Submission to Senate Standing Committee on Legal and Constitutional Affairs' Inquiry

Privacy Legislation Amendment (Enforcement and Other Measures) Bill 2022

Introduction:

1. This submission is based upon my current experience in international privacy and data protection frameworks, and as immediate past Privacy Commissioner of NSW. I am affiliated Associate Professor, Department of Information Policy and Governance, Faculty of Media and Knowledge Sciences, University of Malta.

2. To meet the timeframe for receipt of submissions, this submission is very brief, only addressing in the broadest terms the major points of concern relating to amendments to the *Privacy Act, 1988*. The submission does not consider the proposed changes to the ACMA Act nor comment on proposed changes that are regarded as positive, to the *Privacy Act, 1988* such as the extra-territorality amendments and the enhanced enforcement powers for the Commissioner to protect privacy.

3. The important backdrop for this Bill, and the ongoing review of the *Privacy Act, 1988,* is that while Australia is a signatory to international human right treaties such as the International Convenant of Civil and Political Rights (ICCPR), its citizens – unlike those in many other countries - do not have a:
    a) Constitutional right to privacy
    b) Bill of Rights enshrining human rights including privacy
    c) Privacy tort of action
    d) Privacy law approaching current international best practice

4. Despite the concerns set out below, the Bill should proceed as the reality is, given the Australian history of the slow and seemingly reluctant reform of its overall privacy framework including the *Privacy Act 1988*, this Bill may be the only change that eventuates in the term of the current Parliament.

Points of concern:

5. Key elements missing:

i. While giving the impression of action, amendments only increasing penalties for data breaches, do not address the real problems such as the unnecessary collection and retention of personal information by both the Australian Government and businesses; the glaring exemptions currently available in the Privacy Act, and the lack of real redress for Australian citizens whose privacy is breached.

ii. Reform must stop unnecessary data collection. Data retention requirements under various laws require a major overhaul.

iii. The OAIC itself remains unable to levy fines, and the proposed penalties can only be used for serious or repeated interferences with privacy. The effectiveness of these new penalties is accordingly reduced.

iv. The Australians affected by recent breaches will not be assisted by these tougher penalties – they do nothing to compensate these individuals nor provide victims of future breaches avenues for redress. The monetary returns from penalties applied do not benefit affected individuals.

6. The proposed amendments fail to establish meaningful, long-term privacy protections for ordinary Australians:

i. Along with these new enforcement provisions, the Government should be introducing a tort that allows Australians to sue for serious breaches of privacy.

ii. There have been around ten Human Rights Commission reports across Australia about the need for this redress for Australians. The case has been established; action is required.

7. The emphasis upon enforcement provisions presupposes breaches will be identified:

i. Shortcomings in the *Privacy Amendment (Notifiable Data Breaches) Act 2017* scheme have been identified and its necessary to address shortcomings.

ii. The Inquiry should also consider making a recommendation to ensure whistleblower protections are adequate for the purpose of ensuring breaches are brought to the attention of regulators.

I hope these points will assist the Inquiry. I would be happy to provide additional information to the Committee as required.

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