

**THE "AUSTRALIA CARD"
A SURVEY OF THE PRIVACY PROBLEMS
ARISING FROM THE PROPOSED
INTRODUCTION OF AN AUSTRALIAN IDENTITY CARD**

Adam Marshall

INTRODUCTION

It appears likely that by the time of Australia's bicentenary¹, all Australian residents will have an identity card² issued by the Federal Government, with an associated identification number and entry in a "National Register". The proposal, first officially suggested³ in the Government's white paper on tax reform, released on 4 June 1985, has provoked a great deal of discussion both for and against the card. A recent public survey, commissioned by the Health Insurance Commission and undertaken by Australian National Opinion Polls, appears to show, although not conclusively, that most Australians favour the "Australia Card" proposal.⁴ On the other hand, the secretary of the joint parliamentary select committee, which is currently considering the "Australia Card" proposal⁵ has apparently said that "most people who had seriously considered the question of a national identity card were apposed to it".⁶ Several grounds for such opposition have been put forward, ranging from those who simply say the card will cost too much⁷ to commentators such as Kirby J.⁸ who has said⁹ the card will assist the move toward an Australian society in which a person would not exist or have any rights without a number, making the card "the ultimate triumph of the authoritarian date".¹⁰ By far the greatest

¹"The Federal Government wants the card ... to be fully operational from July, 1989, with individual Australia Cards on issue from March, 1987". *The Age*, 13 January 1986, 7.

²In this paper, this card will be referred to as the "Australia Card", a name which appears to have been coined, or at least promoted by the various news media.

³Unofficial suggestions that Australia have a universal identification system if not an identity card, have been made for several years. The ALRC, in its report on privacy, notes such a comment in the *Sunday Telegraph* 12 June 1983, 7 Law Reform Commission, Australia, Report No. 22, *Privacy* (1983) (hereinafter ALRC 22) para 282, fn 12.

⁴*The Mercury* 12 February 1986, 3.

⁵The eight-member committee, chaired by Senator Terry Aulich (Lab., Tas.) was convened in November 1985, heard its first public submission on 17 December 1985, and is due to present its report to Federal Parliament by 31 March 1986 although Senator Janine Haines (Dem., S.A.) has suggested that this may be extended until mid-April 1986.

⁶*The Age*, 17 November 1985, 18.

⁷*The Age*, 1 September 1985, disclosed that a public service report to cabinet had said the card would cost \$250 million to set up, with on-going costs of \$85 million per annum. See more recently a similar statement by Dr Blewett M.H.R. in *The Age* 11 February 1986, 5.

⁸Former Chairman of the Australia Law Reform Commission and new President of the New South Wales Court of Appeal.

⁹In the Centenary Address to the Science Faculty of the University of Sydney in 1985.

¹⁰See the rather brief report in Law Reform Commission, Australia, *Reform*, July 1985, 99.

area of concern however, has been over the threat the card poses to civil liberties, especially with respect to individual privacy.¹¹

The privacy debate is focused on two major areas; first the allegation that the "Australia Card" will become, if not a *de jure*, then a *de facto* internal passport for all Australian residents. This aspect, which can be described as "Privacy of the Person"¹² has for example been noted by Kirby J,¹³ the Victorian Council for Civil Liberties,¹⁴ the N.S.W. Privacy Committee,¹⁵ and members of the A.L.P. Caucus Legal and Administrative Policy Sub-Committee.¹⁶ The second aspect of concern in the privacy debate is that the card, and more importantly the associated number and register, will allow ready access to vast amounts of personal data over which the data-subject will have little control. The aspect, which can be described as "Information Privacy" is the subject of this paper.

INFORMATION PRIVACY AND THE "AUSTRALIA CARD" - AN OVERVIEW

It should be noted from the outset that in relation to information privacy, the "Australia Card" does not in fact create any new problems.¹⁷ The card, and particularly the identification number, is a "neutral administrative tool"¹⁸ designed to ensure correct identification of individuals and ready access to government files held on that person. The "National Register", even if the worst fears of civil libertarians are realized, will not contain new personal data as such, it will merely be a compilation of all the current files.¹⁹ The increased

¹¹See the statement of the South Australian Attorney-General in his government's submission to the joint parliamentary select committee inquiring into the "Australia Card" proposal. *The Age* 13 January 1986, 7.

¹²*The Age* 11 February 1986, 6, details the ten major occasions when the ordinary citizen will have to use his identity card, according to the Federal Government's submission to the joint parliamentary select committee inquiring into the "Australia Card" proposal.

¹³As defined by the Canadian task Force on Privacy and Computers: Department of Communications and Departments of Justice, Canada, *Privacy and Computers* (1972), 13-14.

¹⁴Law Reform Commission, Australia, *Reform*, July 1985, 99.

¹⁵*The Age* 28 September 1985, *Saturday Extra* 7; 18 December 1985, 6.

¹⁶*The Bulletin* 13 August 1985, 24.

¹⁷See Edward F. Ryan, "Privacy, Orthodoxy and Democracy" in (1973) 51 *Canadian Bar Review* 84, 90 where it is noted that the Canadian (and presumably the Australian) government already make use of the personal profiles kept by various Credit Reference Companies. See also K.J. Langan "Computer Matching Programmes: A Threat to Privacy" (1979-80) 15 *Columbia Journal of Law and Social Problems* 143, 167 where some commentators are noted as saying a formal transfer system is in fact preferable in privacy terms to the current informal but widely used transfer system in the U.S. Government.

¹⁸Mayer, "Privacy and the Social Security Number: Section 1211 of the Tax Reform Act of 1976", (1978) 6 *Rutgers Journal of Computers and Law* 221, 233.

¹⁹It may well be that each Australian, when applying for their "Australia Card", will have to complete an identification questionnaire or submit an interview (See *The Mercury* 3 February 1986, 13). These details, which will most likely already be held by the Australian Passport Office, are not the major concern of the civil libertarians and will not be dealt with at any length in this paper.

The "Australia Card"
A Survey of the Privacy Problems
Arising from the Proposed
Introduction of an Australian Identity Card.

efficiency can however highlight any problems that already exist. According to Kirby J.²⁰ for example, when a computerised identity card was proposed at an informatics conference in Paris in 1980, a man rose from the audience, and "in vivid French" alleged that the Nazi's Jewish extermination campaign, was more successful in the Netherlands (where 90% of Jews perished) than in France (where 60% survived) because the Dutch had produced a card which could not be forged thus increasing the efficiency of the Nazi campaign.

Dr Neil Blewett M.H.R.²¹ has similarly said of the I.D. Card Debate:

There is a great advantage to have this kind of debate so we can provide the privacy protections which are necessary anyhow, which have been needed, if your like, even before this card was introduced.²²

Some of the privacy problems alluded to by Dr Blewett are the serious concerns about the use and abuse of the large data banks of personal information which already exist in Australia. These concerns, discussed at length by the Australian Law Reform Commission (ALRC) in its recent report on privacy²³ and an earlier report on unfair publications,²⁴ and the way in which the "Australia Card" affects them, are the basis for the following discussion.

The Exact Scope of the "Australia Card" Proposal

According to a report in *The Age*, the draft legislation already prepared to introduce the "Australia Card":

provides that specified government departments can obtain access only to identification details held on a control register and not to any other data acquired by the Government to verify identity when the cards are first issued.

