

# Questions from Senator Gallagher to the Attorney-General's Department

*Note: In providing responses to these questions, the Department should consult with the DTA, AGD and any other Commonwealth agency involved in the development of COVIDSafe (to the extent it is necessary to do so).*

## Questions about the Privacy Amendment (Public Health Contact Information) Bill 2020

**Q1. In a media statement on 5 May 2020, the Law Council recommended that “the legislation should prescribe the core parameters or minimum design specifications of the COVIDSafe app and data store themselves, rather than leaving them to be determined from time-to-time. For example, the legislation should provide that the app must operate on a strictly voluntary, opt-in basis at all times, with accessible mechanisms for users to ‘opt out’”.**

### **(a) What is your response to this recommendation?**

The Bill achieves this outcome by setting out comprehensive protections and applying significant penalties to any breach of those protections. The Bill includes provisions to ensure the use of the app is entirely voluntary.

In particular, the Bill already contains protections that address the Law Council’s examples, including:

- ensuring a person cannot be required to use the COVIDSafe app, or be disadvantaged because they choose not to use COVIDSafe.
- consent is required prior to any upload of COVIDSafe app data from a user’s personal device to the National COVIDSafe Data Store, and
- providing that if a person ‘opts-out’ of COVIDSafe through deletion of the app, no further information may be collected from that device, and allowing individuals the right to request deletion of their registration data from the National COVIDSafe Data Store.

### **(b) What are the likely consequences / implications of implementing this recommendation?**

As the Bill already contains all the core protections required to ensure that use of the app is voluntary and that data is appropriately collected, handled and stored in a manner consistent with community expectations, it is not clear what further specifications the Law Council is proposing. Placing further specific parameters or minimum design specifications around the COVIDSafe app may have unintended consequences in preventing the app operating effectively as the app is undergoing continuous development in line with technological advances in this space. Further, it would be inappropriate to apply criminal penalties to enforce the application of technical design specifications.

### **(c) What is the Government’s position on this recommendation?**

The Bill already addresses this recommendation as it contains comprehensive protections. However, to the extent that the Law Council is proposing that detailed technical design specifications be

legislated and enforced through criminal or civil penalties, this would not be appropriate. The Government is committed to ensuring that the COVIDSafe app is developed and operates in a way that is voluntary, unobtrusive, secure, and fulfils its purpose of improving the speed and accuracy of contact tracing. The protections for individuals, and limitations on the handling of COVIDSafe app data reflect this.

**Q2. The Law Council also supported “prohibitions on creating and using ‘derivative data’ from data that has been collected by the app; and reverse engineering or re-identifying data that has been ‘de-identified’”.**

**(a) What is your response to this recommendation?**

The Bill prohibits any collection, use or disclosure of COVIDSafe app data, including deriving, aggregating or de-identifying COVIDSafe app data unless it is for a permitted purpose. The only permitted purpose for de-identifying COVIDSafe app data is for providing statistics on the total number of COVIDSafe registrations.

**(b) What are the likely consequences / implications of implementing this recommendation?**

The Bill already effectively addresses the concern underlying this recommendation.

**(c) What is the Government’s position on this recommendation?**

The Government has implemented protections to address the concerns leading to this recommendation.

**Q3. The Law Council also recommended that the Privacy Amendment (Public Health Contact Information) Bill 2020 be amended to include:**

- **provisions requiring the Privacy Commissioner to inspect and certify that the data deletion obligations at the end of the app’s period of operation have been complied with;**
- **periodic reporting obligations while the app is operational, with these reports tabled in Parliament; and**
- **streamlined arrangements to manage the interaction of investigations by the Privacy Commissioner with law enforcement investigations of offences for breaching the prohibitions on the use of data, under which the Commissioner is not obliged to discontinue investigations.**

**In respect of each of these recommendations:**

**(a) What is your response?**

Provisions requiring the Privacy Commissioner to inspect and certify that the data deletion obligations at the end of the app’s period of operation have been complied with

The Bill includes an obligation on the data store administrator at subsection 94P(2), to delete all COVIDSafe app data from the National COVIDSafe Data Store as soon as practicable after the day determined by the Minister for Health under subsection 94Y(1). This is a binding requirement on the data store administrator.

