

## ***Senate Legal and Constitutional Committee***

### ***Inquiry into the Privacy Act 1988***

#### ***Supplementary submission by the Australian Privacy Foundation, concerning the Privacy Advisory Committee***

After the closing date for the Committee's Review of the Privacy Act, it came to our attention that new members of the Privacy Advisory Committee have recently been appointed (see Media release at [http://www.privacy.gov.au/news/02\\_05.html](http://www.privacy.gov.au/news/02_05.html) ).

Those appointments reminded us of some problematic aspects of Part VII – Privacy Advisory Committee, which we omitted to mention in our original submission.

We have inserted our comments into the text of the relevant sections, below.

#### *s.82 Establishment and membership*

*(1) A Privacy Advisory Committee is established.*

*(2) The Advisory Committee shall consist of:*

*(a) the Commissioner; and*

*(b) not more than 6 other members.*

This restriction on numbers may have the effect of limiting the extent to which the Committee can represent important interests, especially if positions are vacant (see below). There is an important distinction between members who represent the interests of data users within a particular sector and those who represent consumers or citizens – their perspectives and priorities will often be completely different.

We suggest the maximum membership be increased significantly to provide more flexibility (see below).

*(3) A member other than the Commissioner:*

*(a) shall be appointed by the Governor-General; and*

This means in effect appointment by the Attorney-General. Any assessment of the provisions of Part VII need to be made with this in mind as the Attorney-General cannot be considered a neutral and disinterested party. Our suggestions below are in part aimed at safeguarding against the 'stacking' of the PAC by the Attorney-General to favour particular interests or other government policies.

*(b) shall be appointed as a part-time member.*

The meaning of 'part-time' is ambiguous. We suggest that this would be better described as an un-remunerated voluntary position.

*(4) An appointed member holds office, subject to this Act, for such period, not exceeding 5 years, as is specified in the instrument of the member's appointment, but is eligible for re-appointment.*

*(5) The Commissioner shall be convenor of the Committee.*

*(6) The Governor-General shall so exercise the power of appointment conferred by subsection (3) that a majority of the appointed members are persons who are neither officers nor employees, nor members of the staff of an authority or instrumentality, of the Commonwealth.*

Of six maximum, this means that at least 4 should be non-government employees. If, however, not all of the positions are filled (this has been the case for long periods since 1988) then the Committee can be extremely unrepresentative. This is another reason for an increase in the maximum size of the Committee – we suggest an increase to ten appointed members. The limitation in ss.6 would then be a more meaningful safeguard.

*(7) Of the appointed members:*

*(a) at least one shall be a person who has had at least 5 years' experience at a high level in industry, commerce, public administration or the service of a government or an authority of a government;*

This position has for most of the last ten years been filled by a senior officer of the Attorney-General's Department – usually the officer with responsibility for the Privacy Act. We consider this to be inappropriate, as this area of the Department already has a strong direct influence on the Privacy Commissioner. This position should be filled by someone from another government department or agency which is a major 'data user' (the first person appointed under this criteria was from the then Department of Social Services).

*(b) at least one shall be a person who has had at least 5 years' experience in the trade union movement;*

*(c) at least one shall be a person who has had extensive experience in electronic data-processing;*

*(d) at least one shall be appointed to represent general community interests, including interests relating to social welfare; and*

*(e) at least one shall be a person who has had extensive experience in the promotion of civil liberties.*

On the face of it, these criteria seem appropriate. However, we have seen by the history of appointments that the spirit of the criteria has not always been followed, particularly for (d) and (e). We assume the current 'civil liberties' position is currently being filled by the representative from HREOC, and the 'social welfare' position by the psychiatrist. While we have no criticism of the individuals concerned, we do feel strongly that there should be at least one representative of a non-government organisation, who would be less constrained than persons holding government or institutional positions.

There are a wide range of NGOs which could be asked to nominate suitable candidates. These include, in addition to our own organisation, the Australian Privacy Foundation:

- the Consumers Federation of Australia,
- the Public Interest Advocacy Centre,
- the Australian and State Councils for Civil Liberties,
- the Australian Consumers Association,
- the Australian and State Councils of Social Service,
- the Consumer Credit Legal Services,
- the Consumers Health Forum,
- Electronic Frontiers Australia.

We suggest an additional criterion/designated position, as follows:

*(f) at least one shall be a person who is a representative of a non-government organisation involved in social justice, social service provision, consumer representation or civil liberties.*

There is also a case for having a separate position 'reserved' for a representative of health interests, given the importance of this issue.

*(8) A person who has reached 65 years shall not be appointed as a member.*

We see this criteria as unjustified and discriminatory and recommend its removal.

*(9) A person shall not be appointed as a member for a period that extends beyond the time at which the person will reach 65 years.*

We see this criteria as unjustified and discriminatory and recommend its removal.

*(10) An appointed member holds office on such terms and conditions (if any) in respect of matters not provided for by this Act as are determined, in writing, by the Governor-General.*

*(11) The performance of a function of the Advisory Committee is not affected because of a vacancy or vacancies in the membership of the Advisory Committee.*

We propose a new sub-section (12) Vacancies shall be filled within 60 days of the resignation or removal of a member. The newly appointed member shall fulfill the criteria selection left vacant by the former member.

Justification: There have been lengthy periods when positions have been left vacant, with no shortage of persons who would have been available and willing to serve.

### *Section 83 Functions*

These functions are appropriate, although experience has been that the Committee rarely takes the initiative under (a), largely confining itself to advising on the agenda set by the Commissioner. This is partly due to the infrequent meetings and partly to the failure to keep all the positions filled.

We suggest that to provide accountability and transparency, the Commissioner be required to provide a summary account of matters raised by, and discussed by, the PAC, in the Annual Report.

### *Section 87 Meetings*

We propose a new sub-section (1b) The committee shall meet at least twice annually.

Justification: There have been years when only one meeting was held. A committee that never meets so infrequently cannot fulfil its functions, and provides only an illusion of consultation.

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