The register will contain a person's number, a surname including a maiden name, given names, date of birth, "current sex" or sex at birth, address, "visitor to Australia" (where appropriate), black and white photographs²⁵ and signature, issue date, expiry date, and date of death or departure from Australia.²⁶

There is widespread belief amongst commentators, however, that the restrictions on the contents of the register, and the bodies able to use it, will only remain in place until the card has gained public acceptance.²⁷ In fact Ron

²⁰See footnote 9

²¹Dr Blewett, M.H.R., is the minister in charge of the I.D. Card.

²²*The Age* 28 September, 1985, Saturday Extra 7.

²³ALRC 22

²⁴Law Reform Commission, Australia, Report No. 11, *Unfair Publications* (1979) (hereinafter ALRC 11).

²⁵The proposal to include a photograph was rejected by the caucus of the Australian Labor Party at a meeting in September 1985, for reasons of cost and in the light of civil libertarian objections. The issue has not however died, and apparently there is widespread community support for a photograph to be included. See footnote 4.

²⁶*The Age*, 1 September 1985, 5.

²⁷K.J. Langan in "Computer Matching Programmes: A threat to Privacy" (1979-80) 15 *Columbia Journal of Law and Social Problems* 143 notes at 169-170 that despite public assurances about restrictions of usage of the U.S. Social Security Number, when it was introduced, the SSN is now widely used for many purposes. See also, a strong editorial statement in *The Mercury* 12 February 1986, 8.

Castan Q.C., president of the Victorian Council for Civil Liberties, asserts that such a 'foot in the door' approach was proposed from the outset by the inter-departmental committee supervising the introduction of the card. Certainly, the pressure from many government bodies to be allowed access to the scheme would be great. State and Federal police for example, would find a 'unique personal identifier' invaluable, even without a photograph, in the fight against organized crime. Furthermore, even if the current federal government is able to resist this pressure, there is no certainty that future governments will not 'throw the door wide open':

We have to imagine all sorts of possible governments in the future ... people should ask "Would you be happy living in Queensland with cards of this kind ..."²⁸

For this reason, the following discussion is conducted on the basis that there will be widespread use of the 'unique personal identifier' (UPI) by government departments, if not the wider community, and it will give access to a great deal of personal data, either in the register, or through other data banks linked into the system.²⁹

*The Information Privacy Problems.*³⁰

The problems which have already arisen from the widespread use of computerised personal data banks, fall into two areas. First there is a concern about the data itself; that it is either inaccurate, misleading or irrelevant. Secondly there is a concern about the use of the data; that authorised users of the data are able to misuse it or pass it on to unauthorized users, and that unauthorized users are able to obtain the data without "inside" assistance. Both areas cause serious problems with respect to information privacy and both need to be re-examined³¹ in the light of the "Australia Card" proposal.

Since both areas highlight different concerns, and have so far been treated by the law in differing ways, they are broken down for discussion in this paper, in the following manner:

²⁸Professor Ron Johnston, director for the Centre for Technology and Social Change at Wollongong University, quoted in *The Bulletin* 13 August 1985, 27. See also Edward F. Ryan, "Privacy Orthodoxy and Democracy" in (1973) 51 *Canadian Bar Review* 84, 92.

²⁹In his oral submission to the joint parliamentary committee investigating the "Australia Card" proposal, Frank Costigan Q.C. said an identity card system would 'inevitably expand more and more' to centralized data system on everybody in the country with thousands of people having access to it'.

The Mercury 7 February 1986, 1.

³⁰It is recognized that the UPI will be used in private sector data banks. Although there is transfer of personal information between private sector data banks and from public to private sector data banks, the great scope for creation of, and thus concern about personal dossiers, is however in the public sector. This paper is therefore restricted to the effects of the "Australia Card" in the public sector.

³¹The following discussion is strongly based upon the Australian Law reform Commission's Report on Privacy (ALRC 22), where most of the information privacy concerns are discussed in much greater detail than is possible in this paper.

- Concerns about Data - problem 1: Inaccurate, Incomplete and Misleading Data.
 - problem 2: Irrelevant Data.
 Concerns about Users - problem 3: Misuse of Personal Data by Authorised Users.
 - problem 4: Use and Disclosure of Personal Data to Unauthorized Users.

THE PROBLEMS IN DETAIL

PROBLEM ONE:

INACCURATE, INCOMPLETE AND MISLEADING DATA

The Problem

Hayes³² succinctly describes "information privacy" as "the interest of the person [the data-subject] in controlling the information held by others about him".³³ Part of this control involves being able to ensure that any data held by others is both accurate and complete. It is submitted that in this regard, the "Australia Card" with its UPI will in fact promote the accuracy and completeness of government data banks. A UPI allows personal data banks to be simply and reliably matched, thus allowing a more complete file (in this case a "National Register") to be created. Matching also facilitates crosschecking which ensures that this enlarged file, and any other data banks which can access the UPI, are more accurate. Tapper³⁴ cites the example of a police computer in the United States which was linked with the registry of births. It was able to reject a file showing a person had committed a serious crime because that person had only been born two days before the alleged offence.³⁵

It is submitted however, that the situation is completely different when the privacy problem is one of misleading data. A UPI will allow the government to aggregate personal data obtained from various sources and build up a composite profile on each Australian resident. However unless the data which is aggregated is uniformly up-to-date, fair and complete, the composite may be out of date, unfair and distorted.³⁶ In this regard the "Australia Card" poses serious privacy problems. The data in the various Commonwealth data bases³⁷

³²Associate Professor Robert A Hayes, LL.B (Melb.), Ph.D (Monash), Barrister of the Supreme Court of New South Wales and Associate Professor of Law, University of New South Wales, was the Commissioner in Charge of the ALRC's Report on Privacy.

³³Robert A. Hayes, "Information Privacy: The ALRC Report", (1983) 1 *Proceedings of the N.S.W. Society for Computers and the Law* 171, 175.

³⁴Colin Tapper is a Fellow of Magdalen College, Oxford, and All Souls Reader in law.

³⁵Colin Tapper, *Computer Law, Business Data Processing*, 3rd ed. (London: Longman, 1983) 121.

³⁶Kirby, J. "The Computer, the Individual and the Law," (1981) 55 A.L.J. 443, 446.

³⁷Peter Blazey in *The Bulletin* notes that the Federal Government alone has at least five major data banks of personal information.

By far the biggest data bank is operated by the HIC [Health Insurance Commission], which runs Medicare and has issued a Medicare card to virtually every Australian family, in all, about 15.8 million names. The other big four are: The Electoral Commission (10 million names); the Department of Social Security (9.3 million, including the names of four million children); Taxation Office (8.6 million names); Passport Records (4 million names); Citizenship Records (2 million names).

Peter Blazey, "The ID card revolution: how it will affect you," *The Bulletin*, August 13, 1985, 25.

is collected from many different sources for widely different purposes. Often files contain the opinion of a public servant who interviewed the data-subject at some stage, such opinions may be incorrect and even if correct, may be extremely damaging to the data-subject if taken out of context.³⁸ Equally because of the sheer size of the Commonwealth bureaucracy, data in a file will often be out of date. The possible indiscriminate amalgamation of such files under the "Australia Card" proposal would clearly violate the data-subject's information privacy by making control of that data, by that subject, even more difficult.