Subsection 94P(3) of the Bill requires that as soon as reasonably practicable after the deletion required by subsection 94P(2), the data store administrator must notify both the Minister for Health and the

Information Commissioner that the COVIDSafe app data has been deleted. This is an additional protection which has been added to the Bill since the exposure draft release.

The Information Commissioner may conduct an assessment of the data store administrator under their power in section 94T of this Bill to determine whether the acts or practices of an entity (which includes the data store administrator) comply with the requirements of the Bill.

As an independent regulator, the Information Commissioner has the discretion to determine whether, and in what way, it is appropriate to assess the data store administrator's compliance with the Bill after notification that COVIDSafe app data has been deleted from the National COVIDSafe Data Store.

#### Periodic reporting obligations while the app is operational, with these reports tabled in Parliament

Section 94ZA of the Bill requires that the Minister for Health must, as soon as practicable after the six month period of the Bill being enacted (and at the end of each subsequent six month period), prepare a report on the operation and effectiveness of COVIDSafe and the National COVIDSafe Data Store in relation to the previous six month period.

Under subsection 94ZA(3), the Minister for Health must table the report in each House of Parliament within 15 sitting days of the report being prepared.

Additionally, the Information Commissioner must also publish a report each six months reporting on the performance of the Commissioner's functions and exercise of the Commissioner's powers during the previous six month period. Subsection 94ZB(3) requires that this report be published on the Information Commissioner's website.

Both of these reporting obligations have been added to the Bill since the exposure draft release.

#### Streamlined arrangements to manage the interaction of investigations by the Privacy Commissioner with law enforcement investigations of offences for breaching the prohibitions on the use of data, under which the Commissioner is not obliged to discontinue investigations.

The Bill sets out a clear process for the Information Commissioner to refer matters to law enforcement if the Information Commissioner forms the opinion that a criminal offence under the Bill may have occurred.

Section 94U of the Bill sets out that, where the Information Commissioner refers a matter to the Commissioner of Police or Director of Public Prosecutions, the Information Commissioner must discontinue the investigation except to the extent that it concerns matters unconnected with the offence that the Commissioner believes may have been committed.

If the Commissioner of Police or Director of Public Prosecutions decide that a matter will not (or no longer be) subject to the proceedings of an offence, that person must write to the Information Commissioner informing them of this. In this circumstance, the Commissioner may reinitiate their investigation.

Since the exposure draft release, an additional provision has been included in section 94U of the Bill that allows for the Information Commissioner's investigation to continue if the Commissioner of Police or Director of Public Prosecutions gives a notice that such an investigation would not jeopardise or otherwise affect a criminal investigation or proceedings.

These measures streamline investigations between the Information Commissioner and the Commissioner of Police to the extent practical without the risk that an Information Commissioner investigation may prejudice a police investigation into a criminal matter.

- (b) What are the likely consequences / implications of implementing the recommendation?**
- (c) What is the Government's position on the recommendation?**

Provisions requiring the Privacy Commissioner to inspect and certify that the data deletion obligations at the end of the app's period of operation have been complied with

The Bill provides that the Information Commissioner will be notified when the data store administrator has deleted COVIDSafe app data from the National COVIDSafe Data Store and has the discretion to assess whether the data store administrator has complied with its obligations under the Bill. The Information Commissioner may conduct such an assessment at any time they feel is appropriate.

This addresses the recommendation while maintaining the Information Commissioner's independence and discretion in the exercise of her functions and powers.

Periodic reporting obligations while the app is operational, with these reports tabled in Parliament

This recommendation has been addressed in the Bill.

Streamlined arrangements to manage the interaction of investigations by the Privacy Commissioner with law enforcement investigations of offences for breaching the prohibitions on the use of data, under which the Commissioner is not obliged to discontinue investigations.

Streamlined arrangements are provided for in the Bill while ensuring that risks of concurrent investigations prejudicing a criminal investigation by police are appropriately mitigated.

