



---

**Cyberspace Law and Policy Centre**  
A Centre for the Public Interest in Networked Transactions

# Promoting and enforcing privacy principles: an analysis of ALRC proposals for the role of the Privacy Commissioner

Submission to the Australian Law Reform Commission  
on the Review of Australian Privacy Laws Discussion Paper 72 (DP72)

**Graham Greenleaf, Nigel Waters & Lee Bygrave**

Graham Greenleaf  
Professor of Law  
University of New South Wales

Nigel Waters  
Principal Researcher, Interpreting Privacy Principles Project  
Cyberspace Law & Policy Centre, UNSW Faculty of Law

Lee Bygrave  
Associate Professor, Department of Private Law  
University of Oslo  
Visiting Fellow, Faculty of Law, University of New South Wales

**Research Assistance**

Abi Paramaguru, Research Assistant on the *Interpreting Privacy Principles Project*

19 December 2007

Note: submissions in this document number consecutively following on those in our separate submission on the Unified Privacy Principles

*Research for this submission is part of the Interpreting Privacy Principles Project, an Australian Research Council Discovery Project*



# Promoting and enforcing privacy principles: an analysis of ALRC proposals for the role of the Privacy Commissioner

## Contents

<i>Introduction</i> .....	3
<b>1. Overview</b> .....	3
<b>2. Structure of the Office of the Privacy Commissioner</b> .....	4
2.1. Manner of Exercise of Powers .....	5
2.2. Privacy Advisory Committee .....	5
<b>3. Powers of the Office of the Privacy Commissioner</b> .....	5
3.1. Oversight and reporting powers .....	5
3.2. Binding Guidelines to be re-named ‘Rules’ .....	6
3.3. Concerns about OPC Guidance.....	7
3.4. Personal Information Digest .....	7
3.5. Privacy impact assessments.....	8
3.6. Audit functions .....	9
3.7. Self-auditing.....	9
3.8. Functions under other Acts.....	9
3.9. Public interest determinations .....	10
3.10. Privacy codes .....	10
<b>4. Investigation and Resolution of Privacy Complaints</b> .....	11
4.1. Investigating privacy complaints.....	11
4.2. Transferring complaints to other bodies.....	12
4.3. Resolution of privacy complaints, and appeals .....	12
4.4. Other issues in the complaint-handling process .....	14
<b>5. Enforcement issues</b> .....	15
5.1. Enforcing own motion investigations .....	15
5.2. Transparency of the Commissioner’s complaints function.....	15
5.3. Injunctions .....	17
5.4. Civil penalties .....	18
<i>References</i> .....	20
<i>Index of Submissions</i> .....	21

# Introduction

## Structure of Submission

This submission responds to Part F of the Australian Law Reform Commission's Discussion Paper 72 Review of Australian Privacy Law, September 2007 which deals with the Office of the Privacy Commissioner and the promotion and enforcement of the *Privacy Act 1988*.

We make separate submissions on Part D – the proposed Unified Privacy Principles (UPPs); Part E - the Exemptions, and Part G - the Credit Reporting Provisions, and on some other parts of DP 72.

## Background – the iPP Project

Research for this submission has been undertaken as part of a Discovery project funded by the Australian Research Council, 'Interpreting Privacy Principles'. The home page for the project, and other publications relating to the project, are at <<http://www.cyberlawcentre.org/ipp/>>. The *iPP Project* is based at the Cyberspace Law & Policy Centre at UNSW Law Faculty. The principal objective of this research is to conduct over the course of the project (2006-09) a comprehensive Australian study of (i) the interpretation of information privacy principles (IPPs) and 'core concepts' in Australia's various privacy laws, particularly by Courts, Tribunals and privacy regulators; (ii) the extent of current statutory uniformity between jurisdictions and types of laws, and (iii) proposals for reforms to obtain better uniformity, certainty, and protection of privacy.

Concerning the first element, a small but rapidly growing body of cases has developed in Australia over the last few years. Around a hundred Tribunal decisions, a similar quantity of mediated complaint summaries, and relatively small number of relevant Court decisions have become available. There has been little systematic analysis of this material. The relative scarcity of Australian interpretative materials means that the objective necessitates consideration of the interpretation of similar IPPs and core concepts in the privacy laws of other Asia-Pacific countries (particularly New Zealand, which has the largest quantity of reported cases) and European jurisdictions. The *iPP Project*, as it develops this analysis, will aim to make further inputs into the ALRC's review and similar privacy reform projects at State level.

## 1. Overview

No matter how much Australia's privacy principles were improved by the proposed Uniform Privacy Principles (UPPs), this would not matter much unless there were also major improvements in what was identified in many submissions to the ALRC as Australia's chronic under-enforcement of its laws.

The reforms proposed by the ALRC will amount to a fundamental change in the complexion of the Australian legislation, from a system where dissatisfied complaints could never get past the 'black hole' of the Privacy Commissioner's office, to one of a more normal legal regime of appeals, reported cases, and some real understanding of

what the Act actually means emerging over time. We are therefore generally very supportive of the proposed reforms.

In particular, we support the ALRC’s approach in Chapter 42, based on adoption of the ‘responsive regulation’ approach that we advocated in our previous submission, and in particular the ALRC’s conclusion (DP72, [42.25]) that:

‘Consistent with the compliance-oriented regulatory design underpinning the *Privacy Act*, the OPC should implement a compliance policy that adopts an explicit enforcement pyramid approach to restoring compliance and enforcing the *Privacy Act*.’

However, we consider that there are many enforcement-related issues which the ALRC has not yet addressed, or where its recommendations are not yet strong enough. This submission aims primarily to identify those areas in which further improvements could be made, while supporting the excellent proposals already put forward.

