



Australian Government
Office of the Privacy Commissioner

Level 8 Piccadilly Tower
133 Castlereagh Street
Sydney NSW 2000
GPO Box 5218
Sydney NSW 2001

P +61 2 9284 9800
F +61 2 9284 9666
privacy@privacy.gov.au

Enquiries 1300 363 992
TTY 1800 620 241
www.privacy.gov.au

ABN 13 152 473 225

Dr Roger Clarke
Chair
Australian Privacy Foundation

chair@privacy.org.au

Dear Dr Clarke

Thank you for your letter in which you, among other things, congratulate me on my appointment as Privacy Commissioner. I appreciate those congratulations.

In the attachment to your letter you raise a number of issues and outline changes that you believe are necessary for a more positive approach to the role of Privacy Commissioner. My comments on those issues are attached to this letter.

In considering these comments I believe it is relevant to acknowledge that my response is provided in the context of my current role as the Privacy Commissioner and Agency Head of the Office of the Privacy Commissioner (OPC). I mention this because as you would be aware, on 1 November 2010 the OPC will be integrated into the new Office of the Australian Information Commissioner (OAIC). On that date, the Australian Information Commissioner Designate, Professor John McMillan, will become the Agency Head, and the functions under the *Privacy Act 1988 (Cth)* will be vested in his position. In my capacity as Privacy Commissioner I will however, continue to be directly vested with the majority of the functions under section 27(1) of the Privacy Act through the *Australian Information Commissioner Act 2010 (Cth)*.

For this reason the views I express below are made in that context and may not necessarily reflect the direction of the OAIC after 1 November 2010. I am aware that Professor McMillan is responding separately to your letter as a copy was provided to him.

Yours sincerely

Timothy Pilgrim
Australian Privacy Commissioner

31 August 2010

cc. Professor John McMillan
Australian Information Commissioner, Designate

Response to the Issues raised in a Submission by Civil Society on the key Elements of a Positive Approach to the Role of Privacy Commissioner

- 1. Relationship with Agencies, Corporations and Industry Associations**
- 4. Withdrawal from a Consultancy Role for Government Agencies**

I will respond to the matters you raised under both these sections as I believe they are interrelated.

The following subclauses in Section 27(1) of the Privacy Act, which sets out the Privacy Commissioner's statutory functions, I believe, are particularly relevant to the consideration of the issues you have raised. These are:

- (b) to examine (with or without a request from a Minister) a proposed enactment that would require or authorise acts or practices of an agency or organisation that might, in the absence of the enactment, be interferences with the privacy of individuals or which may otherwise have any adverse effects on the privacy of individuals to ensure that any adverse effects of such proposed enactment on the privacy of individuals are minimised;*
- (d) to promote an understanding and acceptance of the Information Privacy Principles and of the objects of those principles and of the National privacy principles;*
- (f) to provide (on request or on the Commissioner's own initiative) advice to a Minister, agency or organisation on any matter relevant to the operation of this Act;*

I believe that the Office's approach to working with agencies and organisations reflects the intent of these functions and in that context it is not my view that the Office has performed any consultancy roles for government agencies.

By the very nature of its work with government agencies, the Office will inevitably be in the position of holding discussions with agencies on proposals in their very formative stage. Given this, there will naturally be situations where the Office is provided with confidential or Cabinet-in-Confidence information as part of this process through briefings and other means. Similarly, corporations may wish to discuss commercial in confidence business proposals. I believe it is important for the Office to be able to provide advice and, where necessary, influence initiatives impacting on personal information at as early a stage as possible. I will continue to encourage agencies and private sector organisations to approach the Office so as to allow me to determine what level of ongoing involvement (if any) we may have with any particular initiative or proposal.

All government agencies have limited resources available to them. The Office must therefore prioritise its activities so that it achieves its outcomes with the resources available to it. In that context, the option for the Office to be able to seek additional resourcing through Memorandums of Understanding (MOU) is a legitimate one that I will continue to consider as the circumstances warrant. Entering into such MOUs will allow the Office to provide guidance and advice on initiatives and proposals that it may otherwise have not had the capacity to do.

In saying that, I am clearly conscious of the need for the Office's independence to be paramount in how it undertakes all its functions. However, I believe that this can be, and has been, achieved as part of the MOU arrangements it currently has with various agencies.

