

Senate Legal and Constitutional Affairs Legislation Committee

Attorney-General's Department

Hearing date: 30 October 2023

Hansard page: 44

David Shoebridge asked the following question:

Senator SHOEBRIDGE: But nobody sees money. Could I ask you about bundled consent. What is there in the bill to prevent the practice of bundled consent happening?

Ms Inverarity: I think I would have to take that one on notice. I'm sorry; I'm not able to answer that for you right now.

The response to the question is as follows:

Consistent with guidance provided by the Office of the Australian Information Commissioner (OAIC),¹ the department understands that bundled consent refers to the practice of an APP entity (as defined in the *Privacy Act 1988*) 'bundling' together multiple requests for an individual's consent to a wide range of collections, uses and disclosures of personal information, without giving the individual the opportunity to choose which collections, uses and disclosures they agree to and which they do not. This practice has the potential to undermine the voluntary nature of the consent.

The OAIC's guidance sets out a range of matters that an entity could consider when contemplating bundled consent:

- it is practicable and reasonable to give the individual the opportunity to refuse consent to one or more proposed collections, uses and/or disclosures
- the individual will be sufficiently informed about each of the proposed collections, uses and/or disclosures, and
- the individual will be advised of the consequences (if any) of failing to consent to one or more of the proposed collections, uses and/or disclosures.

The Identity Verification Services Bill 2023 requires participation agreements to provide for the obtaining of a person's consent to the collection, use and disclosure of identification information when requesting an identity verification service (subclause 9(2)(b)). An individual must be informed of a range of matters related to the use of the identity verification services (see subclauses 9(2)(c) and 9(3)), including information about:

- how the party seeking consent uses identity verification services
- how facial images will be used and disposed of
- whether any facial images will be retained or used for purposes other than those for which the identity verification service is to be requested

¹ The OAIC's guidance material is available at www.oaic.gov.au/privacy/your-privacy-rights/your-personal-information/consent-to-the-handling-of-personal-information.

- what legal obligations the party seeking to collect the identification information has in relation that collection
- what rights the individual has in relation to the collection of the identification information
- the consequences of the individual declining to consent
- where the individual can get information about making complaints relating to the collection, use and disclosure of the identification information for the purposes of requesting and provision of identity verification services, and
- where the individual can get information about the operation and management of the approved identity verification facilities by the department in connection with the requesting and provision of identity verification services.

In combination, these requirements support the provision of voluntary and informed consent, in line with the OAIC's guidance.

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Paul Scarr asked the following question:

Senator SCARR: Okay, that is understood. Can I move to the issue around the clarification of consent?

Ms Inverarity: Certainly.

Senator SCARR: Page 5 of the submission of Digital Rights Watch says:

Much of the IVS Bill is dependent on the concept of "consent." For example, section 35(1) includes a carve out that permits an entrusted person to make a record of, disclose or access protected information "if the person has consented." We further note that point 356 of the Explanatory Memorandum says: "The concept of 'consent' in the Bill is intended to include express consent or implied consent."

Why is it necessary to include implied consent?

Ms Inverarity: We've noted that submission and have been doing some thinking about whether implied consent is appropriate in the context of the bill, and that is something that we'll be considering further. Again, of course, any amendments are a matter for government, but we're certainly considering whether the bill could on the face of it provide for an express consent requirement.

Senator SCARR: Similarly, had you given some thought to the civil penalty clause beforehand? Was there any thinking as to why it was expressed or implied?

Ms Inverarity: To be honest, I'm not entirely sure about that. We can take it on notice and see if there's anything we can provide. But, to my knowledge, I'm not sure whether that was given the same consideration.

The response to the question is as follows:

Subclause 35(1) is intended to be interpreted consistent with the definition of consent in the *Privacy Act 1988* (Cth). Section 6 of the Privacy Act defines consent to mean express consent or implied consent. This intention is reflected in paragraph 356 of the Explanatory Memorandum for the Identity Verification Services Bill 2023 and Identity Verification Services (Consequential Amendments) Bill 2023.

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Paul Scarr asked the following question:

Senator SCARR: I'll just gather myself! I'll quote from the Law Council submission. It says: Many of the proposed definitions in the Bill relating to 'identification information' naturally overlap with terminology related to data management, and obligations attaching to personal information, as defined by the Privacy Act ... That said, some of the operative provisions in the Bill use slightly different terminology, for example:

- the definition of 'personal information' in the Privacy Act references information 'about' an individual; while
- the provisions in the Bill defining 'Face-matching service information' and 'DVS information' use the words 'relating' or 'relates to' an individual.

