Office of the
Victorian Privacy
Commissioner

Office of the Victorian Privacy Commissioner

Submission to the Senate Finance and Public Administration Committee

on the

Freedom of Information Amendment (Reform) Bill 2009 (the 'FOI Bill') and Information Commissioner Bill 2009 (the 'IC Bill')

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1. Introduction

In principle, this office recognises the benefits of creating the 'Office of the Information Commissioner,' encompassing both privacy and freedom of information (FOI) functions. Such benefits include establishing a stronger foundation for more openness in government, as well as the obvious convenience in consolidating the review of government information handling practices into one office. However, these benefits are conditional upon the new office remaining clearly defined and robust enough for its regulators to be able to exercise their key function as independent statutory officeholders or 'government watchdogs'. Transparent access to government information requires an office that functions with transparency. Future benefits are also conditional upon privacy protections of Australian citizens not being diminished for the sake of convenience. My comments in relation to the Bills are as follows:

2. Office Structure: Oversight by the Information Commissioner

One of my central concerns with the IC Bill is that the way the FOI, privacy and information commissioner functions will be exercised in practice is not adequately and transparently set out in the Bill. There is a clear need to define which Commissioner 'does what' on a day to day basis.

While there is need for a level of oversight by the Information Commissioner of both privacy and FOI, in order to fulfil the objectives of a regulator, a level of independence is needed by the FOI and Privacy Commissioners in exercising their usual functions. Currently, under the IC and FOI Bills, the balance between oversight and independence has not been appropriately struck. Rather, the Bills vest primary responsibility for the FOI, privacy and information commissioner functions in the Information Commissioner, without sufficient guidance as to how the Privacy and FOI Commissioners will exercise their 'traditional' functions, and with a level of independence. For example:

1. Schedule 5 of the FOI Bill, effectively removes all references to 'the Privacy Commissioner' in the *Privacy Act 1988 (Cth)*. These are supplanted with references to the 'Information Commissioner', vesting privacy functions primarily in the new Information Commissioner. (Similarly, in the context of defining the FOI functions, the Explanatory Memorandum to the IC Bill wholly refers to the 'Information Commissioner', rather than the FOI Commissioner, as exercising the FOI functions. The FOI Bill does not refer to the FOI Commissioner at all).

2. Clause 12(4), states that the Privacy Commissioner can only undertake certain actions with the approval of the Information Commissioner. Some of these include issuing guidelines or Codes of Conduct or approving privacy codes. (Similar approvals are required for the FOI Commissioner in relation to FOI actions under clause 11(4)(a).)

The overall intent of these provisions may well be to properly establish the Information Commissioner's primacy as head of the new office and prevent conflict in decision-making between the three Commissioners. However, the provisions create uncertainty due to:

1. The Bills appear to vest all powers in the Information Commissioner without a clear statement as to *when* the FOI and Privacy Commissioners will exercise their own functions, and when the Information Commissioner will 'step back' from these. The 're-branding' of the privacy powers may also result in confusion for the general public, for whom it is more appropriate to align privacy powers with a Privacy Commissioner. The result is to undermine the Privacy Commissioner as an independent regulator. Moreover, it diminishes the status of Commonwealth privacy law, which has been in place for more than 20 years.

   Further, clause 12(5) appears to be an attempt to ensure that the Privacy Commissioner exercises his/her own discretion when exercising the privacy functions that have been 'conferred on the Information Commissioner', but it is almost incomprehensible in its drafting. In any case, while 12(5) aims to avoid duplication of decision making between the Information Commissioner and the Privacy Commissioner, again it fails to address exactly *when* the Privacy Commissioner will exercise the privacy functions, and *if and when it is more appropriate* for the Information Commissioner to do so.

2. Clause 12(4) effectively means that 'approval' is required from the Information Commissioner when the Privacy Commissioner exercises important functions, such as issuing guidelines about the handling of personal information. While *consultation* with the Information Commissioner is appropriate, '*approval*' is not. The need for approval may inhibit the Privacy Commissioner from exercising his/her judgement as to when privacy guidance is necessary, and more importantly, may impose limitations on the manner of guidance he/she develops. While consistency and oversight is important between the three Commissioners, it should be recognised that the Privacy Commissioner's 'main functions' are different in important respects to the information commissioner functions.

   The privacy and FOI functions (set out under clauses 8 and 9) are inter-related. While overtly, FOI is about release of information and privacy is about protection of information, both concern the *appropriateness* of information release. In important respects, they are different to the information commissioner functions (set out in clause 7). For example, the FOI and privacy functions are essentially regulatory. The information commissioner functions are essentially advisory. The privacy functions also relate to the private sector. The information commissioner functions do not. As such, the Privacy Commissioner will need to establish guidelines which are primarily informed by the requirements of the Information Privacy Principles (IPPs), National Privacy Principles (NPPs) or proposed Unified Privacy Principles (UPPs), without undue interference. As the Information Commissioner functions do not have a role in regulating the private sector, it is not clear why the Privacy Commissioner would need 'approval' for guidelines based on the NPPs.

In light of the above, consideration should be given to:

- Setting out clearly in the Bill how and when the Information Commissioner will exercise the Privacy and FOI functions;
- Re-drafting clause 12(5) so that it is less ambiguous; and
- Achieving a more appropriate balance between oversight and independence in terms of the Information Commissioner's role in relation to the Privacy and FOI functions.

