



Mr Tim Watling
Secretary
Senate Education, Employment and Workplace Relations Committee
PO Box 6100
Parliament House
CANBERRA ACT 2600

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

Dear Mr Watling

Inquiry into the Student Identifiers Bill 2013

Thank you for your email of 25 March 2013 and your invitation to make a submission to the inquiry of the Standing Committee on Education, Employment and Workplace Relations (the Committee) into the Student Identifiers Bill 2013 (the Bill).¹

The Office of the Australian Information Commissioner

The OAIC was established by the *Australian Information Commissioner Act 2010* 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 (the 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 in one agency, to advance the development of consistent workable information policy across all Australian government agencies.

The Commissioners of the OAIC share two broad functions:

- the FOI functions, set out in s 8 of the AIC Act — providing access to information held by the Australian Government in accordance with the *Freedom of Information Act 1982*, and
- the privacy functions, set out in s 9 of the AIC Act — protecting the privacy of individuals in accordance with the *Privacy Act 1988* (the Privacy Act) and other legislation.

The Information Commissioner also has the Information Commissioner functions, set out in s 7 of the AIC Act. Those comprise strategic functions relating to information management by the Australian Government.

1

www.aph.gov.au/Parliamentary_Business/Committees/Senate_Committees?url=eet_ctte/student_identifiers/index.htm

On 12 March 2014, amendments to Privacy Act will commence, as introduced by the Privacy Amendment (Enhancing Privacy Protection) Act 2012. The amended Privacy Act will include a set of new, harmonised, privacy principles for both the public and private sector, called the Australian Privacy Principles (APPs). These new principles will replace the existing Information Privacy Principles (IPPs) that currently apply to the public sector and the National Privacy Principles (NPPs) that currently apply to the private sector.

The Unique Student Identifier (USI) scheme is currently scheduled to commence operation from 1 January 2014. As such, it will operate primarily under the amended Privacy Act. The OAIC's comments in this submission are framed with reference to the amended Privacy Act.

History of the OAIC's engagement in this matter

On 30 October 2012, the OAIC entered into a Memorandum of Understanding (MOU) with the Department of Industry, Innovation, Science, Research and Tertiary Education (the Department) regarding the implementation of the USI scheme. Specifically, the Department agreed to fund the OAIC to provide independent advice on privacy issues in relation to the USI scheme, and regulatory privacy oversight of the USI scheme.

The term of the MOU is from 30 October 2012 to 30 June 2015. The MOU recognises the OAIC's role as an independent advisor to the Australian Government and an independent statutory office with regulatory functions. Accordingly, the MOU does not fetter the Commissioner in the performance of his functions.

The OAIC has provided policy advice about the privacy issues associated with the USI scheme at various stages in the development of the legislation. The OAIC's submission to the Department's public consultation on the USI scheme legislative package is available on the OAIC's website.² The OAIC and the Department have worked collaboratively to address many of the issues raised in this submission.

Comments on the Student Identifiers Bill

The OAIC supports the introduction of enabling legislation for the USI scheme that appropriately protects an individual's student identifier and associated personal information. Such legislation is essential to establish and maintain public confidence in the new scheme.

The OAIC considers that the Privacy Act reflects community expectations of the appropriate level of protection that should be afforded to personal information in Australia. Accordingly, incorporating the core principles that underpin the Privacy Act into other privacy accountability frameworks will help ensure that they remain consistent with community values and expectations.

The OAIC therefore welcomes the approach taken in the Student Identifiers Bill 2013 (the SI Bill) to reflect the principles in the Privacy Act by outlining specific circumstances in which particular entities may collect, use or disclose an individual's student identifier. The OAIC also notes that the protection of records, destruction requirements and authenticated vocational education and

² See 'Consultation on the Legislative Package for the Unique Student Identifier: Submission to the Department of Industry, Innovation, Science, Research and Tertiary Education (February 2013)' at www.oaic.gov.au/publications/submissions

training (VET) transcript provisions broadly reflect the security and access principles in the Privacy Act.

There are two areas where the OAIC considers that the SI Bill would benefit from greater clarity. These issues are discussed below.

Interaction between the Student Identifiers Bill and the Privacy Act

The SI Bill establishes a privacy oversight function by the Information Commissioner in relation to the handling of the student identifier by the SI Agency, individuals, Registered Training Organisations (RTOs), VET admission bodies, VET-related bodies and other entities.

Subclause 22(1) of the SI Bill deems an act or practice that contravenes section 10 in relation to personal information about an individual, or section 15 or 16 in relation to a student identifier of an individual, to be an interference with the privacy of that individual for the purposes of the Privacy Act.

Subclause 22(2) purports to give the Information Commissioner jurisdiction under the Privacy Act to investigate alleged contraventions of clauses 10, 15 and 16 of the SI Bill by entities that are covered by the SI Bill, but which would otherwise not be covered by the Privacy Act. However, the OAIC considers that the current drafting of subclause 22(2) may not achieve the purpose for which it is intended.

Subclause 22(2) is currently worded in such a way as to require an investigation to be opened under s 40 of the Privacy Act to bring an entity, that may otherwise not be covered by the Privacy Act, under its jurisdiction. However, the OAIC notes that generally the Commissioner's jurisdiction over an entity needs to be established *before* an investigation of the entity can be commenced. This step is also necessary to enable the use of the Commissioner's powers that operate before an investigation is commenced, such as s 41 or s 42 of the Privacy Act.