Is there any reason for the difference in definitions? Are we meant to read something into that, or is it just by the way?

Ms Inverarity: We've adopted the terminology that we think is appropriate in light of the framework that the bill is creating. I'm not sure that I can speak to whether there's an actual legal difference in the operation of those two terms, but I'm very happy to take that on notice and come back to you with an answer.

Senator SCARR: If you want to—because the Law Council say in their submission, at paragraph 16:

Although the words 'relate to' and 'about' are often used interchangeably in general usage, they have come to have specific meaning in privacy and data protection matters.

So it could well be that that's something you might discuss with the Law Council—to work out what they're trying to get to there.

Ms Inverarity: Certainly—very happy to.

The response to the question is as follows:

The Identity Verification Services Bill 2023 uses the term information that 'relates to' a person (rather than information 'about' a person) to clarify that identification information includes technical information, inferred information and any other information where that information relates to the individual, in the sense it can be seen to provide details about their activities or their identity and the connection is not too tenuous or remote.

This is consistent with the Privacy Act Review (see discussion at part 4.2 of the Review and proposal 4.1), available at www.ag.gov.au/rights-and-protections/publications/privacy-act-review-report.

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Paul Scarr asked the following question:

Senator SCARR: A perennial issue. I sit on the scrutiny committee, so this is an issue we come to quite often. In terms of the delegation of the secretary's powers, the Law Council of Australia suggest, at paragraph 44 of their submission:

Consideration should ... be given to limiting the scope of the Secretary's delegation power, such as by:

- specifying certain powers that can be delegated (rather than 'all or any' powers); or
- providing that the Secretary's powers can only be delegated to a certain level of SES employee (such as SES Band 2 and above).

That second bullet point is something we typically see in other legislation just to give comfort as to the level the power can be delegated to. What was the thinking that went into the delegation principles that are contained in the bill as is?

Ms Inverarity: We think it's appropriate that all of the powers be able to be delegated, and we think it's appropriate for them to be delegated to SES employees. I think that's quite a common approach where it's not appropriate for powers to be delegated to more junior officers who don't have the experience and judgement that an SES employee would have.

Senator SCARR: In terms of the seniority of SES employees, the Law Council are suggesting SES band 2.

Ms Inverarity: They're suggesting it be held at a more senior level. That would be highly likely to inhibit our ability to operationalise the framework, if it were to be held at that level.

Senator SCARR: True. How many SES band 2 employees are there?

Ms Inverarity: In the Attorney-General's Department? I would have to take that on notice.

Senator SCARR: Could you take it on notice.

Ms Inverarity: Within my group, for example, there are three—three SES band 2s within the National Security and Criminal Justice Group.

Senator SCARR: Doesn't that give you enough capacity to delegate just to that level and not below?

Ms Inverarity: We would find that challenging if it were only held at the SES band 2 level.

Senator SCARR: Is that right?

Ms Inverarity : I do think so.

Senator SCARR: At what level do you think something like this would typically—

Ms Inverarity : There's only one SES level below band 2, which is band 1. So for the next—

Senator SCARR: How many officers, approximately, just to give me a feel?

Ms Inverarity : Maybe 12 in the group. There may be more. I'm happy to take it on notice. In each division there may be three or four SES band 1s.

The response to the question is as follows:

As at 30 September 2023, there are a total of 29 SES Band 2 officers and 144 SES Band 1 officers in the Attorney-General's Department which includes the Australian Government Solicitor (AGS), Royal Commission into Defence and Veteran Suicide (DVSRC) and Disability Royal Commission (DRC). The figures do not include officers on long term leave*.

These numbers reflect actual SES officers, which refers to both SES who substantively own their position and those who may be temporarily acting in a SES role for more than three months.

The table below details the split of SES officers within the department.

	SES Band 1		SES Band 2		Total
	Substantive	Acting	Substantive	Acting	
AGD (not including AGS, DRC and DVSRC)	38	5	13	2	58
AGS	94	1	12	-	107
DRC	1	1	-	1	3
DVSRC	3	1	-	1	5
Total	136	8	25	4	173

*Staff on long term leave include officers on paid and unpaid leave for 3 months or more.