

AUSTRALIA:

New South Wales: Privacy Commissioner

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

Privacy NSW
PO Box A2122
SYDNEY SOUTH NSW 1235

2. Contact person for this application:

(a) Name

Mr Chris Puplick, Privacy Commissioner

(b) Email address

~~chris.puplick@privacy.org.nz~~

(c) Direct telephone number

~~(61) 2 9248 5501~~

(d) Fax contact

~~(61) 2 9248 5501~~

Type of application

3. The application is for accreditation as:

(b) sub-national Authority

YES

Description of applicant

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

Privacy NSW is the Office of the NSW Privacy Commissioner

5. Is the Authority a public body? YES

6. Geographical jurisdiction

New South Wales (a State of the Commonwealth of Australia)

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)

NSW "public sector agencies" are specifically regulated (ie, they must comply with the Information Protection Principles in the Act, as well as public register and offence provisions). "Public sector agencies" includes local councils and statutory authorities, but excludes state-owned corporations. (Agencies representing the Commonwealth government and other governments are excluded.) However within "public sector agencies" there are exemptions, such as the operational functions of police and some other investigative bodies, and the judicial functions of courts and tribunals.

The Privacy Commissioner has the power to investigate and conciliate any complaints about a violation of privacy, and therefore may investigate complaints against the private sector also. However the private sector are not in any way bound by the IPPs in 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 and Personal Information Protection Act 1998 (NSW)

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? NSW PARLIAMENT

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

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.)

The Privacy Commissioner is appointed by the NSW Governor, on the recommendation of the Attorney General.

Staff of Privacy NSW are appointed by the Privacy Commissioner.

Members of the Privacy Advisory Committee (a part-time advisory board) are appointed by the Attorney General.

15. What process is followed?

The Privacy Commissioner's position is, in most circumstances, advertised publicly and a selection is made by an independent selection panel. This panel is appointed by the Director General of the Attorney General's Department, and the recommendation is made to the Minister for submission to Cabinet and the State Governor. If the Commissioner applies for re-appointment this may be made by the Attorney General, without public applications being called, or it may be determined to call for applications (including from the incumbent) in the usual fashion.

Staff of Privacy NSW are appointed by the Privacy Commissioner, under the Public Sector Management Act. Positions are determined through open merit selection. Most positions are permanent appointments.

Members of the Privacy Advisory Committee (a part-time advisory board) are appointed by the Attorney General under s.60. The Privacy Commissioner is the Chair. There must also be at least one member from the Legislative Assembly (NSW Parliament's lower house) or Legislative Council (NSW Parliament's upper house) nominated by the Attorney General, one member from the Legislative Assembly or Legislative Council nominated by the Leader of the Opposition, and at most four other members nominated by the Attorney General as having, in the opinion of the Attorney General, special knowledge of or interest in matters affecting the privacy of persons.

16. For what term are appointments made?

The Privacy Commissioner - up to five years (renewable).

Staff of Privacy NSW - usually permanent. Can add extra casual or temporary staff as funding permits.

Members of the Privacy Advisory Committee - up to three years (renewable).

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?

The Privacy Commissioner may be removed by the Governor under Schedule 1.

The Privacy Commissioner may be taken to have vacated their office under Schedule 1.

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

YES

21. What are the grounds for removal?

The Privacy Commissioner may only be removed by the Governor for "misbehaviour, incapacity or incompetence".

The Privacy Commissioner may be taken to have vacated their office if they:

- die
- are not re-appointed after expiry of term
- resign
- become bankrupt
- become mentally incapacitated
- are convicted of an offence punishable by 12 months imprisonment or more

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

(e) to initiate an investigation without seeking provision YES - s.48

(f) to report to the head of State, head of Government or legislature YES - s.65 - report to Parliament

(g) make public statements YES - s.36(2)(h)

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

YES - s.66

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).