Although the "Australia Card" might promote the accuracy and completeness of personal data, the effect of any inaccurate or incomplete information which remained in the data bank, together with any misleading data, would be magnified by the greater use to which the data could be put under the "Australia Card" scheme. Ron Castan Q.C. highlights the fact that the Victorian police are already able to access police files whilst 'on the beat' by radioing in a car number plate. He alleges that a similar practice could grow up with the "Australia Card", allowing police to not only find out the identity of a person but also their complete history.³⁹ If there is incorrect data on file, the result could be disastrous. Stephen Mayer⁴⁰ cites a case in Santa Clara County, U.S.A., where a couple were "handcuffed, held at gunpoint and locked up overnight on charges of auto theft" when the Sheriff's deputies were incorrectly informed, following a radio query, that the couple were driving a stolen car.⁴¹

From this example alone, it follows that with respect to inaccurate, incomplete and misleading data either created or accessed by the "Australia Card", information privacy will require that a person will be able to have access to their file on the "National Register" and be empowered to correct or add a disclaimer to the file where they consider it to be inaccurate, incomplete or misleading.

The Current Legal Situation.

In the case of the "National register", and any related Commonwealth Government data banks, the question of access has become subject to some fairly detailed legislation.

Under the Freedom of Information Act 1982 (Cth) a data-subject, like any other person, has an enforceable right to have access to public sector documents⁴² subject to a number of exemptions⁴³. As the Act stands, the contents of the "National Register" would be accessible, since they are not specifically

³⁸For a graphic case study see "A case of Tom, Tom and Dick (M5/1)" in Commonwealth Ombudsman, Sixth Annual Report 1982-83 (Canberra, Australian Government Printing Office, 1983) 85; and in more general terms see R.D. Blackwell [the South Australian Ombudsman] in "Computers and Privacy: Where is the debate," Address given to the Rotary Club of Adelaide, 13 October 1982, 5, cited in ALRC 22, 544.

³⁹*The Age* 28 September 1985, Saturday Extra 7

⁴⁰Stephen Mayer B.A. Hobart College, J.D. University of Chicago, 1977, is law clerk to justice Levin of the Michigan Supreme Court.

⁴¹Stephen Mayer, "Private and Social Security Member: Section 121 of the Tax Reform Act of 1976," (1978) 6 Rutgers Journal of Computers and Law 221, 236.

⁴²Freedom of Information Act 1982, S.11. The right is enforceable in the Administrative Appeals Tribunal, Ss 53-66.

⁴³These exemptions are to be found in Ss 7, 24, 32-47 of the Act.

covered by an exemption under the Act. It is however submitted that this may change as many of the data banks which would be likely to be linked to or included in the register, are already exempt. In fact the exemptions in the Freedom of Information Act already make it virtually useless it is suggested, with respect to information privacy.

The Health Insurance Commission, by far the biggest Commonwealth holder of personal data files⁴⁴ for example, is already exempt under S.7 of the Act. A vast quantity of police files⁴⁵ will be exempted under S.37 of the Act, and S.38 of the Act will hinder access to personal files held, for example, by the Australian Taxation Office, the Department of Social Security⁴⁶, and the Department of Veterans' Affairs. The ALRC notes in conclusion:

The result of these exemptions is that very little personal information is likely to be available under the Act to the person who is the subject of that information.⁴⁷

Nevertheless the Commissioner does note: Because the Act exists, the amount of personal information to which access will be graciously given will increase. This may be so even in the case of departments governed by specific secrecy provisions, such as Social Security. But the right of access is limited.⁴⁸

A data-subject can also have a 'right to reasons' under S.13 Administrative Decisions (Judicial Review) Act 1977 (Cth), S.37 Administrative Appeals Tribunal Act 1975 (Cth), or through the office of the Commonwealth Ombudsman. However, as this right provides at best only an incidental right to personal information, it will not be discussed in any detail here. Similarly, departmental guidelines on staff access to personal files such as those developed by the Australian Public Service Board,⁴⁹ apply to only a very limited section of the potential users of the "Australia Card" and will thus be of little general use in relation to the "Australia Card" proposal.

The question of correction of records at the Commonwealth level is also statutorily covered by the Freedom of Information Act. So far as it goes, S.48 of the Act answers all the information concerns of "Problem One", because it covers personal information "that is incomplete, incorrect, out of date or misleading". There are however two crucial gaps. First it only covers information accessible under the Act. If the information is provided gratuitously, as it has been suggested much of it will have to be, then the correction power under the Act will not apply. Secondly the section only gives a right to request an amendment, not a right to amend. As with access therefore, correction may occur in most cases (for reasons of administrative efficiency), but the data-subject will not have any rights as such.

It has been noted above, that the "Australia Card" UPI will almost certainly be used by the State as well as the Commonwealth Public Service. The situation for access to, and correction of personal files in State data banks is even worse than at the Commonwealth level. Victoria is the only state to have a

⁴⁴See note 37

⁴⁵It is submitted that this exception should still remain as an area where information privacy must come behind the public goal of law and order.

⁴⁶A department which is specifically to be involved with the Australia Card.

⁴⁷ALRC 22, 1002

⁴⁸Ibid

⁴⁹Public Service Board, 'Guidelines on the Keeping of Personal Records on Staff,' Memorandum 79/6236, 30 November 1979.

Freedom of Information Act.⁵⁰ This Act is almost identical, in format, to the Commonwealth Act and is thus subject to all the problems noted above. The other states, have so far made no provision for a data-subject's right to access and correct any file of his or her personal information, held by the respective State Governments. Thus, at the State level in particular, as well as at the Commonwealth level, legislative amendments are necessary to ensure that the "Australia Card" does not merely increase access to incorporate, incomplete or misleading personal data.

PROBLEM TWO: IRRELEVANT DATA

The Problem

Already examples of government departments collecting excessive and irrelevant personal information are not unknown. In a submission to the West Australian Law Reform Commission, a member of the Social Action Welfare Group cited as an example, the 'routine' collection of the name of the mother of an applicant's *de facto* spouse, on applications for unemployment benefits⁵¹. The matching of, and even more importantly the combining of data banks to form a "National Register", following the introduction of the "Australia Card", will only exacerbate this situation. There has already been a suggestion for example that the Australian Passport Office be linked to Health Department computer records to 'assist in the validation of passport records'.⁵²

As with misleading or inaccurate data, ready access to irrelevant data, which may be facilitated by the use of the "Australia Card", can also be highly prejudicial. In The First Annual Report 1978 of the Commonwealth Ombudsman, a case was cited of a person refused a position with the Australian Capital Territory Schools Authority because the Authority discovered that the applicant had, as a juvenile eighteen years before, been convicted of stealing.⁵³

Information privacy will, at first glance, require that a person will be able to have access to their file on the "National Register", and any other data banks which can be matched in to it, and be empowered to remove any irrelevant material. The issue of access as discussed in relation to "Question One", will be relevant. The issue of correction in relation to irrelevant material is however more complex. Unlike accuracy or completeness, relevance is purely subjective. Not only will the data-subject and the data keeper probably disagree as to what is relevant, their individual views will be conditioned upon the context of the date - to what end, and by whom, data will be used. For this reason, striving to achieve greater access to, and correction of personal files by data-subjects may be an unworkable ideal. Instead, it is submitted that a less direct approach may be preferable.

⁵⁰Freedom of Information Act 1982 (Vic.) No. 9859. Plans to introduce such an act in N.S.W. reach back many years, although no firm decision has yet been made.

⁵¹ALRC 22, 382

⁵²Royal Commission of Inquiry into drug trafficking, Interim Report No. 2 Passports (1982) 68, cited in ALRC 22, 282. See also Arthur R Miller "The Privacy Revolution: A Report from the Barricades" (1979-80) 19 Washburn Law Journal 1, 8-9 where in a brief historical survey, Miller notes the effects of Parkinson's Law upon computer technology - if more information can be stored, it will be.

⁵³Commonwealth Ombudsman, First Annual Report 1978 (Canberra, Australian Government Printing Office, 1978) 64-5.