**Q4. In respect of the "data store administrator" concept in the Privacy Amendment (Public Health Contact Information) Bill 2020:**

- (a) Why was the inclusion of this concept, which would allow the "data store administrator" to be changed from time to time, considered necessary or desirable?**

The 'data store administrator' concept ensures that appropriate obligations are placed on an entity responsible for the proper functioning, integrity and security of the COVIDSafe app and the National COVIDSafe Data Store. Expertise from a number of Commonwealth Government agencies may assist in ensuring that COVIDSafe operates effectively, and that the data is handled and protected in a manner consistent with community expectations and the obligations under the Bill.

The delegation approach ensures that agencies with the greatest technical expertise, and the highest capability to deliver the COVIDSafe app effectively, are able to do so. The determination power in subsection 94Z of the Bill limits which agencies can be delegated as a data store administrator by expressly precluding enforcement bodies (as defined in paragraphs (a) to (ea) of subsection 6(1) of the *Privacy Act 1988*, intelligence agencies, the Australian Geospatial-Intelligence Organisation, or the Defence Intelligence Organisation).

Each agency under a determination remains legally responsible for its respective conduct as the 'data store administrator'. Any data store administrator is required to comply with the strict

COVIDSafe app data handling requirements contained in the Bill and will be regulated by the Office of the Australian Information Commissioner in regard to those functions.

- (b) Does the Secretary of the Department of Health intend to appoint one agency or multiple agencies to act as the “data store administrator” for different purposes? If so, please provide details.**

As this question relates to a decision of the Secretary of the Department of Health, the Department of Health will respond to this question.

## **Privacy Commissioner**

**Q5. In light of the new responsibilities that the Privacy Amendment (Public Health Contact Information) Bill 2020 would confer on the Privacy Commissioner, will the Government now appoint a standalone, dedicated Privacy Commissioner? If not, why not?**

The Government is confident that the Australian Information Commissioner and Privacy Commissioner, Ms Angelene Falk, can continue to effectively perform the roles of both the Information Commissioner and Privacy Commissioner.

**Q6. Would it not help to build public confidence in the COVIDSafe app if Australia had a full-time Privacy Commissioner rather than a commissioner who is forced to split her time between three very different jobs? If not, why not?**

Refer to the response to question 5 above.

**Q7. The Attorney-General’s Department told the Committee that the Office of the Australian Commissioner did not require additional resources to enable it to fulfil its new statutory responsibilities under the Privacy Amendment (Public Health Contact Information) Bill 2020. But on 22 October 2019, Ms Falk told Senate Estimates that the Office of the Australian Commissioner required additional resources to fulfill its existing statutory responsibilities. If the OAIC is already underfunded, what is the basis of the Attorney-General’s Department’s confidence that no additional resources are required?**

The Government recognises that the Information Commissioner and Office of the Australian Information Commissioner (OAIC) have an important regulatory role in protecting the privacy of Australians, including those using the COVIDSafe app. The Government provided an additional \$25.1 million over three years to the OAIC in the 2019-20 Budget. The privacy oversight functions in the Bill are consistent with the existing role of the Information Commissioner and OAIC.

**Q8. Has the Attorney-General’s Department specifically discussed the question of resourcing – in the context of this Bill – with the Privacy Commissioner? If so, on what date?**

See response to question 7.

**Q9. Did the Privacy Commissioner tell the Department that the Office of the Australian Commissioner did not require additional resources to enable it to fulfil her new responsibilities under the Privacy Amendment (Public Health Contact Information) Bill 2020? If so, when?**

No. See response to question 7.

## **Implementation of the recommendations in the Privacy Impact Assessment**

**Q10. In respect of each of the 19 recommendations in the Privacy Impact Assessment completed by Maddocks, please provide the following information:**

- (a) Has the recommendation been implemented in full?**
- (b) Where a recommendation has not been implemented in full:**
  - I. What progress has been made in implementing the recommendation?**
  - II. When will the recommendation be implemented in full**

As the Privacy Impact Assessment was commissioned and responded to by the Department of Health, the Department of Health will respond to this question.