## 2. Structure of the Office of the Privacy Commissioner

***Proposal 43–1*** *The Privacy Act should be amended to change the name of the ‘Office of the Privacy Commissioner’ to the ‘Australian Privacy Commission’.*

***Submission DP72-125:*** *We support Proposal 43-1 to change the name of the ‘Office of the Privacy Commissioner’ to the ‘Australian Privacy Commission’.*

***Proposal 43–2*** *Part IV, Division 1 of the Privacy Act should be amended to provide for the appointment by the Governor-General of one or more Deputy Privacy Commissioners. The Act should provide that, subject to the oversight of the Privacy Commissioner, the Deputy Commissioners may exercise all the powers, duties and functions of the Privacy Commissioner under this Act—including a power conferred by s 52 and a power in connection with the performance of the function of the Privacy Commissioner set out in s 28(1)(a) — or any other enactment.*

These two proposals will require reconsideration in light of the new Government’s policy to create an Information Commissioner and to include the Privacy Commissioner as one Commissioner within a tripartite Commission. As there are few details in the Government’s policy concerning the relationship between and functions of the three Commissioners, it is difficult to comment on where Deputy Privacy Commissioners would fit into this structure.

***Submission DP72-126:*** *The ALRC should allow further submissions on this issue once details of the new structure proposed by the Government are available.*

Subject to the above, we support the expansion of the OPC to include at least two statutory officers to provide additional support for changing the name of the OPC to the Australian Privacy Commission (DP72, [43.21]). We support the amendment of

the *Privacy Act* to allow for the appointment of one or more Deputy Privacy Commissioners.

The relationship between the Deputy Privacy Commissioner and the Privacy Commissioner requires further clarification, and must be transparent to the public.

***Submission DP72-127: The Privacy Commissioner should be required to make public the division of responsibilities between the Commissioner and Deputy Commissioners.***

## 2.1. Manner of Exercise of Powers

***Proposal 43–3*** Section 29 of the *Privacy Act* should be amended to provide that the Privacy Commissioner must have regard to the objects of the Act, as set out in Proposal 3–4, in the performance of his or her functions and the exercise of his or her powers.

***Submission DP72-128: We support Proposal 43–3.***

## 2.2. Privacy Advisory Committee

***Proposal 43–4*** Section 82 of the *Privacy Act* should be amended to make the following changes in relation to the Privacy Advisory Committee: (a) require the appointment of a person to represent the health sector; (b) expand the number of members on the Privacy Advisory Committee, in addition to the Privacy Commissioner, to not more than seven; and (c) replace ‘electronic data-processing’ in s 82(7)(c) with ‘information and communication technologies’.

***Submission DP72-129: We support Proposal 43–4.***

***Proposal 43–5*** The *Privacy Act* should be amended to empower the Privacy Commissioner to establish expert panels at his or her discretion to advise the Privacy Commissioner.

***Submission DP72-130: We support Proposal 43–5.***

# 3. Powers of the Office of the Privacy Commissioner

## 3.1. Oversight and reporting powers

***Proposal 44–1*** The *Privacy Act* should be amended to delete the word ‘computer’ from s 27(1)(c) of the *Privacy Act*.

We support the ALRC’s proposal to delete the word ‘computer’ from s 27(1)(c) of the *Privacy Act* in order to broaden the Commissioner’s research and monitoring function to cover all technologies.

***Submission DP72-131: We support Proposal 44-1.***

The ALRC notes that it is preferable that advices (or a generic form of them) are made public if they are relevant to a broader audience and would increase understanding of the *Privacy Act*. It would not be reasonable, however, to require that all advice given by the Commissioner in relation to any matter relevant to the

operation of the Act be made public. (DP72, [44.21]). The ALRC notes that the Commissioner has powers to report on the exercise of some of his or her functions. In addition to the reporting obligations following certain own motion investigations discussed above, where the Commissioner has monitored an activity or conducted an audit in the performance of the functions in ss 27, 28 and 28A of the *Privacy Act*, the Commissioner may report to the Minister about the activity or audit, and must report if directed to do so by the Minister. The Commissioner can give a further report to the Minister where the Commissioner believes it is in the public interest to do so, and the Minister must lay the report before each House of Parliament within 15 sitting days. (DP72, [46.19]).

The Commissioner's Office has improved its practices in recent years in making information about its submissions etc more readily available to the public, particularly through its website and through email notifications to interested parties. However, all existing legislative impediments to greater transparency should be removed. We adhere to our previous submission.

***Submission DP72-132: The Commissioner's powers to report are unnecessarily circumscribed, in particular in those powers in s27 which only allow reports to be made to Ministers. The Commissioner should have an additional explicit power under s27 to report to the public, or make a special report to the Parliament, on all of the matters listed in s27, excepting only those matters dealing with national security or involving equivalent considerations of confidentiality.***

Most of the Commissioner's improvements in transparency have come from making public submissions to Parliamentary or other enquiries where public submissions are invited, or sometimes where the Commissioner is specifically invited to submit. The Commissioner does not have a general function of advising Parliament (or the public) where proposed legislation or regulations might significantly interfere with privacy (and whether such interferences would be justified or not in the Commissioner's view). It would be preferable to give the Commissioner a duty to so report to Parliament, not merely a right to do so, for two reasons: (i) it will increase the Commissioner's vigilance; and (ii) it will remove any suggestion that such interventions by the Commissioner are politically motivated because there is a discretion to intervene.

***Submission DP72-133: The Commission should have an additional duty, under s27, to provide to Parliament a document, to be tabled by the Minister on the next sitting day after receipt, wherever the Commissioner considers that proposed legislation or regulations might significantly interfere with privacy, and stating whether such interferences would be justified or not in the Commissioner's view.***

### **3.2. Binding Guidelines to be re-named 'Rules'**

The ALRC proposes that the language used in the Act should be changed to reflect more accurately the binding or non-binding nature of the guidelines issued (DP72, [44.33]).

