Close

THE CONVERSATION
Academic rigour, journalistic flair

How the law allows governments to publish your private information

March 15, 2017 2.08pm AEDT

Controversy has recently surrounded Centrelink and its handling of 'overpayments' and personal information. AAP/Dave Hunt

Author

Bruce Baer Arnold
Assistant Professor, School of Law, University of Canberra

Recent controversy over the government's use of information provided to Human Services and Veterans' Affairs demonstrates there are major holes in Australia's privacy regime that we need to fix.

Australians are accustomed to providing personal information to federal and state governments. We do it repeatedly throughout our lives. We do so to claim entitlements. We also do so as the basis of public administration – the contemporary "information state".

In making that state possible we trust we will not be treated as a file number or an incident. We will not be doxed.

A key aspect of that trust, consistent with international rights law since the 1940s, is that our privacy will be protected. We assume officials – and private sector entities they use as their agents – will not be negligent in safeguarding personal information.

We also assume they will not share personal information with other agencies unless there is a substantive need for that sharing – for example, for national security or to prevent harm to an

individual. And we expect they will not disclose personal information to the media or directly to the community at large as a way of silencing criticism or resolving disputes.

Australia has a sophisticated body of administrative law and ombudsmen. So, there is no need for public shaming of people who disagree with ministers, officials or databases.

The complicated and inconsistent body of privacy law highlighted by law reform commissions over the past two decades attempts to provide legal protection for personal information. It is overseen by under-resourced watchdogs that – amid threats of termination – are inclined to lick the ministerial hand that feeds them.

That law has major weaknesses, illustrated by the Centrelink controversy and the furore over the Veterans' Affairs Legislation Amendment (Digital Readiness and Other Measures) Bill. The Commonwealth is able to ignore ostensible protections under the Privacy Act and other statutes. That is quite lawful. It has been so for many years, evident in the watchdog's finding in L v Commonwealth Agency.

The watchdog's guidelines state that where someone:

> *… makes adverse comments in the media about the way [a body] has treated them … it may be reasonable to expect that the entity may respond publicly to these comments in a way that reveals personal information specifically relevant to the issues that the individual has raised.*

Put simply, if you complain publicly about a Commonwealth agency that holds personal information relating to you, that agency can lawfully give the information to the media or publish it directly. It can do so to correct what the minister deems to be "misinformation".

There is no requirement that your complaint be malicious, fraudulent, vexatious or otherwise wrong. Disclosure is at the minister's discretion, not subject to independent review. You have no legal remedies unless it could be proved that the official was malicious or corrupt.

We have seen such a disclosure. The Department of Human Services gave personal information to a journalist for publication about a person who disagreed with action by Centrelink to recover an alleged overpayment of an entitlement.

There has been much discussion in the media and the national parliament about the vigour with which the government is seeking to recover overpayments. Worryingly, it remains uncertain whether many of the alleged overpayments actually exist.

Ongoing changes to entitlements policy, the hollowing out of key agencies by the annual "efficiency dividend" (that is, ongoing cuts to budgets) and problematical design and management of very large information technology projects mean overpayments might not have occurred.

Public disclosure of someone's personal information thus looks very much like bullying, if not a deliberate effort to chill legitimate criticism and discussion of publicly funded programs.

The veterans' affairs minister and the shadow minister have apparently not done their homework. The new Digital Readiness Bill – passed in the House of Representatives but not in the Senate – allows the minister to publicly disclose medical and other personal information about veterans. The rationale for that disclosure is to correct misinformation.

Understandably, veterans are unhappy. Legal practitioners and academics wonder about the scope for public shaming through release of department information that might not be correct.

The national Privacy Commissioner has been complacent. Labor's veterans' affairs spokeswoman, Amanda Rishworth, has belatedly expressed concern. The minister has simply referred to the establishment of an independent review by the Australian Government Solicitor and his department. It is difficult to understand why privacy wasn't properly considered before the bill went into parliament.

There are too many loopholes in Australia's privacy regime. Government agencies also need to toughen up in the face of criticism – legitimate or otherwise – and not respond by bullying people through publication of personal information.

Privacy Centrelink government data Data protection