



**Australian  
Privacy  
Foundation**

post: GPO Box 1196  
Sydney NSW 2001  
email: [mail@privacy.org.au](mailto:mail@privacy.org.au)  
web: [www.privacy.org.au](http://www.privacy.org.au)

## **Government Agency Coercive Information- Gathering Powers**

### **Draft Report**

[www.ag.gov.au/arc](http://www.ag.gov.au/arc)

### **Submission to the Administrative Review Council**

**5 March 2007**

#### **The Australian Privacy Foundation**

The Australian Privacy Foundation (APF) is the leading non-governmental organisation dedicated to protecting the privacy rights of Australians. We aim to focus public attention on emerging issues which pose a threat to the freedom and privacy of Australians.

Since 1987 the Australian Privacy Foundation has led the defence of the rights of individuals to control their personal information and to be free of excessive intrusions. We use the Australian Privacy Charter as a benchmark against which laws, regulations and privacy invasive initiatives can be assessed.

For further information about the organisation, see [www.privacy.org.au](http://www.privacy.org.au)

#### **General Comments**

We welcome the invitation to comment on this important draft report.

The discussion of prerequisites/triggers on page 12 of the draft report talks about the need to balance the objectives of coercive powers against ‘the common law rights of individual citizens ... [including] ... rights associated with the enjoyment of property and privacy ...’ but there is no mention, even in the relevant footnote, to statutory information privacy rights which have been well established in Australia at least since 1988.

We are disappointed that the draft report does not give more prominence to the role of statutory privacy principles in relation to the subject matter of the report. Discussion of privacy law is largely confined to a brief factual account of the collection principles in Chapter 7 (without any significant analysis or comment) and a section of Chapter 8 on limits on the use of information. We submit that collection principles in particular deserve much greater attention in the earlier chapters – we comment further below.

The failure to recognise the significance of statutory privacy principles may be explained by a failure, at the outset, to clearly distinguish the operation of coercive information gathering powers in relation to natural persons (individuals) from their application to legal entities such as corporations. This distinction is of fundamental importance, since the Parliament has expressly addressed the privacy of natural persons in the Privacy Act 1988. The Information Privacy Principles (IPPs) which apply to Commonwealth agencies under that Act deal expressly with issues such as justification and proportionality which the Draft Report canvasses, but without recognising either the existence of the Privacy Act or the substantial body of privacy literature, and of privacy jurisprudence in many jurisdictions, which should inform the Report more directly in relation to the use of coercive powers to collect information about individuals.

The Report notes that agencies were asked about the individual vs corporation distinction but because none of them “saw this as a useful or workable distinction” (page 18), the ARC appears to have dismissed the

issue without further thought.<sup>1</sup> It may be unsurprising that agencies with coercive powers do not *like* the distinction, but it is extraordinary that neither they nor the ARC have at least recognised that it is a crucial distinction in existing law – the Privacy Act applies to one category of subject but not the other. Unfortunately this probably accurately reflects the priority which many Commonwealth agencies give to compliance with the Privacy Act – it is all too often seen as a nuisance and minor constraint which can largely be ignored given the weak enforcement regime.<sup>2</sup> The Council will hopefully accord the Privacy Act more respect.

## Specific Comments

### Chapter 2

The Council's provisional view on the minimum threshold for the use of coercive powers (page 18 & Best Practice Principle 2) is that their use be consistent with the objects of the relevant legislation, and that there be 'reasonable grounds' for their use.

We submit that in relation to information about individuals, these thresholds are far too low and do not reflect a proper balance between agency objectives and statutory privacy rights. The collection principles in the Privacy Act require personal information to be collected only where it is 'necessary for or directly related to .. a lawful purpose directly related to a function or activity of the collector' (s.14, IPP 1.1), and that it be 'relevant to the purpose .. and .. not intrude to an unreasonable extent upon the personal affairs of the individual concerned' (s.14, IPP 3 (c) &(d))

At the very least the Council should acknowledge and re-inforce the IPPs as the appropriate minimum threshold for use of coercive powers to obtain information about individuals.

The report notes (page 19) that agencies typically attempt to obtain information informally (and voluntarily) 'where appropriate', but also (later on page 19) that they recognise that the Privacy Act 'may support the use of formal access powers'.

The Council's provisional view that agencies themselves are best placed to decide whether to use coercive powers rather than alternatives (page 20 & BPP 3). We submit that this should be qualified in two ways. Firstly, that agencies should always consider whether there are alternative ways of meeting their objectives without requiring the collection of personal information.<sup>3</sup> Secondly, where collection of personal information is considered necessary, that preference always be given to collecting it directly from the individual concerned rather than from third parties.<sup>4</sup>

We support the Council's provisional view that there should be written records of 'reasons' for the exercise of coercive powers (page 21 & BPP 4) but we submit that there should be regular external monitoring and audit – not just internal.