***Proposal 44–2*** *The Privacy Act should be amended to reflect that where guidelines issued by the Privacy Commissioner are binding they should be renamed ‘rules’.*

***Submission DP72-134:*** *We support Proposal 44–2.*

### **3.3. Concerns about OPC Guidance**

We generally support the ALRC’s recommendations throughout DP72 for further guidance to be issued by the Office of the Privacy Commissioner, although in some instances we make the case for the specific matters to be either in the Act, Regulations or a binding Code (or Rules, if Proposal 44-2 is adopted), rather than left to mere ‘advisory’ guidance. However, we have three significant reservations about any residual non-binding OPC guidelines/guidance.

The first reservation is to note the comments by Nicholson J in *ACMA v Clarity 1 Pty Ltd* (2006) 150 FCR 494 (referenced in DP72 paragraph 64.77) Justice Nicholson observed that non-legislative guidelines do not assist in the interpretation of legislation. This cautionary observation underpins our strong preference, in some cases, for binding obligations.

The second reservation is that the OPC’s track record in issuing useful guidance to the interpretation of privacy principles is not very reassuring: the vague and ambiguous guidelines to the NPPs (September 2001) are the worst example of this, compared with the draft NPP guidelines, and with the Victorian Privacy Commissioner’s Guidelines to the IPPs in the Victorian Act (September 2006) both of which were/are more precise and comprehensive.

Our third reservation is that OPC guidelines will only be of an adequate standard, and carry credibility, if they result from a properly resourced and conducted consultation process involving all relevant stakeholders. Experience of privacy and consumer NGOs in Australia over a long period of time is that consultation processes are often inadequate. Even when adequate on their face they often result in unbalanced and unsatisfactory outcomes due to unequal input and influence as between different classes of stakeholder – most often the ability of business interests to resource a much higher and sustained level of input than civil society NGOs. This third reservation applies equally to the development of any binding Codes or Rules for which the Commissioner is responsible.

***Submission DP72-135:*** *In developing any binding instruments or advisory guidelines, the Commissioner should be required to consult with interested parties, and to have regard to the differential resources and capacities of different groups of stakeholders.*

### **3.4. Personal Information Digest**

***Proposal 44–3*** *Following the adoption of Proposal 21–1 to require agencies to produce and publish Privacy Policies, the Privacy Act should be amended to remove the requirement in s 27(1)(g) to maintain and publish the Personal Information Digest.*

The ALRC makes proposals regarding the ‘input’ side of the Personal Information Digest in the proposed ‘Openness’ principle UPP 4 (DP72, [21.13-19]). We have

commented on these proposals in our separate submission on the UPPs – (CLPC Submissions DP72-46 and DP72-47).

The question remains, however, whether the OPC should have any corresponding ‘output’ obligation in relation to Privacy Policies—that is, to prepare and publish on its website a consolidated index of all Privacy Policies. The ALRC’s preliminary view is that this is not necessary (DP72, [44.22]).

We disagree. As we have commented in relation to the proposed ‘Openness’ principle (UPP 4), we accept that there has been relatively little use of the Commonwealth (and ACT) Personal Information Digests over the 17 years they have been published. However, they remain a potentially valuable resource for the media and public interest groups to make comparisons and hold governments to account. Agencies will have to prepare the equivalent of a Digest entry in any case to satisfy UPP4, so the marginal cost is only that of annual submission and the compilation by the Privacy Commissioner. Now that these processes are established, the savings from removing the obligation would be very small, while a potentially extremely valuable resource would be lost.

Our submissions DP72-47 and DP72-48 address what we consider should be the Commissioner’s obligations in relation to Privacy Policies.

### 3.5. Privacy impact assessments

*Proposal 44–4 The Privacy Act should be amended to empower the Privacy Commissioner to: (a) direct an agency or organisation to provide to the Privacy Commissioner a privacy impact assessment in relation to a new project or development that the Privacy Commissioner considers may have a significant impact on the handling of personal information; and (b) report to the Minister an agency or organisation’s failure to comply with such a direction.*

*Proposal 44–5 The Office of the Privacy Commissioner should develop Privacy Impact Assessment Guidelines tailored to the needs of organisations.*

The practice of privacy impact assessment has matured in the last year since we made our submission to IP 31. Many more PIAs have been conducted in Australia and elsewhere, and the UK Information Commissioner has recently published an International Study of PIA Law, Policies and Practices and a PIA handbook<sup>1</sup>. One the lessons of the experience around the world to date is that the value of PIA as a technique is severely limited if the PIA processes and subsequent reports are not open and transparent, so that they can inform public debate on the merits of new information handling projects.

We recommend that the ALRC take into account the findings and recommendations of this new study, in order to refine its current proposals.

---

<sup>1</sup> [http://www.ico.gov.uk/upload/documents/pia\\_handbook\\_html/html/1-intro.html](http://www.ico.gov.uk/upload/documents/pia_handbook_html/html/1-intro.html)



***Submission DP72-136: We support Proposals 44-4 and 44-5 concerning Privacy Impact Assessments for significant projects or developments of organisations in both the public sector and the private sector.***

### **3.6. Audit functions**

The ALRC's preliminary view is that the power to audit organisations should not be restricted to situations where there are reasonable grounds to believe that the organisation is engaging in practices that pose new and significant risks or contravene the privacy principles or a commitment made in a settlement. Rather, the Commissioner should be empowered to spot audit the levels of compliance in organisations more generally, as she is currently empowered to do in relation to agencies (DP72, [44.96]). If the Commissioner's audit function were expanded to include private sector audits, the ALRC believes that it would be valuable for the OPC to develop an audit manual for organisations (or amend the existing IPP Manual) to provide further detail on the processes involved in an audit. (DP72, [44.99]).

