



Law Council
OF AUSTRALIA

Privacy Amendment (Re-identification Offence) Bill 2016

Senate Legal and Constitutional Affairs Committee

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About the Law Council of Australia

The Law Council of Australia exists to represent the legal profession at the national level, to speak on behalf of its Constituent Bodies on national issues, and to promote the administration of justice, access to justice and general improvement of the law.

The Law Council advises governments, courts and federal agencies on ways in which the law and the justice system can be improved for the benefit of the community. The Law Council also represents the Australian legal profession overseas, and maintains close relationships with legal professional bodies throughout the world.

The Law Council was established in 1933, and represents 16 Australian State and Territory law societies and bar associations and the Law Firms Australia, which are known collectively as the Council's Constituent Bodies. The Law Council's Constituent Bodies are:

- Australian Capital Territory Bar Association
- Australian Capital Territory Law Society
- Bar Association of Queensland Inc
- Law Institute of Victoria
- Law Society of New South Wales
- Law Society of South Australia
- Law Society of Tasmania
- Law Society Northern Territory
- Law Society of Western Australia
- New South Wales Bar Association
- Northern Territory Bar Association
- Queensland Law Society
- South Australian Bar Association
- Tasmanian Bar
- Law Firms Australia
- The Victorian Bar Inc
- Western Australian Bar Association

Through this representation, the Law Council effectively acts on behalf of more than 60,000 lawyers across Australia.

The Law Council is governed by a board of 23 Directors – one from each of the constituent bodies and six elected Executive members. The Directors meet quarterly to set objectives, policy and priorities for the Law Council. Between the meetings of Directors, policies and governance responsibility for the Law Council is exercised by the elected Executive members, led by the President who normally serves a 12 month term. The Council's six Executive members are nominated and elected by the board of Directors.

Members of the 2016 Executive as at 1 January 2016 are:

- Mr S. Stuart Clark AM, President
- Ms Fiona McLeod SC, President-Elect
- Mr Morry Bailes, Treasurer
- Mr Arthur Moses SC, Executive Member
- Mr Konrad de Kerloy, Executive Member
- Mr Michael Fitzgerald, Executive Member

The Secretariat serves the Law Council nationally and is based in Canberra.

Acknowledgement

The Law Council is grateful for the assistance of the Business Law Section's Privacy Law Committee (**the Privacy Law Committee**), National Criminal Law Committee and the Law Society of NSW in the preparation of this submission.

Executive Summary

1. Thank you for the opportunity to provide this submission to the Senate Legal and Constitutional Affairs Committee's (**the Senate Committee**) inquiry into the Privacy Amendment (Re-identification Offence) Bill 2016 (**the Bill**).
2. The Bill would amend the *Privacy Act 1988* (Cth) (**the Privacy Act**) by introducing provisions which prohibit conduct related to the re-identification of de-identified personal information published or released by Commonwealth entities (**the Data**). The Bill, if passed, would introduce specific offences and civil penalty provisions which provide that the data must not intentionally be re-identified, and re-identified personal information must not intentionally be disclosed.
3. Entities that contravene the prohibitions contained in the Bill face a criminal offence punishable by imprisonment for a maximum of 2 years or 120 penalty units or a civil penalty of up to 600 penalty units. Proposed subsection 16E(1) notes the ancillary offence provisions in Part 2.4 of the *Criminal Code Act 1995* (Cth) (**Criminal Code**) apply in relation to the offence created by subsection 16E(7) of the Bill. Specifically, the inchoate offences in section 11.1 (attempt), section 11.2 (aiding, abetting, counselling or procuring), section 11.4 (incitement) and section 11.5 (conspiracy) would apply.
4. The offences would apply retrospectively to conduct engaged in, on, or after 29 September 2016. There are also reverse onus provisions in relation to which the defendant bears an evidential burden.
5. The Law Council recognises the apparent intention of the Bill, to protect private information from improper re-identification of data and the misuse of such data, is important. However, there are a number of concerning features with the implementation of the proposals, which are set out in this submission.
6. Key recommendations of this submission include:
 - The move to a criminal approach of punishment for re-identification of Data warrants further investigation and testing prior to enactment to ensure that unviable offences are not created.
 - The Privacy Act contains restrictions on use and disclosure of de-identified information in relation to credit reporting information (section 20M) and that prohibition is subject to compliance with the Rules as made by the Commissioner under the *Privacy (Credit Related Research) Rule 2014*. Further consideration should be given to a similar approach or mechanisms for the Data.
 - If steps are taken to create additional sanctions or controls for uses of, and specifically, the reverse engineering of de-identified data, serious consideration should be given to protection of other data sets not just the Data.
7. These structural issues are particularly concerning in light of the current drafting of the Bill which is also discussed in this submission.

