

2 August 2010

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cc. Mr John McMillan
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Dear Timothy

The signatories to this letter are Australia's primary civil liberties organisations together with the Australian Privacy Foundation.

We offer you our congratulations on your appointment to the vitally important statutory position of Privacy Commissioner.

We believe that substantial changes are needed to some key aspects of the operation of your Office. A positive approach is vital, in order to recover appropriate balance between administrative and business convenience, on the one hand, and privacy, on the other. The attachment to this letter presents the elements that we perceive to make up such a positive but privacy-protective approach.

We would be pleased to discuss the matters in the attachment with you, jointly and severally as appropriate, with a view to a greatly upgraded relationship between the Commissioner and civil society.

Yours sincerely

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Submission by Civil Society Organisations

Key Elements of a Positive Approach to the Role of Privacy Commissioner

2 August 2010

Background

The last five years have seen an increasing incidence of projects giving rise to public concerns and attracting negative coverage by the media. Companies as popular with consumers as Google and Facebook have suffered major harm to their reputations because they were seen to have played fast and loose with personal data. Successive attempts to create multi-purpose identification schemes have been widely criticised, with the collapse of the Access Card project resulting in costs of many tens of millions to both the public purse and the private sector. A range of both corporations and government agencies have been accused of failing to exercise adequate control over sensitive personal data.

Such problems are arising because corporations and government agencies develop designs that include privacy-invasive features that could have been readily avoided or whose negative impacts could have been readily mitigated. Moreover, many of those features are not even necessary to achieve the organisations' aims. The organisations are including them because they are failing to appreciate just what the public is concerned about, and to gauge public reactions to their intentions.

Under the previous Privacy Commissioner, organisations were permitted and even encouraged to be out of touch with public sensitivities. The Office's *modus operandi* has been to act as a consultant to agencies. It has allowed organisations to regard the Office as a 'single port-of-call' that provides its imprimatur to projects. It has acquiesced to agencies using both the Office and independent Task Forces as shields between themselves and the public. The buffering of organisations from the people who are affected by their designs actively precludes the development by organisations of an appreciation of privacy concerns.

This submission outlines the signatory organisations' views on the key elements of the reforms that are needed in the role of Privacy Commissioner. The document takes into account the functions, powers and constraints of the office that are embodied in the relevant statutes, and shows how corporations and government agencies can be guided into much more constructive approaches, thereby achieving their aims instead of tarnishing their reputations, reducing trust in organisations by consumers and citizens, and risking project failure.

1. Relationships with Agencies, Corporations and Industry Associations

The Office must not perceive its primary role as being to advise organisations about its own reactions to organisations' proposals. Rather, the Office needs to advise organisations how they can develop an appreciation of privacy aspects of their proposals. Naturally this will include mention of specific points that arise from the law and from the Commissioner's analyses and prior statements; but organisations need to understand that the responsibility for understanding public concerns rests with the proponent of the project, not with the Office of the Privacy Commissioner.

The Office's key role is to provide guidance to organisations on how to develop an appreciation of the public's concerns, and how to feed that forward into their design processes. This requires that organisations interact with relevant segments of the public that will be affected by the proposal, and with organisations that represent those segments and advocate for their interests.

In providing this guidance, the Privacy Commissioner needs to exercise the many discretions embodied in s.27 of the Privacy Act in order to lead organisations towards an appreciation of privacy as a whole, not just information privacy, and to draw them far beyond mere compliance with the legal requirements relating to information privacy.

A corollary of this positive approach to the Commissioner's role is that closed meetings with agencies, corporations and industry associations, in the absence of representatives of civil society, must be the exception, not the norm.

Consistent with the aim of ensuring that organisations themselves gain understanding about privacy concerns, meetings about particular proposals need to involve all relevant parties, and especially civil society, in such forms as roundtables and workshops. The Office's role in relation to such events then becomes that of observer, and where appropriate instigator or perhaps facilitator. The Commissioner thereby remains free to assist all sides in appreciating one another's needs and concerns, rather than acting as consultant, independent appraiser, formal adviser, adjudicator and/or approver of proposals.

2. Relationships with Public Interest Associations

The previous Commissioner's policy was to keep NGOs at distance. The primary interaction mechanism was a periodic meeting with representative and advocacy organisations, at which large numbers of issues were discussed, largely in the abstract and in the absence of the organisations whose actions gave rise to the concerns in the first place. Minutes were taken and hours lost, and there were virtually no concrete outcomes.