***Proposal 44–6*** *The Privacy Act should be amended to empower the Privacy Commissioner to conduct audits of the records of personal information maintained by organisations for the purpose of ascertaining whether the records are maintained according to the proposed Unified Privacy Principles (UPPs), Privacy Regulations, Rules and any privacy code that binds the organisation.*

***Submission DP72-137: We support Proposal 44–6.***

### **3.7. Self-auditing**

The ALRC concludes that instituting a self-audit requirement at this time would be premature. Before such a requirement can be considered, there needs to be uniformity in the privacy regimes across Australia (DP72, [44.109]).

The ALRC's preliminary view is that agencies and organisations should not be required to self-audit and report on privacy compliance. The OPC should continue, however, to educate agencies and organisations on the value of self-auditing, including to ensure compliance with the proposed 'Openness' principle. The OPC should also clarify situations where it will regard a self-audit policy as a reasonable step to take to ensure the protection of personal information held, in compliance with the proposed 'Data Security' principle (DP72, [44.111]).

***Submission DP72-138: We support the proposed approach to self-auditing.***

### **3.8. Functions under other Acts**

***Proposal 44–7*** *The Office of the Privacy Commissioner should maintain and publish on its website a list of all the Privacy Commissioner's functions, including those functions that arise under other legislation*

As we noted in our previous submission (CLPC IP31 Submission 6-11), if the Commissioner's functions and powers are scattered through different pieces of legislation it is inevitable that they will be expressed in different forms even where the intent is the same. This will lead to both inconsistent interpretations of what should be

a similar function/power and ‘reform lag’ where a power or function is improved by amendment in one Act but not in another. However, it is equally important that, wherever the Commissioner has a function, the Commissioner’s role be apparent from other legislation concerning that subject matter. It is highly desirable that as many as possible of the Commissioner’s functions be located in the *Privacy Act*, but only if the other legislation to which the function relates contains an explicit cross-reference to the Commissioner’s role and the *Privacy Act* function.

We support Proposal 44–7, but it only addresses part of our concerns, and we adhere to our previous submission, amended slightly.

***Submission DP72-139: ALRC should recommend that all of the Commissioner’s functions be located or relocated, or if appropriate repeated, in the Privacy Act. Any other legislation to which a function relates should contain an explicit cross-reference to the Commissioner’s role and the Privacy Act function.***

### **3.9. Public interest determinations**

***Proposal 44–8 The Privacy Act should be amended to empower the Privacy Commissioner to refuse to accept an application for a public interest determination where the Privacy Commissioner is satisfied that the application is frivolous, vexatious, misconceived or lacking in merit.***

As it stands, this proposal would be too easily abused by the OPC to deny consideration to applications with which it disagrees, or which it could find embarrassing or politically inconvenient.

***Submission DP72-140: Proposal 44–8 should be amended to read “...where the Commissioner is satisfied that the application is misconceived as to the purposes of public interest determinations, or so lacking in merit as not to be worthy of public consideration”.***

We support the comments by the Australian Privacy Foundation in its submission to the ALRC on IP31:

“The powers to make Public Interest Determinations (PIDs) and Temporary PIDs are generally appropriate but have not been used often. Where they have been used, they have necessarily involved significant consultation and delay. This is appropriate given that they have the effect of weakening the level of privacy protection – not something that should be done lightly, particularly as they are subject only to ‘default’ parliamentary approval (i.e. they take effect unless disallowed). The Commissioner needs to be mindful of the burden which detailed PID consultations about often very complex issues place on unfunded consumer organisations.” (*APF Submission on IP31, response to Q.6-18*)

### **3.10. Privacy codes**

***Proposal 44–9 Part IIIAA of the Privacy Act should be amended to specify that: (a) privacy codes approved under Part IIIAA operate in addition to the proposed UPPs and do not replace those principles; and (b) a privacy code may provide guidance or standards on how any one or more of the proposed UPPs should be applied, or are to be complied with, by the***

*organisations bound by the code, as long as such guidance or standards contain obligations that are at least equivalent to those under the Act.*

***Proposal 44–10*** *Part IIIAA of the Privacy Act should be amended to empower the Privacy Commissioner to: (a) request the development of a privacy code to be approved by the Privacy Commissioner pursuant to s 18BB; and (b) develop and impose a privacy code that applies to designated agencies and organisations.*

***Submission DP72-141: We support Proposals 44-9 and 44–10 concerning Privacy code.***

We refer to our Submission DP72-135 concerning the need for adequate consultation with all stakeholders, which applies as much to Codes as to Rules and Guidelines. Part IIIAA already contains a provision requiring consultation (s18A(2)) which is supported by Guidelines issued by the Commissioner under s18BF, which itself contains consultation requirements (s18BF(1A)). However, despite these requirements, the level of consultation on some Codes and subsequent variations has been inadequate.<sup>2</sup> This again highlights the gap that can develop between the intent of statutory requirements and the actual practice, particularly if the agency charged with implementing them – in this case the Privacy Commissioner, does not fully commit to the objectives.

## **4. Investigation and Resolution of Privacy Complaints**

### **4.1. Investigating privacy complaints**

***Proposal 45–1*** *Section 41(1) of the Privacy Act should be amended to provide that, in addition to existing powers not to investigate, the Commissioner may decide not to investigate, or not to investigate further, an act or practice about which a complaint has been made under s 36, or which the Commissioner has accepted under s 40(1B), if the Commissioner is satisfied that: (a) the complainant has withdrawn the complaint; or (b) the complainant has not responded to the Commissioner for a specified period following a request by the Commissioner for a response in relation to the complaint; or (c) an investigation, or further investigation, of the act or practice is not warranted having regard to all the circumstances.*

Proposal (c) could be abused, as it gives the Commissioner a largely unchecked discretion to dismiss complaints.

***Submission DP72-142: We support Proposal 45–1, subject to the qualification that we only support (c) if complainants are given the right***

---

<sup>2</sup> One example being the initial development of the Association of Market Research Organisations Market and Social Research Privacy Code, first issued in 2003. The history of inadequate consultation on this Code is available from the Australian Privacy Foundation.

