

National Institute of Governance,
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**Commentary by Pat Barrett on
Malcolm Crompton's Paper
Entitled "*Light or Soft Touch?:
Reflections of a regulator
implementing a new privacy
regime*"**

18 March 2004

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**COMMENTARY BY PAT BARRETT ON MALCOLM
CROMPTON'S PAPER ENTITLED**

**“LIGHT TOUCH or SOFT TOUCH? : Reflections of a regulator
implementing a new privacy regime”**

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It is tempting to observe that a ‘regulator’s life is not a happy one’. In part, this observation could be derived from the title of Malcolm’s Paper. Regulators tend to be the proverbial ‘meat in the sandwich’ with accusations that they are too hard or too soft often being made, unfortunately often from different quarters at the same time. However, I have to say that people such as Allan Fels and Malcolm Crompton seem to cope with that conundrum very well and actually enjoyed what they did.

This Paper is a reflection of Malcolm’s approach to anything he does. He is pro-active. He thinks seriously about what he has to do and endeavours to provide an effective framework for his own and all his stakeholders’ guidance and as a basis for his organisation’s accountability and required performance. He is not only a strategic thinker, but is also very much concerned about how things are done and the inter-personal relationships that inevitably determine how successful an organisation actually is. He is one of the Public Service’s better communicators and is totally dedicated to his organisation and his people as well as to the results they achieve. As he observes:

The purpose of this Paper is to reflect on a possible framework for measuring the performance of a regulator, then assess the last five years of the Office of the Federal Privacy Commissioner against it. (page 2)

Malcolm also indicates that:

More than ever, it will be critical that we focus on a raft of strategies to achieve the goals we are set as regulators. In the face of forces outlined in this Paper, sticking to an

approach of simply enforcing black letter law will not be an adequate response. (page 44)

I can relate sympathetically to the latter observation as it is precisely the major issue confronting the accounting and auditing profession nationally, and particularly internationally, at this time. Malcolm's comments also remind me of a question I have often heard over the years, which is "Who regulates the regulators?". All of us have to be accountable for what we do, or what we do not do, as the case may be. Malcolm's Paper is very much in that mould. As he also says:

...an ethical, effective, efficient privacy regulator will be essential. This, in turn, calls for measures to test for, and ensure, that the privacy regulator, just as much as any other regulator, is doing the job well. (page 45)

More about that later.

Malcolm refers to the difficulty of regulatory behaviour in a varied, rapidly changing, economic and technological environment. In this respect, he notes that:

Prescriptive law can also lead to a focus on form over substance rather than achievement of the law's actual objectives. It also reflects a desire to limit red tape applying to businesses. (page 4)

He also notes the comment of the former Attorney-General, on 8 November 2000, that the private sector provisions of the *Privacy Act 1988* implement 'the Government's commitment to promote a light touch, co-regulatory approach to privacy protection' (page 4). While the policy embedded in any legislation and its accompanying Explanatory Memorandum should clearly provide the framework and direction intended, there is no doubt that the intent and effectiveness of that policy are also determined by the manner in which it is implemented.

To the extent that the regulator has to interpret the policy intention from the principles espoused, there will always be debate as to whether the touch is too heavy, too light or too soft. In part, there is also a problem of perception which sometimes goes with the public profile of the particular regulator. It is often remarked that 'perception is the reality', as perception often largely determines behaviours.

There is also an old public service saying, often attributed to a former senior Treasury officer, that ‘where you sit is what you see’. This is quite apparent with the growing convergence of the public and private sectors where quite differing views on privacy issues between the two sectors, for example on ‘commercial-in-confidence’ aspects, are getting closer together under the imperatives of public sector accountability, notably greater transparency.

I may not be able to make the same comment on personal privacy issues, particularly where the public sector itself is still coming to grips with issues that are broadly described as the ‘Public Interest’ (such as in data matching) and ‘natural justice’ (making information available to all concerned). Again a conundrum is presented with being too ‘selective’ or too ‘general’ in one’s approach. Nevertheless, as in all aspects of public administration, we need to be guided by the public service values and code of conduct set out in the *Public Service Act 1999* and any other professional standards and ethical codes which apply in our particular professional environment.

I should at least make some comment on the issue of ‘Public Interest’. Malcolm observes that, in terms of what a regulator might be aiming to achieve, it is often some notion of acting in the ‘public interest’ or delivering ‘public value’ (page 11). He refers to a Canadian study which I have accessed. Not surprisingly to me, the authors note that the term is difficult to define. For instance, the *Auditor-General Act 1997* refers to disclosure of particular information in the public interest without defining what that might be (Section 36). However, the Act does indicate in some detail what is ‘sensitive information’ not to be included in public reports (Section 37).

