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Committee Secretary: House of Representatives Standing Committee on Social Policy and Legal Affairs
House of Representatives
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To the House of Representatives Standing Committee on Social Policy and Legal Affairs,

Inquiry into the Privacy Amendment (Enhancing Privacy Protection) Bill 2012

Liberty Victoria welcomes the opportunity to make a submission to the House of Representatives Standing Committee on Social Policy and Legal Affairs Inquiry into Privacy Amendment (Enhancing Privacy Protection) Bill 2012(Clth) (the Bill).

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.

In general Liberty supports the decision of the Government to amend the *Privacy Act 1988* (Clth). The new unified approach, embodied in the proposed Australian Privacy Principles (the APPs), is much clearer and easier to understand than the regime it replaces. The importance of clarity in relation to far reaching legislation that affects the civil liberties of all cannot be underestimated.

The enforcement provisions effectively provide a lay-down measure for the sharing of personal information not only between government agencies, but across national borders (see the newly proposed object (f)). However the ongoing failure to remedy the scope of the Act (i.e. exclusions to various areas and groups) is indicative of an underlying disinterest in protecting privacy; it introduces the concept of a serious and repeated interference with privacy (cl.50, sch.4) and yet does not define what that means (it is not defined in the draft legislation or under the existing Act).

Generally we support the inclusion of objects in an Act. However in this case they are remarkably lacking, object (d) talks about "promoting" (rather than "ensuring") responsible

handling of personal information; (f) is to facilitate the free flow of information across national borders whilst ensuring privacy is "respected" (not "protected"); (g) is to provide a means for individuals to "complain about" alleged breaches... not to prevent or even resolve; and (h) is to implement Australia's international privacy obligation (in the singular rather than the multiple treaties to which we are signatories which impose privacy obligations).

Whilst many of the changes are positive, for example the increased transparency regime found in proposed APP 1, Liberty Victoria is concerned that the legislation fails to safeguard privacy to an adequate extent in relation to the following matters:

Definitions

1. Item 12 – Court proceedings information

The proposed amendment permits information about a judgment of a Court to be included in a person's *credit information*. Whilst the explanatory memorandum proposes that only information about the judgment may be permitted, Liberty submits that the Bill is framed in a way that is likely to lead to incorrect or irrelevant information being included in a person's *credit information*. This is because the proposed provision permits information 'about a judgment' rather than information contained in a final judgment, the former being much broader than the latter. Liberty suggests altering the definition to exclude information that is not contained in a final judgment of a Court.

2. Item 14 – De-identified

'De-identified' information is information about a person who is not identified or is not reasonably identified. In relation to the term 'not reasonably identified' the following description is given in the explanatory memorandum:

The new definition will refer to an individual who is, 'reasonably identifiable'. Whether an individual can be identified or is reasonably identifiable depends on context and circumstances. While it may be technically possible for an agency or organisation to identify individuals from information it holds, for example, by linking the information with other information held by it, or another entity, it may be that it is not practically possible. For example, logistics or legislation may prevent such linkage. In these circumstances, individuals are not 'reasonably identifiable'. Whether an individual is reasonably identifiable from certain information requires a consideration of the cost, difficulty, practicality and likelihood that the information will be linked in such a way as to identify him or her.

Liberty submits that in the current age of easily accessed computerised databases and interconnectivity there is a clear need for strong laws to prevent a person's identity from becoming easily determinable. In these circumstances it is appropriate that safeguards be put in place so that a person cannot be identified after their information has been 'de-identified'.

3. Item 20 – Enforcement related activity

It is proposed that the definition of 'enforcement related activity' be extended from the definition found in the existing National Privacy Principle 2.1 (h) to include 'surveillance activities, intelligence gathering activities or monitoring activities.' Liberty

submits that this proposed extension is far too extensive and fails to adequately balance the needs of enforcement agencies with the wider public interest of the community. There is neither a definition of ‘surveillance activities’ nor ‘monitoring activities’ found in the Bill and, as such, there is little to guide enforcement agencies and agencies to whom they are responsible as to what is legitimate and illegitimate use of private information. Further, enforcement agencies that conduct intelligence gathering activities are, in many respects, immune from external investigation as to the propriety of their activities. Liberty submits that in these circumstances there is a real and alarming potential for the improper use and disclosure of private information including biometric data.

