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National Legal Aid

Ms Jillian Segal AM
President
Administrative Review Council
Robert Garran Offices
National Circuit
Barton, ACT, 2600

9th March 2007

Dear Madam,

Re: Draft Report – Government Agency Coercive Information-Gathering Powers

Thankyou for your letter to Ms Smith dated the 11th January 2007 inviting National Legal Aid's (NLA) comment on the draft report "Government Agency Co-ercive Information-Gathering Powers".

About National Legal Aid

National Legal Aid represents the Directors of the Legal Aid Commissions of all Australian states and territories. Legal Aid Commissions provide legal services to socially and economically disadvantaged people. Legal services include representing clients in federal, state and territory courts and tribunals, working in partnership with private lawyers to represent legally aided people and providing legal advice and education to members of the public.

NLA's Comments on the draft report

The draft report surveys practices around the use of coercive powers based on the practices of selected Commonwealth agencies. It then makes a series of recommendations on desirable administrative practices, indicating at a number of points where these might need to be supported by legislative changes that would contribute to greater consistency, transparency and accountability. Our approach to the report is primarily guided by our shared interest in representing socially and economically disadvantaged clients who may be subjected to or affected by coercive powers and providing members of the community with relevant information about their legal rights and responsibilities. Consequently we have considered the impact of the issues raised in the report for people claiming or receiving benefits, immigrants, those involved in the criminal justice process or seeking administrative law remedies.

Chapters 2 and 3
The issues of when and by whom coercive powers should be exercised are primarily of interest to the Commonwealth agencies who exercise coercive powers, rather than members of the public and organizations affected by them. Our comments are therefore limited apart from expressing general support for:

- principle 1 on legislative triggers for the use of coercive powers,
- principle 2 linking the circumstances in which they should be used to the objects of the relevant legislation,
- principle 4 requiring regular monitoring of their exercise,
- principle 5 establishing a statutory basis for their delegation, and
- principle 7 requiring formal training for the way in which they are exercised.

In relation to principle 1 we note and support the best practice recommendations in Section 8 of the Program Protocol Data-Matching Program (Assistance and Tax) and paragraphs 63 to 65 of the Privacy Commissioner's voluntary Guidelines on The use of data matching in Commonwealth administration on commencing investigations resulting from data matching operations. These relate to the time period for commencing investigations and the general requirement to notify individuals when an investigation based on a data matching result is commenced.

On principle 7 we would stress the importance of training for officers taking part in compulsory examinations, including examinations where a client risks the loss of a benefit for failing to attend. Officers should have a professional approach that recognises the extent of their powers and the legal rights of parties being examined.

We have reservations about the proposition in principle 3 that agencies are best placed to decide whether to use their coercive powers. If this is to be expressed in legislation it should not be at the expense of any rights to administrative and judicial review as to whether the exercise of powers is reasonable in specific cases.

Chapter 4 Notice
More standardised notice provisions would assist practitioners and organisations that provide advice to people and organisations who are subject to the exercise of coercive powers. In the absence of uniformity it is often necessary to research specific provisions to determine how comprehensive the powers are and whether relevant case law applies. At a minimum notices to produce or attend an examination should specify the legal provision under which a power is exercised, any relevant penal provision and any legislative provisions under legislative safeguards that specifically refer to the exercise of the powers being used by the agency concerned.

However there is a risk that, in standardising notice powers across agencies, more coercive or wide ranging powers would become the default standard, whether the needs of specific agencies justified them or not.

Chapter 5 Examinations/hearings
We support the recommendation for legislation that ensures that basic rights are consistently available for people subject to compulsory examinations including specific provisions covering the admissibility of admissions in subsequent proceedings. This is an important issue for legal aid clients who will generally not have access to lawyers when preparing for or attending interviews and examinations, and consequently run the risk of unwittingly breaching penal provisions supporting the exercise of coercive powers.

We note that currently there are considerable variations between agencies in the way safeguards currently apply. Such variation advantages people who have ready access to legal advice, and makes it difficult for legal aid providers to give the kind of generic information that those without ready access to legal advice can rely on.

Given the degree of inconsistency noted in the report on the right to legal representation during an examination we would support a standard policy approach that acknowledges the right to legal representation and requires agencies to adopt a flexible approach to scheduling examinations where an examinee wishes to have a legal advisor present. Agencies that deal with vulnerable clients should have explicit policies to ensure that such clients are encouraged to bring a support person with them.

