



Australian Institute of Private Detectives

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The Privacy Commissioner
PO Box 5218
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Dear Commissioner,

We refer to our letter dated 7/2/05 in which we acknowledged that you were conducting a Review of the Privacy Amendment Private Sector Act, dated 21st December 2004, and that we would like to arrange a meeting with yourself and any of your relevant staff to discuss the possibility of an application for an Interim Determination under the provisions of the Federal Privacy Act.

We also indicated that we preferred to arrange a meeting sooner than later, in the interest of urgency for the problems that are facing defendants in criminal cases who are being denied the right to a fair trial.

We again wrote to you on 14/3/05 and indicated that as to the application for an Interim Determination, we would leave it in obeisance until you had completed your review.

We refer to your letter dated 1/4/05 in which you said that the review had been completed and had been referred to the Attorney-General for his consideration. You further indicated that if we wished to raise the Institute's concerns directly with the relevant Government department we should contact Ms Janine Ward, Acting Assistant Secretary, Information Law Branch.

We had a meeting with Ms Janine Ward on 15th April 2005 but this meeting seemed to go nowhere and nothing has happened since, nor have we been contacted again, but in response to our phone call we were told that the Government and SCAG might be reviewing the matter.

It is now 7 months since the review and when we contacted the Attorney General's department we were informed that SCAG had not even considered our matters, which you had indicated that the A-G would consider and subsequently refer to SCAG.

The spokeswoman in the A-G's department indicated that it would be many months before it would be referred to SCAG.

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We refer to your letter dated 19/10/05 in reply to our letter dated 9/10/05 where we sought an interview for a Public Interest Determination (PID) or a Temporary Public Interest Determination (TPID).

You indicated that after your review of the private sector provisions of the Privacy Act 1988, you included a chapter dealing with the issues relating to private investigation with:

"The Australian Government, through the Attorney-General, should consider requesting that the Standing Committee of Attorney-Generals (SCAG) consider the issues raised by the Australian Institute of Private Detectives as they are broader than the Privacy Act."

"This is still, in my view, the most appropriate way to have the issues you have raised considered, particularly taking into account the broader issues relating to the activities of your members".

You then indicated that you would be happy to meet with us but felt that any meeting should take place following the Government's response to your report.

Perhaps you could indicate as soon as possible how long this TIPD will take; a phone call would suffice.

We, as a matter of interest, note that your office has spent a great deal of time making submissions to government departments on the impact of new security laws last year. We are puzzled by your time spent making these submissions as Enforcement Bodies 6(1) of the Privacy Act 1988 exempts Law Enforcement Bodies from the provisions of the Privacy Act.

It has occurred to us that under the Privacy Act you as the Commissioner have the power and authority to make determinations; however in our submission to your review of the private sector provisions of the Privacy Act 1988, you said that the issues that were raised by us were broader than the Privacy Act.

It has been indicated to us that our issues fall into the areas of Justice and Law Enforcement but it is our contention that these areas are due to the provisions of section 6(1) Enforcement Bodies of the privacy Act 1988 and whilst we possibly agree with the Attorney-General Philip Ruddock, at our meeting with him on 16/6/05, that we are not Enforcement Bodies, there might however be a possibility that an exemption could be made in a separate section of the Act.

This was a welcome avenue from the A-G but to date no attempt has been made to contact us for discussions on this very important point in the interests of Justice and a fair trial.

If we suggested to the Commissioner or any member of your staff that if a member of your/their family had been charged with a criminal offence, which carried a gaol term, and the family member claimed their innocence and indicated that Harry Smith and Joe

Bloggs would be able to confirm their innocence, how would you or members of your staff feel when you could not find Harry or Joe Bloggs because the Privacy Act prevented you and your staff from finding them, thus allowing them to be convicted and sent to gaol for a crime that they have not committed?

In such circumstances you or your staff would have to live with the fact that they were innocent but were unable to prove their innocence because of the Privacy Act. We know that this will probably not happen to you or members of your staff but there are hundreds and thousands of people and families who are affected and are not being afforded a fair trial.

Furthermore, persons before the civil jurisdictions would similarly be prevented from obtaining information in support of a defence or prosecution.

We are aware that you, Commissioner, and your Department, are there to see that everybody's privacy is protected, just as the Justice Department is there to see that justice is done and the Law Enforcement Department is there to see that law enforcement is carried out: just so is the role of Private Investigators to see that their clients get a fair trial and a fair hearing.

