



Professor Rosalind Croucher
President
Australian Law Reform Commission
by email: info@alrc.gov.au

Dear Professor Croucher

Traditional Rights and Freedoms – Encroachments by Commonwealth Laws – Issues Paper 46

The Office of the Australian Information Commissioner (OAIC) welcomes the opportunity to comment on the Australian Law Reform Commission's (ALRC) *Traditional Rights and Freedoms – Encroachments by Commonwealth Laws – Issues Paper 46*, published as part of its review of Commonwealth laws for consistency with traditional rights, freedoms and privileges.

The OAIC is an independent statutory agency within the Attorney General's portfolio, with functions that relevantly include independent oversight of privacy protections in the *Privacy Act 1988*, as well as oversight of the operation of the *Freedom of Information Act 1982*.¹ The OAIC understands that 'the right to privacy' is not a 'traditional right' within the scope of this inquiry. However, the OAIC's experience in balancing the 'right to privacy' with other important rights and interests, may assist the ALRC's consideration of common justifications for encroaching on traditional rights and freedoms (paragraph 1.41 - 1.42). This may be particularly pertinent to consideration of laws limiting freedom of speech, which the Issues Paper notes, have been justified on the basis of protecting individuals' privacy (paragraphs 2.21 – 2.25).

The OAIC is familiar with some of the complexities involved in balancing different rights and freedoms, including as a result of balancing the protection of personal information under the Privacy Act, with individuals' right to access government information under the Freedom of Information Act. Similar to many of the traditional rights and freedoms examined in the Issues Paper, the protection of individuals' privacy in the Privacy Act is not an absolute right. Rather, those interests must be balanced with other interests. This is reflected in the objects of the Privacy Act,² as well as in the exceptions to a number of the Australian Privacy Principles

¹ The Freedom of Information Amendment (New Arrangements) Bill 2014, which proposes the closure of the OAIC on 31 December 2014, was not considered by the Senate before the end of the 2014 sitting period. The OAIC will therefore remain operational until further notice.

² See, for example, s 2A(b) of the Privacy Act which provides that one of the objects of the Act is to recognise that the protection of the privacy of individuals is balanced with the interests of entities in carrying out their functions and activities.

(APPs) in the Act. These exceptions exclude certain information handling practices from the operation of one or more APPs, where the practice is considered to be in the public interest when balanced with the interest in protecting an individual's privacy. Exceptions cover a range of matters including where a use or disclosure of personal information is authorised or required by Australian law³ or where an entity reasonably believes that a use or disclosure is reasonably necessary for an enforcement related activity conducted by an enforcement body.⁴

The OAIC is regularly invited to comment on draft laws that invoke the required or authorised by law exception in the Privacy Act, and that permit the collection, use or disclosure of personal information in a manner that would otherwise be inconsistent with the APPs. The OAIC's advice generally suggests consideration should be given to whether those measures are proportionate and necessary. That is, whether they appropriately balance the intrusion on individuals' privacy with the overall public policy objectives of the proposal. Further, any laws that require or authorise the collection, use or disclosure of personal information (or sensitive information) and invoke these exceptions in the Privacy Act should be drafted narrowly, and, to the extent possible, clearly describe:

- the kind of personal information that is authorised or required to be collected or disclosed
- the particular individuals or class of individuals to whom the information that may be collected or disclosed, relates
- the entities that are permitted or required to collect and disclose the personal information
- the purpose for which the personal information may be collected or disclosed and, once received, for which the information may subsequently be used or disclosed.

Additionally, when handling of individuals' personal information is authorised in the broader interests of the community, it is generally recommended that those activities be accompanied by an appropriate level of privacy safeguards and accountability.

This approach is generally consistent with that taken in applying the right to privacy in Article 17 in the International Covenant on Civil and Political Rights⁵, to which the Privacy Act, in part, gives effect. For example, the Office of the United Nations High Commissioner for Human Rights recently stated that to the extent that there is a restriction on an individual's right to privacy, any interference must be 'necessary for reaching a legitimate aim, as well as in proportion to the aim and the least intrusive option available.'⁶

The OAIC would be pleased to be involved in any discussions with the ALRC about balancing traditional rights, freedoms and privileges with the right to privacy. The OAIC also welcomes

³ APP 6.2(b), Schedule 1 of the Privacy Act

⁴ APP 6.2(e), Schedule 1 of the Privacy Act

⁵ The Privacy Act gives effect, in part, to Australia's obligations under Article 17 of the International Covenant on Civil and Political Rights (see (s 2A(h) of the privacy Act). Article 17 states (1) No one shall be subjected to arbitrary or unlawful interference with his privacy, family, home or correspondence, nor to unlawful attacks on his honour and reputation; (2) Everyone has the right to the protection of the law against such interference or attacks.

⁶ Office of the United Nations High Commissioner for Human Rights, *The Right to Privacy in the Digital Age* UN Doc A/HRC/27/37 (2014), paragraph 23.

the possible development of a tool to test existing and future laws that encroach on traditional rights and freedoms (paragraph 1.43). Such a tool may be a useful reference for agencies, in developing draft policy proposals and laws that may impact on individuals' privacy, as well as for the OAIC when examining and advising on any such proposals. The OAIC would welcome the opportunity to be consulted in its development.

Please do not hesitate to contact Este Darin-Cooper, Director Privacy Law and Practice, to discuss.

Yours sincerely

Timothy Pilgrim
Australian Privacy Commissioner
6 March 2015