

Senate Legal and Constitutional Affairs Committee

Inquiry: Privacy Act 1988

Submitted by the Australian Federal Police

1. Introduction

1.1 Overview

The Australian Federal Police (AFP) welcomes the opportunity to make a submission to the Committee's Inquiry into the *Privacy Act 1988* ("the Act").

This submission outlines two issues with regard to the Terms of Reference for the Committee's inquiry:

- the emergence of Public Source Data (PSD) companies and their potential impact on individual privacy, and
- the AFP's practical experience in obtaining information from the private sector under the Act.

2. Terms of Reference

(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:

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

(A) 'Smart Card' technology and the potential for this to be used to establish a national identification regime,

(B) biometric imaging data,

(C) genetic testing and the potential disclosure and discriminatory use of such information,

(D) microchips which can be implanted in human beings (for example, as recently authorised by the United States Food and Drug Administration)

The AFP closely monitors emerging international law enforcement issues and has observed the impact on information of the emergence of Public Source Data (PSD) companies in the United States of America.

PSDs are private companies who focus solely on the collection and upload of publicly available personal information from which detailed comprehensive personal profiles of individuals are compiled. These profiles are then sold to clients including credit agencies, private investigators and large auditing companies. Some credit agencies have service agreements with PSDs based on an exchange of information

PSDs generally hold a current biographical profile, place of residence and workplace on many US citizens. They have the capacity to trace a person from birth to death using readily obtainable public records and enhancing it with information from sources including records of insurance, credit histories, and school and employment records.

In some cases, all electronic financial transactions can be traced to provide profiles of shopping, travel, and medical visits. The sources of such information are constantly growing. In the USA, the use of unique identifying social security numbers assists the information gathering process.

Whilst individual items of information obtained by PSDs may not breach current privacy legislation, it is the capacity of PSDs to aggregate such information and link it to high powered search engines that provides a significant source of concern.

The extent of PSD activity in Australia is uncertain. However, whilst PSDs are yet to emerge as a significant issue in Australia, the AFP intends to monitor this issue.

(b) the effectiveness of the Privacy Amendment (Private Sector) Act 2000 in extending the privacy scheme to the private sector, and any changes which may enhance its effectiveness;

The AFP recently provided input to the Federal Privacy Commissioner's review of the National Privacy Principles (NPPs) in the Act. The Commissioner for the AFP advised the Privacy Commissioner that in terms of a free flow of information and business understanding its obligations, some practical law enforcement issues are emerging with regard to the AFP accessing information from organisations subject to the NPPs.

Provision of information governed by the NPPs is at the discretion of the organisation requested to provide it. Some organisations have been reluctant to or have refused to provide information requested by the AFP for law enforcement purposes under NPPs. The AFP operational experience in those cases suggests the following causes:

- Organisations that are less familiar with the operation of NPPs can be reluctant to assist law enforcement as they are not aware the disclosure 'reasonably necessary for the enforcement of criminal law or a law imposing a pecuniary penalty' is a lawful disclosure;
- Provision of such information can be in conflict with business outcomes as it requires organisations to provide information that can be detrimental to commercial interests;
- There are costs associated with complying with a request for information that organisations are reluctant to bear; and
- Some organisations are concerned about litigation being commenced by clients whose information has been disclosed to police.

The AFP has had this experience with some utility and service providers. Where information is requested for law enforcement purposes but access is denied, AFP personnel do attempt to negotiate release. However, not all negotiations are successful.

While education has a role to play in raising awareness, this is unlikely to offer a complete solution. A legislative approach such as a 'notice to produce', as is currently available to a number of other government entities, may be a potential solution to these difficulties. The AFP is undertaking some preliminary research on the issue of production notices with the possible aim of requesting a change to legislation to provide a similar power to the AFP.