Section 37 includes two reasons that are of particular interest in this context, the first being that it would unfairly prejudice the commercial interests of any body or person, and the other being any other reason that could form the basis for a claim by the Crown in right of the Commonwealth in a judicial proceeding that information should not be disclosed. (paras e and f)

The Canadian study “Assessing the Public Interest in the 21st Century: A Framework” by Leslie A Pal and Judith Maxwell, December 2003, indicates the following five distinctive approaches to understanding the public interest:

- Process: The public interest arises from, and is served by, fair, inclusive, and transparent decision-making procedures.
- Majority Opinion: The public interest is defined by what a reasonably significant majority of the population thinks about an issue.
- Utilitarian: The public interest is a balance or compromise of different interests involved in an issue.
- Common Interest: The public interest is a set of pragmatic interests we all have in common such as clean air, water, defence and security, public safety, a strong economy.
- Shared Value: The public interest is a set of shared values or normative principles. (Page 1)

They go on to note that regulatory practice and recent reform efforts touch on five broad, related themes, as follows:

- Ensuring more flexible and participatory regulatory processes.
- Assessing both the costs and benefits of regulation.
- Highlighting the growing demand for strong regulation in areas that touch directly on health, safety, and the environment;
- Emphasizing the importance of stewardship (particularly in the environmental field) and mutual responsibility of all citizens for good regulatory outcomes.
- Taking a balanced approach to regulatory outcomes in terms of the various interests involved, but also in terms of an equilibrium among individual consumer and citizen interests, commercial interests, and broad Canadian social values. (Page 2)

The authors conclude that these results suggest a framework for considering the public interest in any regulatory decision, which they call a Public Interest Accountability Framework. It is a two-stage framework. Stage 1 takes the decision-maker through considerations of process, public opinion, specific interests, common interests, and shared values. Stage 2 encourages the decision-maker to explicitly consider the balancing of interests of individuals as consumers/citizens, enterprise or business interests, and collective interests in explaining the reasons for decision. The authors also conclude that “the public interest has come to mean commonly-held interests or values, which if they are not universally accepted are at least very widely held”. (Page 22)

As with audit, regulators are confronted by the problem of achieving the 'right balance' between conformance and performance. It is a difficult balance to achieve and one that can vary with particular situations and over time. In audit, we would say that this is largely a risk management decision reflecting an identification, analysis and prioritisation of all the risks involved and then taking a strategic decision about the approach to be pursued. I suspect regulators do likewise whether or not they might be as intentionally systematic in this respect as auditors.

Again, there is not a one size fits all prescription. Nevertheless, there is one imperative that is also bedeviling the public sector more generally, and that is the need to have a thorough knowledge and understanding of the legislation you are administering and/or which applies to you, such as the Privacy Act, Freedom of Information legislation, the Public Service Act and the Financial Management and Accountability Act. Audit reports tend to suggest that deficiencies in this area are due to a lack of adequate training, occasioned by a lack of priority in the organisation, and a lack of corporate knowledge, largely due to the loss of experience and understanding with the level of departures from the public sector over the past decade in particular.

Malcolm's Paper outlines how a regulator's performance might be tested for the extent to which it is ethical, effective and efficient. The areas he identifies are as follows:

1. Economic Impact
2. Social Outcomes
3. Public Accountability for Resources
4. Independence, fairness, transparency and accountability in decision-making
5. Approach to law enforcement
6. Active engagement in policy formation
7. Ensure clear respect for the law by all parties
8. Service provision.

He goes on to identify milestones and initiatives taken during the period 1999-2004 as follows

1. Strategic Plan – set approach to regulation

2. Creating a culture that respects privacy
3. Partners in developing and promoting privacy solutions
4. A clear and balanced voice on privacy principles
5. A comprehensive understanding of current community perceptions of privacy
6. Risk management framework

The final part of the framework is the identification of how the regulator has performed against the identified measures or simply a scorecard (Page 25). The measures are as follows:

1. Measures of economic impacts
 - not an area of the Office’s expertise
2. Process for assessing/evaluating economic impacts
 - the Office does not yet have a process
3. Minimising observance costs
 - the regulator has to ensure economic losses are minimised if a law requires a changed practice
4. Other economic measures (see pages 26, 27, 28)
5. Measures of social impact
 - too early to gauge impact but there are some indicators as follows
6. Process for evaluating social impacts
 - people are able to better exercise their rights
 - people are willing to protect their interests on their own behalf
 - weighing social impacts and economic benefits
 - fair distribution of social impacts
 - activities of regulator broadly reflect public opinion
 - media have a reformed and balanced approach
 - those regulated changed their behaviour
 - those regulated see benefits of changing and continue to do so regardless of oversight
7. Public accountability for resources
 - strategic plan – prioritises and focuses activities
 - widely known
 - adherence to Plan
 - can account for allocation and spend against Plan
 - evaluated Plan
 - met obligations of FMA Act 1997

- explored means of increasing resources
 - policies and procedures to do so fully transparent, ethical and not compromise independence
 - all stakeholders are aware of the implications of budget allocations
8. Independence, fairness, transparency and accountability in decision-making
 - policy decision-making
 9. Approach to law enforcement
 - complaints handling
 10. Active engagement in policy formation
 11. Ensure that there is clear respect for the law by all parties
 12. Service provision

Malcolm concludes his paper with a “glimpse of the future”. Quite rightly, he points to the fundamental impact of technology and opines that “one of the greatest values at risk will most definitely be privacy”. He urges us not to take a passive role in the further development of technological change. He also urges us to look at the bigger picture. He refers to links with other government initiatives and raises the question as to just how such linking might occur. He admits that it would be difficult, in meaningful terms, to indicate what a privacy future might look like if such linking did occur.

A review of the Privacy Act should inform the Office if it has steered the right course and indicate whether it should “change tack to ensure that it is effective in the next phase of implementing the new private sector provisions”. He points to the need for clear leadership, close engagement with the global community, and adequate measures to test for, and ensure, that the privacy regulator is doing the job well.

In my view, by any reasonable standard, Malcolm should be assessed as having done his job well and should be congratulated for doing so.