Australian Government

Australian Law Reform Commission

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Inquiry into Australian Privacy Amendment Legislation: Response to Question on Notice

I refer to the Senate Finance and Public Administration Legislation Committee public hearing into the Exposure Draft Australian Privacy Principles held on 25 November 2010, at which I appeared as a witness (by telephone), with Bruce Alston, an ALRC Senior Legal Officer.

At the hearing, Senator Mason asked (Official Committee Hansard, F&PA7) whether the privacy protection provided by Australian Privacy Principle 3 (APP 3) is stronger than the equivalent provisions of the current National Privacy Principles (NPP) contained in sch 3 of the *Privacy Act 1988* (Cth). I agreed to take this question on notice and provide the following answer:

The Senator's specific concern relates to APP 3(1), which states:

> (1) An entity must not collect personal information ... unless the information is reasonably necessary for, or directly related to, one or more of the entity's functions or activities.

The equivalent of this provision in the NPPs is NPP 1.1, which states:

> 1.1 An organisation must not collect personal information unless the information is necessary for one or more of its functions or activities.

The Information Privacy Principles (IPPs) use another different formulation. IPP 1.1 states that an agency may collect personal information only if:

> (a) the information is collected for a purpose that is a lawful purpose directly related to a function or activity of the collector; and
>
> (b) the collection of the information is necessary for or directly related to that purpose.

In its report *For Your Information: Australian Privacy Law and Practice* (ALRC Report 108), the ALRC recommended that the 'Collection' principle in its model Unified Privacy Principles should provide that an agency or organisation must not collect personal information unless it is necessary for one or more of its functions or activities (Rec 21–5). This formulation follows NPP 1.1, rather than IPP 1.1.

The reasons for this preference were set out in ALRC Report 108, [21.72]–[21.78] and are based, in part, on the ALRC's view that the NPPs should form the general template for drafting and structuring the new unified principles. The ALRC also noted that the wording of NPP 1.1 is simpler than that of IPP 1.

However, it is not entirely clear whether the formulation in APP 3(1) provides more or less privacy protection than that in NPP 1.1.

Arguably, allowing the collection of information where it is 'directly related' to a function or activity, as well as where it is 'necessary', broadens the scope for collection. However, as discussed in ALRC Report 108, the Office of the Privacy Commissioner's 2001 guidelines on collection of information by organisations provide that :

> The Commissioner interprets 'necessary' in a practical sense. If an organisation cannot in practice effectively pursue a legitimate function or activity without collecting personal information, then the Commissioner would ordinarily consider it necessary for that function or activity. (p 27)

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Further, the High Court of Australia has noted that there is a long history of judicial and legislative use of the term 'necessary', not as meaning 'essential or indispensable', but as meaning 'reasonably appropriate and adapted' (see *Mulholland v Australian Electoral Commission* (2004) 220 CLR 181, [39].

It should also be observed that, arguably, APP 3 is more privacy protective than NPP 1 in that it requires that collection is 'reasonably' necessary. The addition of this objective element was an option considered, but rejected as unnecessary, in ALRC Report 108, [21.77].

Yours sincerely,

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