On page 43 there is a brief reference to agencies' concerns about conflict of interest where one lawyer represents more than one examinee in the same matter. In our view this possibility is adequately addressed by the obligations of practitioners to avoid conflict situations and existing professional complaint mechanisms. We would be opposed to any proposed solution that would work against examinees receiving qualified and experienced assistance. This can be a particularly important issue for legally aided clients, owing to the limited availability of qualified practitioners.

Chapter 6 Privileges:
NLA notes the Australian Law Reform Commission is undertaking a review of privilege and intends to make submissions to the ALRC. NLA's view is that there should be no new legislative change that further abrogates the privilege against self-incrimination and legal professional privilege.

We note that the Report is not recommending substantive changes to the available privileges. However it does recommend that the legislation conferring statutory powers should be consistent and should clearly indicate when and how the privileges may be claimed and the circumstances in which they are abrogated. We would support this recommendation provided it is framed in a way which does not encourage further abridgement of these privileges.

Legal aid providers frequently face demands for information about clients from Commonwealth agencies. In some circumstances the information sought is covered by common law legal professional privilege. In some instances state governments have recognised the need to expand the scope of this privilege to cover the administrative processes that are necessary to determine whether to grant legal aid to a particular client, for example under section 25 of the *Legal Aid Commission Act 1979*

(NSW). Under conflict of law principles, this kind of legislative protection generally gives way to inconsistent provisions in Commonwealth legislation, and therefore provides no protection against an exercise of statutory coercive powers. Given that the public interest behind these instances of extended privilege and the expectation they give rise to for clients can be equally applicable to the process of representing clients funded under Commonwealth legal aid guidelines, the question arises whether a requirement to disclose in response to coercive demands should be resolved purely on the basis of conflict of law principles. The Council should consider whether its recommendations should also include making an allowance for provisions of state legislation that extend the scope of the privilege.

On derivative use immunity Legal Aid NSW's 2006 Submission on the Proceeds of Crime Act 2002 raised concerns that the absence of the immunity in relation to examinations under that Act put practitioners representing clients in both civil and criminal proceedings in a situation where conflict could arise as a result of information they were required to disclose being used in subsequent proceedings, where the information was not itself subject to legal professional privilege. This is a particular issue for legal aid organisations because of the limited availability of qualified practitioners in many areas. The possibility of this kind of conflict should be a criterion when determining whether derivative use immunity should be available in relation to the exercise of coercive powers. In jurisdictions where there is a likelihood of consequential criminal proceedings lawyers who represent clients in administrative proceedings should generally be able to rely on the immunity.

The report notes that the Commonwealth Government has indicated that it intends to adopt recommendations of the Australian Law Reform Commission to recognise confidential professional relationship privilege for the purpose of tendering evidence and in pre-trial proceedings. It is not clear that this would extend to the exercise of coercive powers of public sector agencies. The Council's proposed solution is to recognise the privilege as a discretionary right in relation to coercive powers that is exercisable in specific and compelling circumstances. The problem we see with this proposal is that it purports to create a form of statutory confidentiality against the exercise of coercive powers which the agency exercising those powers is free to waive.

As an alternative we propose that the privilege should be recognised as generally available in relation to the exercise of coercive powers, but there should be a more structured set of criteria for abridging the privilege in particular circumstances. This is an instance where the desirability of consistency might give way to the functions of specific agencies, for example a claim of professional confidentiality privilege might be abridged for some regulatory agencies where it could be used by professional advisers to obstruct the investigation of those kinds of activities which the agency was expected to regulate.

Chapter 7

Contempt of court:

The Report notes that the courts have arrived at an appropriate balance between fairness to parties in legal proceedings and the permissible exercise of investigative powers when proceedings are on foot. It then argues that despite this, there is still

uncertainty as to whether regulators can and should continue their investigations. It proposes clear legislative direction to deal with this issue and the inefficiencies it may cause. It is difficult to respond to this proposal without a clear indication of the issues of concern. We would not support the suggestion that legal safeguards designed to protect fairness should give way to efficiencies without a much clearer case being made.

