



Response to

*Discussion Paper 72:
Review of Australian Privacy Law*

Australian Law Reform Commission

December 2007

For more information about this submission please contact:

Kathleen Flanagan
Research & Policy Officer
GPO Box 1620 HOBART TAS 7000
phone (03) 6213 3566
fax (03) 6231 9589
email k.flanagan@anglicare-tas.org.au

1. Introduction

Anglicare Tasmania welcomes the opportunity to contribute once again to the Australian Law Reform Commission's inquiry into privacy legislation in Australia. Anglicare previously submitted a response to Issues Paper 31, and this submission reinforces many of the points made in that response and expresses support for some of the proposals put forward in Discussion Paper 72.

Once again, Anglicare is not responding to the entirety of Discussion Paper 72, but to those areas in which we have relevant expertise: issues relating to the private rental market and in particular, the operation of residential tenancy databases. Anglicare has also included comments on collection of information, data quality and compliance. These comments are made with particular reference to the operation of the private rental market and the activities of landlords and real estate agents.

Anglicare is one of Tasmania's largest community organisations, offering a range of services to the Tasmanian community, including a number of services to support low income earners and other disadvantaged people with accommodation and related support. Two of our largest services in particular offer support to people who are either living in or trying to enter the private rental market.

- **ACCESS** provides assistance to families and individuals who are homeless or at risk of homelessness, through supporting them to stabilise their existing housing or find alternative long-term housing, brokering crisis accommodation and providing case management.
- The **Private Rental Support Service** (PRSS) provides financial assistance to households seeking to enter or remain in the private rental market. It provides support with bonds, rent in advance or arrears and the cost of removals, as well as related support such as information and referral.

Accommodation support services like ACCESS and the PRSS are under increasing strain due to the prolonged housing crisis affecting Tasmania. The supply of public housing has contracted significantly, and extremely low turnover, high demand and tightened targeting policies effectively exclude many households from access. Home ownership is out of reach due to the dramatic increases in house prices. Many households have become dependent on the private rental market, yet rising rents mean that low income earners are competing for a shrinking supply of affordable houses. In this environment, tenants and applicants for properties have very little power and are vulnerable to exploitation (Flanagan 2007). It is in this context that Anglicare is submitting to the ALRC's review.

2. Residential Tenancy Databases (DP 72, ch.14)

2.1. Recap of Anglicare's response to Issues Paper 31

Anglicare's submission made the following key points:

- use of residential tenancy databases in Tasmania is an emerging rather than established problem, but tenants are aware that the databases exist and can be used against them, and this contributes to tenants' sense of vulnerability and intimidation within the private rental market.
- residential tenancy database listings do not take into account the context in which problems arise, and can in some cases discriminate against a person for factors like being in a violent relationship, having a mental illness or being on a low income. The consequences of a listing can be out of proportion to the original offence, but because the balance of power in the Tasmanian rental market rests with landlords, tenants are reluctant to assert their rights or complain about abuses of their rights.
- while landlords and real estate agents argue that databases are a legitimate risk management tool, access to housing is essential and a human right, and robust intervention in the market through strong and enforceable regulation is justified to ensure all people have access to housing.

Anglicare recommended that the Privacy Commissioner be given the power to issue binding codes, and that such a code be issued for residential tenancy database operators. Anglicare recommended that the code be backed by enforcement mechanisms, and take the approach suggested by the Victorian Law Reform Commission (VLRC 2006).

2.2. Anglicare's response to Discussion Paper 72

Anglicare supports the view expressed by some stakeholders that while greater national consistency and unification of the NPPs and IPPs will be of value, there is still a place for specific guidelines or codes for particular sectors (ALRC 2007). Because of the critical importance of housing for people's wellbeing, and the lack of alternative forms of housing for many low income earners, the private rental market is one of those sectors, especially in relation to residential tenancy database operators.

Anglicare welcomes the new regulations bringing all residential tenancy database operators under the scope of the *Privacy Act 1988* that came into force on 1 December 2007 (*Privacy [Private Sector] Amendment Regulations 2007 [No. 3]*), and, like the Office of the Privacy Commissioner and the ALRC, supports the development of uniform state and territory legislation to regulate the use of residential tenancy databases and the conduct of operators and users of the databases.