*to require a s52 determination if their complaint is dismissed on this ground. (see submission DP72-144)*

## **4.2. Transferring complaints to other bodies**

*Proposal 45–2 The Privacy Act should be amended to empower the Privacy Commissioner to: (a) decline to investigate a complaint where the complaint is being handled by an approved external dispute resolution scheme; or (b) decline to investigate a complaint that would be more suitably handled by an approved external dispute resolution scheme, and to refer that complaint to the external dispute resolution scheme with a request for investigation.*

*Proposal 45–3 Section 99 of the Privacy Act should be amended to empower the Privacy Commissioner to delegate to a state or territory authority all or any of the powers, including a power conferred by section 52, in relation to complaint handling conferred on the Commissioner by the Privacy Act.*

Both these proposals run the risk that the Commissioner's functions could be dispersed among bodies without equivalent powers, or expertise, and in particular that the transparency of the Act's effectiveness will be significantly reduced if there is no central reporting of complaint outcomes.

*Submission DP72-143: We support Proposal 45-2 but on two conditions: (a) that the approved external dispute resolution scheme has the same investigative powers, remedies and rights of appeal as apply to complaints to the Privacy Commissioner, and (b) that the external dispute resolution scheme is required to report to the Commissioner the details and outcome of the complaint resolution, and the Commissioner is required to publish those details to the same extent as any other complaint investigated by the Commissioner.*

*Submission DP72-144: The delegation in Proposal 45–3 should be limited to State or Territory bodies which exercise functions of a Privacy Commissioner. If the Commissioner so transfers a complaint, this should only be done on the basis that the State or Territory body is required to report to the Commissioner the details and outcome of the complaint resolution, and the Commissioner is required to publish those details to the same extent as any other complaint investigated by the Commissioner.*

## **4.3. Resolution of privacy complaints, and appeals**

*Proposal 45–4 Sections 27(1)(a) and (b) of the Privacy Act should be amended to make it clear that the Privacy Commissioner's functions in relation to complaint handling include: (a) to receive complaints about an act or practice that may be an interference with the privacy of an individual; (b) to investigate the act or practice about which a complaint has been made; and (c) where the Commissioner considers it appropriate to do so and at any stage after acceptance of the complaint, to endeavour, by conciliation, to effect a settlement of the matters that gave rise to the*

*complaint or to make a determination in respect of the complaint under s 52.*

***Submission DP72-145: We support Proposal 45–4.***

***Proposal 45–5*** *The Privacy Act should be amended to include new provisions dealing expressly with conciliation. These provisions should give effect to the following: (a) If, at any stage after receiving the complaint, the Commissioner considers it reasonably possible that the complaint may be conciliated successfully, he or she must make all reasonable attempts to conciliate the complaint. (b) Where, in the opinion of the Commissioner, all reasonable attempts to settle the complaint by conciliation have been made and the Commissioner is satisfied that there is no reasonable likelihood that the complaint will be resolved by conciliation, the Commissioner must notify the complainant and respondent that conciliation has failed and the complainant or respondent may require that the complaint be resolved by determination. (c) Evidence of anything said or done in the course of a conciliation is not admissible in a determination hearing or any enforcement proceedings relating to the complaint, unless all parties to the conciliation otherwise agree.*

***Right to require a s52 Determination***

We support Proposal 45–5, and in particular give very strong support to either party having a right under (b) to require a s52 determination (for the reasons spelt out in our earlier submission (CLPC IP31 Submission 6-16)).

However, we consider that that an applicant should also have the right to require a determination wherever the Commissioner proposes to refuse to investigate, or further investigate, a complaint. This should merely require the Commissioner is to state in a letter that the determination is dismissed under s52, giving the reasons for refusing to investigate as the reasons for dismissal. The applicant’s right of appeal would then be triggered, providing a better remedy than the more costly and less understood procedures, and more limited grounds, for judicial review. As we stated in our previous submission (CLPC IP31 Submission 6–16), this is also necessary if the proposed right of appeal against s52 Determinations (see below) is to be meaningful, as the right of appeal could then be avoided by dismissing a complaint under s41.

***Submission DP72-146: We support Proposal 45-5, but an applicant should also have the right to require a determination under s52 wherever the Commissioner proposes to refuse to investigate, or further investigate, a complaint. In such cases, it should be sufficient for the Commissioner to state in a letter that the determination is dismissed under s52, giving the reasons for refusing to investigate as the reasons for dismissal.***

**Commissioner's power to order specific acts**

**Proposal 45–6** Section 52 of the Privacy Act should be amended to empower the Privacy Commissioner to make an order in a determination that an agency or respondent must take specified action within a specified period for the purpose of ensuring compliance with the Act.

**Submission DP72-147: We support Proposal 45–6.**

**Right of appeal against Commissioner**

**Proposal 45–7** The Privacy Act should be amended to provide that a complainant or respondent can apply to the Administrative Appeals Tribunal for merits review of a determination made by the Privacy Commissioner under s 52 and the current review rights set out in s 61 should be repealed.

This proposal, if adopted, will remedy a principal deficiency in the Act.

**Submission DP72-148: We support Proposal 45-7 to allow both complainant and respondent the right of appeal against any s52 determination.**

**4.4. Other issues in the complaint-handling process**

**Proposal 45–9** Section 38B(2) of the Privacy Act should be amended to allow a class member to withdraw from a representative complaint at any time if the class member has not consented to be a class member.

**Proposal 45–10** Section 42 of the Privacy Act should be amended to empower the Privacy Commissioner to make preliminary inquiries of third parties as well as the respondent.

**Proposal 45–11** Section 46(1) of the Privacy Act should be amended to empower the Privacy Commissioner to compel parties to a complaint, and any other relevant person, to attend a compulsory conference.