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)?
- NO

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

- | | |
|--|--------|
| (a) OECD Guidelines (1980) | YES/NO |
| (b) (i) Council of Europe Convention No 108 (1981) | YES/NO |
| (ii) Council of Europe Additional Protocol (8 November 2001) | YES/NO |
| (c) UN Guidelines (1990) | YES/NO |
| (d) EU Directive (1995) | YES/NO |

26. Does the law instead, or additionally, implement any general or specific international instrument? (If so, list the international body and the instrument)

NO

27. Have significant questions been raised about the extent to which the law is consistent with the international instruments which are claimed to be implemented 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.)

NO

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) ONLY PARTLY.
s.42 allows the Privacy Commissioner to be provided with information about compliance arrangements.

- (b) approvals (e.g. prior-checking, notification) NO

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

YES - s.38 inquiries and investigations; s.45-s. 51 complaint conciliation

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

NO - most the Privacy Commissioner can do is issue an investigation report under s.50, and a Special Report to Parliament under s.65.

- | | | |
|-----|---|-----|
| (e) | guidance (e.g. compliance advice) | YES |
| (f) | public education | YES |
| (g) | policy advice for government | YES |
| (h) | studies or research (e.g. into developing technologies, privacy issues) | YES |

Additional comments

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

nil

Other materials

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

nil

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

URL: http://www.austlii.edu.au/au/legis/nsw/consol_act/papipa1998464/

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

not available on internet

URL:

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.

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

- | | | |
|---|--|--|
| 1 | Name of Authority | <p><i>Privacy Commissioner, NSW, Australia (commonly presented as "Privacy NSW")</i></p> |
| 2 | <p>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)?</p> <p><u>Yes</u></p> <p>No</p> <p>Don't know</p> | <p>Notes</p> <p>Covers substantial amount of public sector in the state and has some limited conciliation functions in relation to the private sector</p> |
| 3 | <p>Legal Basis.</p> <p>Is the authority a public body established on an appropriate legal basis (eg by statute or regulation)?</p> <p><u>Yes</u></p> <p>No</p> <p>Don't know</p> | <p>Notes</p> <p>Privacy and Personal Information Protection Act (NSW)</p> |
| 4 | <p>Autonomy and Independence?</p> <p>Is the authority guaranteed on appropriate degree of autonomy and independence to perform its functions (eg the power to make public statements and protection from removal from office)?</p> <p><u>Yes</u></p> <p>No</p> <p>Don't know</p> | <p>Notes</p> <p>Although no specific reference to its independence, it has the appropriate statutory powers to act in an independent manner</p> |
| 5 | <p>Consistency with International Instruments.</p> <p>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)?</p> <p>Yes</p> <p><u>No</u></p> <p>Don't know</p> | <p>Notes</p> <p>None cited</p> <p><i>I suspect that on examination it would be found to be compatible with the OECD Guidelines. However, the position is not as clear cut as the other State privacy law, in Victoria, which is directly</i></p> |

modelled upon Federal law.

- 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

No

Don't know

Notes

Although there is an absence of prior checking and specific enforcement powers there is a range of significant functions

I understand that under the NSW privacy law individuals complain to the State bodies concerned, for internal review, rather than complaining to the Commissioner in the ordinary course of events. However, the Commissioner does, as noted in the application, have investigative powers of an appropriate kind.

- 7 Does the Sub-group recommend accreditation?

Yes

No

Notes

Although there are limitations in the application of international instruments and the absence of enforcement powers, there are enough factors to justify accreditation

- 8 If accreditation is recommended what is the accreditation as?

National authority (within the UN criteria)

Authority within a limited sub-national territory

Authority within an international or supranational body

Notes

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

Voting Rights

No Voting Rights

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

Notes

made?

Refusal

More Information

- 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?

Notes

Not Applicable

Yes

Not

If more information is required what is this:

Signed on behalf of the Sub-group:

Jonathan Bamford

Date: 28/06/02

Blair Stewart

Date: 9 July 2002

Date:

Note: 2 signatures required for recommendations for accreditation.
3 signatures required for recommendations for refusal