The Current Legal Situation

The ALRC notes that most Commonwealth Government departments have a policy of removing a file once it becomes inactive.⁵⁴ This removal may take the form of destruction, or the file may be retained under S.24 Archives Act 1983 (Cth). In either case, any administrator would no longer be working on the basis of irrelevant or, more specifically, out of date information contained in that file, and thus information privacy will be satisfied. There is a crucial problem here however, in that the process will only work when the file is already inactive, it will have no effect on irrelevant material in an active file. Unless a whole file is therefore irrelevant, there is no current process, let alone a legal right, which ensures that irrelevant data in a personal file is removed and thus is not accessible under the "Australia Card" proposal.

The practice at state level is not clear, but it is assumed that it is much the same as Commonwealth procedure. This would mean that at both state and Commonwealth level the current legal response to "Problem Two" is completely inadequate.

PROBLEM THREE: MISUSE OF PERSONAL DATA BY AUTHORISED USERS

It has already been noted above that the Australia Card may well affect individual's privacy rights by increasing the number of people who have access to incorrect data. Furthermore even if the data banks were entirely accurate, the introduction of the "Australia Card" may facilitate misuse of the data.

The Problem

Personal information can be misused within the system when it is collected for one purpose and then used for another. This will be of especial concern with the "Australia Card" as the "National Register" could be used to create dossiers on people, containing information collected from various government departments.⁵⁵ This sort of abuse can lead not only to misleading files being created, a problem which is discussed above, but also removes the information from any control of the data-subject⁵⁶ and can lead to the problem of self incrimination. There are, for example, allegations that the Social Security Department uses its computer to match the addresses of male and female clients, which is information routinely collected from all clients, so as to check on pensioners' residential arrangements.⁵⁷ In effect the clients are required to incriminate themselves. Furthermore, if the "Australia Card" allows personal dossiers to be created and then routinely searched, this can be:

⁵⁴ALRC 22, 1017

⁵⁵This concern was voiced by the South Australian Government in its submission to the joint parliamentary select committee inquiry into the "Australia Card" proposal. *The Age* 13 January 1986, 7. For a comment upon the simplicity of creation of such dossiers and the wide nature of the information which the "Australia Card" could access, see the report on a forum paper delivered by Professor Geoffrey de Q Walker of the Law Faculty of the University of Queensland, in *The Age* 23 January 1986, 3.

⁵⁶K.J. Langan notes in "Computer Matching Programs: A Threat to Privacy" (1979-80) 15 *Columbia Journal of Law and Social Problems* 143, 145 that "since theorists define the concept of privacy as control over information about oneself (A Miller, *The Assault on Privacy* (1971) at 25; A. Westin, *Privacy and Freedom* (1967) at 7), transfers of personal data without consent are perceived to undermine privacy rights".

⁵⁷ALRC 22, 377

criticized as simply a modern version of the 'general warrant' once used to search homes without discrimination or reasonable cause. The only difference [could] be said to be that the search [would be] now directed secretly at a person's record [dossier].⁵⁸

To overcome this problem of information privacy, it would be necessary to ensure that personal information collected for one purpose, was used for that purpose and no other. To achieve this it would be necessary to include in a file, the purpose for which certain information was collected and then have some process of ensuring that the information was only used for that purpose.⁵⁹

The Current Legal Situation

At best the present response to the problem of collecting information for one purpose and using it for another, is piecemeal. There is no legislation at either State or Commonwealth level. Those departmental guidelines to ensure some compliance,⁶⁰ but the approach is piecemeal, it relies upon information having been given for a specific purpose, and as a guideline, it is not necessarily binding and certainly cannot be enforced by the data-subject. Generally this problem of information privacy seems to have been ignored.

PROBLEM FOUR:

USE OF PERSONAL DATA BY OTHER PARTIES

The Problem

Personal information contained in the "National Register" or closely linked data banks, could reach "other parties" in one of three ways. First the information could be released under the Archives Act 1983 (Cth), or following a request under the Freedom of Information Act 1982 (Cth). The effect of the "Australia Card" proposal on this activity will be minimal. At most, the possibility of increased efficiency may mean that more information is released in answer to each request, because more information is readily available to the person processing the request.

Secondly, an authorised user could give or sell the information to unauthorized users. This problem already exists⁶¹ although in minor numbers, but the "Australia Card" will not only increase the amount of information, and thus the stakes available for unscrupulous officers, but it may also facilitate its removal.⁶² By allowing the ready linkage of personal data in several data banks, the "Australia Card" may allow information to be shifted from an area of high physical security to one of lower security.

⁵⁸Ibid

⁵⁹For a startling example of misuse of personal data by authorized users, see *The Mercury* 15 February 1986, 7, where it is reported that some New Zealand policemen have used New Zealand's central records computer to supply personal details of woman drivers who took their fancy.

⁶⁰For example Public Service Board, 'Guidelines on Official Conduct of Commonwealth Public Servants', August 1982, Personal Management Manual Vol. 3

⁶¹In 1983 alone, three officers from the Department of Social Security, in Adelaide, Mt Isa and Brisbane, were charged with illegally providing information. ALRC 22, 540.

⁶²See Vern Countryman, "The Diminishing Right of Privacy: The Personal Dossier and the Computer" in (1971) 49 Texas Law Review 837, 864 with regard to the potential use, by an intruder of the U.S. Social Security Number as a key to personal data in government data banks.

Thirdly, the personal data could simply be stolen from a government data bank. Theft of data is a problem whether the data is stored manually, or on computer. The effect of "Australia Card" in this area will be the same as its effect on the sale of information by authorised users. If data banks can be easily matched, then provided the thief has sufficient technical skills, once he enters the system, he will be able to access vast amounts of personal data.

Current Legal Situation

Freedom of Information Act 1982 and Archives Act 1983:

It has already been noted that the Freedom of Information Act gives any Australian resident an enforceable right to have access to public sector documents.⁶⁴ As such it may not only facilitate information privacy by allowing a data-subject to have access to his file, but may also hinder it by giving others the same access. It was however suggested before, that the contents of the "National register" may be excluded from the ambit of the Act. It was also noted that many of the exemptions already existing under the Act will exclude most of the Commonwealth's collections of personal data from the effect of the Act. Finally S.41(1) of the Act makes a document exempt from disclosure under the Act if it "would involve unreasonable disclosure of information relating to the personal affairs of any person". It is therefore submitted that information privacy with respect to disclosure of personal information, would not be infringed by the Freedom of Information Act 1982 nor, for that matter, by the Victorian Freedom of Information Act, if it were applicable, as it contains the same exemptions.

The Archives Act 1983 (Cth) contains an exemption similar to S.41(1) of the Freedom of Information Act 1982 (Cth)⁶⁴ and will thus be likewise unlikely to markedly infringe upon information privacy.

