

APPLICATION FORM FOR ACCREDITATION AS A DATA PROTECTION AUTHORITY

Application to the Credentials Committee for accreditation as a data protection authority pursuant to the resolutions adopted at the 23rd International Conference of Data Protection and Privacy Commissioners at Paris on 25th September 2001.

Notes:

- (a) Please complete application in French or English.
- (b) Please keep answers brief and to the point.
- (c) Please ensure that all 33 questions are answered
- (d) If you retype the form, please include the numbered questions with your answers. It is possible to avoid such retyping by getting the electronic application form in French or in English upon request by e mail at credentials@privacy.org.nz.

Details of applicant

1. Name and postal address of authority

Office of the Federal Privacy Commissioner
GPO Box 5218
SYDNEY NSW 1042
AUSTRALIA

2. Contact person for this application:

- (a) Name

Timothy Pilgrim, Deputy Federal Privacy Commissioner

- (b) Email address

~~timothy.pilgrim@privacy.org.nz~~

- (c) Direct telephone number

~~02 9222 4601~~

- (d) Fax contact

~~02 9222 4601~~

Type of application

3. The application is for accreditation as:

- (a) national Authority

YES

(b) sub-national Authority

YES ALSO – the
Commissioner is also
Privacy Commissioner for the
Australian Capital Territory (ACT)

(c) Authority within an international, if yes which one..... NO

Description of applicant

4. Description of Authority (e.g. commissioner, commission, board etc)

single commissioner

5. Is the Authority a public body? YES

6. Geographical jurisdiction

Australia and all its external territories

7. Sectoral coverage (i.e. does the applicant's jurisdiction cover the entire public and private sectors? If only part of a sector or if there are significant activities not covered, please specify)

Federal public sector and private sector nationally (see attached Information Sheet 1 - 2001: *Overview of the Private Sector Provisions*, also available at www.privacy.gov.au/business/index.html), ie excludes the public sectors of the Australian States and Territories other than the ACT.

8. Is the role of the Authority mainly concerned with data protection and privacy?
YES

Legal basis

9. Title of law under which the Authority is constituted

Privacy Act 1988 (C'th) [s.19]

10. Is this principally a data protection law? YES

11. Status of the law (e.g. statute, regulation, executive order)

Statute

12. Which body made the law?

Federal Parliament of Australia

13. What body has the power to amend or revoke the law?

Federal Parliament of Australia

Autonomy and independence

14. Who appoints member(s) of the Authority? (Please explain if a different process applies to the presiding member from other Authority members in this question and in subsequent questions.)

Governor-General of Australia

15. What process is followed?

Federal Government recommends a candidate to the Governor-General who appoints the Privacy Commissioner by legislative instrument.

16. For what term are appointments made?

A term not exceeding seven years, but can be re-appointed

17. Does the law under which the Authority operates explicitly state that it acts independently? NO

18. May the member(s) be removed before expiry of their term? YES

19. If yes, who may remove members of the Authority before expiry of their term?

Governor-General of Australia

20. Are there limited reasons specified in the statute, or in another law, providing the permitted grounds for removal?

Yes, as set out in s.25 of the Privacy Act.

21. What are the grounds for removal?

Misbehaviour, physical or mental incapacity, bankruptcy or any similar relief from debt, absence from duty without approved leave for fourteen consecutive days or twenty-eight days in any twelve-month period, or engaging in paid outside employment without the approval of the Minister.

22. Does the Authority possess the following powers (briefly describe and give statutory references)

(e) to initiate an investigation with seeking provision? YES

Yes, the Commissioner can investigate allegations of acts or practices that are interferences with privacy, that have been received from individuals [s.40(1) *Privacy Act 1988*, s.85ZZ(1)(a) *Crimes Act 1914* (C'th)], or referred to the Commissioner by a private sector code adjudicator [s.40(1B) of the Privacy Act]. The Commissioner can also commence an investigation under his own volition of a suspected interference with privacy [s.40(2) of the Privacy Act].

