

Legal and Constitutional Affairs Legislation Committee

Answers to questions on notice – Received 29 February 2016

You have recommended that the committee consider whether the new national policing information functions of the ACC could be carried out without exempting those functions from the Privacy Act.¹

1. What legislative (or other) action would be required to retain the coverage of the Privacy Act over national policing information, once CrimTrac is merged into the ACC?
2. (a) Do you envisage any practical difficulties or concerns with an approach which would result in some information held by the ACC being subject to the Privacy Act, while other information was exempt?

(b) Does this situation exist in any other agencies?

Answers

1. What legislative (or other) action would be required to retain the coverage of the Privacy Act over national policing information, once CrimTrac is merged into the ACC?

Coverage of the *Privacy Act 1988* (Privacy Act) over national policing information could be retained by making an appropriate amendment to the Australian Crime Commission Amendment (National Policing Information) Bill 2015 (the Bill).

For example, this could be done by including in the Bill an amendment to s 7(1) of the Privacy Act (which exempts acts and practices of the ACC from the application of the Privacy Act), providing that ACC acts or practices in relation to the handling of national policing information are not exempt.

2. (a) Do you envisage any practical difficulties or concerns with an approach which would result in some information held by the ACC being subject to the Privacy Act, while other information was exempt?

I understand the Bill is intended, among other things, to ensure that the ACC's sophisticated intelligence and analytic capabilities can be used in relation to national policing information.² I also understand that there are concerns about retaining Privacy Act coverage in relation to this information (or functions which involve the handling of such information) after the merger, as it is perceived that this could perpetuate the 'cultural issues' that currently prevent CrimTrac from sharing information with the ACC in a timely manner.³

¹ Australian Information Commissioner, *Submission 2*, p. 5.

² See, eg, p 2 of the [Explanatory Memorandum](#) to the Bill, and page 3 of the Privacy Impact Assessment (provided as Attachment A to the *Joint submission from the Commonwealth Attorney-General's Department, the Australian Crime Commission and CrimTrac Agency* to the Committee, February 2016).

³ See p 9 of the Privacy Impact Assessment, above n 2.

I understand that if the Privacy Act continued to apply to national policing information and the new ACC functions associated with it, the ACC would have the legal authority to share and use that information internally. In particular:

- As the Privacy Impact Assessment explains,⁴ information currently held by CrimTrac is permitted to be shared with the ACC under the exception in Australian Privacy Principle (APP) 6.2(e), which allows the sharing of information for enforcement related activities. This exception would continue to allow national policing information to be shared internally within the ACC following the merger, and
- once national policing information was subject to any analysis by the ACC, it would no longer fall under the definition of national policing information (and therefore would be exempt from the coverage of the Privacy Act, as for all other types of information handled by the ACC). This is because national policing information is defined to exclude 'any further information, opinion, interpretation or conclusion derived by the ACC' from that information, or any such information 'included in an analysis, report or other presentation by the ACC'.⁵ The Explanatory Memorandum to the Bill confirms that the definition of national policing information is not intended to apply to any information that is currently collected or held by the ACC, or information that will be collected by the ACC in the future in the performance of its intelligence or investigatory functions.⁶

I consider that any cultural changes that are required to ensure appropriate sharing of information within the ACC following its merger with CrimTrac would be better addressed and managed through clear policies, training and guidance to staff, rather than diminishing the protections that apply to the personal information that is currently handled by CrimTrac. I consider that the Privacy Act has, to date, set an appropriate standard for the protection of the personal information handled by CrimTrac, and that this should continue after the merger with the ACC, complementing the ACC's existing obligations under the *Freedom of Information Act 1982*, which promotes transparency in the operation of government and public access to information.⁷

(b) Does this situation exist in any other agencies?

The ACC is one of only a small number of government agencies which are exempt from the Privacy Act entirely.⁸ I note that other law enforcement bodies, including the Australian Federal Police, are not exempt from the coverage of the Privacy Act.

Further, it is not uncommon for agencies to be subject to the Privacy Act in relation to the performance of certain functions (or in relation to the handling of certain information), and exempt for other functions. For example, federal courts and certain federal tribunals are exempt from the Privacy Act, except in respect of acts or practices of an administrative

⁴ See page 9 of the Privacy Impact Assessment, above n 2.

⁵ See Item 1 in Schedule 1 to the Bill.

⁶ See pages 9-10 of the EM.

⁷ See pages 4 and 13 of the Privacy Impact Assessment, above n 2.

⁸ See, eg, s 7(1)(a)(iv) of the Privacy Act and Division 1 of Part 1 of Schedule 2 to the *Freedom of Information Act 1982*.

nature.⁹ Similarly in some States and Territories such as NSW, certain law enforcement agencies (including the NSW Crime Commission) are exempt from privacy law except in connection with the exercise of their 'administrative and educative functions'.¹⁰

Section 7(1)(a)(i)(C) of the Privacy Act provides that a number of agencies are exempt from the Privacy Act in respect of particular documents or statutory activities, such as the Department of Defence (in relation to, among other things, the collection, reporting or analysis of operational intelligence). Other agencies with differential privacy obligations include the Attorney-General's Department, the Australian Communications and Media Authority, the Australian Trade Commission, AUSTRAC, the Classification (and Classification Review) Boards, the Department of the Treasury, the Export Finance and Insurance Corporation, the National Health and Medical Research Council, and the Reserve Bank of Australia.¹¹

It is also common for private sector entities which would not otherwise have obligations under the Privacy Act to be covered by the Privacy Act only in respect of certain activities. For example, reporting entities under the *Anti-Money Laundering and Counter-Terrorism Financing Act 2006* must comply with the Privacy Act when they carry out certain customer verification procedures;¹² and almost all entities (including private sector entities, and State and Territory agencies which would not otherwise be subject to the Privacy Act) must comply with the *Privacy (Tax File Number) Rule 2015* when handling tax file number information.¹³

⁹ See s 7(1)(b) of the Privacy Act and Schedule 1 to the *Freedom of Information Act 1982*.

¹⁰ See, eg, s 27 of the *Privacy and Personal Information Protection Act 1998* (NSW).

¹¹ See Division 1 of Part 2 of Schedule 2 to the *Freedom of Information Act 1982*.

¹² See s 35L of the *Anti-Money Laundering and Counter-Terrorism Financing Act 2006*

¹³ Unless they are entirely exempt from the Privacy Act, as the ACC is. See definition of 'TFN recipient' in s 6 of the *Privacy (Tax File Number) Rule 2015*.