Disclosure to Third Parties by Authorised Users:

If the authorised users are officers or employees of the Commonwealth Government, under the Public Service Act 1922 (Cth), or are employed under similar State legislation⁶⁵ then any disclosure outside their official duties, or without the approval of the designated high government official, is an offence punishable under the relevant State or Commonwealth legislation. Similarly if the authorised user is operating under an Act which itself imposes secrecy, for example S.17 Social Security Act 1947 (Cth), then they are likewise bound to secrecy unless approval from the necessary high government official is given. Apart from these enactments, there is no legislative control either on the 'discretionary disclosure' of the high government officials, under these enactments, or of disclosure of government servants not covered by these statutes. In both areas, significant invasions of information privacy are possible.⁶⁶

In noting this problem however, the ALRC asserted that new laws were not needed because the common law duty of confidence was able to fill the 'information privacy gap'⁶⁷. With the greatest respect it is submitted that the common law will not fill the 'gap', at least in relation to the "Australia Card". There may be circumstances where, for example, the data-subject's dossier on the "National Register" contains information not widely known, which has

⁶⁴See note 42 (supra)

⁶⁴Archives Act 1983 (Cth) 533(1)(g)

⁶⁵See ALRC 22 V.1, 639 footnote 174

⁶⁶See the examples in ALRC 22, 951

⁶⁷ALRC 22, 951

been communicated to the relevant government officer either in confidence, or for a designated purpose⁶⁸, and this information is transferred to the dossier without the consent of the confider and thence used for a purpose inconsistent with the purpose for which the information was originally acquired, in which case confider could sue for breach of confidence, but this if it is submitted will be the rare situation. Much of the information on the "National Register" will be mundane material for example, a person's status as unemployed which the data-subject may nevertheless not wish to be widely disclosed. The vast bulk of material contained on the Register will probably have been communicated by others and not by the data-subject, thus denying the subject standing to sue for breach of confidence. Finally, even if material was given in confidence by the subject, this confidence, as was noted by Stephen J. in *Smorgan v Australia and New Zealand Banking Group Ltd.*⁶⁹, will be subject to the law of the land. Acquired Immune Deficiency Syndrome is now a notifiable disease in N.S.W. This will naturally override the duty of confidence which a doctor owes to his patient and may, if the current "A.I.D.S. hysteria" continues, be information readily available to policemen patrolling the more violent parts of Sydney. Such a gross breach of information privacy, facilitated by the "Australia Card" proposal, will not be actionable by the data-subject under the current law.

In such a situation a common law action in defamation, as discussed at length in the ALRC's report on *Unfair Publication*⁷⁰, will be ineffective since the information is true⁷¹. Neither, it is suggested, will it be actionable as criminal defamation under s 201 Criminal Code 1924 (Tas.) which requires public benefit as well as truth for a defence under s 207⁷², since such a disclosure could be urged to be in the public interest.

Theft of Data:

It is beyond the scope of this paper to discuss the serious problems which have been shown to exist in relation to computer crime. It is simply noted here that it is far from clear if mere theft of personal information would be actionable as theft. Certainly as the law stands, the data-subject would have no standing in such a case and the Commonwealth itself may be unable to sustain an action.

Overall, in relation to "Problem Four", it is submitted that the current law will not protect the interests of the data-subject. Information privacy will require either greater input from data-subjects with respect to the use of the data, or greater legislative controls over the users of the data.

SUMMARY OF THE PROBLEMS

Introduction of the "Australia Card" will, in summary, highlight and intensify the following aspects of information privacy which will need to be addressed by the Federal Parliament:

1. Large amounts of misleading personal data can be held in files which are specifically excluded from the ambit of the Freedom of Information legislation and yet are readily accessed by the UPI. Data-subjects need greater access to, and opportunity to correct such files.

⁶⁸To use the test of Bowen C.J. in Eq. in *Interfirm Comparison (Aust) Pty. Ltd. v. Law Society of NSW* (1975) 6 A.L.R. 455, 541.

⁶⁹(1976) 134 CLR 475, 488

⁷⁰ALRC 11

⁷¹A complete defence at common law.

⁷²A similar defence exists in N.S.W., Queensland, W.A. and the A.C.T. ALRC 22, 809

2. A UPI will facilitate the collection of irrelevant data by government departments. Data-subjects need to be able to ensure that only relevant data is collected.
3. The UPI will allow information collected by one department for one purpose, to be used by another government department for a different purpose. Data-subjects need to be able to restrict and in some cases prevent this transfer.
4. The UPI will increase the information available to an unauthorized user able to access a government data bank. As the rewards from such unauthorized use will increase, and the UPI may in fact facilitate unauthorized access, the penalties for such activity will need to be increased and the security systems will need to be strengthened.

REMEDIAL MEASURES

OVERVIEW

This section is deliberately not entitled "Solutions". As Countryman⁷³ said in his article "The Diminishing Right of Privacy: The Personal Dossier and the Computer"⁷⁴, in what is submitted to be a particularly apt comment given the scope of the problems which arise from the "Australia Card" proposal, with respect to personal dossiers:

The only hope for substantial protection of privacy against the computerized dossiers, therefore, is that they don't exist - at least that they not exist on the present scale⁷⁵.

Given, as noted however at the outset of this paper, that the "Australia Card" seems likely to be introduced, the solution of "no Australia Card" has been ruled out. Nevertheless, it should be possible for some action to be taken to reduce the effect of the problems outlined in the earlier part of this paper.

It is submitted that four aspects of information privacy need urgent attention. The first three of these - a data-subject's right of access to personal information held about them; their right to correct, amend, or add a disclaimer to a contentious file; and their right to control the use of personal information held about them - will be discussed in the final part of this paper. The fourth aspect, the physical security of the data storage which arises in relation to an aspect of "Problem Four" outlined above, namely "Theft of Data", will not be covered in detail here. Obviously, as a result of the introduction of the "Australia Card", the number of access points (computer terminals) to the "National Register" and any linked data banks will increase, and specific safeguards will have to be introduced⁷⁶, but in the absence of specific details on the operation of the "National Register", concrete proposals are not possible.

A further issue related to the theft of data is the giving or selling of information by authorised users to unauthorized users. A problem was noted earlier in relation to disclosures by 'high government officials', and this will be covered below in relation to control of personal data by the data-subject. Disclosures by lesser government officials however do not, it has been submitted, warrant special legislative consideration with regard to the introduction of the

⁷³Vern Countryman is a Professor of Law at Harvard University

⁷⁴(1971) 49 Texas Law Review 837

⁷⁵Id 869

⁷⁶For an example of the type of systems involved see F.M. Auburn "A Law Enforcement Information System" (1972) The New Zealand Law Journal 409, 410.

"Australia Card". It was suggested above that the UPI may increase the rewards to the unauthorized user from such disclosure and thus penalties for disclosure may need to be increased, but as has been noted by the ALRC under the heading of "Reform Disclosure Laws":

Privacy interests are [already] relatively well protected by the existing law⁷⁷... No general legislative restriction on disclosures should be made for the purpose of privacy alone⁷⁸.

Consequently, this aspect of privacy and the "Australia Card" will not be considered further.

The recommendations part of this paper which, as was the case with the problems section, relies heavily upon the report into Privacy by the ALRC, deals first with the way in which it is suggested consideration of the three remaining aspects of privacy will help to overcome the privacy problems arising from the "Australia Card". Secondly, the ALRC's recommendations upon the implementation of these privacy aspects, will be discussed together with a discussion of the Federal Government's recent proposal to set up a Data Protection Authority, and finally a slightly simpler form of implementation will be considered.

THE ASPECTS OF INFORMATION PRIVACY

Access to Personal Data by the Data-subject

Access by the data-subject is almost universally regarded as a crucial part of information privacy. It is embodied in the OECD *Guidelines on the Protection of Privacy and Transborder Data Flows of Personal Data*⁷⁹ as part of the "Individual Participation Principle" which is described in the accompanying "Explanatory Memorandum" as "perhaps the most important privacy protection safeguard"⁸⁰. Kirby J notes that access is "reflected in the legislation of all those countries which have so far enacted laws for data protection"⁸¹.

