement data security

The law enforcement data security provisions in part 4 apply to both Victoria Police and the new chief statistician. They are largely based on the provisions of the CLEDS act, and the bill provides for continuity between the two regimes, including the 'Standards for Victoria Police law enforcement data security' issued in 2007. It should be noted that if a law enforcement data security standard is inconsistent with a protective data security standard, the law enforcement security standard prevails to the extent of the inconsistency.

The reforms embodied in this bill create a more streamlined system that will have broader and more comprehensive oversight of the privacy and information security regime for the Victorian public sector. The bill also introduces flexibility in relation to handling of personal information held by the public sector where appropriate in the public interest. At the same time, the Victorian government is responding to trends worldwide towards more open access to information, which the government has endorsed through its DataVic Access Policy.

PDP commissioner's functions

In light of the scope of the bill, the PDP commissioner will be responsible for a broad range of functions. In respect of privacy these include:

> promoting an understanding of and acceptance of the IPPs and of the objects of those principles;
>
> examining the practices of organisations with respect to personal information they maintain;
>
> receiving complaints about the acts or practices of organisations that do or may contravene IPPs or adversely affect individuals' privacy;
>
> conducting or commissioning audits of organisations in respect of their handling of personal information;
>
> issuing compliance notices to organisations; and
>
> issuing guidelines and other materials in relation to the IPPs.

In respect of protective data security and law enforcement data security, the PDP commissioner's functions include:

> issuing protective data security standards and law enforcement data security standards;
>
> developing the Victorian protective data security framework and promoting the uptake of protective data security standards by the public sector;
>
> conducting monitoring and assurance activities, including audits, to ascertain compliance with data security standards, and referring findings;
>
> undertaking reviews of matters relating to data security and crime statistics data security; and
>
> making reports and recommendations.

I commend the bill to the house.

Debate adjourned on motion of Mr NOONAN (Williamstown).

Debate adjourned until Thursday, 26 June.

CRIME STATISTICS BILL 2014

Second reading

Debate resumed from 11 June; motion of Mr WELLS (Minister for Police and Emergency Services).

Mr McGUIRE (Broadmeadows) — I will continue my contribution to this debate following its adjournment last night. Accurate, reliable and accessible crime statistics are in the public interest.