



Professor Rosalind Croucher
President
Australian Law Reform Commission

By email: info@alrc.gov.au

Dear Professor Croucher

Traditional Rights and Freedoms – Encroachments by Commonwealth Laws – Interim Report 127

As the Acting Information Commissioner, I welcome the opportunity to comment on the Australian Law Reform Commission's (ALRC) *Traditional Rights and Freedoms – Encroachments by Commonwealth Laws – Interim Report 127* (Interim Report), published as part of its review of Commonwealth laws and traditional rights, freedoms and privileges.

I support the ALRC's conclusion that privacy regulation does not unjustifiably interfere with freedom of speech and therefore does not require further scrutiny. My comments are intended to assist the ALRC's consideration of privacy within the context of its review.

Privacy regulation and freedom of speech

Privacy, and particularly control over our personal information, is fundamental to the freedoms that we enjoy in Australia and privacy regulation can be seen to support freedom of speech.

The privacy protections contained in the *Privacy Act 1988* (Cth) (Privacy Act) can promote free speech, by conferring on individuals influence over how their personal information, which includes identifying information about them and their opinions, is handled. Further, anonymity and pseudonymity, options generally afforded to an individual under the Privacy Act, can promote free and frank expression. The assurance that an individual can speak with their privacy protected is often an inducement for an individual to speak freely.

In Chapter 3 of the Interim Report, the ALRC notes that in some circumstances, Commonwealth information laws, including the Privacy Act, may operate to interfere with freedom of speech and expression.¹ However, the ALRC further acknowledges that freedom of speech is not an absolute right and limitations on freedom of speech can be justified, if the limitations are in order to pursue legitimate objectives and are proportionate.²

¹ Paragraph 3.140 - 3.144

² Paragraph 3.159 – 3.185

In that regard, I support the ALRC's view that the restrictions permitted by the International Covenant on Civil and Political Rights (ICCPR) are relevant when considering whether restrictions on freedom of speech may be appropriately justified. Article 19(3) of the ICCPR specifies the legitimate aims that must be pursued by any legal restriction on the exercise of freedom of speech. These aims include promoting respect for the rights or reputations of others. The protection against arbitrary interference with privacy in Article 17 of the ICCPR may be seen as such a right that serves to protect the rights of others. Importantly, the Privacy Act gives effect, in part, to Australia's obligations under Article 17 of the ICCPR.³

Equally, I recognise that the right to privacy is not an absolute right. Privacy is a right that must be appropriately balanced against other rights, including the right to freedom of speech and the public interest in being informed about matters of public concern. This balancing of interests is reflected in the objects of the Privacy Act,⁴ as well as in the exceptions to a number of the Australian Privacy Principles (APPs) in the Act. These exceptions operate to exclude certain information handling practices from breaching one or more APPs, where the practice is considered to be in the public interest when balanced with the interest in protecting an individual's privacy.⁵ I consider that the APPs operate to provide a strong and effective mechanism for protecting an individual's personal information, while supporting the disclosure of personal information in circumstances where other public interest considerations outweigh the individual's right to privacy.

Role and functions of the Australian Information Commissioner

The balancing of different rights and objectives is a feature of the role of the Australian Information Commissioner. By way of example, the Commissioner's functions under the Privacy Act include examining proposals that may restrict the exercise of an individual's privacy protections in light of another public interest objective. In this context, I am regularly invited to comment on proposed enactments and personal information handling practices that may impact on the privacy of individuals. I am therefore familiar with some of the complexities involved in balancing different rights and public interests.

Further to this, the Commissioner's functions regularly require balancing the protection of personal information under the Privacy Act with the broader public interest in the free flow of information and with an individual's right to access government information under the *Freedom of Information Act 1982*. In doing this, I adopt a similar approach to that suggested by the ALRC in the Interim Report and generally suggest that any proposed law or practice that has the potential to intrude on an individual's privacy is appropriately balanced with the overall public policy objectives of the law or practice. That is, whether the law or practice is reasonable, proportionate and necessary and the least privacy invasive option.

³ See s 2A(h) of the Privacy Act.

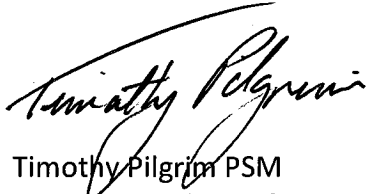
⁴ See, for example, s 2A(b) of the Privacy Act, which provides that one of the objects of the Act is to recognise that the protection of the privacy of individuals is balanced with the interests of entities in carrying out their functions and activities.

⁵ Exceptions cover a range of matters including where a use or disclosure of personal information is authorised or required by Australian law (APP 6.2(b)) and where an entity reasonably believes that a use or disclosure is reasonably necessary for an enforcement related activity conducted by an enforcement body (APP 6.2(e)).

I would be pleased to be involved in any discussions with the ALRC about balancing the right to privacy with traditional rights, freedoms and privileges, including freedom of speech.

If you or your colleagues wish to discuss any of the issues raised in this submission, please do not hesitate to contact Melanie Drayton, Director of Regulation and Strategy, on 02 9284 9812 or at Melanie.Drayton@oaic.gov.au.

Yours sincerely

A handwritten signature in black ink, reading "Timothy Pilgrim". The signature is written in a cursive style with a large, sweeping flourish at the top.

Timothy Pilgrim PSM
Acting Australian Information Commissioner
21 September 2015