Good evening

Thank you for inviting the Information Commissioner and Australian Privacy Commissioner, Timothy Pilgrim, and the Deputy Commissioner, Angelene Falk, to appear at the Senate Committee's public hearing into the Veterans' Affairs Legislation Amendment (Digital Readiness and Other Measures) Bill 2016 (the Bill) on Thursday, 16 February 2017. They are pleased to accept.

In advance of the hearing, we thought it may assist the Committee to provide:

- a brief outline of the role and responsibilities of the Office of the Australian Information Commissioner (OAIC)
- an overview of the OAIC's engagement with the Bill
- a response, where possible, to the Committee's questions provided to the OAIC on 10 February 2017.

This email is provided as background information only and is not a submission.

OAIC

The OAIC is an independent Commonwealth statutory agency. It was established by the Australian Parliament to bring together three functions:

- privacy functions (protecting the privacy of individuals under the Privacy Act 1988 (Privacy Act), and other Acts)
- freedom of information functions (access to information held by the Commonwealth Government in accordance with the Freedom of Information Act 1982 (FOI Act)), and
- information management functions (as set out in the Information Commissioner Act 2010).

The integration of these three interrelated functions into one agency has made the OAIC well placed to strike an appropriate balance between promoting the right to privacy and broader information policy goals.

The OAIC's responsibilities include examining proposals that may restrict the exercise of individuals' privacy protections in favour of another public interest objective.

The Privacy Act

The Privacy Act contains thirteen legally-binding Australian Privacy Principles (APPs). These set out standards, rights and obligations relating to the handling, holding, accessing and correction

of personal information. Personal information is information or an opinion about an identified individual, or an individual who is reasonably identifiable.

The APPs apply to most Australian Government agencies, all private sector organisations with an annual turnover of more than $3 million, all private health service providers and some small businesses – collectively referred to as APP entities.

The APPs are principles-based law. This provides APP entities with the flexibility to tailor their personal information handling practices to their diverse needs and business models and to the diverse needs of individuals. The APPs are also technology neutral, applying equally to paper-based and digital environments. This is intended to preserve their relevance and applicability, in a context of continually changing and emerging technologies.

The Privacy Act recognises that the protection of individuals' privacy, through the protection of their personal information, is not an absolute right. Rather, those interests must be balanced with the broader interest of the community in ensuring that APP entities are able to carry out their legitimate functions and activities. This balancing is reflected in the exceptions to a number of the APPs. Exceptions cover a range of matters including where a use or disclosure of personal information is authorised or required by Australian law or where an entity reasonably believes that a use or disclosure is reasonably necessary for an enforcement related activity conducted by an enforcement body.

OAIC comments on the Bill

APP 6 outlines when an APP entity may use or disclose personal information. It generally provides that an APP entity can only use or disclose personal information for a purpose for which the information was collected (known as the 'primary purpose'), or for another purpose where one of the exceptions listed in APP 6 apply. As noted above, the exceptions include where 'a use or disclosure of personal information is authorised or required by Australian law'.

The OAIC is regularly invited to comment on draft laws that require or authorise the collection, use or disclosure of personal information. Consistent with the approach taken in applying Article 17 in the International Covenant on Civil and Political Right (ICCPR), the OAIC's advice generally suggests consideration should be given to whether those measures are proportionate and necessary. That is, whether they appropriately balance the intrusion on individuals' privacy with the overall public policy objectives of the proposal. Additionally, when handling of individuals' personal information is authorised in the broader interests of the community, it is generally recommended that those activities be accompanied by an appropriate level of privacy safeguards and accountability. Should such a proposal be considered to appropriately balance these objectives, it is generally recommended that the scope of the proposal be drafted consistent with the spirit and intent of the Privacy Act.

On 31 October 2016, the OAIC was invited to comment on the Bill, following a request from the Office of Parliamentary Counsel (OPC), via the Attorney General's Department, Information Law Unit (the AGD). The OAIC's comments on the Bill were provided to the AGD on 3 November 2016, and we understand that they were then passed on to the OPC and the Department of Veterans' Affairs (DVA). The comments focused on the public interest disclosure provisions in

Schedule 2 of the Bill which permit certain disclosures and invoke the 'required or authorised' by law exception in APP 6 in the Privacy Act. The OAIC's comments are attached.

The OAIC has reviewed the Commonwealth Ombudsman's written submissions to the Committee and notes its suggestion to involve the OAIC in the development of laws and policies raising privacy issues (Commonwealth Ombudsman, Supplementary submission). In this regard, the OAIC would welcome the opportunity to be consulted on rules made by the Minister in relation to public interest disclosure certificates under the proposed amendments in Schedule 2 of the Bill.

Committee questions

Please advise the committee what is the current situation that DVA or other agencies require this power?

As outlined above, the OAIC's role includes examining proposed enactments that would require or authorise acts or practices that might otherwise interfere with privacy (s 28A(2), Privacy Act) and ensuring that any adverse effects of a proposed enactment on the privacy of individuals are minimised (s 28A(2)(c), Privacy Act). The OAIC provided some brief comments on the Bill. At that time, the OAIC did not have access to the Explanatory Memorandum (including Statement of Compatibility with Human Rights). Details about the current situation that necessitates this power may be a matter for DVA. As the 'public interest disclosure' provisions in Schedule 2 of the Bill broaden the circumstances in which personal information can be used and disclosed, we suggest that DVA use the Explanatory Memorandum (including its Statement of Compatibility with Human Rights), to explain the need for such provisions.

Why does DVA require these provisions so urgently?

This may be a matter for DVA.

Is there not already a mechanism for agencies to report crimes to police?

As noted above, APP 6 generally provides that an APP entity can only use or disclose personal information for a purpose for which the information was collected (known as the 'primary purpose'), or for another purpose where one of the exceptions listed in APP 6 apply. The following exceptions to APP 6 would permit agencies to disclose personal information to the police, where:

- the APP entity reasonably believes that the use or disclosure of the information is reasonably necessary for one or more enforcement related activities conducted by, or on behalf of, an enforcement body (examples include the Australian Federal Policy or a State or Territory Police force or service) (APP 6.2(e)), and
- the entity reasonably believes that the collection, use or disclosure is necessary to lessen or prevent a serious threat to the life, health or safety of any individual, or to public health or safety (and it is unreasonable or impracticable to obtain the individual's consent) (APP 6.2(c) and s 16A, item 1)
- the use or disclosure of the information is required or authorised by or under an Australian law or a court/ tribunal order (APP 6.2(b)).

Over the last 5 years, how many cases were there of mistake and/or misinformation that agencies did not have the power to respond to?

This may be a matter for DVA.

Invitation to make a written submission

I would also like to take this opportunity to thank the Committee for the invitation of 6 December 2016 to make a submission to this inquiry. I apologise that the OAIC did not respond. The OAIC had overlooked the invitation due to a clerical error.

Kind regards

Office of the Australian Information Commissioner