



THE LAW SOCIETY
OF NEW SOUTH WALES

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3 November 2022

Dr James Popple
Chief Executive Officer
Law Council of Australia
DX 5719 Canberra

By email: natalie.cooper@lawcouncil.asn.au

Dear Dr Popple,

Senate Committee Inquiry into the Privacy Legislation Amendment (Enforcement and Other Measures) Bill 2022

Thank you for the opportunity to contribute to the Law Council's submission in relation to the Senate Legal and Constitutional Affairs Committee's Inquiry into the Privacy Legislation Amendment (Enforcement and Other Measures) Bill 2022 ("the Bill"). The Law Society's Privacy and Data Law Committee has contributed to this submission.

Increased penalties under section 13G of the *Privacy Act 1988*

The Law Society supports in principle the amendments set out in Item 14 of Schedule 1 to the Bill, which effectively increase the penalties under section 13G of the *Privacy Act 1988* ("Privacy Act") for serious or repeated privacy interferences. We note these amendments mirror the proposed maximum penalties in the Australian Consumer Law ("ACL"), under the Treasury Laws Amendment (More Competition, Better Prices) Bill 2022.

We support the harmonisation of the maximum penalty provisions in the Privacy Act and ACL, in accordance with the recommendations of the *Digital Platforms Inquiry* Final Report.¹ However, we suggest consideration be given to clarifying the meaning of 'benefit' under proposed section 13G(3), which provides:

- (3) The amount of the penalty for a contravention of subsection (1) by a body corporate is an amount not more than the greater of the following:
 - (a) \$50,000,000;
 - (b) if the court can determine the value of the benefit that the body corporate, and any related body corporate, have obtained directly or indirectly and that is reasonably attributable to the conduct constituting the contravention—3 times the value of that benefit;
 - (c) if the court cannot determine the value of that benefit—30% of the adjusted turnover of the body corporate during the breach turnover period for the contravention.

¹ Australian Competition and Consumer Commission, *Digital Platforms Inquiry*, Final Report (2019) 35.

Whereas a breach of the ACL by a corporation may, evidently, produce a quantifiable, commercial benefit, the potential ‘benefit’ to a corporation resulting from serious or repeated data mismanagement is, in our view, significantly less clear. As such, we question the effectiveness of subsection 13G(3)(b) as a deterrent for corporations from engaging in problematic data practices. We suggest consideration be given to reframing this subsection to reflect the harm caused by serious privacy infringements, rather than the value of the benefit obtained by the breaching entity.

Enhanced enforcement powers for the Office of the Australian Information Commissioner

Item 18 of Schedule 1 to the Bill amends the Privacy Act by introducing a new section 26WU, effectively empowering the Australian Information Commissioner (“the Commissioner”) to obtain information or documents relating to eligible data breaches. While the Law Society supports, in principle, enabling the Commissioner to conduct comprehensive and expeditious investigations relating to eligible data breaches, the broad powers proposed under section 26WU, both to obtain and retain information, raise a number of practical and procedural issues.

Subsection 26WU(4) outlines the procedural requirements for a written notice given by the Commissioner to provide information, produce a document or answer a question under subsection 26WU(3). While the Commissioner is required to state the manner and time in which information is to be provided, we suggest consideration be given to amending the subsection, such that the manner and timeframe specified by the Commissioner must be reasonable or practicable in the circumstances. This qualification is, in our view, necessary to counterbalance the significant powers granted to the Commissioner under section 26WU, noting that under section 26WU(6), the sole mechanism available to entities to oppose the disclosure of information under section 26WU, is to obtain a certificate from the Attorney-General under section 70 of the Privacy Act.

We also note, in any event, that the increased enforcement powers proposed under section 26WU are contingent upon a significant increase in funding and resourcing for the Office of the Australian Information Commissioner (OAIC) in order to take practical effect.

Enhanced information sharing powers for the Office of the Australian Information Commissioner

Item 20 of Schedule 1 to the Bill seeks to enhance the Commissioner’s ability to share information. Under proposed section 33A, the Commissioner is enabled to share information or documents with a receiving body for the purpose of the Commissioner or the receiving body exercising its powers, or performing its functions or duties.

Notwithstanding the limitations set out in section 33A(3)-(5), there is, in our view, a significant risk that the regime of information sharing proposed under section 33A may act as a deterrent for entities that would otherwise pursue early and voluntary engagement with the regulator.

