Your Ref:
Our Ref: LH :
Date: 22 February 2005

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The Secretary
References Committee
Australian Senate
Parliament House
Canberra ACT 2600

Dear Sir/Madam,

INQUIRY INTO PRIVACY ACT

We refer to your letter dated 14 December 2004 and thank you for the opportunity to make a submission in this matter.

Legal Aid Queensland (LAQ) has been required to protect the privacy of its clients since its formation. The doctrine of legal professional privilege applies to most documents and communications between LAQ and clients. In addition, Sections 75 and 82 of the Legal Aid Queensland Act 1997 provide legislative protection. LAQ complies with Privacy Principles introduced administratively by the Queensland Government for government departments and instrumentalities. LAQ's Privacy Plan applies both to personal information held in relation to clients and employees.

Since its establishment, the Consumer Protection Unit at LAQ has received many complaints from consumers concerning matters regulated by the Privacy Act (Cth). The Consumer Protection Unit specialises in consumer injustices including disputes with credit providers and insurers. In that capacity it provides direct advice to over 600 Queenslanders each year and undertakes follow up case work. Case work is undertaken on behalf of consumers where the matter is in the public interest or to highlight some of the deficiencies that may, for example, exist within credit reporting or the invasion of consumer's privacy.

Advice solicitors at LAQ also provide advice on privacy matters.

(a) The overall effectiveness and appropriateness of the Privacy Act 1988 as a means by which to protect the privacy of Australians, with particular reference to:

(i) international comparisons:

(ii) the capacity of the current legislative regime to respond to new and emerging technologies which have implications for privacy

There are currently many problems with the existing regime. One can only assume that those problems would be exacerbated when the Privacy Commissioner has to deal with privacy concerns arising out of new technologies.

Legal Aid Queensland's experience is mostly confined to privacy considerations in the area of credit reporting where consumers generally suffer the most detriment. Currently the process is that "credit providers" (as defined under the Act) release certain information about their customers to the credit reporting agency. The credit provider is not obliged to (and does not) provide evidence as to the accuracy of the information.

Privacy Principle 9 requires a record keeper not to use information without first making steps to ensure that it is accurate. The problem however is that this does not prevent the credit reporting agency from accepting information to keep the record. The agency is not caught by Privacy Principle 9 because it does not itself use the information. It is the credit providers doing credit checks who make use of the information.

Consumers are not notified as a matter of course when information is provided or altered. This means that the record held in relation to a particular individual may be inaccurate without that consumer's knowledge. Most consumers only become aware that inaccurate information is held at a time when it is critical that the information be accurate, such as when they apply for finance and are refused on the basis of a default listing on their credit report.

Baycorp Advantage Ltd (Australia's main consumer credit reporting agency) does provide a service to consumers whereby it will contact consumers if alterations are made to the credit report at an annual cost of $29.95. Given the number of entities which potentially have sensitive information about a consumer, if each of these entities had a similar service at a similar cost it would be prohibitively expensive for many people.

Even when the consumer becomes aware of a possible inaccuracy, the onus of proving that the record is incorrect lies with the consumer who is generally in the weaker bargaining position and has less resources. Whilst some inaccuracies are obvious and easy to prove others involve a dispute about whether and when the consumer fell into default. This is important because a credit provider can only report a default to a credit reporting agency when the consumer has been in default for at least 60 days. In this situation consumers are forced to prove that they either don't owe the money or are not in default. This is a most unfair and unsatisfactory situation given that if the credit provider wished to recover money they would bear the onus of proof in any court proceedings. There is no obligation on a credit provider after listing a default to commence recovery proceeding.

Privacy Principle 8 seems to make an attempt at requiring the record keeper to ensure that the record is correct and to respond to requests to alter the information. However it may be that this principle does not go far enough. It certainly does not appear to be enforced. Indeed it may be onerous for a credit reporting agency to have to investigate

the accuracy of each and every notification. The credit provider who reports a default is in a better position to provide the evidence of accuracy.

LAQ's experience in the credit reporting area is that many organisations do not make compliance with the Privacy Act a priority. The Privacy Commissioner has the power to impose large penalties but does not do so. There appears to be no understanding of the problem of systemic breach evidenced by one example of breach.

There is also a problem with dispute resolution. There is no requirement for entities to have internal dispute resolution procedures and there is no guaranteed alternative to the Privacy Commissioner for external dispute resolution. Having alternative means of dispute resolution would relieve the load on the Privacy Commissioner's Office and also allow some of the less serious complaints be dealt with informally by measures such as apologies and correction of records etc.

(iii) any legislative changes that may help to provide more comprehensive protection or improve the current regime in any way.

Legislation requiring entities to have an approved internal dispute resolution regime compliant with the Australian Standard for internal dispute resolution ought to be a introduced. Unless the Privacy Commissioner's office has greater resources to take enforcement action and prioritises enforcement action the legislation will remain ineffective. Other alternatives for external dispute resolution funded by industry (particularly in credit reporting) ought to be explored given the positive outcomes for consumers of those sorts of schemes in the financial services and the telecommunications sector.

To ensure compliance mandatory minimum penalties ought to be imposed by the Privacy Commissioner for systemic breaches. This will have the effect of ensuring that entities make compliance with the privacy legislation a priority.

