



Committee Secretary  
Senate Legal and Constitutional Affairs Committee

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Dear Committee Secretary

## **Migration Amendment (Health Care for Asylum Seekers) Bill 2012 – submission**

The Senate Legal and Constitutional Affairs Committee (the Committee) is conducting an inquiry into the Migration Amendment (Health Care for Asylum Seekers) Bill 2012 (the Bill).<sup>1</sup> The OAIC welcomes the opportunity to make a submission.

### **Office of the Australian Information Commissioner**

The Office of the Australian Information Commissioner (the OAIC) was established by the *Australian Information Commissioner Act 2010* (the AIC Act) and commenced operation on 1 November 2010. The OAIC is an independent statutory agency headed by the Australian Information Commissioner. The Information Commissioner is supported by two other statutory officers: the Freedom of Information Commissioner and the Privacy Commissioner. The former Office of the Privacy Commissioner (OPC) was integrated into the OAIC on 1 November 2010.

The OAIC brings together the functions of information policy and independent oversight of privacy protection and freedom of information (FOI) in one agency, to advance the development of consistent workable information policy across all Australian government agencies.

### **Comments on the Inquiry**

The OAIC understands that the Bill amends the *Migration Act 1958* (Migration Act) to create a panel of medical, psychological, dental and health experts to monitor, assess and report to the parliament on the health of asylum seekers who are taken to regional processing countries. In particular, the OAIC notes that the panel will be required to collect personal information, including health information, of all persons in offshore detention. The Bill confers specific powers on the panel to obtain information that may be necessary in carrying out its duties. This information may include (but is not limited to) individual records and details of persons employed in the health care and daily treatment of detained persons, etc.<sup>2</sup>

<sup>1</sup> Information about the Committee's inquiry is available at [http://www.aph.gov.au/Parliamentary\\_Business/Committees/Senate\\_Committees?url=legcon\\_ctte/migrati on\\_health\\_care\\_2012/info.htm](http://www.aph.gov.au/Parliamentary_Business/Committees/Senate_Committees?url=legcon_ctte/migrati on_health_care_2012/info.htm)

<sup>2</sup> Explanatory Memorandum to the *Migration Amendment (Health Care for Asylum Seekers) Bill 2012*



## Key Recommendations

The sensitive nature of the personal information that will be collected by the panel means that serious consequences could arise for asylum seekers if the personal information collected by the panel was subject to misuse, loss, unauthorised access or disclosure. For these reasons, it is important that the Bill also include provisions that provide appropriate protection for the privacy of the individuals affected.

Accordingly, the OAIC recommends

1. the panel should ensure it does not collect unnecessary personal information which is not relevant to its functions and that it will collect personal information in an open and transparent way
2. the panel be strongly encouraged to develop a privacy policy that sets out how it will manage the personal information it collects and
3. subclause 198ABA(7) in the Bill be amended to reflect that a report prepared by the panel must not include any *personal* information of asylum seekers.

## Coverage of the Privacy Act

The OAIC considers that the health advisory panel established by the Bill will have obligations under the *Privacy Act 1988* (Cth) (Privacy Act). Further, as the panel will be a body appointed for a public purpose by or under a Commonwealth enactment, it will be defined as an 'agency'<sup>3</sup> for the purposes of the Privacy Act and subject to the Information Privacy Principles (IPPs).<sup>4</sup> The IPPs outline the panel's obligations regarding the handling of personal information, including collection, use and disclosure, the accuracy of personal information and how it is kept secure.

The IPPs set out the minimum information handling requirements for agencies. Although the IPPs do not require agencies to treat health information differently from other personal information, the Guidelines to the IPPs recommend that agencies take extra care if particularly sensitive personal information is involved or using or disclosing personal information is likely to have serious consequences for the person the information is about.<sup>5</sup> Given that the panel will be collecting and handling the sensitive health information of asylum seekers, the OAIC recommends that the panel take extra care to ensure compliance with the IPPs and Guidelines and ensure it does not collect unnecessary personal information which is not relevant to its functions as set out in the Bill.

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(Explanatory Memorandum), p4 available at

[http://www.aph.gov.au/Parliamentary\\_Business/Committees/Senate\\_Committees?url=legcon\\_ctte/migration\\_health\\_care\\_2012/info.htm](http://www.aph.gov.au/Parliamentary_Business/Committees/Senate_Committees?url=legcon_ctte/migration_health_care_2012/info.htm)

<sup>3</sup> See section 6 of the *Privacy Act 1988*. Available at

<http://www.comlaw.gov.au/Details/C2012C00414>

<sup>4</sup> See Information Privacy Principles, section 14 of the *Privacy Act 1988*. Available at

<http://www.comlaw.gov.au/Details/C2012C00414>.