### Chapter 3

In relation to delegation of powers, (pages 23-26) we submit that delegation should not be permitted below a certain level of seniority within agencies, but that formal training and accreditation is also important. These should not be seen as alternatives – both should be required.

<sup>1</sup> Footnote 31 acknowledges the distinction in privacy law but mainly in the context of corporations not having privacy rights – the fact that individuals do is not pursued in the body of the report, other than in a particular limited respect in Chapter 8

<sup>2</sup> We refer the Council to our recent submission to the Australian Law Reform Commission's Privacy Review for our wider criticism of privacy law and its weak enforcement – see [http://www.privacy.org.au/Papers/ALRC\\_IP31\\_070202.pdf](http://www.privacy.org.au/Papers/ALRC_IP31_070202.pdf)

<sup>3</sup> This is one of the main functions of Privacy Impact Assessment – a technique promoted by the Privacy Commissioner – see <http://www.privacy.gov.au/publications/pia06/index.html> and endorsed by the Attorney-General on 29 August 2006

<sup>4</sup> This is a specific requirement of the National Privacy Principles applying to the private sector (Privacy Act Schedule 3, NPP 1.4), and the IPPs and NPPs are likely to be aligned as a result of the ALRC Review. This preference for direct collection is also a requirement of the NSW and Victorian privacy laws applying to their public sector agencies, showing that it is equally relevant for government agencies.

We support the Council's provisional view that all officers exercising coercive powers should be subject to the full range of accountability legislation and instruments (page 24 & BPP 6). We believe that there should be strict limits on the contracting out of information gathering – it is not in our view appropriate for private sector contractors to exercise coercive powers, unless, as in the example given, they are engaged as temporary public servants subject to all accountability mechanisms. However, if any exceptions can be justified, we support the view that full legal responsibility must remain with the government agency (BPP 6).

#### Chapter 4

We cannot understand how this chapter of the draft report on 'notification' neglects to even mention, let alone take into account, the specific 'notice' requirements of the Privacy Act 1988. IPP2 (s.14) expressly requires agencies collecting personal information directly from the individual concerned to notify them of specified matters. At the very least, this needs to be factored in to the discussion and the Council's view as to notification standards. At least one of the Council's provisional views recommends content for notices which is already expressly required by IPP2 without this being mentioned (legislative authority – page 36 & BPP 13 – see IPP 2(d)).

While the IPPs do not include an equivalent 'notice' obligation where agencies collect personal information from third parties, this is a feature both of the private sector NPPs (NPP 1.5) and of the NSW & Victorian privacy laws applying to their State agencies. As already noted, the current ALRC Privacy Review is likely to recommend harmonisation of the IPPs and NPPs, and this may result in an extension of the NPP 1.5 obligation to Commonwealth agencies. We would have expected the ARC to anticipate and discuss this likelihood, and to have recommended minimum standards of notice about intended purpose etc, when coercive powers are used to obtain personal information.

#### Chapter 7

As already noted, we find the factual summary of the collection principles of the Privacy Act at the end of Chapter 7 to be largely wasted in that the Council has failed to take their significant implications into account in the earlier Chapters.

#### Chapter 8

We are puzzled by the absence of any discussion, either in this chapter or elsewhere, of the High Court decision in *JOHNS v. AUSTRALIAN SECURITIES COMMISSION AND OTHERS* [1993] HCA 56. This case set out significant constraints on the secondary uses which can be made of information obtained through the use of coercive powers. While it has not been widely cited in subsequent cases, it has been debated in privacy journals<sup>5</sup> and must remain a highly relevant judgement. We submit that the Council consider the effect of *JOHNS v ASC* and makes express reference to it in its report.

In relation to inter-agency exchange of information and secrecy provisions, we have no objection to the removal of unnecessary barriers and unjustified inconsistency. However, many of the barriers and inconsistencies are the result of conscious decisions by Parliament about the appropriate limits of use and disclosure. In the case of personal information, these limits have to a greater or lesser extent been informed by privacy law concepts, and reflect deliberate choices – both public policy choices and, where allowed, by the choices of individuals, about quarantining information in different 'silos'.

The privacy literature is replete with examples of the risks inherent in attempting to use personal information collected for one purpose for secondary unrelated purposes. Problems of data quality and the importance of context in interpreting information are significant factors in any inter-agency exchange, and have been formally recognised in the safeguards in the *Data-matching (Assistance and Tax) Act 1990* and in the similar Data-matching Guidelines issued by the Privacy Commissioner and adopted by many Commonwealth agencies.<sup>6</sup> We find it surprising that there is no mention of these issues<sup>7</sup>, or of the data matching legislation and guidelines in the draft Report.

