

10 October 2024

Committee Secretary
Senate Legal and Constitutional Affairs Legislation Committee
PO Box 6100
Parliament House
Canberra ACT 2600

By electronic lodgement

Dear Committee Secretary

Privacy and Other Legislation Amendment Bill 2024

The Queensland Office of the Information Commissioner (**OIC**) welcomes the opportunity to make a submission to the Legal and Constitutional Affairs Legislation Committee's inquiry into the Privacy and Other Legislation Amendment Bill 2024 (**Bill**).

OIC is an independent statutory body that reports to the Queensland Parliament. The Information Commissioner is an Officer of Parliament and is charged with functions under the *Right to Information Act 2009* (Qld) (**RTI Act**) and the *Information Privacy Act 2009* (Qld) (**IP Act**) to, respectively, facilitate greater access to government-held information and oversee safeguarding of personal information collected, used and held by public sector agencies.

OIC's statutory functions include mediating privacy complaints made against Queensland public sector agencies, issuing guidelines on privacy best practice, initiating privacy education and training, and conducting regulatory audits and reviews to monitor agency performance and compliance with the RTI Act and the IP Act. Our office also reviews agency decisions about access and amendment to information.

Our submission

OIC made two submissions on the Attorney-General's Department *Review of the Privacy Act 1988 (Cth) Issues Paper* (27 November 2020) and *the Privacy Act Review Discussion Paper* (10 January 2022). Relevant passages from our submissions are set out below and a copy of each submission is published on our website.¹

We note the Bill's explanatory memorandum² and the Minister's second reading speech³ confirm the Bill is only implementing the first tranche of reforms to the *Privacy Act 1988* (Cth) (**Privacy Act**) that were agreed by the Government in the [Government Response Privacy Act Review Report](#) (September 2023) (**Government Response**).

¹ [Submission dated 27 November 2020 to the Attorney-General's Department in response to the Review of the Privacy Act 1988 \(Cth\) Issues Paper](#). [Submission dated 10 January 2022 to the Attorney-General's Department in response to the Privacy Act Review Discussion Paper](#).

² [Page 3](#).

³ [Speech](#), page 22, 12 September 2024, House of Representatives.

OIC notes that a range of matters canvassed in the Government Response to the Privacy Act Review remain to be progressed.⁴ OIC urges the Commonwealth Government to progress these matters soon, as we consider their implementation will significantly strengthen and enhance privacy protections for Australians.

The balance of this submission does not address every matter the subject of the Bill before the Committee. Rather, it responds to matters in the Bill that were the subject of our earlier 2020 and 2022 submissions.

1. Protections

a. Automated decision making

OIC welcomes the increased transparency that would be provided by the new obligations on entities subject to the Australian Privacy Principles (**APP**). This includes information relating to automated decision making in an entity's privacy policy under new APP 1.7 to 1.9. We also note that a breach of APP 1.7 would be a contravention of the new civil penalty provision in new section 13K.⁵

In our earlier 2020 and 2022 submissions, OIC recommended the adoption of legislative restrictions based on those prescribed in the European Union General Data Protection Regulation (**GDPR**). We note that, unlike the GDPR, relevant provisions in the Bill⁶ do not create a right for individuals:

- not to be subject to a decision which is based solely on automated processing, and which produces legal effects;⁷ or
- to request information about how decisions using automated decision making technology have been made, as well as the significance and envisaged consequences of those decisions for an individual.⁸

The explanatory notes to the Bill state:

- Whether or not a decision could reasonably be expected to significantly affect the rights or interests of an individual depends on the circumstances. For example, a decision's effect on a child or person experiencing vulnerability may be considered significant compared to its effect on other individuals.*
- The effects must be more than trivial, and must have the potential to significantly influence the circumstances of the individual concerned.*
- APP 1.9 sets out more information about the types of decisions that may affect a person's rights or interests, and examples.*

OIC notes that, while APP 1.9(d) lists some of the types of decisions that may affect a person's rights or interests, APP 1.7(b) ultimately confers on an APP entity the

⁴ Including, for example, amending the definition of 'personal information', the introduction of a 'right to erasure', and implementation of a direct right of action for individuals to seek redress for an interference with privacy.

⁵ Item 87 in part 15 of schedule 1.

⁶ Schedule 1, part 15.

⁷ Regulation (EU) 2016/679, Recital 71.

⁸ Regulation (EU) 2016/679, Article 15.

discretion to assess whether the use of automated decision making ‘*could reasonably be expected to significantly affect the rights or interests of an individual*’.

OIC understands that the Australian government is continuing to work on proposals to introduce mandatory guardrails for AI in high risk settings.⁹ OIC welcomes the government’s commitment to provide further legislative protections of individuals’ personal information in this context.

2. Regulation and enforcement

a. Enforcement powers and civil penalty provisions

OIC welcomes the Bill’s expanded enforcement powers for the Australian Office of the Information Commissioner (**OAIC**), and tiered civil penalty regime. As noted in our 2022 Submission:

OIC supports the adoption of additional enforcement mechanisms and powers for the OAIC to support an updated and strengthened Privacy Act, including the proposal to create tiers of civil penalty provisions to give the OAIC more options so they can better target regulatory responses (24.1) and provide OAIC with the power to require an Australian Privacy Principle (APP) entity to identify, mitigate and redress actual or reasonably foreseeable loss or damage suffered by individuals.

OIC also considers the effectiveness of additional enforcement mechanisms and powers requires adequate resourcing of the regulator. As submitted previously by OIC, a strong legislative privacy framework together with appropriate resourcing will assist in ensuring OAIC can regulate, guide and champion greater protection of the community from harm and position Australia to meet evolving future challenges.

OIC reiterates the need for the OAIC to be appropriately resourced to implement the proposed legislative changes and to continue to effectively carry out its enforcement functions across the broad remit of the public and private sectors. In addition, OIC submits such resourcing should extend to investment in the OAIC’s technological capabilities to assist it in the efficient detection and monitoring of privacy practices, and in its proactive campaigns to promote best practice privacy by regulated agencies and organisations.

b. Statutory tort for serious invasion of privacy

Consistent with our earlier submissions, OIC supports the Bill’s proposed introduction of a cause of action in tort for a serious invasion of privacy¹⁰ modelled on the Australian Law Reform Commission report, *Serious Invasions of Privacy in the Digital Era* (ALRC Report 123).

c. Eligible data breach declarations

Finally, OIC notes provisions enabling the making of Ministerial declarations, excusing APP entities from complying with Privacy Act obligations where they are impacted by an eligible data breach.

⁹ [Department of Industry, Science and Resources, Safe and responsible AI in Australia: Proposals paper for introducing mandatory guardrails for AI in high risk settings, September 2024.](#)

¹⁰ Schedule 2.

From 1 July 2025, Queensland government agencies will be subject to a Mandatory Notification Data Breach scheme, which is partly modelled on Part III C of the Privacy Act as it currently stands. OIC will monitor the operation of the proposed declaration provisions, as we commence administration and oversight of the Queensland scheme.

We hope the above assists the Committee in its inquiry.

Should you require further information regarding the above matters, please contact us at administration@oic.qld.gov.au or on 07 3234 7373.

Yours sincerely

Joanne Kummrow
Information Commissioner