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# Privacy impact assessments as a control mechanism for Australian counter-terrorism initiatives

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A B S T R A C T

Democracy in Australia is gravely threatened by a flood of measures harmful to human rights that have been introduced since 2001, a large proportion of which are unjustified and not subject to effective controls. The passage of these measures through the Parliament has been achieved on the basis of their proponents' assertions and without appropriate scrutiny. Parliament had available to it various forms of impact assessment techniques, but failed to require that such methods be applied.

The study reported here had as its focus one particular form of evaluation – Privacy Impact Assessment (PIA). The study found that the PIA process should have been performed for each proposal, but was in fact seldom applied, and where it was applied the process and report were in almost all cases seriously deficient.

Survival of democracy is dependent on the Parliament standing up to the national security extremism that has taken hold of the Attorney-General's Department. Ministers and Parliamentary Committees must demand prior evaluation of proposals that restrict civil freedoms, must ensure transparency in relation to the proposals and their justification, and must require effective controls over, and mitigation features within, those measures that survive the evaluation process.



## 1. Introduction

The last 15 years have seen the passage through Australian Parliaments of scores of statutes containing hundreds of provisions that embody unprecedented threats to human rights and freedoms. The national security community has grasped power within the public service since 2001, and has sustained an ongoing scare campaign, aided and abetted by a credulous media. Parliament has become dominated by the Executive, and in particular by the Attorney-Generals' Department (AGD). The vast majority of MPs and Senators have been, and remain, cowed by a combination of party staff, agency briefings and opinion polls driven by the media. As and when a genuine emergency arises in Australia, law enforcement agencies, with their vastly increased resources and their increasingly para-military organisational arrangements, are in a strong position to exercise a wide array of inadequately-controlled powers, and thereby curtail democratic processes.

The human rights that are under threat are highly diverse. Appendix S1 contains a list of widely-recognised rights, extracted from AHRC (2015). Many of the rights defined in the

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International Covenant on Civil and Political Rights (ICCPR, 1966) have been compromised by Australian national security measures since 2001. These include freedom from arbitrary detention (Art. 9), freedom of movement (Art. 12), right to a fair trial (Art. 14.1), minimum guarantees in criminal proceedings (Art. 14.2-14-7), privacy (Art. 17), freedom of information, opinion and expression (Art. 19) and freedom of association (Art. 22), and possibly also rights to equality and non-discrimination (Arts. 2.1, 26, 27), freedom from torture (ICCPR Art. 7), retrospective criminal laws (Art. 15), freedom of assembly (Art. 21) and right to nationality (Art. 24). Specific instances of compromise of each of those Articles are identified in Appendix S4.

Although it is conventional to define human rights within the context of ICCPR, it is arguably inappropriate to do so in Australia, because, almost alone among its reference group, it does not have human rights entrenched in its Constitution. Moreover, the federal Parliament has steadfastly refused to comply with its obligations under international law, which theoretically compel it to implement human rights through legislative provisions.

It is vital that documentation be maintained of the post-2001 incursions into human rights using the excuse of 'the terrorist threat'. The increasing constraints on access to information and publication of information are undermining the scope to perform such analyses, and are threatening to render them illegal and unsafe for individuals conducting them.

In order to keep the scale of the challenge within bounds, this paper has used a narrow lens. Firstly, the focus is on the cluster of human rights associated with privacy. Secondly, the analysis is framed in terms of the impacts on privacy of measures that have been identified as national security and/or counter-terrorism initiatives. Thirdly, the specific question asked is to what extent the privacy impacts have been subjected to the discipline of Privacy Impact Assessment (PIA) prior to being put before the Parliament and enacted.

The paper commences by providing working definitions of key terms. This is followed by a review of the statutes and measures imposed during the period 2001–15. It then reports on a study of the extent to which the PIA technique has been applied to those proposals.

## 2. Background

This section provides a foundation for the analysis that follows. It first describes privacy as a cluster of aspects of human rights, and then outlines the protections for privacy in Australia. Working definitions of the terms 'national security' and 'counter-terrorism' are provided. The various forms of impact assessment are surveyed, with a particular focus on those most relevant to privacy. Finally, relevant government policies are identified relating to the conduct of PIAs.

### 2.1. *Privacy*

This section draws heavily on a summary previously published in Clarke (2014c). Privacy is expressed as a human right in the Universal Declaration (UDHR, 1948, particularly Art. 12) and the International Covenant (ICCPR, 1966, particularly Art. 17). When conducting policy analysis, however, it has proven to be much more convenient to define it, after Morison (1973), not as a right but rather as:

> the interest that individuals have in sustaining 'personal space' free from interference by other people and organisations.

The advantage of this approach is that it underlines the fact that privacy is one interest among many. Hence all privacy protections are an exercise in balance among multiple considerations. Contrary to the organisation-serving precepts popularised by Westin (Harris and Westin, 1995), there are no 'privacy fundamentalists' who adopt an absolutist position on privacy rights; almost all rights are universally acknowledged as being to some degree relative, including privacy.

The human need for privacy has multiple dimensions (Clarke, 1997, 2006), as summarised in Fig. 1. Despite privacy's allegedly recent origin as a preoccupation of well-off societies, all of these dimensions are readily recognisable in the Universal Declaration and the International Covenant.

The deepest-seated need is for privacy of the physical person, which is addressed by a large number of Articles in ICCPR. Four further dimensions can be distinguished. Surveillance, whether it is conducted in a physical manner (using the eyes and ears of humans), aided by technologies (such as directional microphones and recording apparatus), or entirely automatically, threatens the privacy of personal behaviour and thereby constrains how people act. Covert surveillance causes many people to have a generalised fear of the 'pan-optic', which has an even more substantial impact on their freedom of behaviour. This 'chilling effect' ranges from being highly desirable (where it creates a disincentive for criminal, psychopathic and sociopathic behaviour) to highly undesirable (where it reduces artistic creativity, scientific and engineering inventiveness, economic innovation or political speech, or

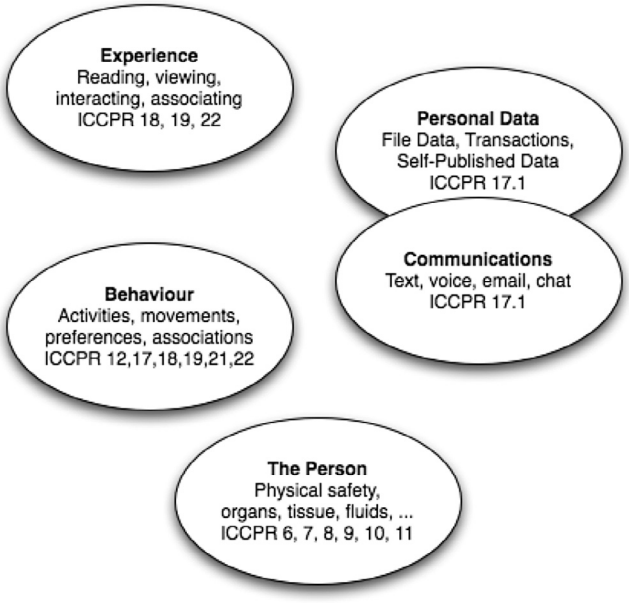


**Fig. 1 – The dimensions of privacy.**