fact sheet

March 2013

NUMBER 24

Australian Privacy Principle 2 – Anonymity and pseudonymity

Anonymity and pseudonymity are different concepts. Both are regulated by the *Privacy Act 1988* (Privacy Act) in the private sector and these protections will soon be extended to Commonwealth Government agencies.

This fact sheet provides an overview on the current status of the Privacy Act as it applies to the concepts of anonymity and pseudonymity as well as information about the impact of Australian Privacy Principle 2 (APP 2 – anonymity and pseudonymity).

What are anonymity and pseudonymity?

It is important that the terms anonymity and pseudonymity are not used interchangeably in the privacy context as they have different meanings.

The circumstances surrounding a particular record may make one or the other of these options more feasible for implementation by an entity collecting information. In some cases, neither will be feasible.

Anonymity

When an individual transacts or interacts with a third party anonymously it is on the basis that either no identifying details are disclosed to that party or at least no identifying details are recorded or linked to the relevant record.

Pseudonymity

In contrast pseudonymous interactions usually involve the relevant individual providing a different or fabricated identity, which may include a name alone, or other details such as a different address or date of birth. A simple example of a pseudonymous transaction/interaction in the social media or online context involves the use of an ***avatar***.

In computing, an 'avatar' is the graphical representation of the user or the user's alter ego or character. It may take either a three-dimensional form, as in games or virtual worlds, or a two-dimensional form as an icon in internet forums and other online communities.

A number of Commonwealth agencies already manage programs that allow clients and other third parties to engage with the agency and other clients using an avatar.

How does the Privacy Act currently regulate anonymity and pseudonymity?

National Privacy Principle 8 (NPP 8) requires that, wherever it is lawful and practicable, individuals must have a clear option of not identifying themselves when entering into transactions with an ***organisation***:

The term 'organisation' is defined in the Privacy Act and does not include Commonwealth Government agencies. There is no equivalent principle in the Information Privacy Principles (IPPs), which apply to the records in possession and control of Commonwealth agencies.

Nonetheless, AGS has been called upon to advise agencies on ways in which their policies or programs can comply with the spirit of NPP 8.

It is important to note that NPP 8 does not specifically refer to pseudonymity. However, it is recognised that the wording of NPP 8 is broad enough to encompass pseudonymity.

The intention behind NPP 8 was detailed in the Revised Explanatory Memorandum to the *Privacy Amendment (Private Sector) Bill 2000*, which states:

> Anonymity is an important dimension of privacy. In some circumstances, it will be practicable to do business anonymously. In others, there will be legal obligations that require identification of the individual. Unless there is a good practical or legal reason to require identification, organisations should give people the option to operate anonymously. This principle is not intended to facilitate illegal activity.[1]

Proposal to extend the principle relating to anonymity and pseudonymity

The Australian Law Reform Commission (ALRC) recommended in its 2008 Privacy Report (*For your information: Australian privacy law and practice*) that the proposed Australian Privacy Principles should contain a principle called 'anonymity and pseudonymity'.

It was recommended that this proposed APP require agencies and organisations to give individuals the clear option, where it is lawful and practicable, of either not identifying themselves or identifying themselves with a pseudonym.[2]

The ALRC's recommendation was accepted by the Australian Government in its First Stage Response to the ALRC Privacy Report.[3] In accepting the recommendation, the Government stated that:

> Giving individuals the option to interact anonymously or by using a pseudonym is an effective way to protect individuals' privacy by ensuring that personal information is only collected where necessary.

This statement accords with the current requirement under both IPP 1(1)(b) and NPP 1.1 that personal information shall not be collected unless necessary for the functions or activities of the agency or organisation.

Amendments to the Privacy Act

The *Privacy Amendment (Enhancing Privacy Protection) Act 2012* (Cth) (the Reform Act) passed through Parliament on 29 November 2012 and received royal assent on 12 December 2012.