**Proposal 45–12** Section 69(1) and (2) of the Privacy Act should be deleted, which would allow the Privacy Commissioner, in the context of an investigation of a privacy complaint, to collect personal information about an individual who is not the complainant.

**Proposal 45–13** The Privacy Act should be amended to provide that the Privacy Commissioner may direct that a hearing for a determination may be conducted without oral submissions from the parties if: (a) the Privacy Commissioner considers that the matter could be determined fairly on the basis of written submissions by the parties; and (b) the complainant and respondent consent to the matter being determined without oral submissions.

**Submission DP72-149: We support Proposals 45-9 to 45-13.**

## 5. Enforcement issues

### 5.1. Enforcing own motion investigations

*Proposal 46–1* The Privacy Act should be amended to empower the Privacy Commissioner to: (a) issue a notice to comply to an agency or organisation following an own motion investigation, where the Commissioner determines that the agency or organisation has engaged in conduct constituting an interference with the privacy of an individual; (b) prescribe in the notice that an agency or organisation must take specified action within a specified period for the purpose of ensuring compliance with the Privacy Act; and (c) commence proceedings in the Federal Court or Federal Magistrates Court for an order to enforce the notice.

*Submission DP72-150:* We support Proposal 46–1 to give power to the Commissioner to make and enforce determinations as a result of an ‘own motion’ investigation.

As we said in our previous submission (CLPC IP31, Submission 6-16.1), ‘own motion investigations’ will typically be exercised when there is evidence of a serious privacy breach with significant implications for the public interest.<sup>3</sup> The ALRC’s proposals address the problem we identified that OPC lacks power to enforce an ‘own-motion investigation’. However, the issue of transparency remains. The Commissioner started in 2005 to publish summaries of some own motion investigations, but we don’t know how selective this is. This power also falls short as responsive regulation because its exercise is largely unknown.

*Submission DP72-151:* Own motion investigations should be the subject of public notice by the Commissioner, and should have procedures developed for appropriate intervention by other interested parties (such as NGOs in the relevant area). The Commissioner should be able to make a special report to Parliament of the results of an own motion investigation.

### 5.2. Transparency of the Commissioner’s complaints function

The ALRC notes that there is no express power or obligation to report investigations of complaints and the *Privacy Act* does not explicitly envisage the Commissioner reporting directly to Parliament. The ability to report on the results of audits, however, provides the Commissioner with another kind of ‘enforcement’ mechanism, as such reporting can involve a measure of publicity and sanction. (DP72, [46.20]).

#### Complaints manual

In our previous submission we pointed out that there is no published manual of the procedures used, and policies adopted, by the OPC in its investigation and resolution of complaints. We submitted that the OPC should publish online a comprehensive manual of its complaint resolution policies and procedures, and keep it up-to-date. We note that the OPC published its policy on use of the s52 Determination power (see our

---

<sup>3</sup> See further OPC (2005), Appendix 10.

Submission DP72-144 above) in the Spring 2006 issue of its Privacy Matters newsletter, which was a welcome first step.

*Proposal 45–8 The Office of the Privacy Commissioner should prepare and publish a document setting out its complaint-handling policies and procedures.*

*Submission DP72-152: We support Proposal 45–8.*

### **Complaint outcomes – reporting**

In our previous submission we set out detailed reasons why OPC's practices in relation to reporting details of significant privacy complaints were inadequate, and the dangers to effective enforcement of the Act that this deficiency posed (CLPC IP31 Submission 6.22.2). We will not repeat these reasons here, but we note that the DP72 has not addressed this issue. We believe it should do so. The OPC has made significant improvements in its reporting in recent years, including the publication each year since 2002 of a number of de-personalised case notes – recently more than 20 a year, and the retrospective publication on the Internet of pre-2002 case summaries. Despite these improvements we consider that its performance on this point is still inadequate and submit that further reform of the OPC's complaint outcome reporting is essential for the future effective operation of the Act. We therefore repeat our earlier submission.

*Submission DP72-153: The OPC should be required to reform its procedures for reporting privacy complaints along the following lines: (i) adhering to publicly-stated criteria of seriousness of which complaints are reported; (ii) confirmation in each Annual Report that these criteria for reporting have been adhered to; (iii) naming complainants who elect to be named; (iv) naming private sector respondents where the interests of other potential complainants or the public interest justifies this; and (v) naming all public sector respondents except where this would cause serious harm to the interests of the complainant or another person; and (vi) providing sufficient detail in complaint summaries for them to be useful to interested parties.*

In our previous submission, we made detailed recommendations for criteria of seriousness and for items (i)-(vi) (CLPC IP31 Submission 6.22.2) based on Greenleaf (2003). We will not repeat them here, but suggest they remain relevant.

### **Complaint outcomes – statistics**

As we argued in our previous submission, despite the breadth of the remedies (including monetary compensation) provided in s52, it has been difficult to accurately answer the question 'do complainants get remedies under the *Privacy Act*?', except for the occasional remedy revealed haphazardly in a reported complaint. The discussion in the previous section refers to summaries of individual complaints, but it is equally important that interested observers should be able to obtain a clear idea of the OPC's overall performance in handling complaints. The amount of detail and presentation of complaint statistics in the Commissioner's *Annual Reports* and web site have improved significantly in recent years. Consistent statistical reporting is also essential to allow an assessment of trends over time.



We repeat our previous views (CLPC IP31 Submissions 6-22.3 and 6-22.4) that two types of statistics are particularly valuable:

(i) *Statistics of which provisions are used to dispose of complaints* (particularly the various sub-categories of s41): This information was provided for the first time in the 2003-04 Annual Report and has continued<sup>4</sup>. This is a major improvement on previous practices.

