



Australian Government

Office of the Australian Information Commissioner

Mr Stephen Palethorpe
Committee Secretary
Senate Standing Committee on Environment and Communications
Parliament House
CANBERRA ACT 2600

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Dear Mr Palethorpe

I would like to thank the Senate Standing Committee on Environment and Communications for its invitation to respond to a supplementary submission from the Australian Privacy Foundation (the APF), relating to the Committee's inquiry into the adequacy of protections for the privacy of Australians online.

I would also like to take this opportunity to respond to comments made in a submission from the Australian Communications Consumer Action Network (ACCAN). My reason for doing this is that the APF submission refers to research recently commissioned by ACCAN into privacy complaint handling in the telecommunications sector which is the subject of the ACCAN submission.

The attachment to this letter outlines the Office of the Australian Information Commissioner's (the Office) responses to some of the issues and assertions raised by the APF in its supplementary submission.

Yours sincerely

Timothy Pilgrim
Australian Privacy Commissioner

15 December 2010

OAIC Comments in Response to the Supplementary Submission made by the Australian Privacy Foundation (APF) - 30 November 2010

Parliamentary Committee Processes

It is not directly the role of this Office to comment on the views expressed by the APF on how Parliamentary Committees undertake their review processes, such as the comments made on pages 2 and 8 of their submission. However, the Office takes seriously its responsibility to comment on draft legislation and believes that making submissions to Senate and Joint Committees on prospective legislation and other inquiries provides an effective means of contributing to a reasoned consideration of the potential privacy impacts of proposed legislative changes.

The former Office of the Privacy Commissioner (now integrated into the Office of the Australian Information Commissioner) had a long history of contributing to Committee inquiries, including making 25 submissions to Senate and Joint Committees in the period from 1 January 2009 to 31 October 2010. The Office will continue to contribute to Committee processes in a similar way.

Privacy Impact Assessments as Standard Practice in Business and Government

On page 12 of their supplementary submission, the APF raises issues relating to Privacy Impact Assessments (PIAs). The Office regularly promotes the use of PIAs as a means of identifying and addressing privacy issues in both the public and private sectors.

To reinforce the Office's view of the value in undertaking PIA's, it issued a guide for government agencies and private sector organisations to assist them in this process.¹ The PIA Guide sets out the advantages to agencies and organisations of undertaking a PIA (see pages v-viii of the guide).

Currently, while the Office promotes and encourages the use of PIAs, the *Privacy Act 1988* (the Privacy Act) does not require that PIAs be undertaken. It would therefore be inappropriate for the Office to seek to require agencies or organisations to conduct PIAs. The Office maximises its influence by establishing and maintaining constructive and helpful relationships with agencies and organisations. As a result many government agencies and private sector organisations undertake PIA's as part of developing and implementing new initiatives.

In this regard, I note that in its first stage response to the Australian Law Reform Commission's (ALRC) report into privacy law and practice, the Government has accepted the ALRC's recommendation that the Privacy Act should be amended to empower the

¹ <http://www.privacy.gov.au/materials/types/download/9349/6590>

Commissioner to direct government agencies to undertake PIAs in relation to new projects that may have a significant privacy impact.²

Effective, Efficient and Privacy-Positive Complaints-Handling

On page 13 of the APF's submission it states that 'there is an urgent need for the new Privacy Commissioner to adopt a much more positive and privacy-protective approach to complaints-handling'. The APF also comments on that organisation's experience of complaint-handling by the Office. I note that the APF has not supported these statements with evidence. This limits the Office's ability to address these concerns in detail.

The Office has a strong focus on conciliating complaints by bringing the parties together and helping to resolve the privacy issues in dispute. This is in line with section 27(1)(a) of the Privacy Act which states that the Commissioner should 'endeavour, by conciliation, to effect a settlement of the matters that gave rise to the investigation'. The Office believes that less adversarial processes such as conciliation often deliver better outcomes.

Conciliation can be an effective and quick way of resolving a complaint. Skilled conciliators create the opportunity for parties to openly and constructively discuss matters and how they might be resolved in a neutral environment. Conciliation also gives an opportunity for parties to actively decide how a complaint is resolved. Conciliated outcomes include apologies, access to records, changed procedures in private sector organisations and government agencies, staff training, staff counselling and payment of compensation. Many matters are settled subject to confidentiality agreements.