(f) to report to the head of State, head of Government or legislature? YES

- The Commissioner provides an annual report to the Minister [Federal Attorney-General] who tables it in Federal Parliament [s.97].

- Where the Commissioner investigates an act or practices under his own volition [s.40(2)] and considers it appropriate, he may report to the Minister on the matter. If the Commissioner is not satisfied that reasonable steps have been taken to prevent a repetition of the act or a continuance of the practice, he may provide a further report to the Minister [s.30(4)]. The Minister is obliged to lay a copy of the report before both Houses of Parliament within fifteen sitting days [s.30(5)]

- Where the Commissioner has under his functions monitored an activity or conducted an audit, he may report on the activity or audit to the Minister. Similarly, the Commissioner may provide a further report if, in his opinion, appropriate action has not been taken and this latter report must be tabled in Both Houses by the Minister within fifteen sitting days [s.32]

(g) make public statements? NO

The Commissioner does not have a formal general power to make public statements, however the Commissioner's powers include promoting an understanding and acceptance of the Information Privacy Principles, the National Privacy Principles and the Credit Reporting provisions [s.27(1)(d), s.28A(1)(c)]. It is common practice for the Commissioner to make public statements.

23. Does the Authority (and its staff) have immunity from legal suit for actions performed in the course of their duties?

Yes. [s.64]

24. Applicants may list any other measures set out in the statute or in other laws which guarantee the Authority's independence (for example if the law provides specifically that the Authority's finances are protected).

Nothing to add

Consistency with international instruments

25. Does the Authority explicitly implement any international instrument (for example if the law under which the Authority operates specifies that it implements such international instrument)? YES

If "yes", which of the following does it principally implement?

- (a) OECD Guidelines (1980) YES
- (b) (i) Council of Europe Convention No 108 (1981)
(ii) Council of Europe Additional Protocol (8 November 2001)
- (c) UN Guidelines (1990)
- (c) EU Directive (1995)
26. Does the law instead, or additionally, implement any general or specific international instrument? (If so, list the international body and the instrument)

International Covenant on Civil and Political Rights

27. Have significant questions been raised about the extent to which the law is consistent with the international instruments which are claimed to be implement in answer to questions 25 and 26? (Applicants should supply further information to assist the Committee including a description of any measures under way to address these inconsistencies.)

The Australian Government is currently discussing the adequacy of the Australian law with the EU.

Appropriate functions

28. Does the Authority possess functions in any of the following areas (briefly describe and give statutory references):
- (a) compliance (e.g. audit, inspection) YES

The Commissioner has power to

- investigate allegations of interferences with privacy received from individuals [s.40(1), s.85ZZ(1)(a) *Crimes Act 1914* (C'th)], referred by a private sector code adjudicator [s.40(1B)], or commence an investigation under his own volition [s.40(2)]
- carry out compliance audits on entities within jurisdiction, except private sector organisations that are not subject to the credit reporting provisions as well [s.27(1)(h), 28(1)(e), 28A(1)(g)]
- carry out compliance inspections [s.27(1)(k), s.28(1)(d), s.28(1)(h), s.28A(1)(j), s.309 *Telecommunications Act 1997*]

- refer prima facie offences for prosecution by the Australian Federal Police or the Commonwealth Director of Public Prosecutions [s.49(1)]

(b) approvals (e.g. prior-checking, notification) YES

The Commissioner's powers include

- approving guidelines issued by the National Health and Medical Research Council on the use in research of medical information held by Federal agencies [s.95]
- approving guidelines issued by the National Health and Medical Research Council on the application of the National Privacy Principles to health information [s.95A]
- consulting on any telecommunications industry codes or standards that relate to privacy before they can be registered, varied or revoked by the Australian Communications Authority [s.134 Telecommunications Act]
- examining requests for exemptions to the Spent Conviction Scheme and advise the Attorney-General [s.85ZZ(1)(b)]
- approving, varying or revoking a private sector privacy code which replaces the National Privacy Principles as the set of governing provisions for subscribers to an approved privacy code. [s.18BB, s.18BD, s.18DE]
- reviewing the operation of an approved privacy code [s.18BH]
- reviewing a decision made by the code adjudicator in a complaint made under an approved privacy code [s.18BI]
- issuing guidelines that are standards applying to information about an individual's claim under the Medicare and Pharmaceutical Benefits Programs [s.135AA of the *National Health Act 1953*].