I would add that I do not see the Office's involvement with agencies and organisations in this context as preventing or taking the place of those entities engaging with representatives of civil society organisations. The Office has in the past impressed upon agencies and organisations the importance and benefits of seeking a broad range of views on proposals that impact on the handling of individuals' personal information. We will continue to do this in the future.

2. Relationship with Public Interest Associations

The Office has held regular meetings with public interest associations and NGOs as you acknowledge. The purpose of these meetings has been, in part, to advise these groups of the key activities of the Office and to hear directly from attendees their views on these activities and other issues.

As I discussed at the most recent of these meetings, held on 28 July 2010, I am open to reviewing the structure of these meetings to ensure that they are useful to all attendees and I look forward to receiving any suggestions to this end.

3. Stimulation of an Effective Privacy Consultancy Industry

The Office has always taken the position that agencies and organisations that are introducing significant initiatives that impact on privacy should undertake a Privacy Impact Assessment (PIA). The Office encourages those entities to use external organisations to undertake the PIA as this can often ensure an independent assessment of the impact of a particular initiative or proposal.

While the Office will continue to support the consultancy community through approaches such as allowing individual organisations to list themselves on its website, I am open to suggestions on other support which the Office could provide. However, I also believe that

there are limits to which an Australian Government Agency should be seen endorsing, either directly or indirectly, commercial entities.

You specifically mention in your submission the recent emergence of a privacy industry association which I assume to be a reference to the International Association of Privacy Professionals, Australia New Zealand (IAPPANZ). While I acknowledge your views on that particular organisation's background, I nevertheless believe that the establishment of such Associations do need support. I see similarities, for example, in the activities of the IAPPANZ to those our Office undertakes with Australian and ACT Government Privacy Contact Officers. In that regard I am supportive of activities that take a positive approach to promoting good privacy practices across a range of sectors.

5. Complaint Handling and Determinations

Sub-sections 27(1)(a) and (ab) of the Act state that the Privacy Commissioner has the function to investigate an act or practices of an agency or organisation (respectively) that may breach an Information Privacy Principle (IPP) or National Privacy Principle (NPP). Those subsections go on to say that where the Commissioner considers it appropriate to do so, he or she should "*endeavour, by conciliation to effect a settlement of the matters that gave rise to the investigation*".

As you would be aware, it has been the practice of this Office to attempt to resolve complaints through the use of alternative dispute resolution (ADR) procedures. It is my view that bringing the parties together as part of a conciliation process is the best approach to achieving acceptable outcomes in a complaint. I will continue to promote the effective use of conciliation and ADR processes as the primary approach to resolving complaints brought to my Office.

However, where a case warrants it, I will always consider the use of all powers available to me under the Act to reach an effective resolution.

6. Constructive use of Own-Motion Investigations

The Office will continue to comply with the intent of the Act in the resolution of own-motion investigations as it would in the case of a complaint brought by an individual.

In that context the Act requires the Commissioner to undertake such investigations "in private". In accordance with the principles of natural justice, the Office would keep the parties to an investigation informed of its progress. However, as you can appreciate, where a matter is brought to the attention of the Office by a third party who may not be directly affected by the matter it may not be appropriate, or may even be unlawful, for the Office to make certain matters known to the third party.

Having said that, the Office will endeavour to ensure that, to the extent possible, it keeps the third party advised of the progress of its own motion investigation.

7. Conduct of Independent Audits

As I stated above under my response to issues 1 and 4, it is not my view that the Office has performed any consultancy roles for government agencies.

In respect of the Office's audit powers, these are discretionary and as such need to be considered in the context of all of the Office's statutory functions. As you may recall, in the years following the commencement of the private sector provisions there was a sixfold increase in the number of complaints being lodged with the Office. This meant that, like all organisations, the Office was required to prioritise its activities. Priority was given to those functions which had the most immediate impact on individuals, such as the resolution of complaints.

Currently, the Office is mostly undertaking audits through funding provided as part of various MOUs, such as the MOU with the Australian Capital Territory Government. As I mentioned above, I believe that entering into such arrangements is a legitimate option for the Office. I would add that in the last year the Office also undertook audits into several Credit Reporting Agencies. As resources and other priorities allow, I hope to continue an expanded audit program.