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25 September 2005

Ms Julie Dennett
A/g Committee Secretary
Senate Legal and Constitutional Committee
VIA EMAIL: legcon.sen@aph.gov.au

Re: Privacy Legislation Amendment (Emergencies and Disasters) Bill 2006

Dear Ms Dennett and Senators,

Please find following our submission on the Privacy Legislation Amendment (Emergencies and Disasters) Bill 2006. We consent to its publication.

We agree with legal assessments by both the Attorney-General's Department and the Privacy Commissioner that the Privacy Act already permits virtually all reasonable responses to emergencies envisaged by this proposed amendment. Further legislative change is therefore both unnecessary and potentially a source of further confusion, as well as posing a hazard to balanced privacy protection.

We argue that the solution to the confusion which causes the (infrequent) problems argued in support of this change lies in common-sense guidance and education about the current Act, not further complications and loopholes.

Yours sincerely

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About the Australian Privacy Foundation

The Australian Privacy Foundation is the leading non-governmental organisation dedicated to protecting the privacy rights of Australians. We aim to focus public attention on emerging issues which pose a threat to the freedom and privacy of Australians.

Since 1987 the Australian Privacy Foundation has led the defence of the rights of individuals to control their personal information and to be free of excessive intrusions. We use the Australian Privacy Charter as a benchmark against which laws, regulations and privacy invasive initiatives can be assessed.

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Overview of concerns

This Bill introduces a very detailed and complex new Part VIA, purportedly to address a lack of clarity about the ability to respond to emergencies.

We acknowledge the consideration given to this issue by the Privacy Commissioner in her March 2005 *Review of the Private Sector Provisions of the Privacy Act* (sections 7.13 & 7.14) and by the Senate Committee in its June 2005 report *The Real Big Brother* (paragraphs 5.92-5-107 & 7.50). We note that the Senate Committee merely endorsed the Privacy Commissioner's recommendations, which were to consider amending NPP 2, with an accompanying definition of 'national emergency' (with an alternative change to the Temporary Public Interest Determination provisions). Other submissions on this issue suggested similar changes to the public sector IPPs.

It is clear from the evidence taken by the Privacy Commissioner and Senate Committee that many of the examples given of the Privacy Act preventing sensible use of personal information are due either to a wilful or inadvertent misunderstanding of the Act, which would be best addressed through better short-term communications and long-term education rather than wholesale changes to the privacy protection framework in the Act.

The amendments in this Bill go much further than the Commissioner (and Senate Committee) recommended. Even if legislative amendments are necessary, then amendments of this complexity, rather than clarifying, are likely to further confuse agencies and organisations about the effect of the Privacy Act. If legislation is required, then a minor amendment to the 'emergencies' exceptions – as suggested by both recent reviews - should suffice, and would be much clearer.

However, we remain unconvinced that legislative amendments are necessary at all. We strongly suggest that a better alternative would be guidelines from the Privacy Commissioner or Attorney-General's Department making it clear that the existing provisions of the Privacy Act already allow collection, use and disclosure of personal information for the benefit of individuals in emergency situations. The Minister in his Second Reading speech admitted that:

> "On the contrary, the bill serves to clarify and enhance what is largely already permissible under the Privacy Act."

In the rare circumstances where a collection, use or disclosure may technically not be permitted by the Act, it is unlikely that the individuals concerned would complain, and in any case, both the Privacy Commissioner and the Courts would have the discretion to treat any such complaint as trivial.

The lack of a clearer justification for these amendments suggests to us that they have more to do with protecting government from embarrassment, and/or facilitating other public interests at the expense of individuals' privacy rights, than they do with promoting the interests of individuals affected by emergencies or disasters.

Specific concerns

1. It is undesirable for the declaration of an emergency for Privacy Act purposes to be unconnected from any other declaration (EM para 25). We would have expected this to be consequential upon emergencies declared for more pressing and urgent reasons. It is difficult to envisage circumstances in which the ONLY reason for declaring an emergency would be to allow transfer of personal information.