It has already been suggested in relation to Problems One and Two that access by the data-subject will be crucial in the resolution of those problems. Certainly, where it is thought that the data in a file might be inaccurate, incomplete or misleading, the person who will usually have the most pressing interest to correct this and be in the best position to realize that there are errors in the file will be the data-subject. Thus it should be in both the interest of the data-subject and the record keeper, to allow the former to have access to the file.

It has been noted that access to Victoria and Commonwealth files is already provided to some extent by the Freedom of Information Act in those two jurisdictions. Both those acts are however subject to some wide ranging exceptions which, it has been asserted above, make access to much of the personal data held by the Commonwealth Government for example, virtually impossible. It has been suggested in relation to privacy in general

⁷⁷For the existing secrecy provisions in various pieces of Commonwealth and State legislation, see note 65 (supra)

⁷⁸ALRC 22, 1307.

⁷⁹OECD. Paris 1981 (hereinafter OECD Guidelines).

⁸⁰Id. 31

⁸¹Kirby J. "The Computer, the Individual and the Law" (1981) 55 ALJ, 443, 449.

the individual about whom data is kept should be given almost complete access to that data.⁸²

and given community concern about the "Australia Card", it is submitted that access to the "National Register" and related data banks should be as easy as is reasonably possible. This it seems, is covered by the ALRC's Information Privacy Principle 6 Access to Records of Personal Information:

Where a person has in his possession or under his control records of personal information, the record-subject should be entitled to have access to those records.⁸³

Obviously some records will still be unavailable and it is suggested that in such a situation it may be desirable to allow access to a third party for correction, as will be discussed below.

The Data-subject's Right to Correct or Add a Disclaimer

Assuming that the data-subject has by some method been able to see their entry in the "National Register" or other government data bank accessed by the UPI, it has been asserted above in relation to Problems One and Two, that a right to correct or add a disclaimer to a file, will either remove or lessen the problem of inaccurate, incomplete or misleading data, and may be a sufficient privacy response in some cases, to irrelevant data. This right, like the right to access, is considered to be one of the most important privacy protections and benefits not only the data-subject, but should also benefit the record keeper and user.

The right is "common to the legal systems which provide protection for information privacy"⁸⁴ and appears as part of the OECD's 'Individual Participation Principle'⁸⁵ and in the Information Privacy Principles proposed by the ALRC⁸⁶. In the 'Explanatory Memorandum', to the OECD Guidelines it is stated however that "the right to access and challenge cannot be absolute".⁸⁷ With respect, it is submitted that although right to access must be restricted in some cases, the right to add a disclaimer at the very least, should be an absolute right. Obviously if access has not been obtained, correction by the data-subject will be irrelevant as they will be unaware of the contents of the file. Once access has however been obtained, failure to provide even minimal redress, especially given the fact that the "Australia Card" will probably increase the use of this information, will create serious privacy concerns within the community.

It has been recognized above that access to personal data by the data-subject will be refused in some cases, but such refusal should not also remove any process of correction. It will obviously be impossible for the data-subject to enforce correction, but provision should first be made for the data-subject to apply to a third party if they have reason to believe in inaccessible file contains

⁸²James M. Vache and Michael J. Makibe "Privacy in Government Records: Philosophical Perspectives and Proposals for Legislation" (1979) 18 Gonzaga Law review 515, 554.

⁸³ALRC 22, 1195

⁸⁴ALRC 22, 1278

⁸⁵OECD Guidelines, 11

⁸⁶ALRC 22, 1195.

⁸⁷At 31.

incorrect information.⁸⁸ This third party provided they have access, should be able, if necessary, to correct the file. Secondly, there should be some publicly visible correction facility built into the data storage system, perhaps in the form of guidelines, or guidelines and some general review body.⁸⁹

It is submitted, that with one alteration, the above concerns are encompassed by the ALRC's Information Privacy Principles 5 - "Correction of Personal Information":

A person who has in his possession or under his control records of personal information about another person should correct it so far as it is inaccurate or, having regard to the purpose of collection or to a purpose that is incidental to or connected with that purpose, misleading, out-of-date, incomplete or irrelevant.⁹⁰

The suggested alteration is the replacement of "should" with "must". The principles as a whole were drafted to cover a wide range of applications in both the public and private sector, and as a consequence use advisory not mandatory language. The community concern about the introduction of the "Australia Card" has already been detailed above. Consequently if the principle is specifically directed at the "Australia Card" files, and given that these files are held by the public sector, it should be possible and desirable to use mandatory language.

Data-subject's Right to Control the Use of Personal Data

One of the basic precepts of information privacy is that data must only be collected for a purpose and it will be noted below that the ALRC has recommended that the data-subject should be informed of this purpose. Built upon this ideal is the concern that information should not be used for other purposes except in very limited cases. This arises out of what can be described as the individual's desire to

be able to exercise a measure of control over relationships with others; this means that:- a person should be able to exert an appropriate measure of control on the extent to which his correspondence, communications, activities are available to others in the community.⁹¹

The "Australia Card" proposal specifically and deliberately violates this aspect of information privacy. Even ignoring the concerns expressed above about the use of the UPI to create complete personal dossiers, the card is being introduced for the announced purpose of facilitating data transfer between the Australian Taxation Office and the Department of Social Security. As this will be the legislated purpose of the proposal, it will come outside the Use Limitation Principles as formulated by the OECD⁹² and the ALRC⁹³ as both of these do not apply where the use or disclosure of information is required by law. Since the possibility of indiscriminate use of information is probably one of the single greatest community concerns arising out of the "Australia Card"

⁸⁸ This could perhaps arise as a result of the conduct/attitude of some government employee who, or agency which, does has access to the file.

⁸⁹ For example the Privacy Commissioner discussed below

⁹⁰ ALRC 22, 1195

⁹¹ ALRC 22, 1033

⁹² OECD Guidelines, 10

⁹³ ALRC 22, 1195

proposal, legislative safeguards will need to receive great prominence in this area. Furthermore, if some form of legislative restriction can be placed upon the use of data under the "Australia Card" scheme this should provide a solution for aspects of "Problems Two to Four" above.

It has already been suggested that part of "Problem Two" may be overcome by giving data-subjects access to and a right to correct their files. Furthermore, if transfers of data using the UPI can be restricted to transfers for relevant purposes, that is the use to which the data can be put can be so restricted, then Problem Two, at least so far as it is aggravated by the introduction of the "Australia Card", should be remedied.

"Problem Three" is specifically concerned with the unsuitable use of data, and "Problem Four", where releases of information are made by 'high government officials', is also concerned with use of data for a purpose not envisaged or desired by the data-subject. Both these problems should be overcome by some limitation upon the use to which the data is put.

IMPLEMENTATION OF INFORMATION PRIVACY

The ALRC's Recommendations

In its report on Privacy, the ALRC made some wide ranging recommendations with respect to the implementation of information privacy. Although these were not specifically framed to deal with a scheme such as the "Australia Card" proposal, with a few minor alterations, they would, it is submitted, overcome most of the information privacy problems which, will arise upon the introduction of the "Australia Card". It is well beyond the scope of this paper⁹⁴ to retrace the analysis of the ALRC,⁹⁵ instead the following section is a summary of the areas of interest in the recommendations⁹⁶ with comments given in the light of the "Australia Card" proposal.⁹⁷

The ALRC commences by defining personal information as "information about a natural person from which, or by use of which, the person can be identified".⁹⁸ It is revealing to note that the ALRC did not consider an explicit link between the subject and the information was necessary; if the data could easily be combined with other data to reveal identity, this would they said, be sufficient. It is this linkage of data to 'reveal' a person's identity which is part of the major concern with the UPI. It would therefore seem that the ALRC's definition of personal information will encompass all the "Australia Card" data.

