



**LAW INSTITUTE OF VICTORIA**  
**Policy on privacy-related issues in laws and government policy**  
**Approved by LIV Council on 17 November 2011**

The protection of privacy arises in many contexts in which the Law Institute of Victoria calls for reform. This policy has been developed to inform LIV committee and Council members of matters to be considered when developing or commenting on law or policy that impacts on privacy. Consideration of these issues will help to ensure a consistent approach by the LIV to privacy-related issues.

This LIV Policy on privacy-related issues in laws and government policy is distinct from the LIV privacy policy which governs the way in which the LIV protects privacy as an organisation. The LIV's organisational privacy policy is available at: <http://www.liv.asn.au/About-LIV/LIV-Website/Privacy-Policy>.

### **Broad Policy Positions**

The LIV considers that:

#### *Minimum standards*

- All government policy and law should, at a minimum, comply where relevant (and subject to statutory exemptions) with the:
  - Information Privacy Principles (Cth) (Commonwealth government bodies)
  - National Privacy Principles (private organisations)
  - Information Privacy Principles (Vic) (state government bodies)
  - Health Privacy Principles (Vic)
  - *Charter of Human Rights and Responsibilities Act 2006* (Vic)
  - Any equivalent provisions in operation from time to time (e.g. the proposed Australian Privacy Principles)

#### *Exemptions*

- The relevance of any statutory exemptions should be noted e.g. under the *Privacy Act 1988* (Cth), there are exemptions for: individuals in non-business capacity, organisations acting under Commonwealth or State contracts, employee records, journalism, political acts and practices, and small businesses.

#### *Assessment and justification*

- Government proposals to regulate matters that impact on privacy should be accompanied by a 'Privacy Impact Assessment' or otherwise explain why the body is collecting or using the information.

#### *Consolidation and harmonisation of laws*

- A national approach to privacy should be developed, including the harmonization of relevant state and territory laws. In particular, privacy policy principles should be consolidated and simplified. Separate legislation for privacy in specific contexts (e.g. health records) should be discouraged except where necessary to afford distinct protection for unique and sensitive categories of information. The current frameworks for protection of privacy are too complex, outdated and incomplete. The laws governing privacy include separate state, territory and federal Privacy Acts and secrecy provisions in various Acts.<sup>ii</sup>

The Law Institute of Victoria  
is a member of



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### *Statutory cause of action*

- There should be a statutory cause of action in Victoria and at the Commonwealth level for invasions of privacy. Every individual has a right to privacy, which is based on the principles of equality and the dignity of every human being. The right is not absolute but will depend on context and circumstances. The right to privacy is recognized in the Victorian *Charter of Human Rights and Responsibilities Act 2006* but it is not comprehensively recognized or enforceable under statute or in the common law in Victoria or federally.<sup>iii</sup>

### *Limitations on privacy in the public interest*

- The LIV does not support specific exemptions (such as exemptions for media organisations) from any new statutory cause of action for breaches of privacy.<sup>iv</sup> The incorporation in a statutory privacy action of a requirement to balance the right to privacy with other rights in the public interest – such as the right to freedom of expression and participation in public affairs – could provide appropriate safeguards for anyone who has legitimate reasons for privacy invasions. Any limitations on the right to privacy made in the public interest must be reasonable, necessary and proportionate.

### *Limits on administrative burden*

- Privacy protections should not be used to increase the administrative burden on individuals. This is particularly a problem for family members, who face highly bureaucratic processes when seeking to act as a family member's agent. Current regulation of privacy treats all members of society as discrete individuals, which does not match the reality of many family units.

### *Training*

- Appropriate training should be made available to individuals responsible for complying with privacy laws, including those in the public service.

### **Addressing specific privacy proposals**

When developing or commenting on law or policy that impacts on privacy, LIV committee and Council members should have regard to the following:

#### *Accessibility*

- Are the privacy aspects of the proposal easy to use/understand?
- Is there a need for education about the proposal and its impact on privacy?

#### *Collection*

- Is the information collected by 'legitimate', 'fair' or 'reasonable' means?
  - Consideration should be given to:
    - what are the purposes and functions of the body collecting the information?
    - what is the impact on the individual?
    - what is the relationship between the individual and body - is it ongoing or a single transaction?
- Is the amount of information being collected and the way in which it is being collected proportionate to, and reasonable given, the relationship between the body and the individual.
  - Consideration should be given to:
    - what are the functions of the agency?
    - what is the individual's relationship with the agency - is it ongoing or a single transaction?
    - can the transaction/service/good reasonably be provided without this information?
  - Consideration may also be given to:
    - can the individual interact with the organisation anonymously and pseudonymously?
    - Is the collection of the information undermining or negating that option?
- Is the individual aware that her or his information is being collected and what it will be used for? Is the individual aware of her or his rights in relation to the information?

## Use

- Is the information being used for the purpose for which it was collected?
- If it is a secondary use, does the individual know about it? Can they opt out?
- Is the secondary use reasonably connected to the primary use?

## Disclosure

- When is disclosure of information lawful and unlawful?

## Storage

- Does the proposal require the storage of information for long periods of time?
- Will databases be created?
- Who will access the databases?
- How will security be maintained?
- Will the use for which the information was collected be cross-referenced to the information stored in the database?

## Ownership

- Who owns the information collected? The individual or the body?
  - It may be necessary to distinguish between the “raw” information collected and any “value added” information, such as opinions or analysis.
- If the information is stored in a database, who owns the database?
- Can individual’s request the information be amended or removed? Can this request be enforced?
- If revenue is created from the information, does the individual share in this revenue?
- Is the body claiming ownership of genetic or biometric information of an individual?

## Regulation

- Is the current regulation in relation to the proposal adequate?
- Did the regulations foresee this type of proposal? Or are the regulators playing ‘catch-up’?
- Are any new regulations easy to use/understand, inexpensive, and flexible?
- Is there a need for education about the regulations?
- Do any other codes or policies need reviewing?

## Breaches

- How will breaches of privacy be detected?
- How will breaches of privacy be remedied?
- Can the remedies be enforced by individuals?

## Comparative laws

- Are there examples of privacy protections in other jurisdictions which could inform privacy protection? For example, UK law provides for grading of privacy protections (see *Campbell (Appellant) v. MGN Limited (Respondents)* [2004] UKHL 22).

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<sup>i</sup> Office of the Australian Information Privacy Commissioner, Privacy Impact Assessment Guide, May 2010.

<sup>ii</sup> See submission on Exposure Draft of the Australian Privacy Principles 19 August 2010 <http://www.liv.asn.au/Membership/Practice-Sections/Administrative-Law---Human-Rights/Submissions/Exposure-Draft-of-the-Australian-Privacy-Principle?glist=0&rep=1&sdiag=0>

<sup>iii</sup> See submission on Inquiry into Surveillance in Public Areas 6 July 2009 <http://www.liv.asn.au/Membership/Practice-Sections/Administrative-Law---Human-Rights/Submissions/Inquiry-into-Surveillance-in-Public-Areas?glist=0&rep=1&sdiag=0>

<sup>iv</sup> *Ibid.*