By way of background, Part V of the Privacy Act contains a number of provisions relevant to the Commissioner's investigation of complaints. Under s 36 of the Privacy Act, an individual may complain to the Commissioner about an act or practice that may be an interference with the privacy of the individual. Generally, an act or practice by an entity that is not subject to the jurisdiction of the Privacy Act cannot be an interference with privacy for the purposes of the Act.

When a complaint about an act or practice is received, an initial assessment is made to determine if the complaint should be the subject of preliminary inquiries (s 42), investigated (s 40) or declined (under one of the decline powers in s 41). This initial assessment includes determining whether the matter should be proposed to be declined because the matter falls outside of jurisdiction.

The OAIC believes that to ensure the correct interaction between the Privacy Act and the SI Bill and to ensure that Subclause 22(2) achieves its purpose, it should be amended to say: 'an act or practice of an entity that contravenes section 10, 15 or 16 is the subject of ~~an investigation by~~ [replace with: 'a complaint to'] the Information Commissioner under Part V of the Privacy Act'. This would then allow for the full use of the Commissioner's powers under Part V of the Privacy Act.

The OAIC believes that its suggested amendment to the SI Bill would deem an entity to be an organisation at the point that a complaint is received, thus establishing the Commissioner's jurisdiction over that entity and enabling the use of all the Commissioner's powers under Part V of the Privacy Act.

Provision of privacy notices

The OAIC recommends that the SI Bill is amended to require an RTO, VET admission body or other entity to provide a privacy notice to a student when the entity applies for a USI on the student's behalf.

The APPs will require an agency or organisation that collects personal information from an individual to take reasonable steps to notify the individual of certain matters at or before the time of the collection, or, if that is not practicable, as soon as practicable after the collection (APP 5). These matters are listed in APP 5.2, and include:

- the purposes for which the information is being collected
- whether information about the individual will be collected from other sources
- the consequences for the individual if the information is not collected
- who the information may be disclosed to
- how the individual may access and correct their information
- how the individual may make a complaint.

The SI Agency, to be created under the SI Bill, is an 'agency' under the Privacy Act. Therefore when an individual applies for a student identifier directly to the SI Agency, the SI Agency is obliged to provide a privacy notice to the individual, in accordance with APP 5. However, in some cases a RTO, VET admission body or other entity that applies for a student identifier on an individual's behalf may not be covered by the Privacy Act or by equivalent State or Territory legislation. In this situation, the entity may not be obligated to provide a privacy notice to the individual at the time that the individual's personal information is collected for the USI application.

In response to this, the Department has advised the OAIC that it is intended that a privacy notice will appear on screen the first time that an individual logs on to the online USI system, regardless of the route that has been taken to apply for the student identifier. The Department has also advised that it will provide RTOs and other entities with a template privacy notice, and will encourage entities to include this notice on their admission forms.

The OAIC acknowledges that these strategies are likely to go some way to mitigate the risk that some individuals will not receive privacy notices at the time of collection. However, the OAIC considers that best privacy practice would be to include a provision about privacy notices in the SI Bill. This would be consistent with the inclusion of provisions in the SI Bill of all other aspects of the information flows that will occur under the USI scheme – collection, use, disclosure and destruction of personal information and the student identifier.

Publication of a Privacy Impact Assessment

The OAIC encourages agencies and organisations to complete a Privacy Impact Assessment (PIA) for projects or policy proposals where personal information is to be handled. PIAs provide opportunities to clearly outline the information flows and identify the privacy risks and benefits in

a project or proposal, and to formulate strategies to mitigate any risks. PIAs also provide an opportunity for an agency to proactively address community concerns about aspects of a project that could potentially have significant impacts on privacy. For more complex projects a series of PIAs may be required, using an iterative process of assessment as the project scope and detail is refined.

The OAIC also encourages entities to make PIAs, or comprehensive summaries, publically available as soon as practicable after completion, and considers that consultation with key stakeholders is an important part of the PIA process. The OAIC believes there is great value in demonstrating that an entity has considered the privacy risks at various stages in the project, and that the PIA and stakeholder engagement has helped to shape the project's development. Publication of PIAs provides transparency and gives stakeholders and the community confidence that privacy considerations have been 'built in' to the project.

The OAIC notes that the Department has completed two PIAs in relation to the USI scheme thus far. The Department published the Executive Summary of its latest PIA, prepared by Minter Ellison Lawyers and Salinger Privacy, as part of its public consultation on the USI scheme legislative package. The OAIC understands that the Department plans to complete a third PIA, which will include an evaluation of the effectiveness of the IT system design in addressing privacy risks. The IT system will play a significant role in the USI scheme meeting the protections afforded to personal information under the Privacy Act.

The OAIC welcomes the Department's use of an iterative PIA process and the publication of an Executive summary of the latest assessment. The OAIC looks forward to the completion of the third PIA to ascertain the specifics of how the IT system will operate. The OAIC also encourages the Department to make the third PIA publicly available as soon as possible after it is completed.

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

Yours sincerely


Timothy Pilgrim
Australian Privacy Commissioner

29 April 2013