The Reform Act puts into practice the Government's first stage response to the ALRC Report including the implementation of a unified set of APPs that apply to both the public and private sector. These APPs will replace the current IPPs and NPPs.

The reforms commence on 12 March 2014.

1 Revised Explanatory Memorandum, *Privacy Amendment (Private Sector) Bill 2000* at [384].

2 Ibid 706, [20.64] and recommendation 20-1.

3 Australian Government, *Enhancing national privacy protection, Australian Government first stage response to the Australian Law Reform Commission Report 108*, October 2009, [39].

New APP 2 – anonymity and pseudonymity

New APP 2 creates a general right to anonymity or pseudonymity for individuals when dealing with agencies:

2.1 Individuals must have the option of not identifying themselves, or of using a pseudonym, when dealing with an APP entity in relation to a particular matter.

2.2 Subclause 2.1 does not apply if, in relation to that matter:

(a) the APP entity is required or authorised by or under an Australian law, or a court/tribunal order, to deal with individuals who have identified themselves

or

(b) it is impracticable for the APP entity to deal with individuals who have not identified themselves.

This right is subject to certain exceptions, including where it is impractical for an APP entity (which includes a Commonwealth Government agency) to deal with individuals who have used a pseudonym, or where the APP entity is required or authorised by law to deal only with individuals who have identified themselves.

What will amount to circumstances where it is 'impracticable' for the APP entity to deal with anonymous or pseudonymous individuals will depend on the particular circumstances and will vary from case to case.

One example of a case where anonymous or pseudonymous interactions will be impracticable is where an individual is making a claim from or requesting payment of money or an entitlement from a Commonwealth Government agency (for example, Centrelink or Medicare payments).

Some agencies currently have programs or policies in place that allow them to interact with individuals on an anonymous or pseudonymous basis, such as through hotlines or social networking platforms. In some cases, agencies have already developed a 'double-blind' registration system for their programs (particularly for online forums), which would allow them to register clients for participation in a program but to interact with them pseudonymously to protect their identities.

Agencies should be aware that there is standing practice or professional/public acceptance within some parts of the community in some areas of the right to interact anonymously or pseudonymously, such as in online communities and healthcare.

The establishment of an environment that permits anonymous or pseudonymous interaction with Commonwealth Government agencies will necessarily present additional issues and management considerations for an agency to ensure that the appropriate protections for that environment are not breached.

There will also be additional privacy considerations for the agency, in terms of notification, security, access, amendment and disclosure of information.

Other recent developments – anonymity and pseudonymity and the review of European data protection rules

The right of an individual to interact anonymously or pseudonymously is also recognised internationally.

By way of example, the European Parliament has recently issued two draft reports commenting on the proposed reform of European data protection rules.*

The draft reports contain proposed amendments to the proposed General Data Protection Regulations. The proposed amendments specifically recognise the risks associated with the linking of data to identify an individual particularly in an online setting and encourage the use by entities of pseudonymous and anonymous data when interacting with individuals online, to strengthen an individual's right to privacy and to better manage the risk of improper linking of information online for purposes such as identity fraud.

* European Parliament, Committee on Civil Liberties, Justice and Home Affairs, Draft Reports on the General Data Protection Regulation 17 December 2012 and Protection of Individuals with regard the Processing of Personal Data, 20 December 2012.

More information please contact

Jane Lye Senior Executive Lawyer
T 07 3360 5736
jane.lye@ags.gov.au BRISBANE

Elena Arduca Senior Executive Lawyer
T 03 9242 1473
elena.arduca@ags.gov.au MELBOURNE

Justin Davidson Senior Executive Lawyer
T 02 6253 7240
justin.davidson@ags.gov.au CANBERRA

Tara McNeilly Senior General Counsel
T 02 6253 7374
tara.mcneilly@ags.gov.au CANBERRA

This material is provided to AGS clients for general information only and should not be relied upon for the purpose of a particular matter. Please contact AGS before any action or decision is taken on the basis of this fact sheet.

© AGS All rights reserved