Compliance costs:
Principle 19 proposes that agencies should be required to report annually on the number of instances in which coercive powers have been exercised. The proposal does not directly address the burden on individual clients, who will often lack the capacity to access or digest the information. Nevertheless the recommendation could benefit advocacy organizations that monitor the effectiveness of regulatory regimes on behalf of their clients. For this proposal to be effective agencies should not able to get away with only releasing vague and imprecise data. This calls for guiding principles to ensure that sufficient information is provided for interested observers to obtain a clear picture of the way powers have been exercised, while at the same time safeguarding ongoing investigations and critical investigative methods.

Over-lengthy and overly permissive privacy notifications:
We are not convinced that the Privacy Commissioner's new internal Privacy Policy provides as effective a precedent for resolving this issue. However the Policy does suggest a useful approach that agencies can build on. People affected by the exercise of coercive powers would benefit from receiving a condensed summary notice with a clear link to more detailed information that addresses the more technical implications. The important point to establish is that the up-front, simple notice accurately reflects the underlying information and is not misleading. As long as this is so the condensed notification can achieve the positive result of making it more difficult to conceal overly permissive uses of information in the small print.

Chapter 8 Secrecy and Privacy provisions
We note that many of the concerns about complex and inconsistent provisions affecting the ability to share information with other agencies come from regulators that provide welfare oriented services to disadvantaged people rather than those that regulate commercial activities. This is scarcely surprising. Information about health, relationships and domestic arrangements require more sensitive privacy protection than information about commercial activities that generally have a public dimension. At the same time we recognise the importance of expediting flows of personal information between agencies to provide more coordinated services to those in the greatest need. However this should not ignore the fact that vulnerable people often have a greater stake in ensuring that the information collected and shared about them is fair and accurate.

In principle privacy laws are supposed to expedite the process of sharing information by establishing a strong accountability framework. As the report notes, privacy laws are often less restrictive than other statutory confidentiality and secrecy provisions, that are often inconsistent with each other as well as with the overarching privacy regime.

One way of achieving greater consistency and transparency for arrangements to exchange information that are often ad-hoc and operate anomalously would be to redraft confidentiality provisions that are designed to protect personal information to make them more consistent with the information privacy principles. We also support Guidelines to encourage a more systematic approach to the way confidentiality and investigative powers interact with each other and the Privacy Act.

The report recommends that where provisions governing disclosure of information gathered through coercive powers, require consent, consent to disclosures that could lead to serious consequences for the individual should be express, voluntary and informed. This approach would not necessarily resolve the complex issues that often arise where the quality of consent becomes an issue.

Where legislation includes a consent requirement, this is usually an alternative to other permissible grounds for disclosure such as legal authorisation or the need to reduce an overriding risk. In other instances the requirement for consent or prior notification arises because the agency lacks an authority to disclose that would override the normal requirements of privacy legislation or natural justice. In all of these circumstances a requirement for express consent which is triggered by considerations that will often be subjective would be a rather blunt instrument. In some circumstances it would simply encourage the agency to identify an authority to disclose which by-passed the consent requirement altogether. For this reason we would recommend a more flexible approach that requires that the preconditions to and form of consent would be appropriate to the circumstances.

Any requirement for express, voluntary and informed consent would obviously need to incorporate procedures to deal with the situation where the individual concerned lacked the capacity to give this kind of consent.

Chapter 9 Accountability provisions

The report reviews the existing range of accountability mechanisms for Commonwealth agencies but does not specifically recommend additional processes to replace or supplement them. It tentatively recommends a form of mandatory reporting by agencies of the way these powers have been exercised, similar to the reporting required for telephone intercepts, under the Telecommunications (Interception) Act. This is consistent with the recommendation on compliance costs in chapter 7, and our comments on that section of the report are also relevant.

In relation to keeping records for accountability purposes, it is not entirely clear which approach the Council endorses in the last paragraph on page 81 whether that of the Senate Standing Committee or of the Government's response. From the point of view of clients seeking production of records relating to the exercise of coercive powers in legal proceedings a centralised register would clearly be preferable.

Conclusion

NLA is grateful both for the opportunity to make submissions on the Draft Report on Coercive Information Gathering Powers and for the extension of time granted to lodge them.

Where we feel able to support the Administrative Review Council, we have indicated that to be the case. It is hoped that those areas where we have expressed concern will be revisited by the Council in its continuing deliberations.

Yours sincerely,

Bill Grant OAM
Chairperson
National Legal Aid