PRIVACY AND PERSONAL INFORMATION PROTECTION AMENDMENT (STATE OWNED CORPORATIONS) BILL 2016

17 March 2016 Page:: 4

Bill introduced on motion by Mr Paul Lynch, read a first time and printed.

Second Reading

Mr PAUL LYNCH (Liverpool) [10.28 a.m.]: I move:

That this bill be now read a second time.

It gives me pleasure to introduce this bill on behalf of the Labor Opposition. The object of this bill is to amend the principal Act, the Privacy and Personal Information Protection Act 1998, known as PPIPA or the PPIP Act. The amendment proposed is to remove from the principal Act the exclusion of State-owned corporations [SOCs] from that Act and to extend that Act to State-owned corporations that are not subject to the Commonwealth Privacy Act. This proposal adopts a recommendation of the New South Wales Privacy Commissioner in her report under section 61B of the Privacy and Personal Information Protection Act dated February 2015 and tabled in this Parliament.

The PPIP Act provides that the public sector agencies included within its regime are legally bound by the information protection principles. These include that information about individuals must be relevant, accurate and not intrude upon personal affairs. Public concerns over these issues and potential breaches are getting greater rather than receding. There are increasing worries, for example, about big data. The PPIP Act provides for a regime of internal review with obligatory advice to and consultation with the Privacy Commissioner. There is also a provision for a complaint to be made to the Privacy Commissioner. Additionally, there is an option for a review of the conduct or decision complained about to the NSW Civil and Administrative Tribunal [NCAT]. Recommendation 3 of the section 61B report by the Privacy Commissioner states:

All NSW SOCs should be subject to privacy regulation so that either:

a) the PPIP Act applies to SOCs not covered by the Privacy Act 1988 (Cth); or

b) those currently not prescribed under the Privacy Act 1988 (Cth), are prescribed.

The Government has taken no steps to act on this sensible recommendation. Accordingly the Opposition proposes this bill. I note the Privacy Commissioner has reiterated her position as recently as two weeks ago at a parliamentary committee hearing. At that hearing the Privacy Commissioner, Dr Coombs, was asked whether there was in her view the slightest justification for the exclusion of SOCs from the privacy regime to continue. Part of her answer to this question was:

When that exemption was put in it was very much about SOCs being on a level playing field with commercial organisations. Since then SOCs are covered by the 1988 Commonwealth Act, and I think there are three prescribed under the schedule at the back. I note that the statutory review of the Privacy and Personal Information Protection Act which occurred in 2003-04 recommended that SOCs be included in the legislative regime of the New South Wales privacy legislation and the NSW Law Reform Commission made a similar recommendation that they be brought in. My view is that it is entirely appropriate.

Now you have seen the movement of State-owned corporations into what is considered to be the government sector underneath the Government Sector Employment Act and I think other Acts as well.

Pursuant to sessional order business interrupted and set down as an order of the day for a future day.

PRIVACY AND PERSONAL INFORMATION PROTECTION AMENDMENT (STATE OWNED CORPORATIONS) BILL 2016

Second Reading

Debate resumed from 17 March 2016.

Mr PAUL LYNCH (Liverpool) [10.15 a.m.]: The arguments for the proposition in this bill are simple and compelling and are well put in the Privacy Commissioner's report under section 61B of the Privacy and Personal Information Protection Act. The NSW State Owned Corporations holds significant amounts of personal information concerning citizens of this State. Most State agencies, government departments, local councils, universities and so on are subject to the provisions of the Privacy and Personal Information Protection Act; however, State-owned corporations [SOCs] are exempt from this legislation. The justification for the exclusion of SOCs from the Privacy and Personal Information Protection Act was to create a level playing field between other commercial operations and SOCs.

In the almost two decades since these legislative provisions were introduced things have changed. There is now a privacy regime at the Federal level, which is set out under the Commonwealth Privacy Act. Section 6F of that Act allows New South Wales SOCs to opt into the Commonwealth privacy regime; if they do not opt in they are excluded. Three New South Wales SOCs are prescribed organisations under the Act and thus covered by it. This gives rise to the anomalous position that citizens who are customers of these SOCs have the benefit of legislative protections but consumers and customers of other SOCs do not. Moreover, the SOCs claim that they are behaving in a proper and responsible manner, that is, as if they were morally bound by such privacy regimes.

The SPEAKER: Order! There is too much audible conversation in the Chamber. Hansard will have trouble hearing the member with the call. The member for Liverpool will be heard in silence.

Mr PAUL LYNCH: I quote from the Privacy Commissioner's report:

> Review of annual reports and privacy policies show that the majority of SOCs state they comply with either Commonwealth or NSW privacy legislation. A number of SOCs including Sydney Water, Water NSW and TransGrid, refer to being bound with IPPs in the PPIP Act. Other SOCs refer to being bound to the *Privacy Act 1988* (Cth) including TransGrid, Landcom and the Forestry Corporation although not prescribed under the *Privacy Act 1988* (Cth).