As noted in the OAIC’s *Privacy regulatory action policy*:

The OAIC’s preferred regulatory approach is to facilitate voluntary compliance with privacy obligations and to work with entities to ensure best privacy practice and prevent privacy breaches.²

² Office of the Australian Information Commissioner, *Privacy regulatory action policy* (May, 2018) 3.

In 2020-21, voluntary notifications comprised approximately 15% of the notifications received by OAIC under the Notifiable Data Breaches (“NDB”) scheme.³

The sharing of information by the Commissioner with other bodies, including ‘enforcement bodies’ under section 33A(2)(a), has the potential to undermine the voluntary aspects of OAIC’s regulatory approach, which may be necessary to mitigate or resolve privacy issues at an early stage.

The risk of disincentivising voluntary reporting might be compounded by the indefinite, and potentially expansive list of bodies authorised to receive information under section 33A(2). Alternative complaint bodies, for example, as defined by section 50(1) of the Privacy Act, include any external dispute resolution schemes which may be recognised by the OAIC on an ongoing basis. We suggest consideration be given to amending this provision to provide an exhaustive list of relevant bodies authorised to receive information under the Privacy Act. We note that such a provision could be modelled on section 155AAA of the *Competition and Consumer Act 2010*.

We also note that section 33A(3) provides:

- (3) The Commissioner may only share information or documents with a receiving body under this section if:
 - (a) the information or documents were acquired by the Commissioner in the course of exercising powers, or performing functions or duties, under this Act; and
 - (b) the Commissioner is satisfied on reasonable grounds that the receiving body has satisfactory arrangements in place for protecting the information or documents.

Given the Commissioner’s broad discretion under this section, we suggest consideration be given to limiting the information or documents that may be shared by the Commissioner to that which is necessary and proportionate to the exercise of the receiving body’s powers, or performance of its functions and duties. In relation to section 33A(3)(b), we suggest consideration be given to amending this subsection, to the effect that the Commissioner must be satisfied on reasonable grounds that the receiving body has ‘secure’ arrangements in place for protecting the information or documents. Such a requirement would, in our view, provide a more appropriate safeguard for the receipt and storage of sensitive privacy information.

Application of amendments

Item 45 of Schedule 1 to the Bill sets out the arrangements for the application of the amendments. The Law Society supports Item 45(3) which specifies that the increased penalties under section 13G of the Privacy Act do not apply in relation to an act done or practice engaged in before the commencement of this item.

However, we note with some concern the retrospective nature of several of the Bill’s provisions, including:

- The Commissioner’s ability to disclose information or documents under sections 33A and 33B that was obtained prior to the commencement of these items; and
- The Australian Communication and Media Authority’s ability to disclose authorised information under subsection 59D(1) of the *Australian Communications and Media Authority Act 2005* that was obtained prior to the commencement of this item.

³ Office of the Australian Information Commissioner, *Annual Report 2020-21*, 36.

While there may be practical considerations that necessitate the retrospective nature of these provisions, we do not consider these considerations have been adequately explained or justified in the Explanatory Memorandum. Similarly, we do not consider the regulatory impacts of these retrospective provisions, which will inevitably affect existing matters and previous submissions made under mandatory reporting schemes, have been adequately disclosed.

Accordingly, the Law Society does not support the application of the amendments to information obtained prior to their commencement, in the absence of significant further detail regarding the regulatory impact of these provisions on existing privacy matters.

Fragmentary approach to privacy law reform

The Law Society supports a holistic, consistent approach to privacy and data law reform. We are concerned that the introduction of the Bill, independently of the Privacy Act Review, may unnecessarily increase the regulatory burden on affected entities, as well as complicate the ongoing review of the substantive provisions of the Act. Accordingly, the Law Society supports bringing forward the Review of the Privacy Act as a matter of priority, and calls for a roadmap for the harmonisation of Australia's privacy and data laws as part of the Review process.

We hope this input is of assistance. Please contact Nathan Saad, Policy Lawyer, on (02) 9926 0174 or nathan.saad@lawsociety.com.au in the first instance if you have any queries.

Yours sincerely,

A handwritten signature in black ink, appearing to be 'JvP', with a long horizontal flourish extending to the right.

pp. Joanne van der Plaats
President