However, the tenancy database sector has not responded well to previous efforts to regulate it through the use of the Privacy Commissioner's power to make determinations – as noted in Discussion Paper 72, complaints continue to be received and the impact of the determinations on actual conduct has been limited (ALRC 2007: 1235). It is also the case that some of the concerns expressed about tenancy databases may not be addressed by application of the NPPs alone (OPC 2007).

In Tasmania, residential tenancy legislation, which would include the proposed uniform legislation covering tenancy databases, is administered through the Office of Consumer Affairs and Fair Trading (CAFT) in the Department of Justice. Unfortunately, CAFT's current approach to the regulation of the private rental market is reactive rather than proactive, and Anglicare's experience is that there is widespread, although by no means universal, disregard of legislative requirements by landlords (Jones 2006). For this reason, Anglicare still supports the development of a binding code for residential tenancy database operators to be developed and enforced by the Privacy Commissioner (Anglicare supports granting the Commissioner the power to issue binding codes in Recommendation 5 of this submission).

Evidence shows that private renters are more likely to be on a low income, experience housing stress, and struggle financially (Anglicare Tasmania 2007). The social housing system is under increasing pressure, and what social housing is available is highly targeted to people with complex needs rather than people experiencing broader problems with affordability (Flanagan 2007). Home ownership is out of the question for many low income earners: house prices, even in suburbs rated by the Real Estate Institute of Tasmania as 'affordable', such as former broadacre public estates, are steadily increasing (REIT 2007). Increasing numbers of low income households are staying in the private rental market into the long-term, often living in poverty (Burke 1999). For such households, a negative listing on a residential tenancy database could potentially exclude them from the private rental market entirely, forcing them into homelessness. It is for this reason that Anglicare supports the strongest possible regulatory approach, via uniform state and territory legislation and a specific, binding code under the *Privacy Act*, to provide a regulatory framework that ensures that any listing is handled so that the consequences are proportional to the original offence.

2.3. Anglicare's recommendations

1. Anglicare recommends that a binding code be developed and enforced by the Privacy Commissioner that provides detailed guidance on compliance with the *Privacy Act* by residential tenancy database operators and their customers.

This code should be based upon the approach suggested by the Victorian Law Reform Commission (VLRC 2006) and outlined in Anglicare's submission to Issues Paper 31 (Anglicare Tasmania 2007).

3. Bundled consent (DP 72, ch.16)

3.1. Recap of Anglicare's response to Issues Paper 31

Anglicare's submission made the following key points:

- existing application forms used by Tasmanian real estate agents routinely use 'bundled consent', and consent is required before an application will be processed.
- consent forms are complicated, wide-ranging and use language that would be inaccessible for a person with literacy issues or for whom English was a second language.

Anglicare recommended that the Privacy Commissioner fast-track Recommendation 22 of her 2005 review (Curtis 2005), the development of guidelines on bundled consent.

3.2. Anglicare's response to Discussion Paper 72

Anglicare notes the comments of some stakeholders outlined in Discussion Paper 72 that using bundled consent improves efficiency and reduces costs to the consumer because it prevents the organisation having to repeatedly contact the consumer about minor or routine matters. Anglicare accepts this argument is reasonable in relation to bundling consent in order to obtain a person's permission for a real estate agent to both process an application and to manage any resulting tenancy. But it is not a reasonable argument in relation to expecting a person to then agree in the same consent notice to the release of their personal information to the media, as they were required to do in the example Anglicare provided to the ALRC in its submission to Issues Paper 31 (Anglicare Tasmania 2007).