There is a significant and undesirable inconsistency between SOCs covered by the Commonwealth regime and those that are not. The Privacy Commissioner records that this discrepancy was noted in the Department of Premier and Cabinet's 2014 response to her invitation to comment on the operation of the Privacy and Personal Information Protection Act. The fact that SOCs say they behave as if covered by privacy legislation even though not legally bound to do so is, of course, a good thing. It also means presumably that there is no extra regulatory or cost burden to be imposed if this were to be made legally binding—that is, if they are doing it already it should make no difference if the legislation is extended.

Whilst the fact that SOCs proclaim their voluntary compliance is a good thing, it is not the same as being legally bound and, as the Privacy Commissioner pointed out, it does not provide the external review of complaints handling that is available under the legislation. When the legislation was initially adopted SOCs were excluded. This was argued on the basis that SOCs should not be at a

disadvantage compared to other corporations that were not covered by privacy legislation. Things have evolved since then. A significant number of corporations are included within the Commonwealth scheme, based upon their size. So the argument that SOCs should not be covered by privacy legislation because the private sector is not covered does not have the strength it once did.

Additionally, expectations about SOCs have altered somewhat. As the Privacy Commissioner points out, section 3 (1) (g) of the Government Sector Employment Act specifically includes SOCs in the definition of the "government sector". They are covered under the freedom of information regime of the Government Information (Public Access) Act. I note that the Information Commissioner has recently reported a 100 per cent compliance rate by SOCs to that regime. The primary reason for extending the purview of the Privacy and Personal Information Protection Act is, of course, a matter of principle. To once again quote from the Privacy Commissioner:

> This regulatory gap in SOCs' responsibility for the personal information they collect, use and hold results in inconsistent privacy protections for consumers. This needs to be addressed as the community has heightened concerns around the collection, storage, use, and disclosure of their personal information and expects Government to provide protections for their personal information and privacy as shown by recent research."

These issues were also considered by the review of the Privacy and Personal Information Protection Act which was carried out by the New South Wales Attorney-General's Department, as it then was. Paragraph 8.4 of that review states:

> SOCs are specifically excluded from the ambit of the Act. The government's intention in their excluding them was originally to ensure a level playing field so that SOCs did not have to comply with privacy legislation that did not apply to their equivalent service providers in the private sector. Subsequently, the Commonwealth Privacy Act was amended to include the large companies in the private sector, however the application of the Commonwealth Act to state instrumentalities is incomplete, as they must either be incorporated under the Corporations Act 2001 … or prescribed as organizations for the purpose of the Commonwealth Privacy Act before it will apply.

The review also said, in response to SOCs concerns, that one of the statutory objectives for SOCs is not just to be a successful business and to operate as efficiently as possible but also to exhibit a sense of social responsibility by having regard to the interests of the community in which it operates. The review reported some disquiet by SOCs about the position. However, it referred to the fact that Sydney Water preferred to be covered by the regime. It also pointed out that some SOCs thought being included in the Privacy and Personal Information Protection Act would allow them to take advantage of exemptions relating to inter-agency transfer of information. This led to recommendation 12 of the review, which was that "All NSW SOCs should be subject to privacy regulation".

There has also been support provided to the position put in this bill by the New South Wales Law Reform Commission. In May 2010 the commission released report No. 127 entitled, "Protecting privacy in New South Wales". Recommendation 2.1 of the report put a position that is consistent with this bill. The commission justified its position at paragraph 2.20, to which I refer the House. The commission also adopted some of the arguments of the Australian Law Reform Commission, which pointed out that statutory corporations are covered by privacy legislation in other jurisdictions but not in New South Wales.

The commission also pointed out that State Records NSW notes that State-owned corporations are already covered by freedom of information legislation and the State Records Act. State-owned corporations should thus be included under the Privacy and Personal Information Protection Act to ensure consistency in the management of information. The present Government has displayed a minimal interest in the governance of State-owned corporations. The Government issued an issues

paper concerning State-owned corporations in 2013, but there has been no further public comment on that.

The Department of Premier and Cabinet is telling people who contact its department inquiring about progress that the matter is "still under consideration". My own discreet inquiries reveal that the review report has been drafted. Interestingly, the review, among other things, recommends the changes that I have proposed in this bill, but the Government has taken no action on it. My questions on notice about this topic have likewise been ignored. The changes proposed by this bill are long overdue. The Government should have got on with it some time ago. Because the Government has not, the Opposition has. I commend the bill to the House.

Debate adjourned on motion by Mr Victor Dominello and set down as an order of the day for a future day.