3. Office Structure: Function Exchange

Under the IC Bill, the FOI Commissioner may perform both FOI and privacy functions (clauses 11(1)&(2)). Similarly, the Privacy Commissioner may perform both the privacy and FOI functions (clauses 12(1)&(2)). The IC Bill and its Explanatory Memorandum contain little guidance as to when it is appropriate for either Commissioner to perform the 'traditional' functions of the other. The Explanatory Memorandum states only that this is 'for flexibility'; that one Commissioner would not 'regularly' perform the functions of the other; and that it 'is anticipated that in practice' the Privacy Commissioner will perform the privacy functions, and the FOI Commissioner, the FOI functions.

In light of the Information Commissioner *also* having the privacy and FOI functions, it is not clear what the inclusion of clauses 11(2) and 12(2) is intended to achieve. The usefulness of the Privacy and FOI Commissioner 'sharing' functions is further diminished by a presumable lack of familiarity by each Commissioner with their non-traditional functions. In the event of conflict between the view of the Privacy Commissioner and the FOI Commissioner (or the absence of one or the other) vesting both functions in the Information Commissioner to make the ultimate decision is surely enough.

In my view, if there is some unstated intention or usefulness by including clauses 11(2) and 12(2), then this should be clearly expressed in the Bill or Explanatory Memorandum. Otherwise, without a clearly defined rationale, these clauses may lead to confusion amongst the general public and uncertainty within the office.

4. The Advisory Committee and Reporting to the Minister

Clause 27 establishes the Information Advisory Committee (the Committee). The Committee is to assist and advise the Information Commissioner on matters relating to the performance of the information commissioner functions (clause 7). Those functions involve the delivery of coordinated advice to the Government on broad government information management matters. While the Committee does not advise the Information Commissioner on the FOI or the privacy functions, the Explanatory Memorandum states:

> *However, matters upon which the Committee advise the Information Commissioner may relate to those functions* (privacy and FOI).

The danger of clauses 7 and 27 is that the Information Commissioner may be influencing government policy on information management, on the advice of a Committee potentially dominated by technical experts, keen to promote data matching and information exchange. The fact that these Committee members will also inevitably be 'advising' the Information Commissioner on FOI and privacy matters – with no provision for the Information Commissioner to in turn consult with the FOI and Privacy Commissioners – may result in a disproportionate emphasis on pro-data sharing. This weakens both the office's role, and the perception of it as an independent 'watchdog'. As such, consideration should be given to ensuring that under the IC Bill, members of the Committee are evenly represented by

individuals with technical expertise and those whose interests extend to privacy and human rights, and consumer protection. The Information Commissioner should also be required to consult with the other two Commissioners.

Further, under clause 30, the Information Commissioner is required to report annually and only to the Minister. Enabling the Information Commissioner to instead report directly to Parliament, and whenever he/she believes it appropriate but at least annually, would also better ensure the independence of the office.

5. Privacy under FOI

Under the current section 41 of the FOI Act, a document will be exempt from disclosure if it would involve an unreasonable disclosure of personal information. The proposed new clause 11A(5) significantly waters down this protection. Under clause 11A(5), to prevent disclosure of personal information, the disclosure itself would need to be 'unreasonable' under section 47F and also 'contrary to the public interest'. Where an individual is seeking access to another person's information, this new test is particularly problematic.

Though this office supports a new pro-disclosure approach by the Commonwealth government, such an approach should not be directed towards diminishing existing *individual* privacy protections. Information about systems of government and the people working as a part of that system ('business information') and information identifying individuals whose personal information is held by government ('personal information') is not necessarily the same thing. Therefore, this information should not be treated identically for the sake of expediency.

For example, while a number of factors are set out favouring access to the document in the public interest (clause 11B), the factors set out to decide whether the disclosure is 'unreasonable' do not properly take into consideration (clause 47F(2)) the effect the disclosure will have on an individual's privacy, or the views of the 'owner' of the information. Further, under clause 27A, the process for consultation where a request is made for access to a document containing personal information is a confusing, non-mandatory process. Clause 27A(1)(b), is subjective, operating where 'it appears to the Agency or Minister' that a person may wish to contend that their information is conditionally exempt, and the release is not in the public interest. As stated in my previous submission, reliance on a subjective decision on the part of the agency or Minister means that the process poses substantial risks to personal privacy, as the whole consultation and review process is dependent on this initial judgement. Where a document contains personal information, the document should not be released without *mandatory notification* to the person concerned, and with a real opportunity provided to that person to have their views concerning the release taken into account.

As I also stated in my previous submission, my office has received a number of complaints under the *Information Privacy Act 2000 (Vic)* from individuals whose personal information has been disclosed, purportedly under the *Freedom of Information Act 1982 (Vic)*, without the mandatory notification and consultation process set out in that Act being followed.

I note that the Government proposes to amend the *Privacy Act 1998 (Cth)* to enact an enforceable right of access to, and correction of, an individual's own personal information, rather than maintenance of this right through the current FOI Act. These amendments are scheduled to be introduced in 2010. This office supports this new system of access and correction to personal information under the Privacy Act. Additionally, where an application for one's own personal information contains the personal information of another within the same document ('mixed information' requests), such an application should ultimately be dealt with under the Privacy Act rather than FOI. In my view, this is because an initial assessment of an issue under the Privacy Act often requires a distinction between 'personal information' and 'business information'. The former is protected under privacy laws, the latter is not. As such, where a request involves information that relates to both an individual, and matters of government accountability, it is more appropriate for this initial assessment to be undertaken by the Privacy Commissioner – possibly in consultation with the FOI Commissioner where required – and then referred on or dealt with as appropriate.

HELEN VERSEY
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