



30 November 2021

Privacy Act Review
Attorney-General's Department
Robert Garran Offices
3-5 National Circuit
Barton ACT 2600

Dear Sir/Madam

ENHANCING ONLINE PRIVACY BILL EXPOSURE DRAFT

This is a submission on the draft Privacy Legislation Amendment (Enhancing Online Privacy and Other Measures) Bill 2001 (Online Privacy Bill) released by the Commonwealth Attorney-General's Department.

About the IPC

The Information and Privacy Commission NSW (IPC) oversees the operation of privacy and information access laws in New South Wales.

The Privacy Commissioner has responsibility for overseeing and advising NSW public sector agencies on compliance with the *Privacy and Personal Information Protection Act 1998* (PPIP Act) and the *Health Records and Information Privacy Act 2002* (HRIP Act) and promotes awareness and understanding of privacy rights in NSW. The PPIP Act and HRIP Act establish the Information Protection Principles and Health Privacy Principles which govern the collection, security, use and disclosure of personal and health information by NSW government agencies and, in the case of the HRIP Act, private sector health care providers.

Online Privacy Code

The Privacy Commissioner welcomes the introduction of new provisions concerning the development and registration of a binding Online Privacy Code for social media services, data brokerage services and large digital platforms.

Contracted service providers

Section 6BAA provides that an act or practice does not breach the OP Code if done by an OP Organisation that is a contracted service provider for a Commonwealth contract or for the purpose of meeting an obligation under the contract. Given shifting modes of government service delivery across all levels of government, there may be value in extending this exemption under s6BAA to include an act or practice by an OP organisation that is a contracted service provider for a State or Territory contract.

Request to cease use or disclosure of personal information

I note that the Code will include a provision which will enable an individual to request that an organisation cease to use or disclose their personal information (section 26KC(2)(h)). This is an important addition to the Act and provides the individual with enhanced protections through a legislated mechanism to control their personal information. The Bill establishes the procedural requirements that will apply to such a request. Of note in this process is the provision at section 26KC(4)(c)(ii) which will enable an Online Privacy Organisation to impose a reasonable charge for responding to a request. I have concerns that the imposition of charges is likely to act as a barrier and will discourage individuals from exercising the right to request that an organisation cease to use or disclose their personal information.

Children and vulnerable groups

The Bill also provides for the Code to include new requirements to protect the privacy of children and vulnerable groups. The inclusion of additional requirements for these individuals is supported. The acute information asymmetry between digital platforms and consumers noted in the ACCC Digital Platforms Final Report is especially heightened in relation to children who may, due to their age and inexperience, lack the ability to foresee the consequences of providing their personal information to a service provider or to understand complex and legalistic privacy notices and privacy policies.

Development timeframes

It is appropriate that the provision in the Bill for the development and registration of the Code mirror the processes which are operative for the existing Codes under the *Privacy Act 1988* (Cth) (Privacy Act). Given the complexity of the sector being regulated under the Code and diversity of organisations within that sector, the 12-month timeframe for development of the Code may be insufficient to allow for full and meaningful consultation processes to be undertaken. Consideration should be given to expanding the timeframe for development of the Code.

New and Enhanced Enforcement Powers

I welcome the proposed enhancements to the Information Commissioner's powers under the Privacy Act. It is essential that the Privacy Act provides the Office of the Australian Information Commissioner (OAIC) with robust enforcement mechanisms that ensure individuals have access to quick and effective remedies for the protection of their privacy rights and that encourage active compliance by entities subject to the Act.

Increased penalties for a serious and/or repeated interference with privacy and the introduction of civil penalties for interferences with privacy will send a strong message about the importance of privacy compliance, while providing the OAIC with the discretion to seek civil penalties where this is the appropriate regulatory tool.

The introduction of an infringement notice power where a person fails to provide information, answer a question, or produce a document or record when this has been required under the Privacy Act will provide an effective measure to encourage greater co-operation by entities with the regulatory activities of the OAIC.

The Privacy Commissioner supports the proposed expansion of the information sharing powers under the Act. The introduction of section 33A would enable the Commissioner to share information with other authorities, including State or Territory authorities, for the purpose of the Commissioner or the receiving body exercising its powers or performing its functions or duties and will be a valuable addition to the legislation. This enhancement will facilitate increased cooperation between regulators.

Resourcing

I take this opportunity to note that any revisions to the Privacy Act that result in new and/or enhanced regulatory functions for the OAIC will require a commensurate increase to its resourcing to ensure the effectiveness of any enhanced regulatory regime. The OAIC must be appropriately resourced to properly carry out its statutory functions and use the full suite of regulatory powers effectively.

Please do not hesitate to contact me if you require any further information. Alternatively, your officers can contact [REDACTED], Senior Project Officer, Legal Counsel and Regulatory Advice on [REDACTED] or via email at [REDACTED].

Yours sincerely

[REDACTED]

Samantha Gavel
Privacy Commissioner