4. Item 36 – Personal Information

The proposed definition introduces the unqualified concept of ‘reasonably identified.’ In the existing regime personal information includes information ‘about an [individual](#) whose identity is apparent, or can reasonably be ascertained, from the information or opinion.’ Information which, when combined with other sources, leads to the identity of a person is not, under the existing law, ‘personal information.’ In this respect the amendment is an improvement in that it appears to contemplate that a person’s identity could be ascertained by compiling information from various sources. In this respect the explanatory memorandum states:

The new definition will refer to an individual who is, ‘reasonably identifiable’. Whether an individual can be identified or is reasonably identifiable depends on context and circumstances. While it may be technically possible for an agency or organisation to identify individuals from information it holds, for example, by linking the information with other information held by it, or another entity, it may be that it is not practically possible. For example, logistics or legislation may prevent such linkage. In these circumstances, individuals are not ‘reasonably identifiable’. Whether an individual is reasonably identifiable from certain information requires a consideration of the cost, difficulty, practicality and likelihood that the information will be linked in such a way as to identify him or her.

Liberty submits, as stated above, that current information storage and data access technology increases the ease with which a person’s identity can be discovered. The explanatory memorandum appears to acknowledge this observation. As such, Liberty submits that the Act should provide specific safeguards to ensure that an individual is not classified as not reasonably identifiable, when in practice the individual’s identity is easily determined.

5. Item 6 - APP Entity

An APP entity is defined to mean an agency or an organisation. This definition does not include small businesses nor does it include individuals. Item 21 defines entity and the result is that some small business operators will become subject to privacy rules in relation to credit reporting.

Liberty Victoria submits that the Australian Privacy Principles should apply to individuals and small business operators engaged in commercial activities. Whilst the application of privacy law to credit reporting is positive, the opportunities for small businesses and individuals to impose upon an individual’s privacy are broad and as such their use of personal information should be subject to regulation.

6. Item 31 – Non-profit Organisation

The definition of non-profit organization has been extended to include racial, ethnic within 'cultural', as well as 'recreational' purposes. Liberty approves of this extension.

The Australian Privacy Principles

Liberty Victoria supports the introduction of a new consolidated privacy regime. The APPs provide such a development. However, there are aspects of the APPs, and the regime that they operate in, that Liberty submits are inadequate to properly protect the privacy of individuals:

7. APP 2 – Anonymity and Pseudonyms

An APP entity is not required to comply with APP 2 where it is 'impracticable' for the APP entity to deal with individuals who have not identified themselves. Liberty Victoria submits that the threshold of impracticability is too low. Liberty submits that APP entities should be required to comply with APP 2 unless it is not possible to carry out their operations without respecting an individual's choice to remain anonymous.

8. APP 3 – Collection of information

APP 3 introduces the 'reasonably necessary' test. This is an improvement on the test of 'necessary' as it appears in the NPP 1.1. However, Liberty submits that organizations should not collect sensitive personal information unless their primary operations cannot be realised without the information and the information has been collected with consent. Similarly, APP 3.4 (e) defines the thresholds for non-profit organization's collection and use of sensitive personal information. Liberty Victoria submits that the threshold of 'relates to the activities of the organisation' is totally inadequate to protect the privacy of individuals. This observation is amplified where it is acknowledged that many businesses operate under both a for profit and a non-profit structure, but practically, treat both entities as a single business.

Liberty Victoria further submits that the definitions of both 'a permitted general situation' and 'a permitted health' situation are framed too broadly and are open to abuse under APP 3.4 (b) & (c).

APP 3.5 requires that an APP entity must collect personal information only by lawful and fair means. The current NPP 1.2 also qualifies this restriction by requiring information be collected only in a way that is not 'unreasonably intrusive'. Liberty Victoria supports the retention of this further safeguard.

APP 3.6 requires that personal information must only be obtained from the individual, unless 'it is unreasonable or impractical to do so.' The explanatory memorandum states that the provision is framed in a way that will permit enforcement agencies to investigate people without their knowledge. Liberty Victoria submits that the provision should be redrafted in a way that more accurately and specifically reflects this goal. The proposed provision makes no reference to the very specific purpose explained in the explanatory memorandum and in that respect Liberty submits that the proposed provision should be reframed to reflect that, and no other, purpose.