The Privacy Act requires the Commissioner to conduct investigations in private (section 43(2)). The Office recognises that advocacy organisations, including the APF, see value in 'naming and shaming' organisations and government agencies involved in privacy breaches. However the Office also recognises that many individuals prefer their complaint to remain private. In addition, the ability of government agencies and private sector organisations to enter into confidential conciliation agreements is an essential aspect of the Office's approach to alternative dispute resolution, which seeks to encourage resolution of matters as close to the source of the issue as possible. As one means of finding a balance between confidentiality and the public interest in complaint handling processes and outcomes, the Commissioner publishes de-identified case studies each year. These act as a guide to organisations and agencies about the interpretation and application of privacy law in Australia. There are more than 200 case studies published on the Office's website.³

² *Enhancing National Privacy Protection, Australian Government First Stage Response to the Australian Law Reform Commission Report 108, For Your Information: Australian Privacy Law and Practice, Recommendation 47-4, p 86.*

³ <http://www.privacy.gov.au/materials/types/casenotes?sortby=59>

Where a matter cannot be resolved through conciliation, the Commissioner may have recourse to other powers, such as the ability to make determinations under section 52 of the Privacy Act. These determinations are enforceable through the Federal Magistrates Court and the Federal Court. The Office will use such mechanisms to resolve complaints where the circumstances of a particular case warrant it.

In relation to the Office's complaint handling processes, the APF refers to the submission made by the Australian Communications Consumer Network (ACCAN), and in particular, to research ACCAN commissioned on privacy complaint handling in the telecommunications sector. The matters raised in the ACCAN submission are addressed below.

An Active, Privacy-Protective Stance by the New Privacy Commissioner and OAIC and Appendix: The Scope of the Privacy Commissioner's Functions

In this section of its submission, the APF states that the Office has failed to fulfil its obligations in relation to the 'broad field of privacy protection'. The Appendix - presented as an analysis of seven functions of the Commissioner that the APF suggests are not currently adequately exercised - is largely devoted to reproducing the relevant sub-sections of the Act and the analysis to support the APF's view is limited.

The Office considers that it currently exercises the seven functions referred to effectively. The following are some examples of how the Office meets its responsibilities under each of these provisions:

- **s 27(1)(b)**

The Office regularly comments on the privacy implications of draft legislation and proposed initiatives. The Office has made submissions on privacy issues to a range of agencies and organisations, including the Australian Law Reform Commission, various Senate Committees and many government agencies. In the 2009/10 financial year, the Office made 41 submissions on different privacy issues.⁴ In the same period, the Office issued media releases on 24 different privacy issues.

The Office's comments are not restricted to 'information privacy' issues. The Office also comments on initiatives that have implications for individuals' privacy in a broader sense. For example, the Office of Transport Security (OTS), as part of its Aviation Security Screening Review, has been consulting with the Office about the proposal to trial body scanning technology for use at Australian airports to detect liquids, aerosols, gels and other dangerous goods.

The Office provided advice to the OTS about privacy impact assessments and trialling of these new technologies. This advice emphasised that implementing good privacy practices was important in gaining community confidence.

⁴ <http://www.privacy.gov.au/materials/types/submissions?sortby=65>

- **s 27(1)(c)**

The Office conducts research into and monitors IT developments. For example, staff in the OAIC's Policy Section monitor privacy-related developments that are reported in the media, discussed in on-line fora, and addressed in academic research. The Office also meets regularly with key organisations in the IT sector to discuss developments in the use of new technologies.

The Office has a broad function in relation to Australian Government information management policy and practice, including freedom of information and privacy. This broader function will complement the Office's existing specific function in relation to data processing and computer technology.

- **s 27(1)(f)**

The OAIC routinely provides advice to agencies and organisations on matters relevant to the operation of the Privacy Act. For example, in the 2009/10 financial year, the Office provided advice on privacy matters to the Department of Human Services in relation to service delivery reform, to the Department of Health and Ageing and other stakeholders regarding e-health initiatives, and the Department of the Prime Minister and Cabinet in relation to privacy law reform.

Since 1 July 2010, the Office has provided more than 70 significant policy advices to government agencies and private sector organisations.