***Submission DP72-154: Publication of statistics of which provisions are used to dispose of complaint should be continued, and expanded to provide additional details. For example, it would be simple but informative to list the laws relied upon under s41(e), and in the Table ‘Grounds for Declining to Investigate Complaints Further Following an Investigation’ a further column could note how many of each category of dismissal were the subject of published complaint summary.***

(ii) *Statistics of remedies afforded to successful complaints* (by agreement, in the case of mediated complaints), including details of the amounts of compensation paid to complainants. Annual reports since 2005-06 have usefully included a table of outcomes. The main improvement still needed is to link this table to stated criteria of practices in relation to publication summaries.

***Submission DP72-155: The OPC should continue to publish, at least annually, statistics of the remedies obtained where complaints are settled with some remedy being provided to the complainant, including statistics of the numbers of cases in which compensation was paid and the amounts of compensation paid. OPC should continue to improve its reporting practices, for example by noting in the Table ‘Nature of Remedies in Complaints Closed as Adequately Dealt With After Investigation’ how many examples of each category of remedy were the subject of published complaint summaries..***

### 5.3. Injunctions

The ALRC does not propose any reform to the injunction provisions (DP72, [46.26]), but notes that greater use could be made of the injunctions power if the ALRC’s proposal that the *Privacy Act* be amended to empower the Commissioner to direct an agency or organisation to prepare a privacy impact assessment is implemented (DP72, [46.27]).

As we noted in our previous submission, in theory, the power to seek an injunction to prevent privacy-invasive practices from continuing is the ‘twin peak’ of the Commissioner’s pyramid of enforcement options. The Commissioner has never sought to obtain an injunction (or even threatened to, as far as is known), and so has in effect surrendered the potential effectiveness of this power as a tool for responsive regulation. The corollary of this is that few organisations would ever be aware that there was a possibility that the Commissioner could seek an injunction against their practices.

---

<sup>4</sup> OPC (2007), Table 3.8

The Commissioner's ability to seek an injunction is potentially a particularly valuable aspect of the Privacy Act as regulation, because it carries with it the requirement that the Commissioner must also seek an interpretation of the Act by the Federal Court, rather than applying what the Commissioner's Office imagines is the law. Given that there are no useful decisions on the *Privacy Act* after 20 years – except one where one commercial party used the injunction provision against another – the opportunity for the Commissioner to seek judicial guidance on difficult aspects of the Act would be a rare and valuable opportunity, but it is one the Commissioner has never taken up.

The ability for complainants to seek an injunction as an alternative to the long wait to have complaint considered by the Commissioner is inherently valuable. Alternative avenues of enforcement are generally a good thing, in our view, and it would be desirable for complainants, in cases that are serious enough, to have an effective means of bypassing the Commissioner and going directly to the judicial system for remedies. Likewise, the ability for NGOs to seek injunctions, because of the lack of a standing requirement in s98, is a theoretically valuable means by which contesting interpretations of principles could be resolved. However, unless complainants or NGOs have the resources to risk costs being awarded against them when they seek an injunction, and possibly damages if they seek an interim injunction, they cannot utilise these opportunities. Twenty years experience shows that none have even tried to do so.

It is counter-productive for the ALRC to simply ignore the ineffectiveness of s98, given its potential value. We adhere to our previous submission (CLPC IP31 Submission 6-19) that the ALRC should make recommendations in this area. While we do not have a clear answer as to what reforms should be made to s98, at least the following possibilities should be considered:

- The provision of sufficient resources to the Commissioner to pursue s98 injunctions, with a guarantee that any costs awarded against the Commissioner in unsuccessful cases would not have to be met out of the OPC's regular budget.
- A formal procedure by which NGOs or complainants can request the Commissioner to use his powers to seek s98 injunctions, and when he does so to become parties to the matter without risk of costs against themselves.

***Submission DP72-156: The s98 injunction provisions are valuable in theory, but ineffective in practice. The ALRC should recommend means by which the use of s98 by the Commissioner, by NGOs and by complainants can be made more effective.***

#### **5.4. Civil penalties**

***Proposal 46–2*** *The Privacy Act should be amended to allow a civil penalty to be imposed where there is a serious or repeated interference with the privacy of an individual. The Office of the Privacy Commissioner should develop and publish enforcement guidelines setting out the criteria upon which a decision to pursue a civil penalty is made.*

***Submission DP72-157: We support Proposal 46–2, but consider it less important than improvements to the awarding of compensation to***

*complainants (via settlements or determinations), and greater transparency in relation to when this is done.*

## References

Greenleaf, G. 2003, “Reforming reporting of privacy cases: A proposal for improving accountability of Asia-Pacific Privacy Commissioners”, accepted for publication in Paul Roth (ed.), *Privacy Law and Policy in New Zealand*, (Wellington, NZ: Butterworths LexisNexis, 2004)

CLPC IP31 - Greenleaf, G., Waters, N, and Bygrave L (‘CLPC IP 31’). [Implementing privacy principles: After 20 years, its time to enforce the Privacy Act](#), Submission to the Australian Law Reform Commission on the Review of Privacy Issues Paper, January 2007,

OPC (2005) - Office of the Privacy Commissioner, March 2005, *Getting in on the Act: Review of the Private Sector provisions of the Privacy Act 1988*.

OPC (2007) - Office of the Privacy Commissioner, *The Operation of the Privacy Act Annual Report 2006-07*.

## Index of Submissions

Note: submissions in this document number consecutively following on those in our separate submission on the Unified Privacy Principles

### *Introduction*

#### **1. Overview**

#### **2. Structure of the Office of the Privacy Commissioner**

Submission DP72-125: We support Proposal 43-1 to change the name of the ‘Office of the Privacy Commissioner’ to the ‘Australian Privacy Commission’.

Submission DP72-126: The ALRC should allow further submissions on this issue once details of the new structure proposed by the Government are available.

Submission DP72-127: The Privacy Commissioner should be required to make public the division of responsibilities between the Commissioner and Deputy Commissioners.

Submission DP72-128: We support Proposal 43–3.