The provision invites suspicion that a declaration could be made for reasons of government convenience rather than solely to assist the interests of affected individuals.

The provision also 'unfairly' and unnecessarily inserts a separate bureaucratic process into emergency situations which will inevitably reflect adversely on the Privacy Act.

It would be far preferable to have these provisions triggered by the declaration of an emergency or disaster for other reasons. We note that the Privacy Commissioner recommended the use of determination of an 'incident' under s.23YUF of the Crimes Act as the appropriate 'trigger'.

2. The use of the definition of 'responsible person' from NPP 2.5 (EM para 38) takes this relationship out of context. This definition was designed to encompass the range of people who might need to be informed only in the circumstances specified in NPP 2.4; i.e. for health care or compassionate reasons AND where individual for whom they are responsible is incapacitated, etc, AND where the disclosure is not contrary to any clearly expressed wish.

None of these safeguards would appear to apply to the new amendments, so that it leaves a complete discretion to 'entities' (both agencies and private sector organisations) to decide in what circumstances personal information may be transferred (for a permitted purpose) to a 'responsible person'.

Note that the definition of responsible person does not include anyone under the age of 18, so that the amendments would not appear to allow, for example, disclosure to children of a parent involved in a declared incident? Given the objective of the Bill, this would appear to be an important oversight.

3. Permitted purpose is defined as 'a purpose that relates to the Commonwealth's response to an emergency or disaster in respect of which an emergency declaration is in force'. Clause 80H(2) gives a non-exhaustive list of examples. Most of these seem consistent with the objective of assisting individuals. The ones that do not are

> *(c) assisting with law enforcement in relation to the emergency or disaster; and*
> *(d) coordination or management of the emergency or disaster*

It is not clear why these circumstances are not already covered by the existing law enforcement and related exceptions to the use and disclosure principles (IPP10.1 (b) and (d), 11.1(c) and (e) and NPP 2.1(e)(f) and (h)). Collection in these

circumstances would already be lawful under IPP 1.1 or NPP 1.1, and in the case of sensitive information by NPP 10.1(c).

4. The amendments allow collection, use or disclosure by both agencies and organisations for permitted purposes. Disclosure can be to almost any other agency or organisation – the only significant limitation appearing to be a prohibition on *private sector organisations* disclosing personal information to the media. The EM states that this is so that the normal operation of the Privacy Act would apply in this case (para 39).

We note that this exception does not apply to *agencies,* thus allowing the Government to make disclosures to the media at their discretion. This appears contrary to the Minister's statement in his Second Reading speech that:

> "The amendments will not permit the disclosure of personal information to the media. If there is a need to involve the media to ensure a speedy and effective response to the emergency, then agencies and organisations must do so in accordance with the normal operation of the Privacy Act."

5. The Bill has the effect of overriding not only the operation of the Privacy Act principles (IPPs and NPPs) but also the operation of any secrecy provisions (EM para 52) (except those applying to some intelligence agencies, and any specifically determined in future by regulation, where, in the Minister's words: " … a sound policy case is made out to preserve those provisions even in an emergency situation.")

We submit that the case for overriding specific secrecy provisions needs to be made 'up-front' in the amending legislation rather than reversing their effect and waiting for someone to realise, after the event, that there were very good reasons for non-disclosure notwithstanding an emergency. If a 'blanket' case can be asserted in advance for some intelligence agencies, then why not for a wide range of other secrecy provisions which were presumably consciously legislated without such a broad 'emergencies' exception, and which have operated in most cases for many years without reportedly creating an problem?

6. If the amendments proceed, despite our submission that they are unnecessary, we strongly support the inclusion of clause 80Q, making it an offence for anyone other than a responsible person to further disclose information. Most of the exceptions provided by 80Q(2) are appropriate.

However we do not believe that the Minister should be able to add other classes by Regulation (80Q(2)(g)). As this is already legislation which provides an exception to well-establish privacy protections, any further exceptions should be at least debated in Parliament and thus more open to public scrutiny - and approval or disapproval - than Regulations. Important privacy protections should not suffer death by a thousand cuts.