<sup>5</sup> Professor G Greenleaf, *High Court confirms privacy right against governments*, [1994] 1 PLPR 1 <http://www.austlii.edu.au/cgi-bin/disp.pl/au/journals/PLPR/1994/1.html?query=Johns%20v%20ASC>

<sup>6</sup> see [http://www.privacy.gov.au/publications/HRC\\_PRIVACY\\_PUBLICATION.pdf\\_file.p6\\_4\\_23.15.pdf](http://www.privacy.gov.au/publications/HRC_PRIVACY_PUBLICATION.pdf_file.p6_4_23.15.pdf)

<sup>7</sup> Apart from a brief acknowledgement of community attitudes in the provisional view on p.71

We submit that the Council's provisional views on inter-agency exchange of information (BPPs 20-22) need to be better informed, by reference to privacy law and literature, particularly in relation to threshold criteria and safeguards.

The section of Chapter 8 on privacy law as it affects inter-agency exchange of information is, like the section of Chapter 7 on collection, little more than a factual summary of the relevant provisions of the Privacy Act. There is no analysis or recognition of the significant implications that the use and disclosure principles (IPPs 10 & 11 and their equivalents in other privacy jurisdictions) have for a meaningful review of coercive information gathering powers and their use.

The Council's only provisional view on this subject is that there should be guidelines for agency officers on the interaction of the Privacy Act and agency secrecy provisions (page 72 & BPP 22).. Apart from noting that many Commonwealth agencies already have such internal guidelines, we have no difficulty in supporting this recommendation. But it is not a substitute for the more thorough analysis that is required and which should inform all the the other recommendations which the Council will be making.

In relation to intra-agency exchange of information, the discussion would again benefit from more detailed analysis of privacy laws. Cases decided by the NSW Administrative Decisions Tribunal under the *Privacy and Personal Information Protection Act 1998 (NSW)* have given important guidance on the distinction between use and disclosure<sup>8</sup>, and the Privacy Act itself has an ambiguous definition of 'use' that '... does not include mere disclosure' (s.6), the effect of which remains unclear after 18 years, but could be significant for the application of the IPPs.

The reference on page 73 to ACCC and ASIC assertions that they are not restricted as to the use of information for a particular purpose neglects to address the decision in *JOHNS v ASC* already mentioned.

The brief discussion of 'consent' on page 74 touches on a particular complex and vexed issue in privacy law, but does not do it justice. We support the general thrust of the Council's provisional view (BPP 23) – that any consent should be express, voluntary and informed, but the practical difficulty of implementing this in the context of the use of information obtained by coercive powers is not addressed. There is also an important issue of whether it is appropriate (or practicable) to seek consent for disclosure as an alternative to the use of coercive powers in the first place, which is not addressed – see our earlier comments about alternatives under Chapter 2.

The brief discussion of physical security and records management on page 72 is far too superficial and complacent, and it is not clear why IT or data security has been omitted. While the obligation imposed by IPP 4 is acknowledged, there is no reference to the serious shortcomings in information security and records management exposed over the years by successive Privacy Commissioner, Auditor-General and Ombudsman reports, and by periodic disclosure of extensive abuses of information by staff in agencies such as Centrelink and the ATO.

Any discussion of agency information-gathering powers should take into account the clear evidence of significant security risks. While we would support any recommendations that security be taken more seriously, we submit that public policy decisions about the acceptability and limits of agency powers have to be made on the assumption that sensitive information – including personal information – will inevitably be used and disclosed inappropriately from time to time.

## Chapter 9

The draft report again betrays its neglect of privacy law by failing to include the Privacy Commissioner in the list of external complaint processes on pages 77-78, and the absence of any reference to processes for responding to interferences with privacy elsewhere in this chapter. Also, there is no mention under 'Accountability to individuals' heading on page 78 of the specific access and correction rights, and related notice obligations, under the FOI and Privacy Acts.

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<sup>8</sup> the NSW Act, like the Commonwealth IPPs, has separate principles, unlike the NPPs and Victorian *Information Privacy Act 2000*

We support the Council's endorsement on page 79 of the Senate Committee's recommendation for centralised agency records of the exercise of coercive powers, but note that this is not translated into a specific Council view or Best Practice Principle. We submit that it should be.

### **Conclusions**

We are very disappointed at the neglect of privacy law in the draft Report. We hope that the Council will remedy this before the final report, so that it better reflects not only the existing application of the Privacy Act 1988 to Commonwealth agencies exercising coercive information-gathering powers, but also the subsequent developments in privacy law being analysed by the ALRC in its Privacy Review.

We suggest that the Council seeks advice from the Privacy Commissioner, as well as from the wider community of privacy experts, on these issues.