(c) redress for individuals (e.g. complaints, conciliation enforcement)

Yes, the Commissioner has power to investigate complaints [s.40 of the Privacy Act, s.85ZZ(1)(a) Crimes Act 1914] and to attempt to resolve them at first instance by conciliation [s.27(1)(a), s.27(1)(ab), 28A(1)(b) of the Privacy Act]. The Commissioner has power to issue a complaint determination that may include orders that a respondent must carry out certain actions, including paying the complainant monetary compensation [s.52 of the Privacy Act]. Determinations are enforceable through the Federal Court of Australia which considers the matter in a *de novo* hearing.

(d) sanctions available to Authority (for example, prosecution and enforcement) YES

The Privacy Act creates a number of criminal offences for specific types of data mishandling [s.49(4)] and where the Commissioner forms the view that such an offence has been committed, he is obliged to refer the matter to Australian Federal Police or Commonwealth Director of Public Prosecutions for prosecution to be considered [s.49(1)].

The Privacy Act also creates criminal offences for certain actions by persons in the course of the Commissioner investigating a complaint, such as failing to attend compulsory conferences, failure to produce documents or information to the Commissioner, knowingly providing false or misleading information to the Commissioner [s.46, 65 and 66].

These offences all carry penalties of fines or terms of imprisonment or both.

Determinations made by the Commissioner in a complaint investigation are enforceable in the Federal Court of Australia [s.52 and Divisions 3 and 4 of Part 5 of the Privacy Act].

(e) guidance (e.g. compliance advice) YES

The Commissioner's powers include

- publishing guidelines on avoidance of acts or practices that may be interferences with privacy by federal government agencies [s.27(1)(e) of the Privacy Act]
- providing advice (with or without request) to federal government agencies [s.27(1)(f)]
- publishing guidelines on the handling of tax file number information [s.28(1)(a)]
- providing advice (with or without request) to tax file number recipients [s.28(1)(g)]
- publishing guidelines on avoidance of acts or practices that may be interferences with privacy by credit providers and credit reporting agencies [s.28A(1)(e)]
- providing advice (with or without request) to credit providers and credit reporting agencies [s.28A(1)(f)]
- issuing guidelines for tax file number based data-matching [s.27(1)(p)]
- issuing a Credit Reporting Code of Conduct for credit providers and credit reporting agencies [s.28A(1)(a)]
- publishing guidelines on the interpretation of the National Privacy Principles [s.27(1)(e)]
- providing advice to the private sector code adjudicator for an approved privacy code [s.27(1)(fa)]
- publishing guidelines for the private sector on developing privacy codes and complaint handling processes under those codes [s.27(1)(ea), s.18BF(1)(a) and (b)]
- publishing guidelines on the factors that the Commissioner will take into account when considering approving a privacy code or varying an approved privacy code [s.18BF(1)(c)].

(f) public education YES

The Commissioner has power to

- promote an understanding and acceptance of the Information Privacy Principles, the National Privacy Principles [s.27(1)(d)], and the credit reporting provisions [s.28A(1)(c)]
- undertake educational programs to promote the protection of individual privacy [s.27(1)(m), s.28A(1)(k)]

(g) policy advice for government YES

The Commissioner has power to

- provide advice (with or without a request from a Minister) on proposed enactments that might have an adverse effect on the privacy of individuals because they would require or authorise acts or practices by federal agencies or private sector organizations that would otherwise be interferences with privacy in the absence of those enactments [s.27(1)(b), s.31]
- provide advice (with or without request) to a Minister [s.27(1)(f), s.28A(1)(f), 27(1)(c)]

