



Australian Government

Office of the Australian Information Commissioner

Family Violence, Employment and Superannuation Law (IP 36)

Submission to the Australian Law Reform Commission

April 2011

Submission by Timothy Pilgrim, Australian Privacy Commissioner

Office of the Australian Information Commissioner

1. The Office of the Australian Information Commissioner (OAIC) is an independent statutory agency established by the *Australian Information Commissioner Act 2010* (AIC Act). The OAIC commenced operation on 1 November 2010 and is headed by the Australian Information Commissioner, supported by two other statutory office holders, the Freedom of Information Commissioner and the Privacy Commissioner.
2. Together the Commissioners of the OAIC exercise three broad functions:
 - (i) the freedom of information (FOI) functions set out in s 8 of the AIC Act
 - (ii) the privacy functions set out in s 9 of the AIC Act
 - (iii) the Information Commissioner functions set out in s 7 of the AIC Act.
3. As the national privacy regulator the OAIC can provide general advice on privacy issues and the application of the *Privacy Act 1988* (the Privacy Act).

Preliminary

4. The OAIC appreciates the opportunity to make comments to the Australian Law Reform Commission (the ALRC) on the Issues Paper *Family Violence and Commonwealth Laws—Employment and Superannuation Law* (IP 36) (the Issues Paper), which concerns the treatment of family violence in Commonwealth employment, occupational health and safety, and superannuation law.¹
5. The OAIC strongly supports initiatives to protect the safety of those experiencing family violence and better support those adversely affected by this type of violence.
6. The OAIC recognises the sensitivity of personal information related to family violence matters and the potential for an individual to be stigmatised, embarrassed or discriminated against as a result of the disclosure or inappropriate sharing of this information. The challenge is to ensure that initiatives contain appropriate privacy safeguards regarding the handling of an individuals' personal information, while providing strong protection against harm from family violence.
7. The right to privacy is not absolute and in some circumstances, privacy rights will necessarily give way where there is a compelling public interest reason to do so. In these instances, the OAIC seeks to ensure that the solution implemented minimises the intrusion to the fullest extent possible in the circumstances.

¹ Issues Paper available at: <http://www.alrc.gov.au/publications/family-violence-and-commonwealth-laws-employment-and-superannuation-law-ip-36>

Comments on *Family Violence and Commonwealth Laws—Employment and Superannuation Law (IP 36)*

Employee records exemption

8. In examining how Commonwealth employment law might better protect the safety of those experiencing family violence, the ALRC has found that privacy issues may arise when victims of family violence disclose experiences of family violence to their employer.²
9. Where the disclosure of family violence to an employer is related to the employment of the employee, such as for the purposes of obtaining leave, it is personal information which constitutes an employee record. In the case of a private sector employer, the handling of employee records directly relating to the employment relationship is exempt in some circumstances from the operation of the Privacy Act.³ The employee records exemption may effectively discourage the disclosure of experiences of family violence to private sector employers where victims are concerned about how their information will be handled and protected.
10. In *For Your Information: Australian Privacy Law and Practice*, Report 10 (2008), the ALRC recommended the removal of the employee records exemption. The ALRC considers that the case for amending the Privacy Act to remove the employee records exemption is further strengthened in those circumstances where the employee records exemption creates additional barriers to the disclosure of family violence.⁴
11. Employee records can contain a significant amount of personal information about employees. Furthermore, employers sometimes hold sensitive information, for example regarding the health or disabilities of their employees. There is a real possibility of harm if employees' personal information is used or disclosed inappropriately. Where employers receive "sensitive" information, or information which due to its nature affected individuals may consider to be sensitive, such as evidence of family violence, employers should be required to handle that information in a manner consistent with the Privacy Act.⁵
12. Generally, it is the view of the OAIC that there should be minimal exemptions from the Privacy Act to promote effective protection of privacy rights and reduce regulatory fragmentation. Where exemptions such as the employee records exemption currently

² Issues Paper 36, paragraph 23

³ Private organisations are exempt from the operation of the Privacy Act where an act or practice is directly related to: the employment relationship between the organisation and the individual; and an employee record held by the organisation. See Privacy Act ss 7(1)(ee), 7B(3).

⁴ Issues Paper 36, paragraphs 27 – 28

⁵ Sensitive information is defined in s 6 of the Privacy Act.

exist there should be sound public interest in retaining them.

13. As part of its submission to the ALRC review of privacy, the former Office of the Privacy Commissioner submitted that, on balance, given the desirability of national consistency of privacy regulation and to reflect community expectations, the employee records exemption provided in section 7B(3) of the Privacy Act should be removed. Reference was made to a number of benefits that may result from coverage of employee records under the Privacy Act, including being consistent with protection of an employee's rights as a private citizen, providing certainty about rights and obligations for employers and employees, eliminating regulatory difficulties in interpreting the exemption, and providing access to a conciliation-based complaints process through the Privacy Commissioner.⁶

Family violence leave and flexible working arrangements

14. The Issues Paper considers how the *Fair Work Act 2009* (Cth) and agreements and instruments made under that Act, might be amended or drafted to provide additional protection and support for victims of family violence. Options include the introduction of family violence leave or entitlements to request flexible working arrangements on the basis of experiencing family violence.⁷
15. Should family violence leave or flexible working arrangements be introduced, the OAIC suggests that consideration be given to how individuals demonstrate their entitlement to the benefit or provide evidence of their experience of family violence. For example, proof of family violence could be required in the form of an agreed document issued by the police service, a court, a medical practitioner, a domestic violence support service or lawyer, or a counselling professional.
16. Evidence of family violence is highly sensitive personal information and individuals should be given a choice as to how they demonstrate their entitlement to a particular benefit. Where there is more than one acceptable way of demonstrating an entitlement it is often better practice to offer alternatives and give individuals the choice as to the personal information they provide. Providing choice as to the source of information enables individuals to exercise a level of control over their personal information and may assist in minimising barriers to disclosure.
17. As previously outlined, concern over the way in which those who receive disclosures of family violence handle that information may further contribute to individuals choosing not to disclose the information. Where employers receive such sensitive information

⁶ Submission to the Australian Law Reform Commission's Review of Privacy - Issues Paper 31 (February 2007) chapter 5, paragraphs 104 – 113, available at: <http://www.privacy.gov.au/materials/types/download/9111/6748>; Submission to the Australian Law Reform Commission's Review of Privacy – Discussion Paper 72 (December 2007) chapter 36, available at: <http://www.privacy.gov.au/materials/types/submissions/view/6757>

⁷ Issues Paper 36, paragraph 55

they should be required to accord that information comparable protection to that provided under the Privacy Act. Despite the sensitivity of the personal information held, where the employee records exemption applies private sector organisations are not required to comply with obligations under the Privacy Act. The OAIC supports the removal of the employee records exemption provided in section 7B(3) of the Privacy Act to better protect and support those experiencing family violence.