9. APP 4 – Unsolicited information

APP 4.3 requires that ‘the entity must, as soon as practicable but only if it is lawful and reasonable to do so, destroy the information or ensure that the information is de-identified.’ Liberty Victoria supports the apparent increase in obligations as compared with NPP 1.3. However, Liberty submits that in addition to this clause, a maximum time limit should be imposed after which it is deemed that the information was not destroyed ‘as soon as reasonably practicable.’

10. APP 6 – Use or disclosure of personal information

Liberty Victoria is concerned about the apparent extension of the definition of ‘permitted health situation’ to include ‘management, funding and monitoring of a health service.’ The need to collect information in relation to the provision of actual health services is more legitimate because the public interest in the standards of actual health service delivery are great. Further, health practitioners are subject to a raft of rules as to the relationship between themselves and their patients. The necessity in relation to mere administration is not evident. Combined with the effect of APP 6.3, discussed below, APP 6 permits too great an intrusion and use of personal information for substantially unrelated tasks.

APP 6.3 permits an enforcement agency to collect information without the individual’s permission from a non-enforcement agency. The explanatory memorandum states:

APP 6.3 will provide that an agency will be allowed to disclose biometric information or templates if the recipient is an enforcement body and the disclosure is conducted in accordance with the guidelines made by the Commissioner. This approach recognises that non-law enforcement agencies have current, and will have future, legitimate reasons to disclose biometric information and templates to enforcement bodies. A practical example of the effect of this option would be to enable, consistent with the Commissioner’s guidelines, the automatic provision of biometric information and templates by a non-enforcement agency into a database operated by an enforcement body.

In the strongest terms Liberty Victoria submits that this approach to data collection and use across agencies is disproportionate to the need and has the potential for serious abuse. It would damage the community’s trust in non-enforcement agencies because they would be perceived as being, and would become, the agents of enforcement agencies. In relation to the provision of medical services and biometric data, the invasive consequences will be grave. Liberty Victoria submits that the proposed provision should be removed.

11. APP 7 – Direct marketing to individuals

APP 7.3 provides that an organization may use or disclose information about an individual for the purposes of direct marketing if the individual has consented or it is impracticable to obtain that consent. Liberty Victoria submits that there is not reason to qualify the consent requirement in this circumstance. This is because the purpose of the provision is the regulation of direct marketing. How it is that a person could be the successful target of direct marketing where they cannot be contacted is not evident. For this reason Liberty Victoria submits that the qualification in APP 7.1 (b) (ii) should be removed.

12. APP 8 – Cross border disclosure of personal information

APP 8 appears stronger than NPP 9 and in that respect Liberty Victoria supports the increased regulation in an area in which privacy intrusion is particularly difficult to prevent. However, Liberty remains concerned that the scope of the safeguards in the legislation is not adequate to properly ensure that overseas enforcement agencies do not behave in a manner that is inconsistent with the APPs.

13. APP 11 – Access to personal information

Liberty Victoria submits that the removal of the qualification ‘imminent’ from the ‘serious threat’ exceptions is neither necessary nor in the public interest. The ‘imminent’ qualification should be retained. Further, refusal to permit a person to access their own information should not be subject to a determination that the request is ‘frivolous’. Clearly, the public have a genuine interest in being able to check records about themselves that may be used for both government and private purposes. For that reason, Liberty submits that access should only be refused where the request is vexatious.

Further, Liberty Victoria submits that access to personal information should not be accessible by reference to FOI standards. In this respect Liberty submits that the ALRC’s recommendation of an enforceable right of access and correction is appropriate and should not be reserved for future consideration as foreshadowed in the explanatory memorandum.

14. APP 13 – Correction

APP 13.2 (b) requires that, if an APP entity corrects personal information about an individual... and the individual requests that the entity notify the APP entity that first supplied it with the incorrect information, the first mentioned entity must notify the other APP entity. Liberty Victoria submits that the individual should not be required to request correction in this manner. As soon as an error is discovered all APP entities that have relied on the erroneous information should be required to correct their own records and inform any other entity on which they originally relied.

Thank you for the opportunity to make this submission. Please contact Professor Spencer Zifcak, Georgia King-Siem or Hugh Crosthwaite through the Liberty Victoria office on 9670 6422 or info@libertyvictoria.org.au if we can provide any further information or assistance. This is a public submission and is not confidential.