



**Australian
Privacy
Foundation**

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17 November 2014

Mr Jean-Philippe Walter
Chair of the Consultative Committee
Council of Europe Convention 108

Dear Mr Walter,

**Convention 108 – Submission to the Ad Hoc Committee on Data Protection (CAHDATA)
Working Document – Convention 108 with Additional Protocol and Modernisation
proposals**

This submission is made by the Australian Privacy Foundation (APF) via the APF's International Committee. Details of APF are annexed. APF has Observer status on the Consultative Committee (T-PD) in relation to Convention 108. The APF requests that its apology for non-attendance at the 3rd Meeting on 3-4 December 2014 be noted.

The APF notes the Resolution concerning the Convention 'modernisation' proposals adopted by the European Conference of Data Protection Authorities on 5 June 2014, endorsing the work undertaken by the Consultative Committee, noting that 'any reduction in the level of protection currently afforded by Convention would be a step backwards', and supporting twelve proposals by the Consultative Committee to strengthen the Convention. The APF supports and endorses those comments by the European Conference.

In particular, the APF notes the comments by the European Conference that the expansion of Convention 108 to countries outside the Council of Europe 'must not lead to a reduction in the high standards of data protection' in the current Convention and in the proposed modernization. As a civil society organization based in a country which we hope will eventually accede to the Convention, we strongly endorse this view. High but realistic standards for accession to the Convention are necessary before the APF would support Australian accession, because of the consequences for Australia of being a party to the Convention, in particular the requirements of free flow of personal data to other Parties, pursuant to Article 12. The interests of Australian data subjects require that no parties to the Convention must have inadequate data protection standards, and our support for Australian accession is contingent upon that.

APF supports the proposed changes to the T-PD Proposals contained in the Proposals for Discussion, subject to the reservations expressed below

APF supports these changes: Preamble 3rd paragraph; Art. 1 (but subject to our reservations concerning Art. 3(1) and Art. 1bis); Art. 2(c); Art. 3 (except Art 3(1) as below); Art. 4; Art 5 (except Art. 5(3)(c) as below); Art. 6 (except Art. 6(2) as below); Art 7 (except Art. 7(2) as below); Art 7bis (except Art. 7bis(1) as below); Art. 8; Art. 8bis (except Art. 8bis (3) as below); Art. 9; Art. 10; Art. 12 (except Art. 12(7)(c) as below); Art. 12bis; Art. 13 (except as below); Arts. 14-20; Art. 21; and Art. 22.

APF proposes the following changes to the Proposals for Discussion, in order both to improve them, and to guard against weakening of the T-PD proposals:

- Art. 3(1) should be improved by addition of the words 'including any person subject to the jurisdiction of the Party', so as to avoid any limitation of protection to citizens or residents only.

- Art. 5(3)(c) should be improved by re-introduction of the words ‘and limited to the minimum necessary’, as in the T-PD proposals. The principal of minimality in personal data collection is becoming every day more essential for data protection laws to be effective, particularly as it becomes more difficult to control use and disclosure, or ‘Big Data’ practices. Preventing collection of personal data unless its collection is necessary for legitimate purposes is now an essential principle of data protection. By far the majority of countries outside Europe with data privacy laws have already adopted the minimum collection principle. If Convention 108 does not require minimum collection, there is a serious question to be asked as to whether they should even consider acceding to Convention 108, because data exports to countries with no such principle will place the privacy of their citizens at risk.
- Art. 6(2) should be improved by stating ‘guard against and if possible prevent’.
- Art. 7(2) should have appended to it words such as ‘and also in appropriate cases shall notify the data subjects who may be affected, in circumstances to be determined by law, including whenever required by the competent supervisory authority’.
- Art. 7bis(1) should be improved by addition, after ‘categories of recipients of the personal data’, the words ‘and the location of any recipient who is outside the jurisdiction in which the controller is located, and the means of exercising the rights set out in article 8’.
- Art. 7(1bis) should be improved by stating, instead of ‘already has the relevant information’, the words ‘has already received the relevant information from the data controller’.
- Art. 8bis (3) should be improved by concluding with the words ‘, including taking them into account from the earliest stages in the design of products and services’.
- Art. 12(7)(c) should be improved by addition of a new clause Art. 12(10): ‘A supervisory authority shall be as transparent as possible (subject to protecting the rights of data subjects) when making decisions concerning data subjects or controllers, either singly or by category, and in particular should publish their decisions in a systematic and permanent form allowing free public access.’ Without such transparency, supervisory authorities cannot be held accountable by the public or their representatives, and neither data subject nor controllers, nor their representative, can understand the practical implementation of the law.
- Art. 14 should be improved by addition of a new clause Art. 13(4) ‘A supervisory authority shall give explicit consideration to joining those associations of supervisory authorities which it is eligible to join, and if it decides not to so join it shall publish its reasons.’