The ALRC then recommends that its information privacy principles, of which the relevant ones in this context have already been listed above, should be declared by the Parliament "to be the basis for the protection of privacy in the information processing context."⁹⁹ Clearly such principles could be included in part of the legislation setting up the "Australia Card". The ALRC

⁹⁴ And perhaps the author.

⁹⁵ The preparation of ALRC 22 took over seven years.

⁹⁶ Specifically, recommendations which are only applicable to data banks in the private sector have been omitted, and as the Card is not primarily a data collection device, some aspects of the Collection Principles are not covered.

⁹⁷ There has been a great deal of academic discussion with regard to alternative schemes to promote information privacy. Most commentators recommend a scheme somewhat similar to the ALRC, and as the ALRC canvasses, and dismisses, the alternative schemes in its report, the reader is merely referred in the alternative, to the selection of commentaries noted in the bibliography.

⁹⁸ ALRC 22, 1198

⁹⁹ Id, 1200

further recommends that "so far as the Commonwealth public sector is concerned, efforts should be made to publicize the existence and nature of record-systems containing personal records".¹⁰⁰ Clearly this publicity should also include the data banks which can be accessed by the UPI.

The collection of government data is not really a specific privacy concern which arises from the "Australia Card" proposal. However the ALRC has recommended as part of the process of collection of information, that the data-subject should be informed of the purpose of the collection. This will be of especial importance under the "Australia Card". The ALRC notes that the data-subject should be notified of the purpose of collection "to allow him to test subsequent use of that information by the record keeper".¹⁰¹ Much of the data accessed by the "Australia Card" however, will already have been 'collected' without notification of purpose. For this reason it is submitted that with regard to this aspect of the ALRC's recommendation, purpose notification should not be part of the Collection Principle, but should be a principle in its own right. Furthermore, for administrative simplicity, the purpose of holding a government file should not be notified to all data-subjects as a matter of course, but rather as the result of a specific query by the data-subject.

In relation to the storage of data, the ALRC recommends measures to ensure that data is not used for a purpose inconsistent with the notified purpose.¹⁰² It has already been noted above that in the absence of specific details of the "Australia Card" proposal, it is not possible to make specific recommendations in this area. The ALRC does recommend that failure to comply with Storage Principles and Collection Principles, such as failure to notify purpose should not result in criminal or civil sanctions as the principles are too vague.¹⁰³ It suggests that there are already sufficient remedies available to cover the worst abuses.¹⁰⁴ It may however be, and it is submitted that this should be the case, that if the purpose specification principle for example, is enacted as part of the "Australia Card" proposal, then a failure to comply with a specified procedure, should be subject to a statutory penalty. Again however, without more specific details of the proposal, it is not possible to pursue this issue any further here.

The ALRC discusses access to personal information at great lengths in its recommendations.¹⁰⁵ In effect it recommends the enactment of a Privacy Act¹⁰⁶ along lines very similar to the Freedom of Information Act 1982 (Cth). The differences between the two acts are mainly to accommodate the private sector within the ambit of the former Act. This paper has been written on the basis that the "Australia Card" will be limited to the public sector,¹⁰⁷ and for this reason only a few of the differences need be noted here.

The ALRC recommends that some of the exceptions contained in the Freedom of Information Act should be relaxed when transferred to the Privacy Act. These are namely that the Legal Professional Privilege exception should only apply to a request for personal information by the data-subject when the subject is in litigation or releasing the information would provide a party to litigation with documents unavailable by way of discovery or inspection in the

¹⁰⁰ *Id.*, 1208

¹⁰¹ *Id.*, 1211

¹⁰² *Id.*, 1222

¹⁰³ *Id.*, 1225

¹⁰⁴ *Id.*, 1227

¹⁰⁵ *Id.*, 1230 - 1277

¹⁰⁶ *Id.*, Appendix A

¹⁰⁷ See footnote 30

litigation.¹⁰⁸ Secondly, that a request which would, if made under the Freedom of Information Act, be considered likely to breach the privacy of others or be a matter relating to business affairs, should still be subject to the same restrictions but that the Privacy Act should make provision for 'Reverse - F.O.I.' as is the case in the Freedom of Information Act 1982 (Vic.). This means that the party whose business interest or privacy is likely to be affected should be asked if they are willing for the information to be released. Thirdly, the exception based upon breach of confidence should be amended so as not to be a blanket exception, but also be dependent upon an element of 'public interest'. Fourthly, with some exceptions which are not noted here, a request for information by the legal guardian of an incompetent person should be treated as a request by the incompetent person and finally, the exemption in the Freedom of Information Act for information which is covered by the secrecy provisions of other Commonwealth laws,¹⁰⁹ should not appear in the Privacy Act.

It is submitted that if such a Privacy Act were introduced it would cover, bearing in mind all the conflicting interests which would arise, a sufficient standard of access to the "National Register" and other Commonwealth data bases which could be linked by the UPI. It has however been suggested above that the UPI may however allow access to the data banks held by the various state government. If this was the case, similar Privacy Acts would need to be enacted at the State level.

The ALRC also considers the current right to amend records contained in Part V of the Freedom of Information Act 1982 (Cth) noting that Part V was really a "stop-gap" measure introduced in the Senate, it recommended that:

Legislation, which should replace Part V of the Freedom of Information Act 1982, should require record-keepers, on request from record-subjects (and, in case of legally incompetent record-subjects, their guardians) to correct any information contained in personal records that is wrong or that, having regard to the purpose for which it was collected by the record-keeper, is incomplete, out-of-date or misleading. It should be a matter for the record-keeper and the record-subject to determine whether the amendment should be made by altering the record or by adding an appropriate notation.¹¹⁰

Provided this right is not made subject to access having been granted under the Act, for reasons detailed above, then such an alteration to the Freedom of Information Act for both Victoria and the Commonwealth would remedy "Problem One" and some of "Problem Two". The other Australian jurisdictions would need to enact a Freedom of Information Act, similar to those of Victoria and the Commonwealth, containing the above broad right to amend personal records.

One area that the ALRC's recommendations will not overcome is in the data-subjects control of the use of personal data. The ALRC recommends, to ensure that the data-subject has some control over the use of data held on them, that the law relating to duties of confidence be amended: so that as a general rule, the duty attaches to the information irrespective of who actually hold the information;¹¹¹ so that the data-subject has standing to enforce that duty

¹⁰⁸ ALRC 22, 1263

¹⁰⁹ Freedom of Information Act 1982 (Cth.) S.38

¹¹⁰ ALRC 22, 1,xvii

¹¹¹ ALRC 22, Vol.2, 1313

whether or not that duty is actually owed to them;¹¹² and so that the remedies available from such action are rationalized.¹¹³ This will be useful to stop disclosure by 'high government officials' under the Freedom of Information Act and its equivalents, but it will have no effect against transfers between departments using the UPI. Such transfers will clearly be permitted under the "Australia Card" legislation, and this permission will override the common law duty of confidence. This fact is noted by the ALRC in its discussion of the problems arising as a result of 'matching'.¹¹⁴

The ALRC does however canvass the possibility of logging of significant disclosures (or transfers) by record keepers.

Maintaining a record of each disclosure of personal information is a useful tool in monitoring an information system's compliance with information privacy principles. The individual who obtains access to his personal records is entitled to know how and to what extent the record is being used and whether it is being used properly.¹¹⁵

Despite the use of computers, it may not be possible or desirable to log each transfer of information under the "Australia Card" scheme, but it should be possible to publicize in general terms how the data is used and to which departments it is transferred. Not only would such a scheme provide the publicity about the use of "Australia Card" data which it has been suggested above, would be desirable, but it would provide, subject to certain evidentiary requirements, the basis for an individual to pursue some redress.

