

Senate Economics Legislation Committee

Inquiry into Digital ID Bill 2023 and the Digital ID (Transitional and Consequential Provisions) Bill 2023

Department of Finance

Response to Question on Notice

Hearing of 9 February 2024

Question on Notice 3 (Proof Hansard pages 35-36 (Senator Canavan))

Topic: clarification regarding compliance with clause 74 of the Digital ID Bill 2023 which relates to the voluntary creation and use of digital IDs.

Senator CANAVAN: It seems strange to treat Commonwealth government agencies differently from state ones, when the privacy and other issues are very similar. I'll move on. Senator Shoebridge has largely covered this, but my concern here—going back to the issue of the comparabilities if they can provide another service; I think it's clause 74(2).

...

Mr Shepherd: I think it has been attested today that that detail is not covered in the bill. I think there is provision that it could be covered in rules, by necessities. We could cover more detail in the rules about accreditation or the scheme—

Senator CANAVAN: Could you come back to me on notice about which section of the bill those rules would fall under, or where those instruments would be available—

Mr Shepherd: We can take on notice where we might cover a bit more detail on that. Again, it's subject to a decision by the regulator.

Senator SHOEBRIDGE: But the rules can't read down the section.

Senator CANAVAN: That's why I've asked for it on notice. It seems to me strange.

Senator SHOEBRIDGE: You can't limit the operation of the section through the rules. That's the problem with that argument.

Mr Shepherd: Can we take that on notice and have a look at that one, please?

Response

Clause 74 of the Digital ID Bill 2023 promotes the voluntary creation and use of digital IDs by individuals to access services provided by organisations that rely on digital IDs provided through the Australian Government Digital ID System.

Subclause 74(1) provides that a participating relying party (a relying party approved to participate in the Australian Government Digital ID System) must not require an individual to create or use a digital ID as a condition of receiving a service from the relying party, or of accessing a service through the relying party. This means a participating relying party will need to offer an individual an alternative way to access a service that does not require the creation or use of a digital ID.

There are exceptions and exemptions to the requirement in subclause 74(1) but no rule making power to narrow the provision.

The Digital ID Regulator will enforce compliance with this provision and would ultimately need to consider matters on a case-by-case basis. In general terms however, if an alternative service offered to an individual by a participating relying party is not made available in practical and timely way this would be unlikely to satisfy subclause 74(1). During the Committee's hearing, questions were raised about whether an in-person service that was only available every three weeks would be sufficient to meet the requirement. If there were no extenuating circumstances this would be unlikely to satisfy subclause 74(1).

There may be scope for the Bill to more explicitly require that an identity verification method or service that is offered as an alternative to the creation or use of a digital ID through the Australian Government Digital ID System must be reasonably available or accessible to an individual. The Department of Finance is giving consideration to this issue.

Exception regarding other service

During the Committee's hearing, there were questions and discussion about Subclause 74(2).

Subclause 74(2) deals with situations where a participating relying party provides a particular type of service to its customers or clients that facilitates their access to another service offered by the participating relying party.

This is not intended to exempt a participating relying party from subclause 74(1) on the grounds that the participating relying party provides another service that is a completely different service to one that requires use of a Digital ID.

Subclause 74(2) is only intended to exempt a participating relying party from subclause 74(1) where it applies to a service that enables an individual to access another service (for example, an online portal that facilitates access to a banking service); and where there is an alternative way to access that same other service (for example, a banking service) without using a digital ID through the Australian Government Digital ID System. This is because the individual can choose whether to use their digital ID, or to verify their identity in another way to access the other service.

Another example, which is provided in the explanatory memorandum, is where a government agency requires an individual to lodge documents to report on a program the individual is involved in. Individuals can lodge their reports online using the agency's online document lodgement service, which is accessed using their digital ID in the Australian Government Digital ID System. Alternatively, the individual can email the document or lodge it at a post office and comply with any identification requirements the agency has in place for those methods of transmission. Because the individual can lodge the documents at a post office or by email instead of using the online lodgement service and their digital ID, the agency does not contravene subclause (1). In other words, in this example the individual's use of their Digital ID to lodge documents is likely to be considered voluntary.

A contrary example of a service that an individual uses a digital ID to access that would be unlikely to satisfy subclause (1) is where an individual is required to use their digital ID to apply for bank account with a participating relying party providing financial services, and the participating relying party provides another completely different service such as selling foodstuffs that can be obtained without a digital ID. The alternative service (of selling foodstuffs) is not intended to qualify as "another service" in 74(2)(a). This means the exception set out in subclause 74(2) is unlikely to be enlivened, and it is intended the requirement for use of a digital ID to be voluntary in subclause 74(1) would still apply.

It was considered necessary to include subclause 74(2) in the Bill because: i) it is reasonable for a participating relying party to require use of a digital ID to access a online portal service that cannot be replicated offline; and ii) what is necessary for use of digital IDs to be voluntary is for the individual to be able to access the other service (for example, opening a bank account or lodging documents) in another way than using an online portal that requires use of a digital ID.

Exemptions

Other exceptions and exemptions to the requirement in subclause 74(1) are described briefly in Finance's submission to the Committee's inquiry. These include the exception in subclause 74(4) that the Digital ID Regulator may grant an exemption, on application by a participating party, if the Regulator considers it appropriate to do so. The Digital ID Regulator is able to grant an exemption on grounds such as those outlined at subclause 74(5), including for a small business (paragraph 74(5)(a), for a participating relying party providing its services solely online (paragraph 74(5)(b)), or where there is some other exceptional circumstance.

The ability for the Digital ID Regulator to grant these exceptions is necessary because it would be unreasonable to require any small businesses or solely online service, in all circumstances, to offer individuals an alternative to the use of a digital ID in order to access services provided by the entity. This could effectively require the small business or solely online service to implement or maintain an alternative identity verification process that involves otherwise unnecessary collection of personal information as well as an additional cost. It would also create a disincentive for small businesses or solely online services to join the Australian Government Digital ID System.

Similarly, the grounds for an exception in exceptional circumstances at paragraph 74(5)(c) is necessary because there may be temporary or other circumstances in which an entity could reasonably provide access to services using a digital ID without an available alternative. For example, if a flood or other disaster cut access to roads in regional or rural areas and prevented a business from offering services in person, and where other non-digital service delivery channels are not suitable or available for that business, it may be reasonable for the business to still provide online services that require the use of a digital ID.

There may be scope for the Bill to more explicitly require that, in considering applications for exemptions under subclause 74(4), the Regulator have regard to the reasonableness of any impacts on the accessibility of services for individuals. The Department of Finance is giving consideration to this issue.