APF considers that all of these improvements are necessary to maintain the high standards needed of the Convention. APF also agrees with the European Conference that each State Party should ensure that its supervisory authority participates in the Consultative Committee of Convention 108.

We look forward to hearing the results of the CAHDATA committee deliberations.

Yours sincerely,



Graham Greenleaf AM
(Member, APF International Committee, on behalf of the APF)

Australian Privacy Foundation

Background Information

The Australian Privacy Foundation (APF) is the primary national association dedicated to protecting the privacy rights of Australians. The Foundation aims to focus public attention on emerging issues that pose a threat to the freedom and privacy of Australians. The Foundation has led the fight to defend the right of individuals to control their personal information and to be free of excessive intrusions.

The APF's primary activity is analysis of the privacy impact of systems and proposals for new systems. It makes frequent submissions to parliamentary committees and government agencies. It publishes information on privacy laws and privacy issues. It provides continual background briefings to the media on privacy-related matters.

Where possible, the APF cooperates with and supports privacy oversight agencies, but it is entirely independent of the agencies that administer privacy legislation, and regrettably often finds it necessary to be critical of their performance.

When necessary, the APF conducts campaigns for or against specific proposals. It works with civil liberties councils, consumer organisations, professional associations and other community groups as appropriate to the circumstances. The Privacy Foundation is also an active participant in Privacy International, the world-wide privacy protection network.

The APF is open to membership by individuals and organisations who support the APF's Objects. Funding that is provided by members and donors is used to run the Foundation and to support its activities including research, campaigns and awards events.

The APF does not claim any right to formally represent the public as a whole, nor to formally represent any particular population segment, and it accordingly makes no public declarations about its membership-base. The APF's contributions to policy are based on the expertise of the members of its Board, SubCommittees and Reference Groups, and its impact reflects the quality of the evidence, analysis and arguments that its contributions contain.

The APF's Board, SubCommittees and Reference Groups comprise professionals who bring to their work deep experience in privacy, information technology and the law.

The Board is supported by Patrons The Hon Michael Kirby AC CMG and The Hon Elizabeth Evatt AC, and an Advisory Panel of eminent citizens, including former judges, former Ministers of the Crown, and a former Prime Minister.

The following pages provide access to information about the APF:

- Policies <http://www.privacy.org.au/Papers/>
- Resources <http://www.privacy.org.au/Resources/>
- Media <http://www.privacy.org.au/Media/>
- Current Board Members <http://www.privacy.org.au/About/Contacts.html>
- Patron and Advisory Panel <http://www.privacy.org.au/About/AdvisoryPanel.html>

The following pages provide outlines of several campaigns the APF has conducted:

- The Australia Card (1985-87) <http://www.privacy.org.au/About/Formation.html>
- Credit Reporting (1988-90) <http://www.privacy.org.au/Campaigns/CreditRpting/>
- The Access Card (2006-07) http://www.privacy.org.au/Campaigns/ID_cards/HSAC.html
- The Media (2007-) <http://www.privacy.org.au/Campaigns/Media/>