The positive approach required of the Office involves the active identification of the many NGOs that have an interest in privacy matters in particular contexts, engagement with all of them at the same level of intensity as with major agencies, major corporations and industry associations, and the facilitation of discovery by organisations of the NGOs relevant to their proposals, including through publication on the Office's web-site of a register of all such organisations.

3. Stimulation of an Effective Privacy Consultancy Industry

For many years, the Office has enabled consultancies to list themselves on the Office's web-site. Apart from that, the Office appears to have been largely inactive in the area. During the last several years, a privacy industry association has emerged; but it is a mere chapter of a US industry association, and it consequently imports thinking from a jurisdiction that has values, attitudes and laws very different from those in Australia.

The positive approach that needs to be adopted by the Privacy Commissioner involves the provision of guidance to consultancy organisations regarding the kinds of techniques and advice that Australian organisations need.

Naturally, Privacy Act Compliance Checks are part of that framework. Much more importantly, however, consultancies need to support organisations in the performance of preliminary Privacy Issues Analysis assignments, and comprehensive Privacy Impact Assessments (PIAs). The outcomes of these activities then need to lead into articulated privacy planning and control techniques.

As part of the positive approach to guiding organisations to develop a real appreciation of privacy concerns, and to engage with relevant NGOs, the Office needs to drive the consultancy community towards a far greater degree of maturity than it has achieved to date.

4. Withdrawal from a Consultancy Role for Government Agencies

Appropriately, the Office has established MoUs with a range of organisations such as the ACT government and other regulators within and beyond Australia.

However, the Office also has MoUs in place with several government agencies, accepts funding from them, and performs services for them. This creates at least the appearance of an inappropriate relationship between a statutory office charged with regulatory responsibilities and organisations that it is intended to exercise those responsibilities over.

As part of the positive approach, the Office needs to withdraw from these MoUs as quickly as possible in order to avoid compromise to the role. The measures outlined above establish the basis whereby agencies can gain access both to the necessary appreciation of privacy concerns and to the expertise that they need to assist them to develop privacy-sensitive designs.

5. Complaints-Handling and Determinations

During the last 5 years, the Office has adopted a highly negative approach to complaints, both those by members of the public and representative complaints. Key facets of this have been the highly legalistic tone of replies to complainants, and what appears to have been active search for ways to avoid having to deal with particular complaints.

In addition, the potential impact of many complaints has been dissipated. One reason has been the exceedingly long timelines for the handling of complaints, to the extent that complainants no longer remember the details of the matter and hence are less inclined to follow up. Another pattern has been lengthy deferral of particular complaints because the Office is conducting, or plans to conduct, a broader investigation into related matters.

The positive approach to complaints-handling involves far greater professionalism and responsiveness in the Office's incident management system, and relegates the necessary legalese to a technical attachment to the response to the complainant.

Further, very serious concerns about the previous Commissioner's approach have been an apparent policy of not proceeding to formal Determinations (which bemused even some of the Commissioner's overseas colleagues), explicit refusal to make Determinations even when dissatisfied complainants have sought them, and inadequate transparency in complaints-handling processes. Determinations represent and encourage the development of case law, clarifying the meanings of terms, and thresholds and balances; yet not a single new Determination has been made for the last 5 years.

The positive approach to complaints perceives them as opportunities to clarify, to organisations and the public alike, where the boundaries lie, where possible through clear decisions by the Commissioner, and where necessary through decisions on appeal to higher authorities.

6. Constructive Use of Own-Motion Investigations

The previous Commissioner's policy was to conduct own-motion investigations in complete isolation from the public and from NGOs. This has been the case even where the investigation has been commenced at least in part because of expressions of concern by members of the public or civil society.

The law places constraints on the Commissioner, but it does not preclude engagement of the public in such matters. The positive approach that is needed includes firstly such involvement of civil society as is practicable in each particular circumstance, and secondly the reporting of outcomes in sufficient detail that the public is informed.

7. Conduct of Independent Audits

The independence and credibility of the Office has been undermined by the performance of a consultancy role for government agencies. In addition to withdrawing from that role and instead stimulating a more effective consultancy marketplace, the Office needs to resume the statutory audit function that has been largely in abeyance for many years.

It is clear that the Office has not been adequately funded to conduct the audits envisioned in the legislation. Where public policy considerations make it important that an audit be nonetheless conducted, the Office risks serious compromise to its role and its reputation if it accepts funding directly, and if it enters into an MOU with the agency whose activities it is to audit. Alternative approaches exist that can avoid such compromise, in particular budget transfers between portfolio agencies such that the funding is of the nature of an increment to the amount appropriated to the Office, and the conduct of the audit solely by means of the powers afforded by statute.