Anglicare welcomes the ALRC's view that consent is dependent on the context, on whether consent is informed, on whether consent is voluntary, and on whether consent for one purpose is bundled with another purpose (ALRC 2007: 578-9). In the case of low income earners in the private rental market, the context for giving consent is a housing market in crisis, a critical shortage of affordable housing, and the vital role of housing in contributing to a person's wellbeing and capacity to engage with their community. All these factors make it likely that a person will give consent even if they are not comfortable with what they are consenting to. Consent in such a situation cannot be said to be truly voluntary, particularly consent being given to matters not directly related to the application for the tenancy or the management of the tenancy but which have been bundled together with such directly related matters. Finally, consent may not be genuinely informed as literacy problems may prevent people from understanding what they are signing – an ABS study found that only half of the Australian population aged 15-74 is considered capable of coping with the literacy demands of everyday life (McLennan 1996) – and many consent forms used by real estate agents and sighted by Anglicare use very complicated language.

Anglicare believes that real estate agents should not use bundled consent for any matter not directly related to processing the application (which would include confirming the applicant's identity and conducting reasonable reference checks) and managing any resulting tenancy (which would include provision of the tenant's contact details to tradespeople conducting essential repairs and maintenance and contacting the tenant about inspection times and dates or changes to the lease).

3.3 Anglicare's recommendations

2. Anglicare supports Proposal 16.1, that the Office of the Privacy Commissioner should provide further guidance about what is required of agencies and organisations to obtain an individual's consent for the purposes of the *Privacy Act*, and particularly that the Office should provide advice on when it is and is not appropriate to use 'bundled consent'.

4. Application forms (DP 72, chs.18, 24)

4.1. Recap of Anglicare's response to Issues Paper 31

Anglicare's submission made the following key points:

- landlords in Tasmania routinely require tenants to provide information that is not necessary for processing the application or managing any tenancy, but that leaves the tenant vulnerable to discrimination, such as information about their reliance on Centrelink benefits, their marital status or family structure, and whether or not they will be accessing private rental support services for assistance with their bond.
- tenants have little choice but to provide the information because it is required as a condition of their application being assessed.

Anglicare recommended that the Privacy Commissioner be given the power to issue binding guidelines, and that such guidelines be issued on the information agents and landlords can reasonably collect from tenants. Anglicare did not recommend revision of NPP 1.1 in its submission because we lacked the expertise to comment on whether similar abuses of NPP 1.1 occurred in other industries.

4.2. Anglicare's response to Discussion Paper 72

Anglicare was interested to read in Discussion Paper 72 that many other stakeholders had concerns that personal information being collected by a range of organisations was not genuinely necessary or relevant for the purposes for which it was collected. It is also interesting that the Office of the Privacy Commissioner's submission at one point gave as an example the possibility of providing more specific guidance on what information a real estate agent could legitimately collect from an applicant for a tenancy (OPC 2007: 221).

Anglicare's original recommendation was that the Privacy Commissioner issue binding guidelines to real estate agents on this matter, but the ALRC's suggestion that the proposed UPPs incorporate both an objective test of what is 'necessary' information and a requirement that information be 'relevant' will achieve the same goal, providing that compliance with the changes is monitored and that the Privacy Commissioner reserves the right to take further action, such as the development of a binding code or guidelines for particular industries, if required.

4.3. Anglicare's recommendations

- 3.** Anglicare supports Proposal 18.2, the adoption of the proposed UPP 2.1., 'An agency or organisation must not collect personal information unless it reasonably believes the information is necessary for one or more of its functions and activities'.

If the proposed UPPs are not adopted, and separate IPPs and NPPs are retained, then Anglicare would support amendments to IPP 1.1 and NPP 1.1 to include an objective test of what is 'necessary' similar to that proposed in UPP 2.1.

- 4.** Anglicare supports Proposal 24.2, the adoption of the proposed UPP 7, 'An agency or organisation must take reasonable steps to make sure that the personal information it collects, uses or discloses is, with reference to a purpose of collection permitted by the UPPs, accurate, complete, up-to-date and relevant'.

If the proposed UPPs are not adopted, Anglicare would support an amendment to NPP 3 to include the requirement that information collected, used or disclosed is relevant to the purpose for which it was collected.