(h) studies or research (e.g. into developing technologies, privacy issues) YES

The Commissioner has power to undertake research into, and to monitor, developments in, data processing and computer technology [s.27(1)(c)]

Additional comments

29. Applicants are invited to offer any further comments that they wish.

Other materials

30. List any attachments which will accompany the application as an electronic attachment or to follow by post.

Information Sheet 1 - 2001: *Overview of the Private Sector Provisions* available at www.privacy.gov.au/business/index.html

31. If law under which the Authority operates is accessible on the Internet, please give the reference

URL: www.privacy.gov.au/act/index.html

32. If a recent annual report of the Authority (or a similar recent publication outlining typical activities) is available on the Internet, please give the reference

URL: www.privacy.gov.au/publications/page1.html#19.4

Research use

33. With the consent of applicants, the Committee proposes to make copies of the applications available to appropriate researchers approved by the Committee to facilitate a study on data protection. Please indicate whether you agree to this use:

- I agree to this application being released to a researcher YES

Making the application

The application should be emailed to the credentials committee at credentials@privacy.org.nz

If sent as an email attachment it should be in M/S Word.

If unable to email the application, it should be posted to:

Credentials Committee
C/- Privacy Commissioner
P O Box 466
Auckland
New Zealand

The Committee needs access to a copy of the law under which the Authority is constituted. This need not be supplied in hard copy if it is available on the Internet and listed at question 31. If the law itself is not in English or French, it will be useful to supply an English or French summary or translation if one exists.

Use of information

The information in this form will be used for processing the application and will be disclosed to members of the committee and their staff (being the commissioners from New Zealand, France and the United Kingdom) and future committees. It may be also disclosed also to the Data Protection Authorities which participate to the international conference and approved researchers. Any personal data contained in the form is available for access and correction in accordance with the applicable data protection laws of current and future committees. In the first instance it is subject to the New Zealand Privacy Act 1993.

Malcolm Crompton

Malcolm Crompton
Australia Federal Privacy Commissioner

**ACCREDITATION OF DATA PROTECTION AUTHORITY
CHECKLIST FOR THE CREDENTIALS SUB-GROUP**

1 Name of Authority

Federal Privacy Commissioner, Australia

2 Does the authority have clear and wide ranging data protection functions covering a broad area of economic activity (eg not just an advising body or a body operating in a narrow field such as medical privacy)?

Yes

Notes

3 Legal Basis.

Is the authority a public body established on an appropriate legal basis (eg by statute or regulation)?

Yes

Notes

4 Autonomy and Independence?

Is the authority guaranteed an appropriate degree of autonomy and independence to perform its functions (eg the power to make public statements and protection from removal from office)?

Yes

Notes

5 Consistency with International Instruments.

Is the law under which the authority operates compatible with at least one of the international instruments dealing with data protection and privacy (eg EU Directive, OECD Guidelines, Council of Europe Convention)?

Yes

Notes

OECD Guidelines principally implemented. ICCPR also noted.

6 Appropriate Functions.
Does the authority have an appropriate range of functions with the legal powers necessary to perform those functions (eg the power to receive and investigate complaints from individuals without seeking permission)?

Yes

Notes

7 Does the Sub-group recommend accreditation?

Yes

Notes

8 If accreditation is recommended what is the accreditation as?

National authority (within the UN criteria)

Notes
While clearly a national authority for accreditation purposes the Commissioner *additionally* is Privacy Commissioner for a sub-national territory, the Australian Capital Territory (ACT).

9 If accreditation is as an authority within an international/supranational body does the recommendation include voting rights?

Not applicable

Notes

10 If accreditation is not recommended does the Sub Group recommend that accreditation is refused or is more information needed before a decision can be made?

Not applicable

Notes

11 If accreditation is not recommended and the application is from an authority with narrow functions does the Sub Group recommend that, at the discretion of the conference host, observer status is granted?

Not applicable

Notes