<sup>5</sup> See the Plain English Guidelines to Information Privacy Principles 8-11 p 7, at:

<http://www.privacy.gov.au/materials/types/guidelines>



Further, there may be cultural sensitivities for some asylum seekers about the collection of mental and physical health information. When performing its functions the panel should ensure that it collects personal information in an open and transparent way. Asylum seekers should be provided with notice about what information is being collected about them, where the authority to collect the information lies and any person, body or agency to whom the panel normally discloses that type of personal information.

The IPPs and supporting guidelines are not intended to impede the panel from conducting appropriate health assessments or hinder the provision of health care to asylum seekers. However, the OAIC considers that compliance with the principles and guidelines will help ensure that the panel's information handling practices incorporate appropriate privacy protections for asylum seekers as well as the providers involved in their care.

### ***Privacy Act Reform***

Reforms to the Privacy Act are currently being considered by Parliament following the introduction of the *Privacy Amendment (Enhancing Privacy Protection) Bill 2012* (Privacy Bill). The Privacy Bill will consolidate the National Privacy Principles (NPPs) and the IPPs into a single set of high-level principles – the Australian Privacy Principles (APPs), which will apply to all APP entities.<sup>6</sup>

If the Privacy Bill is passed in its current form, additional obligations will apply to the panel in relation to sensitive information. Proposed APP 3<sup>7</sup> creates additional requirements for agencies with respect to the collection of sensitive information about an individual, including health information. In particular, APP 3.3 provides that an agency must not collect sensitive information about an individual unless the individual consents to the collection of the information and the information is reasonably necessary for, or directly related to, one or more of the entity's functions or activities. In effect, this will mean the panel will need to seek an individual's consent before collecting any health information about them and any collection must be reasonably necessary for, or directly related to, one or more of the panel's functions or activities.

Under the current IPPs, agencies are not required to develop a privacy policy. However, proposed APP 1.3<sup>8</sup> requires the panel to have a clearly expressed and up-to-date policy (the APP privacy policy) about its management of personal information. The panel must take such steps as are reasonable in the circumstances to make its APP privacy policy available free of charge and in an appropriate form. The OAIC strongly encourages the panel to develop a privacy policy, not only in preparation for the proposed Privacy Bill but also because privacy policies enhance the transparency of the operations of agencies.

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<sup>6</sup> Clause 6 of the Privacy Amendment (Enhancing Privacy Protection) Bill 2012 provides that 'APP entity' means an agency or organisation. Therefore the OAIC considers that the panel will meet the definition of APP entity. Available at: <http://www.comlaw.gov.au/Details/C2012B00077>

<sup>7</sup> See Schedule 1—Australian Privacy Principles of the Privacy Amendment (Enhancing Privacy Protection) Bill 2012, available at: <http://www.comlaw.gov.au/Details/C2012B00077>

<sup>8</sup> See Schedule 1—Australian Privacy Principles of the Privacy Amendment (Enhancing Privacy Protection) Bill 2012, available at: <http://www.comlaw.gov.au/Details/C2012B00077>

Privacy policies also give individuals a better and more complete understanding of the sort of personal information an agency holds and the way it handles that information.

***Personal information in panel reports***

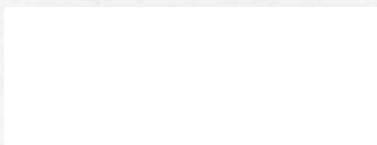
The OAIC notes that in order to safeguard the privacy of individuals in detention, written reports by the panel are not to contain personally identifiable information.<sup>9</sup>

This commitment to protecting the privacy of asylum seekers is welcomed. However, the OAIC recommends that subclause 198ABA(7) of the Bill be amended so that a report prepared by the panel must not include personal information as defined in the Privacy Act.<sup>10</sup> By using the term personal information, it would be clear that reports prepared by the panel could not include any information or opinion, whether true or not, about an individual whose identity is apparent, or can reasonably be ascertained, from the information or opinion.

This would provide stronger privacy protections for asylum seekers than the current form of subclause 198ABA(7). It would ensure that the identity of an asylum seeker could not be reasonably ascertained, despite the removal of personal identifiers, due to the unique characteristics of their circumstances or the through re-identification. Further, it would provide greater alignment between the functions of the panel as described in the Bill and the obligations the panel will have under the Privacy Act.

I hope this submission assists the Committee with its consideration of the Bill.

Yours sincerely



Timothy Pilgrim  
Australian Privacy Commissioner

16 October 2012

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<sup>9</sup> Explanatory Memorandum, p4

<sup>10</sup> Section 5 of the *Migration Act 1958* provides that "personal information" has the same meaning as in the *Privacy Act 1988*.