

7 November 2023

Senator Nita Green
Chair
Senate Legal and Constitutional Affairs Committee
PO Box 6100
Parliament House
CANBERRA ACT 2600

By email: legcon.sen@aph.gov.au

Dear Chair

Response to question on notice: Identity Verification Services Bill 2023

The Law Council of Australia appreciates the opportunity to have appeared before the Senate Legal and Constitutional Affairs Committee on 30 October 2023 in relation to the Identity Verification Services Bill 2023 (**IVS Bill**) and the Identity Verification Services (Consequential Amendments) Bill 2023.

In the course of the public hearing, the Deputy Chair of the Committee, Senator Scarr, asked that the Law Council take on notice the question of what should be included in the IVS Bill as a 'bare minimum' in relation to additional privacy protections.¹

As noted by several contributors to the inquiry, the preferred approach to addressing identified issues within the reform proposal is to ensure that the privacy frameworks underpinning the rights and obligations in the IVS Bill are adequate. Ideally, reforms to the *Privacy Act 1988* (Cth) that have been agreed, or agreed in principle, by the Australian Government will be implemented prior to the IVS Bill coming into effect. Such an approach would alleviate many of the concerns raised about the IVS Bill, including the undesirability of a fragmented approach to privacy and data reform.

However, the Law Council appreciates the timing challenges associated with this approach, and highlights the following measures that we believe would improve the proposed framework:

- amending clause 9 of the IVS Bill to require participating entities to obtain *express* consent in relation to the collection, use and disclosure of biometric and other sensitive information;
- introducing financial penalty provisions for non-compliance with requirements in the IVS Bill as they relate to obligations of parties to participation agreements;
- expanding the oversight and assessment powers of the Information Commissioner at clause 40 to align with the assessment powers currently contained at subsection 33C(1) of the Privacy Act;

¹ Commonwealth, *Proof Committee Hansard*, Senate Legal and Constitutional Affairs Committee (30 October 2023), 21.

- including a mandatory requirement that the Information Commissioner be consulted prior to the development of any rules made pursuant to clause 44 of the IVS Bill; and
- including an interim review of the operation of the IVS Bill to be conducted after 12 months of operation, with a specific focus on privacy protections.

Finally, the Law Council continues to hold the view that additional clarity is desirable for the standards of compliance, set out in proposed Parts 2 and 3 of the IVS Bill. For example, clause 28 seeks to address 'use' and 'disclosure' of identification information by the Department, however it is silent on obligations that attach to 'holding' information.

Most risks will arise from the misuse and disclosure of information, hence the need to expressly address these parts of the data lifecycle, as the IVS Bill has done. However, security risks can arise from simply holding the information, and the Law Council believes there is scope for the IVS Bill to better address the relevant responsibilities attaching to this retention. It is important that these anomalies be clarified to avoid ambiguities and potentially unintended consequences.

While this is not an exhaustive list of areas for improvement, the Law Council is of the view that the above matters are areas that should be prioritised, if the Committee is inclined to recommend further changes to the IVS Bill.

To discuss further, please contact

Yours sincerely

Greg McIntyre SC
President-Elect