- **s 27(1)(k)**

The Office considers the implications for individuals' privacy of proposed data-matching activities by Australian Government agencies in several ways. We review protocols submitted under voluntary data matching guidelines⁵, we monitor the statutory data-matching program under the *Data-matching Program (Assistance and Tax) Act 1990* (the Data-matching Act), and we provide advice more broadly.

The voluntary data matching guidelines developed by the Office require that programs are regularly monitored and evaluated, that individuals identified have the opportunity to dispute the results, and that action against individuals is not taken solely on the basis of automated processes. In 2009/10, the Office received 10 program protocols for proposed non-statutory data-matching activities.⁶

The Office is responsible for monitoring the functioning of the statutory data-matching program under the *Data-matching Program (Assistance and Tax) Act 1990* (the Data-matching Act), which provides for the use of tax file numbers in data-matching processes undertaken by a special unit within Centrelink (the data-

⁵ The voluntary data-matching guidelines for government agencies were issued by the Office under s 27(1)(e) of the Privacy Act and can be found at: <http://www.privacy.gov.au/materials/types/download/8688/6527>.

⁶ Details of the data-matching protocols received can be found in the Office of the Privacy Commissioner's 2009/10 Annual Report at para 3.9.2: <http://www.privacy.gov.au/materials/types/reports/view/7140#3.9>

matching agency) for the purposes of detecting overpayments, taxation non-compliance and the receipt of duplicate payments.⁷ The data-matching agency runs matches on behalf of Centrelink, the Department of Veterans' Affairs (DVA) and the Australian Taxation Office (ATO).

During 2009/10 the Office inspected Centrelink's handling of a sample of data-matching cases at three regional Business Integrity Sites.

- **s 27(1)(m)**

The Office conducts educational activities on its own and in conjunction with other organisations. For example, the Office manages a network of Privacy Contact Officers (PCOs) from Australian and ACT Government agencies and hosts four meetings a year. The meetings enable PCOs to meet directly with the Privacy Commissioner and hear about the Office's activities and other privacy-related issues, such as privacy law reform. The Office also facilitates the Privacy Connections network for professionals in the private sector. This network encourages increased communication between privacy professionals in the private sector and the Privacy Commissioner and furthers privacy professionals' knowledge of current privacy concerns.

Each year, as part of Privacy Awareness Week, the Office organises privacy-related events and produces materials designed to educate the public about privacy. For example, as part of Privacy Awareness Week 2010, the Office collaborated with Asia Pacific Privacy Authorities (APPA) members including Canada, Hong Kong, New Zealand and Korea, to produce a free online tool to help people protect themselves against identity theft. The Office also joined with the Australian Communications and Media Authority and the Department of Broadband, Communications and the Digital Economy to launch 'Mobilise Your Phone Privacy', a pocket guide containing 10 simple tips to help mobile phone users protect their privacy.

The Office publishes a range of plain English information sheets and Frequently Asked Questions on its website to enable individuals, government agencies and private sector organisations to easily understand their rights and obligations under the Privacy Act.

- **s 27(1)(r)**

This subsection provides that the Commissioner may (or if requested to do so, will) make reports and recommendations to the Minister in relation to any matter that

⁷ The Office issued Guidelines in relation to this statutory data-matching program under s 27(1)(p) of the Privacy Act. The Guidelines form part of the Data-matching Act and can be found at: <http://www.comlaw.gov.au/ComLaw/Legislation/LegislativeInstrument1.nsf/0/67E90E95FAF13E88CA2572C000095ED5?OpenDocument>.

concerns the need for, or the desirability of legislative or administrative action in the interests of the privacy of individuals.

While the Office has not had occasion to make formal recommendations to the Minister directly, it regularly makes recommendations to agencies, organisations and Senate Committees regarding legislative or administrative measures that affect individuals' privacy. For example, the Office has made a range of recommendations relating to changes to the Privacy Act in the course of the ongoing privacy law reform process.

- **s 27(1)(s)**

This sub-section is an enabling function that provides the Commissioner with the power to do 'anything incidental or conducive' to the performance of other functions. An example of an activity that could fall under this provision would be the engagement by the Commissioner in a public debate on a key privacy issue in the media. In this regard, the Office received 201 requests from the media in the 2009/10 financial year.