5. Compliance (DP 72, ch.44)

5.1. Recap of Anglicare's response to Issues Paper 31

Anglicare's submission made the following key points:

- the experiences of Anglicare's clients in the private rental market suggest that the provisions of Tasmania's residential tenancy legislation, the *Residential Tenancy Act 1997*, are frequently broken by landlords and that tenants are disempowered and unwilling to seek the protections currently provided under the Act.
- under the *Residential Tenancy Act 1997*, for disputes or breaches of the Act that are not related to the disbursement of security deposits or boarding premises (which are the responsibility of the Residential Tenancy Commissioner), the only recourse tenants have is the Courts, which can be expensive and is intimidating for tenants.¹

Anglicare recommended that the Privacy Commissioner be given the power to issue binding codes and guidelines to address abuses of tenants' rights by residential tenancy databases and the collection of unnecessary personal information by landlords respectively. Anglicare also recommended that, in relation to the binding code for residential tenancy database operators, the Privacy Commissioner have access to enforcement mechanisms, including the power to order fines and other appropriate penalties for database operators and agents who did not comply with their obligations.

5.2. Anglicare's response to Discussion Paper 72

Anglicare welcomes recognition by the ALRC of the importance of securing, monitoring and enforcing compliance in ensuring that the protections provided by the *Privacy Act* are available to everyone in Australia. Anglicare supports the expansion of the Privacy Commissioner's powers in relation to compliance and the addition of penalties for serious or repeated breaches of the *Privacy Act*. It is Anglicare's view that more stringent regulation will ensure that the rights of tenants are better protected, and that this will address some of the problems with the current balance of power between tenants and landlords.

Under the current system, development of a privacy code can only be initiated by the industry concerned. It seems highly unlikely that an industry which was not complying with the *Privacy Act* and was not responsive to conciliatory approaches to reform would take the step of initiating the development of a code. For this reason, Anglicare supports widening the Privacy Commissioner's powers in relation to privacy codes, and particularly, giving the Privacy Commissioner the power to issue binding codes when there are systemic problems within a particular industry and the industry itself is reluctant to address them.

Anglicare also agrees that approving privacy codes, binding or voluntary, to operate in addition to the privacy principles rather than replacing them is a sensible way to streamline the system and ensure both cross-sector consistency in relation to privacy regulation and tailored responses to particular privacy issues in individual sectors.

5.3. Anglicare's recommendations

5. Anglicare supports Proposals 44.9 and 44.10, for amendments to Part IIIAA of the *Privacy Act* establishing privacy codes as forms of additional guidance on the operation of the UPPs (or NPPs and IPPs) rather than as a replacement of the principles; and empowering the Privacy Commissioner to request the development of a privacy code or develop and impose a privacy code for particular agencies or organisations.

¹ Note: Tasmania does not currently have a residential tenancy tribunal of the kind referred to in Discussion Paper 72, pp.533, 535.

6. References

- ALRC (Australian Law Reform Commission) 2007, *Review of Australian Privacy Law*, Discussion Paper 72 (3 volumes), Australian Law Reform Commission, Sydney
- ALRC (Australian Law Reform Commission) 2006, *Review of Privacy*, Issues Paper 31, Australian Law Reform Commission, Sydney
- Anglicare Tasmania 2007, *Response to Issues Paper 31: Review of Privacy*, Anglicare Tasmania, Hobart
- Burke, T. 1999, *Private rental in Australia*, Swinburne University of Technology, Melbourne, <www.sisr.net/cah/publications.htm>
- Curtis, K. 2005, *Getting in on the Act: The review of the private sector provisions of the Privacy Act 1988*, Office of the Privacy Commissioner, Sydney
- Flanagan, K. 2007, *Housing: Building a Better Future – The Bigger Picture*, Anglicare Tasmania, Shelter Tasmania and the Tasmanian Council of Social Service, Hobart
- Jones, C. 2006, response to request for information from Murray Gordon, Acting Director, Consumer Affairs and Fair Trading, 21 July 2006, <www.anglicare-tas.org.au>
- OPC (Office of the Privacy Commissioner) 2007, *Submission to the Australian Law Reform Commission's Review of Privacy – Issues Paper 31*, Office of the Privacy Commissioner, Sydney
- REIT (Real Estate Institute of Tasmania) 2007, *Market Activity*, <www.reit.com.au>
- VLRC (Victorian Law Reform Commission) 2006, *Residential Tenancy Databases: Report*, Victorian Law Reform Commission, Melbourne