In the review report under Public Interest Determinations that you said the following:

The Privacy Commissioner could issue a Public Interest Determination enabling organisations to private detectives acting in specified circumstances. The PID process involves public consultation and could be a chance for stakeholders to provide views and information on where the balance in public interest lies. However, as discussed, the issues on access to personal information arise more broadly than the Privacy Act, and a PID would not necessarily solve all the matters of concern to private investigators. It is also the case that even if actions were taken to allow organisations to disclose personal information to private investigators without consent, it cannot force organisations to do so.

This is a complex matter. There are many social policy issues involved in this debate and the wider community should have the opportunity to comment on this issue. There are also a range of laws that have an impact on the activities of private investigators. This would be a matter for state and territory governments.

It would therefore be preferable for the governments to consider this issue so that there is a wider public debate with all relevant federal, state and territory stakeholders involved.

With all due respect we are of the opinion that this is all wishful thinking and appears to be a bureaucratic brush off. We are well aware as Private Investigators that nobody has to talk to us nor do they have to talk to the Enforcement Bodies except in certain

circumstances, however it is the choice of the potential witness to make that informed decision to talk or assist us, not an Act of Parliament.

If we understand correctly, what you are saying is that despite what the International Covenants say and the decisions of the High Court, you now consider that it would be preferable for government to consider this issue so that there is a wider public debate with all relevant federal, state and territory stakeholders involved.

The question that now has to be asked is why do we have the benefits of the High Court making decisions and then allow or ask the federal, state and territory stakeholders to find some way to ignore our High Court and the International Covenants that are supposed to bind the executive arm of government?

In our submission to your review we quoted and annexed the 2nd reading speech by the then Attorney-General Daryl Williams and we again quote as follows:

“The Bill draws on the 1980 OECD guidelines for the protection of Privacy and Trans-border Flows of Personal Data which represent a consensus among our major trading partners on the basic principles that ought to be built into privacy regulation. It will also implement certain obligations under Article 17 of the International Covenant on Civil and Political Rights”.

We also pointed out that there was an omission in that Article 14 was selectively omitted from the speech.

We can only reiterate the High Court ruling in the Ah Tin Teoh case, which also formed part of our submission to your review, and we again quote as follows:

34. Junior counsel for the appellant contended that a convention ratified by Australia but not incorporated into our law could never give rise to a legitimate expectation. No persuasive reason was offered to support this far-reaching proposition. The fact that the provisions of the Convention do not form part of our law are a less than compelling reason – legitimate expectations are not equated to rules or principles of law. Moreover, ratification by Australia of an international convention is not to be dismissed as a merely platitudinous or ineffectual act (17), particularly when the instrument evidences internationally accepted standards to be applied by courts and administrative authorities in dealing with basic human rights affecting the family and children. Rather, ratification of a convention is a positive statement by the executive government of this country to the world and to the Australian people that the executive government and its agencies will act in accordance with the Convention. That positive statement is an adequate foundation for a legitimate expectation, absent statutory or executive indications to the contrary, that administrative decision-makers will act in conformity with the

Convention (18) and treat the best interests of the children as "a primary consideration". It is not necessary that a person seeking to set up such a legitimate expectation should be aware of the Convention or should personally entertain the expectation; it is enough that the expectation is reasonable in the sense that there are adequate materials to support it.

Our basic submission is that an exemption under the Privacy Act 1988 either under the Law Enforcement 6(1) section or another section will solve the problems created in the Privacy Act and comply with the rulings of the High Court and Australia's obligations under the International Covenant on Civil and Political Rights.

We believe that you as the Privacy Commissioner have the power and authority to make a Temporary Public Interest Determination or at least make recommendations to the A-G that there appears to be a most serious flaw in the Privacy Act in that people are being denied the rights to a fair and equal trial or hearing before the courts and tribunals in both the Civil and Criminal jurisdictions.

The original purpose of asking for a meeting was to discuss some of the problems with you and your staff to see if there was a way to try and resolve these matters that concern our industry and, we believe, the public generally.

We are hopeful that our pleas on behalf of the public and our industry will not fall on deaf ears on yourself and members of your staff, and that legal and moral considerations will be fully and honestly canvassed.

After the spokeswoman for the A-G had indicated that the SCAG discussion could be months away we are now making this application for a Public Interest Determination (PID) but we are also seeking a Temporary Public Interest Determination (TIPD).

As always we are available to meet with you and your staff at any mutually convenient time.

Yours faithfully,

A handwritten signature in black ink, appearing to read 'John Bracey', with a long horizontal flourish extending to the right.

John Bracey.

22/11/05.

Enclosure: Application for a Public Interest Determination and a Temporary Public Interest Determination.