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20 June 2013

**Liberty Victoria Submission to the
Senate Standing Committee on Legal and Constitutional Affairs
Inquiry into the
*Privacy Amendment (Privacy Alerts) Bill 2013***

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This is a public submission and not confidential.

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Liberty Victoria is one of Australia's leading human rights and civil liberties organisations. It is concerned with the protection and promotion of civil liberties throughout Australia. As such, Liberty is actively involved in the development and revision of Australia's laws and systems of government. Further information on our activities may be found at www.libertyvictoria.org.au.

Liberty Victoria welcomes the opportunity to comment on the above Bill. However before doing so, we note with extreme disappointment that public comment opened on 18 June 2013 and closed two days later on 20 June 2013. This is a not conducive to open and transparent Government and it is extremely unlikely that many members of the public or any other interested party will have had time to review the Bill let alone prepare submissions to this Committee. Privacy is an important issue and with increasing amounts of personal data being collected by both the private and public sectors, the issue as to how that information is used and protected is of high public interest.

We now provide the following comments on the Bill itself.

The Bill imposes a data breach notification requirement on entities in certain limited circumstances and where an entity contravenes this requirement, it will have interfered with the privacy of an individual. **The purpose of the legislation is commendable**

In essence, the Bill requires an entity to notify individuals of serious data breaches where they are *significantly affected* by unauthorised access or disclosure of personal information which *will* result in a real risk of serious harm to any of the individuals to whom the personal information relates (or the personal information is of a kind specified in the regulations). This extends to the loss of personal information in circumstances where unauthorised access or disclosure may occur.

Liberty Victoria believes the notification criteria are limited to an unnecessarily narrow cohort. Notification of the data breach to the individual affected should be made as a matter of course but remedies similar to civil penalty provisions should be available where significant risk of serious harm has been created by the data breach. Liberty agrees that harm should be defined to include harm to reputation, economic harm and financial harm; s26ZE.

Notification of serious data breaches applies in relation to personal information, credit reporting information, credit eligibility information or tax file number information; s26ZB. Liberty generally supports this approach although we note that there are some inconsistencies when referring to ‘tax file numbers’ or just ‘file numbers’ which should be addressed, see s26ZA in particular.

The proposed legislation requires notification by a statement which must be provided to the Commissioner, followed generally by the taking of reasonable steps to notify individuals significantly affected by the breach. In some cases this also extends to publishing the statement on the entity’s website and in one newspaper in each State. The statement must identify the entity, contain a description of the serious data breach believed to have occurred, the information affected and recommendations on what individuals should do about it. This is similar to breaches of environmental protection legislation and provides a beneficial remedy as well as a deterrent to lax procedures for organisations and entities upon whom the requirement is imposed. Liberty Victoria agrees with these requirements and notes that the regulations should require the published

statement to meet minimum requirements as is common with notice requirements in the OHS and environmental field.

In terms of communicating the serious data breach, the Bill provides that the entity can notify individuals by whatever means normally used by the entity to engage with the individual; s26ZB(3). This is a sensible, technology neutral approach which we agree with as it should ensure communication of the serious data breach is effective and timely.

Whilst Liberty Victoria welcomes the general notification provisions contained in the Bill we are concerned that a large part of the Bill is dedicated to exceptions, the breadth of which which Liberty opposes.

Enforcement bodies

Subsection 26ZB(4) exempts enforcement bodies from notifying individuals or publishing serious data breaches if it believes on reasonable grounds that it would prejudice one or more enforcement related activities conducted by it (or on its behalf). Whilst it is foreseeable that in some limited circumstances enforcement bodies would have need of this, it is also foreseeable that it could be used to avoid disclosing almost any breach by those bodies. Further, the following subsection allows the Commissioner to grant an exception which could be relied upon rather than relying on the enforcement body's own determination of what might prejudice 'enforcement related activities'. In our submission a process is required to ensure a degree of accountability and transparency and oversight of the decisions not to report on or notify of serious data breaches and Freedom of Information provisions should be amended to permit access by individuals and the Privacy Commissioner within a period after any active investigations is completed

Commissioner exemption

Subsection 26ZB(5) allows the Commissioner to exempt an entity from subsection (1) where satisfied that it is in the public interest to do so. However this exemption should be limited to subsections (1)(g) & (h) and not provision of the statement to the Commissioner. As noted above, it might be preferable to allow certain classes of matter to be referred to the Commissioner by enforcement bodies seeking a recommendation as to disclosure or non disclosure or exemption under this part,

rather than the enforcement body clothing itself with total immunity and exercising their own broad exemption for all classes of data breach for all time.

So called 'secrecy' exception

Subsection (10) is rather misleadingly entitled 'exception – inconsistency with secrecy provisions' and yet contains a broader exception where the notification of the breach would be inconsistent with any law of the Commonwealth that prohibits or regulates the use or disclosure of the information. This should be reconsidered.

Section 26ZC enables the Commissioner to direct an entity to prepare a breach notification statement and take steps to notify those significantly affected and also to publish details of the instance where the Commissioner believes on reasonable grounds that a serious data breach has occurred. However the Commissioner cannot give such a direction where any of the other exceptions apply; see subsections (5)-(7). Liberty strongly supports the Commissioner's power to make such a direction and further recommends removing or reducing the breadth of the exceptions. By inserting the words 'and appropriate in the circumstances to do so', the Commissioner would only make such a direction where an entity had failed to take adequate or appropriate action itself.

Given the time available, this submission is necessarily brief, but should the Committee wish us to address any further revision of the Bill Liberty would be pleased to assist.