In the case of Record keepers which have high volumes of information reported to them by 3rd parties (ie persons or entities other than the person to whom the information relates) such as credit reporting agencies and tenancy databases, it may not be practical to enforce Privacy Principle 8. Section 18G Privacy Act 1988 requires a credit reporting agency to take reasonable steps to ensure that the record is accurate. This is either not enforced or there is no consistency or certainty as to what steps might be considered reasonable given the volume of information that credit reporting agencies handle.. Clarification is required as to just what the obligations of a credit reporting agency are.

Certain obligations also need to be specifically imposed upon credit providers making notifications to credit reporting agencies. Whilst the provisions of Part III A of the Privacy Act attempt to impose obligations upon credit providers to keep their records accurate, the provision needs to ensure that there is an ongoing obligation that information provided to a credit reporting agency is accurate and up to date and not just at the time it is communicated to the credit reporting agency. A credit provider ought to provide evidence of the accuracy of any information, particularly of any defaults.. The Credit reporting agency would then only be liable if:

- it makes a default listing without requiring evidence of the accuracy of the listing from the credit provider or;
- when advised of a possible inaccuracy by the consumer to whom the record relates, fails to investigate and or fails to amend the record accordingly; or
- where it has failed to amend the record in favour of the consumer when requested to do so by the credit provider making the original report.

It there is a dispute between the consumer to whom information relates and the credit provider and

- the credit provider provides evidence but it is equivocal; and;
- the credit reporting agency is unable to determine the accuracy or the information provided by either the credit reporting agency or the consumer:

the legislation ought to provide for the removal of the listing. The current legislation provided by Section 18Fof the Privacy Act relating to credit reporting agencies allows a notation on the file that the information is disputed. In our view the current legislation does not provide sufficient consumer protection as the listing is still there and there is no evidence that other lenders take into account the notation that the consumer 's assertion that the listing is not correct when assessing eligibility for an extension of credit.

The legislation needs to further provide that the listing be deleted in its entirety if the credit provider fails to commence court proceedings within 3 months of making the default listing or if court proceedings are finalised in the consumer's favour. The listing could remain for longer than three months if the credit provider could provide satisfactory evidence to the credit reporting agency, that despite taking all reasonable steps, proceedings could not be commenced because the consumer could not be found.

Above all, whether future amendments will be made to the legislation, the legislation will remain ineffective unless there is proactive enforcement and provisions made so that consumers have access to justice through a quick efficient and no cost dispute resolution process.

(b)effectiveness of the Privacy Amendment (Private Sector) Act 2000 and changes which may enhance its effectiveness

The Privacy Amendment (Private Sector) Act 2000 greatly widened the scope of the Privacy Act 1988. There are now a significant number of small not for profit organisations who are now required to comply with the Privacy Principles because they receive Commonwealth funding. For many small not for profit organisations this has caused great disruption and significant commitment of limited resources in order to ensure compliance. Many of these organisations struggle to remain financially viable.

For small not for profit organisations now caught by the Privacy Act 1988, the onerous nature of the requirements contained in the Privacy Act is difficult to justify when compared with the restricted nature of the organisation's activities and their limited capacity to cause any real detriment to a consumer by failing to strictly comply with all of the privacy principles.

(c)resourcing of the Office of the Federal Privacy Commissioner

It does not appear that the Privacy Commissioner is resourced adequately to effectively enforce the Privacy Act.

In September 2004 one of our officers was informed by the Privacy Commissioner's Office that they had just started opening files for complaints received in September 2003. A delay of one year or more between the making of a substantive complaint and investigation of the complaint is arguably not acceptable.

Whilst the Privacy Commissioner's Office does undertake a preliminary assessment as to urgency in order to give priority to urgent complaints, this is not sufficient to prevent injustice caused by the delay. The Privacy Commissioner's Office is not necessarily in a position to predict the potential consequences to the consumer of the breach which is alleged. Even the complainant may not be fully aware of the consequences of a breach of privacy at the time the complaint is made. In many if not most cases, any damage would have been well and truly done by the time the complaint is investigated if it was not originally given priority.

In the case of less serious complaints, it may assist if the Privacy Commissioner were able to order small amounts of compensation and apologies. Public apologies may be appropriate in the case of more serious matters.

As mentioned in (a) (iii) it would also assist in easing the load on the Commissioner's Office is entities, particularly in the credit reporting area were required to make available an approved internal dispute resolution process. Aggrieved consumers should also have access to efficient no cost external dispute resolution processes either via the Privacy Commissioner or an industry scheme meeting the requirements for external dispute resolution schemes contained in the Australian Securities and Investment Commission Policy Statement 139.

(d)general comments

Legal Aid Queensland was consulted by the Federal Privacy Commissioner with respect to Credit Reporting Determination 2002 No. 1. A submission in response was prepared by Loretta Kreet of our Consumer Protection Unit in November 2002. That submission is attached and may be of assistance to your inquiry. We would be interested in being informed of the dates of any public hearings with a view to the possible participation of our Loretta Kreet.

Yours faithfully,

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JOHN HODGINS
CHIEF EXECUTIVE OFFICER