Submission DP72-129: We support Proposal 43–4.

Submission DP72-130: We support Proposal 43–5.

#### **3. Powers of the Office of the Privacy Commissioner**

Submission DP72-131: We support Proposal 44-1.

Submission DP72-132: The Commissioner’s powers to report are unnecessarily circumscribed, in particular in those powers in s27 which only allow reports to be made to Ministers. The Commissioner should have an additional explicit power under s27 to report to the public, or make a special report to the Parliament, on all of the matters listed in s27, excepting only those matters dealing with national security or involving equivalent considerations of confidentiality.

Submission DP72-133: The Commission should have an additional duty, under s27, to provide to Parliament a document, to be tabled by the Minister on the next sitting day after receipt, wherever the Commissioner considers that proposed legislation or regulations might significantly interfere with privacy, and stating whether such interferences would be justified or not in the Commissioner’s view.

Submission DP72-134: We support Proposal 44–2.

Submission DP72-135: In developing any binding instruments or advisory guidelines, the Commissioner should be required to consult with interested parties, and to have regard to the differential resources and capacities of different groups of stakeholders.

Submission DP72-136: We support Proposals 44-4 and 44-5 concerning Privacy Impact Assessments for significant projects or developments of organisations in both the public sector and the private sector.

Submission DP72-137: We support Proposal 44–6.

Submission DP72-138: We support the proposed approach to self-auditing.

Submission DP72-139: ALRC should recommend that all of the Commissioner’s functions be located or relocated, or if appropriate repeated, in the Privacy Act. Any other legislation to which a function relates should contain an explicit cross-reference to the Commissioner’s role and the Privacy Act function.

Submission DP72-140: Proposal 44–8 should be amended to read “...where the Commissioner is satisfied that the application is misconceived as to the purposes of public interest determinations, or so lacking in merit as not to be worthy of public consideration’.

Submission DP72-141: We support Proposals 44-9 and 44–10 concerning Privacy code.

#### **4. Investigation and Resolution of Privacy Complaints**

Submission DP72-142: We support Proposal 45-1, subject to the qualification that we only support (c) if complainants are given the right to require a s52 determination if their complaint is dismissed on this ground. (see submission DP72-144)

Submission DP72-143: We support Proposal 45-2 but on two conditions: (a) that the approved external dispute resolution scheme has the same investigative powers, remedies and rights of appeal as apply to complaints to the Privacy Commissioner, and (b) that the external dispute resolution scheme is required to report to the Commissioner the details and outcome of the complaint resolution, and the Commissioner is required to publish those details to the same extent as any other complaint investigated by the Commissioner.

Submission DP72-144: The delegation in Proposal 45-3 should be limited to State or Territory bodies which exercise functions of a Privacy Commissioner. If the Commissioner so transfers a complaint, this should only be done on the basis that the State or Territory body is required to report to the Commissioner the details and outcome of the complaint resolution, and the Commissioner is required to publish those details to the same extent as any other complaint investigated by the Commissioner.

Submission DP72-145: We support Proposal 45-4.

Submission DP72-146: We support Proposal 45-5, but an applicant should also have the right to require a determination under s52 wherever the Commissioner proposes to refuse to investigate, or further investigate, a complaint. In such cases, it should be sufficient for the Commissioner to state in a letter that the determination is dismissed under s52, giving the reasons for refusing to investigate as the reasons for dismissal.

Submission DP72-147: We support Proposal 45-6.

Submission DP72-148: We support Proposal 45-7 to allow both complainant and respondent the right of appeal against any s52 determination.

Submission DP72-149: We support Proposals 45-9 to 45-13.

#### **5. Enforcement issues**

Submission DP72-150: We support Proposal 46-1 to give power to the Commissioner to make and enforce determinations as a result of an 'own motion' investigation.

Submission DP72-151: Own motion investigations should be the subject of public notice by the Commissioner, and should have procedures developed for appropriate intervention by other interested parties (such as NGOs in the relevant area). The Commissioner should be able to make a special report to Parliament of the results of an own motion investigation.

Submission DP72-152: We support Proposal 45-8.

Submission DP72-153: The OPC should be required to reform its procedures for reporting privacy complaints along the following lines: (i) adhering to publicly-stated criteria of seriousness of which complaints are reported; (ii) confirmation in each Annual Report that these criteria for reporting have been adhered to; (iii) naming complainants who elect to be named; (iv) naming private sector respondents where the interests of other potential complainants or the public interest justifies this; and (v) naming all public sector respondents except where this would cause serious harm to the interests of the complainant or another person; and (vi) providing sufficient detail in complaint summaries for them to be useful to interested parties.

Submission DP72-154: Publication of statistics of which provisions are used to dispose of complaint should be continued, and expanded to provide additional details. For example, it would be simple but informative to list the laws relied upon under s41(e), and in the Table 'Grounds for Declining to Investigate Complaints Further Following an Investigation' a further column could note how many of each category of dismissal were the subject of published complaint summary.

Submission DP72-155: The OPC should continue to publish, at least annually, statistics of the remedies obtained where complaints are settled with some remedy being provided to the complainant, including statistics of the numbers of cases in which compensation was

paid and the amounts of compensation paid. OPC should continue to improve its reporting practices, for example by noting in the Table 'Nature of Remedies in Complaints Closed as Adequately Dealt With After Investigation' how many examples of each category of remedy were the subject of published complaint summary stated criteria of practices in relation to publication summaries.

Submission DP72-156: The s98 injunction provisions are valuable in theory, but ineffective in practice. The ALRC should recommend means by which the use of s98 by the Commissioner, by NGOs and by complainants can be made more effective.

Submission DP72-157: We support Proposal 46–2, but consider it less important than improvements to the awarding of compensation to complainants (via settlements or determinations), and greater transparency in relation to when this is done.

### ***References***

### ***Index of Submissions***