The APF contrasts what it describes as the 'positive stances' adopted by Privacy Commissioners in other countries with the approach adopted by the former Australian Privacy Commissioner. The APF notes particularly this Office's decision not to sign an April 2010 letter to Google regarding its privacy practices that was signed by a number of other Privacy Commissioners or their equivalents. While the former Privacy Commissioner did not sign the April 2010 letter to Google, the Office does cooperate with privacy authorities in other countries to actively investigate privacy issues with an international dimension. For example, earlier this year the Office undertook an own motion investigation into Google's actions in relation to the 'Street View' incident whereby Google collected of unsecured WiFi payload data in Australia using Street View vehicles. The Office worked with counterparts in New Zealand, Canada and Hong Kong in examining that matter. As a result of the investigation, Google have made a number of undertakings relating to their information handling practices.⁸

The Office is also involved in a number of international initiatives to promote cooperation between bodies with a responsibility for privacy and information management including:

- **Asia Pacific Privacy Authorities (APPA)**
A forum for privacy authorities in the Asia Pacific Region to exchange ideas about privacy regulation, new technologies and the management of privacy enquiries and complaints.
- **APEC Data-Privacy Subgroup (APEC DPS)**
A group that builds policy recommendations and implements capacity building projects based on the APEC Privacy Framework adopted by APEC leaders in 2004.

⁸ <http://www.privacy.gov.au/materials/types/media/view/7103>

- **APEC Cross Border Privacy Enforcement Arrangement (APEC CPEA)**
A framework for voluntary cooperation and assistance on privacy enforcement-related activities. The Office is a co-Administrator of the CPEA.
- **OECD Working Party on Information Security and Privacy (WPISP)**
A working party that develops policy options to sustain trust in the Internet Economy.
- **OECD Global Privacy Enforcement Network (GPEN)**
A network of privacy enforcement authorities established to discuss the practical aspects of international privacy law enforcement co-operation.

The APF states that the Office is a ‘protector of government agencies and business’, rather than a ‘protector of people’s privacy’. I note that no evidence to support this assertion has been provided by the APF. The protection and promotion of the privacy of Australians is central to the Office’s work. The advice and guidance that the Office provides daily to agencies and organisations is aimed at enhancing the protection of individuals’ privacy, as is the work of the Office’s complaint handling area.

OAIC Comments in Response to the Submission made by the Australian Communications Consumer Action Network (ACCAN) - July 2010

ACCAN’s submission to the Committee is based on research conducted for ACCAN by the University of New South Wales Cyberspace Law and Policy Centre. The APF’s supplementary submission (page 13) references this research in support of its contentions regarding the Office’s complaint handling processes. The Office commented publicly on the conclusions of that research at the time of its release in September 2010.

The research does not distinguish between the different types of privacy complaints received by the Privacy Commissioner, the Telecommunications Industry Ombudsman and the Australian Media and Communications Authority. It compares without distinction the investigation times required for complex complaints under the Privacy Act with complaints received under the *Spam Act 2003* or the *Do Not Call Register Act 2006*. It appears to suppose that because some privacy related complaints can be resolved quickly under one piece of legislation, all privacy complaints, regardless of their complexity, can be resolved in the same timeframe. For example, approximately 30% of the telecommunications privacy complaints received by the Office are complex complaints relating to credit reporting, which generally require more detailed investigation than the often more straightforward matters dealt with under other provisions of the Privacy Act or other enactments.

The Office expressed directly its disappointment that this distinction was not made by the authors, and that further information was not sought from the Office. The Office was also disappointed that the opportunity to seek information from consumers and to draw evidence-based conclusions was apparently not pursued. Evidence from consumers could

have provided valuable information about the nature of complaints and the level of consumer satisfaction with outcomes.

The Office focuses on working cooperatively with complainants and respondents to resolve complaints through conciliation by achieving outcomes such as apologies, improved business processes, and compensation if appropriate. While the average time taken to resolve all complaints is six months, complaints are often resolved much more quickly. In other cases, that are more complex or where for the example the parties are especially entrenched in their positions, more time may be required in order to reach a mutually satisfactory resolution.

The Office notes that the Government's first stage response to the ALRC's review of privacy law and practice accepted a number of recommendations that would enhance the Office's complaint processing and enforcement powers.