

**Australian
Privacy**

Foundation

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email: mail@privacy.org.auweb: www.privacy.org.au**Workplace Privacy: Options for Reform****Consultation Paper, April 2007****Australian Privacy Foundation submission to the
Standing Committee of Attorneys-General****July 2007****The Australian Privacy Foundation**

The Australian Privacy Foundation (APF) 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.

For further information about the organisation, see www.privacy.org.au

Introduction

This is a submission on the paper “Workplace Privacy: Options for Reform”. While we welcome the consultation paper, we are disappointed by the process. Workplace privacy regulation will affect the majority of the Australian population, and proposals for change need to be widely canvassed. The consultation has not been widely publicised and while the Paper is dated April 2007 we only received the invitation to comment under cover of a letter dated 6 June – the delay is not explained. Neither the paper nor any details of the consultation appear to be on any website, making it difficult to easily refer other interested parties to it. We believe there should have been a much greater level of transparency, and proactive promotion of the consultation.

In this spirit, we also urge SCAG to make all submissions on the paper public, including on a website, subject to reasonable requests for confidentiality. This is now the default expectation for government enquiries and reviews. We normally post our submissions on our website and intend to do so with this one.

Why protect workplace privacy?

The consultation paper provides a useful summary of the current position, which clearly exposes the fragmented and confusing patchwork of regulation in this area. It is in the interests neither of employees nor of employers for this to continue. We support the analysis of the case for regulation of workplace privacy, summarized in paragraphs 70-77 but do not understand the basis for the suggestion in para 77 that “it may be difficult to justify a comprehensive model ...” We suggest on the contrary that the evidence, including the VLRC’s recommendations following its extensive review, all points to the need for comprehensive regulation as soon as practicable to fill a glaring gap in the privacy protection framework in Australia. We reject an ideological presumption in favour of so-called ‘light touch’ regulation – the guiding principle behind any consideration of regulation should be ‘no less than needed, no more than required’.

One argument for regulation not mentioned in the Consultation paper is the issue of transborder data flows. One of the weaknesses in Australia's privacy laws identified by the European Union¹ in its assessment of adequacy of third country laws (for the purposes of the EU Data Protection Directive) is the employee record exemption in the Privacy Act 1988. This exemption remains a sticking point in achieving an assessment of 'adequacy' which would facilitate the transfer of employee information between Australia and EU countries. It is also likely to be a continuing obstacle to any similar assessments under the privacy laws of other countries and under other privacy instruments such as the 2005 APEC Privacy Guidelines. Comprehensive regulation of workplace privacy in Australia could remove these constraints and relieve employers needing to transfer employee details across international borders from the onerous requirement to satisfy privacy requirements in other ways.

Who should be covered?

In answer to the questions after paragraph 79, we agree with the sentiment in para 79 that workplace privacy protection should extend to all groups in the workplace including contractors, and volunteers. There is no justification for an arbitrary distinction based on the nature of the relationship. Anyone in a work-like environment, performing duties on behalf of another person or organization, should be entitled to the same level of privacy protection. We are not aware of any practical difficulties or objections to a broad coverage.

What measures would be appropriate?

Option 1 (do-nothing) is unacceptable given the demonstrated need for regulation. Option 2 (voluntary guidelines) is likely to be ineffective, and as stated in para 92 could lead to further confusion and uncertainty.

Option 3 (mandatory codes, with binding determinations on complaints) would be the ideal solution but as suggested in para 98 is unlikely to be well enough resourced, could lead to further proliferation of different standards. However, the suggestion that the absence of supporting legislation is an argument against this option is misleading – by definition any mandatory codes approach *requires* legislative backing. This option should not be seen as an alternative to Option 5 (legislative regime) – rather a different approach to providing legislative backing through diverse existing mechanisms and laws.

Option 4 (hybrid combination of approaches) has some attractive features. We support the idea of different levels of protection for different practices, depending on their intrusiveness, but would exclude the lowest tier – voluntary guidelines – for the reasons articulated in relation to Option 2. A hierarchy of rules would be consistent with the principle of proportionality. As with Option 3, we do not see Option 4 as an alternative to legislation – see below.

Option 5 (legislative regime) is in our view the preferred option. This could be achieved either by uniform legislation or state referral of powers to the Commonwealth. We have seen no convincing argument for why statutory regulation of workplace privacy is inconsistent with federal industrial relations law.

Far from being 'heavy-handed', a uniform national law is likely to be the most efficient and cost-effective, with the smallest burden on employers of any of the meaningful options. It would be no more onerous for employers than a mandatory code or hybrid approach. We do not see Option 5 as excluding the better features of Options 3 and 4 – a uniform law should prohibit certain practices, mandate development and observance of codes for others, and otherwise default to a principles based regime. Enforcement should be through a combination of complaints handling and a pro-active monitoring and audit role for one or more regulators – with civil penalties for non-compliance.

¹ Article 29 Data Protection Working Party: Opinion 3/2001 on the level of protection of the Australian Privacy Amendment (Private Sector) Act 2000

http://ec.europa.eu/justice_home/fsj/privacy/docs/wpdocs/2001/wp40en.pdf

Monitoring and data collection

We support the need for monitoring and collection of data about workplace privacy both before and after any new regulatory regime is introduced. An independent regulator in each jurisdiction should be immediately charged with this task, with liaison and cooperation with their counterparts, and with publication of reports on their findings and activities.

Conclusion

The Australian Privacy Foundation welcomes the consideration of workplace privacy protection by the Standing Committee of Attorneys-General, and urges all Australian governments to move speedily to regulate workplace privacy, with an effective and enforceable regime that fills this significant gap in privacy protection. We look forward to the opportunity to participate in the development of such a regime.

Given that in relation to workplace privacy the Australian Law Reform Commission has expressly deferred to the SCAG process in its current comprehensive review of Privacy, SCAG has, in our view, an obligation to progress this work without further delay.

Please note that postal correspondence takes some time due to re-direction – our preferred mode of communication is by email, which should be answered without undue delay.