For the purpose of providing redress, the ALRC recommends that a Privacy Commissioner be appointed as part of the Human Rights Commission¹¹⁶. Such a privacy guardian would, among other things, inquire into, conciliate and resolve disputes.¹¹⁷ The ALRC recommends that the guardian should be able to give directions in some cases,¹¹⁸ and would present a public report to parliament.

Given that the "Australia Card" is considered to be necessary, it is suggested that a public report upon privacy violations, although not directly solving an individual data-subject's complaint, may be the most appropriate way to bring about any necessary change to procedures under the "Australia Card" scheme.

The Federal Cabinet's Recommendation

Although the ALRC's Report on Privacy was presented on 14 December 1983¹¹⁹ there has as yet been very little legislative response to its recommendations. Whether this is caused by considerations of cost, or because this is yet another example of Australian legislatures' poor response to Law Reform Commission Reports,¹²⁰ it is suggested that it would be unrealistic to expect the recommendations to be implemented before the "Australia Card" proposal

¹¹² *Id.*, 1312

¹¹³ *Id.*, 1314

¹¹⁴ *Id.*, 1324

¹¹⁵ *Id.*, 1325

¹¹⁶ *Id.*, 1039-1092

¹¹⁷ *Id.*, 1040

¹¹⁸ *Id.*, 1041

¹¹⁹ Parliamentary Paper No. 304/1983

¹²⁰ See comments in Law Reform Commission, Australia, Report No. 21, Annual Report 1982 (1982) paragraphs 12-15; Law Reform Commission, Australia, Report No. 23, Annual Report 1983 (1983) paragraph 1.

comes into effect. Furthermore, even if fully implemented, the recommendations would not fulfill two crucial aspects of information privacy. First they would not provide the data-subject with sufficient control over the use to which their personal data is put. Secondly, the ALRC's proposals only apply to the Commonwealth government, thus the considerable privacy concerns that will arise with respect to the States will not be addressed. Finally, the ALRC's proposals are far more detailed than is necessary. The results in a legislative response which is unnecessarily complex, and, since it involves several pieces of legislation and the creation of a new statutory office, will be a response that is unnecessarily expensive. Instead of implementing a revised form of the ALRC's recommendations as part of the "Australia Card" proposal, the Federal Cabinet has recently approved the establishment of a powerful watchdog committee to monitor the planned Australia Card and to control the rise of information in the accompanying national data-bank.¹²¹

This Data Protection Authority, included as part of the Federal Government's submission to the joint Parliamentary Select Committee investigating the Australia Card, would be involved in recommending principles for the establishment and administration of the central register for the card. It would give people rights of appeal and access in relation to the information held on the register for the card. Its membership would include specialists in privacy and computer systems.¹²²

Although Michelle Gratton writing in *The Age* in support of the Data Protection Authority has said

with the controversial I.D. card ... the government needs to demonstrate that every effort will be made to safeguard civil liberties.¹²³

the Data Protection Authority proposal may in fact prove to be an inefficient way of demonstrating this effort.

The Commonwealth Public Service Board and departments of Treasury and Prime Minister Cabinet have apparently already "opposed the agency on the grounds that it was unnecessary and costly."¹²⁴ Given that it will cost, to current reports, \$2.3 million per annum solely for running expenses, let alone set-up costs, and have a staff of forty-four,¹²⁵ it will virtually be as expensive and coupled as the ALRC's recommendations outlined above,¹²⁶ and yet be a body restricted to "Australia Card" problems, and not address the wider privacy issues covered by the ALRC's recommendations.

If the Federal Government does not intend to implement widespread privacy protections, the privacy problems outlined above in relation to the "Australia Card" may in fact be best dealt with by presently existing authorities. The Commonwealth Attorney-General's Department has for example suggested that

existing bodies such as the Administrative Appeals Tribunal and the Human Rights Commission could deal with complaints about the central computer register formed by the I.D. card.¹²⁷

¹²¹ *The Mercury*, 31 January 1986, 3.

¹²² *The Age*, 31 January 1986, 5

¹²³ *Ibid.*

¹²⁴ *The Age* 13 February 1986, 1.

¹²⁵ *Ibid.*

¹²⁶ The ALRC has for example recommended the establishment of a Privacy Commissioner as part of its amendment of several pieces of Commonwealth legislation.

¹²⁷ *The Age* 13 February 1986, 1.

The final part of this paper puts forward a simplified version of the ALRC's recommendations with strong emphasis upon existing statutory Authorities. This proposal is put forward in the light of the privacy problems arising under the "Australia Card", as a basic solution at minimal cost.

A Minimalist Recommendation

It has been noted that the ALRC's recommended Privacy Act is strongly based upon the current Freedom of Information Act 1982 (Cth). The ALRC recommended a separate piece of legislation to implement their recommendations because, since they cover not only the public sector but also the private sector, and are intended not only to resolve current problems but also be a guide for future developments, it would be inappropriate to try to accommodate the alterations within the current Freedom of Information Act 1982 (Cth) which was only intended to remedy current public sector problems. In the context of this paper however, these considerations are irrelevant. As has already been asserted, the "Australia Card" will, at least initially, be restricted to the public sector. Furthermore, the legislation can be specifically targeted, and does not need to be generally framed to cover future privacy invasions. As a result it is suggested that those recommendations which the ALRC has suggested should be embodied in a Privacy Act could more simply be included as part of an amended Freedom of Information Act. Alterations to Part V of this Act have already been suggested and apart from this, the major amendments would be needed in relation to the exclusionary sections as detailed above.

For similar reasons it is suggested that instead of creating a new Privacy Commissioner, it should be possible to achieve all the desired changes recommended by the ALRC under the current structure of the Commonwealth Ombudsman. The Privacy Commissioner was preferred by the ALRC because they wanted the office to embrace not only the public but also the private sector. Since the latter will not be relevant to the "Australia Card" proposal, a minor extension of the Ombudsman's powers should achieve the desired level of control.

Finally, it has been noted that the ALRC's recommendations do not extend to the State government sector. This is a major shortfall in light of the "Australia Card" proposal and would require immediate attention. In the short term at least, the solution would lie in making it illegal for any State government body to utilise the UPI. Once this was done, the scheme could later be extended to the States on a sort of licence system provided that each State which wished to exploit the uPI scheme, first enacted, or altered their current Freedom of Information Act, and then extended the powers of their government Ombudsman.

Eventually, it is submitted, the ALRC's proposals should be implemented. Until that time, the simplified measures outlined above should put forward some sort of remedy for the major information privacy problems that will arise from the "Australia Card" proposal.

CONCLUSION

It is suggested in this paper that by 1988, every Australian resident will be carrying an identity card known as the "Australia Card". Although the card will have little impact within the private sector, it will pose four very serious problems for individual privacy, relating to:

1. inaccurate, incomplete and misleading data;
2. irrelevant data;
3. misuse of personal data by authorized users; and
4. use of personal data by other parties.

To remedy these it is suggested that at the Commonwealth level, the Freedom of Information Act 1982 (Cth) be amended, and the powers of the Commonwealth Ombudsman be extended to implement the recommendations of the ALRC in its Report on Privacy. Finally it is suggested that the "Australia Card", with its associated UPI should not be extended to the various States until each has enacted similar legislation within its own jurisdiction.

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