8. If the above is not accepted by the Senate Committee and the Bill is to proceed, the Law Council makes the following key recommendations which should as a minimum be addressed:
- The Bill or Explanatory Memorandum to the Bill should be amended to clarify whether proposed subsection 16D(2) is intended to give authorisation under Australian Privacy Principle (**APP**) 3.6(a)(ii).
 - The criminal offences should only apply to prospective conduct.
 - The reverse onus provisions should be removed from the Bill.
 - Proposed paragraph 16D(3)(a) should be amended to clarify that the contract needs to be between the entity, as the contracted service provider, and the *responsible* agency, and not just a contract between the entity and for example, another agency.
 - The exemption in proposed subsection 16D(3) should extend to sub-contractors.
 - If the intention is to facilitate better access and availability of data across agencies, then there should be a proper framework for data sharing, as is proposed in the Productivity Commission report¹, as opposed to giving a blanket exemption to agencies.
 - The Office of the Australian Information Commissioner (**OAIC**) should consider running a public education campaign to increase awareness of the proposed new offences.
9. The Law Council welcomes the pending the review of the Bill as part of the Senate Committee process and would welcome an opportunity to address any questions that the Senate Committee may have or expand on the above issues where required.

¹ Australian Government Productivity Commission, *Productivity Commission Draft Report: Data Availability and Use* (2016).

Structural issues

De-identified vs identified or personal information

10. The definition of 'de-identified' in section 6 (1) of the Privacy Act in turn depends on the definition of 'personal information' also defined in section 6 (1) of the Privacy Act. The scope of the definition of personal information is not always a clear cut matter especially where it concerns information about 'an identifiable or reasonably identifiable individual'. The issue was the subject of an appeal from the Administrative Appeals Tribunal to the Full Federal Court. The matter was heard on 23 August 2016 by the Federal Court and a decision is pending.²

Criminal sanctions in privacy regime

11. The notion of criminal sanctions is new to the privacy regime and is potentially disruptive and unworkable. As the Senate Committee would appreciate, the Privacy Act has been focused on investigation of potential breaches of the Privacy Act and the imposition of civil penalties in serious and or systemic breaches of privacy.
12. The move to a criminal approach warrants further investigation and testing, not least because of the higher onus of proof required and the reverse onus provisions. This will make any enforcement difficult and in some cases virtually impossible. This risks important protections (as envisaged by this Bill) becoming unviable to successfully prove in practice and therefore illusory. This is further compounded by the uncertainty as to the definition of personal information (as noted above) which is likely be a threshold issue in many complex matters.

Inconsistency with current approaches to de-identified data

13. The Privacy Act contains restrictions on use and disclosure of de-identified information in relation to credit reporting information (section 20M) and that prohibition is subject to compliance with the Rules as made by the Commissioner under the *Privacy (Credit Related Research) Rule 2014*.
14. Further consideration should be given to a similar approach or mechanisms for the Data. This is particularly pertinent in the context of current policy and technical discussions that see de-identification as a key data protection measure.³

Limited focus of the Bill

15. The Bill focuses only on the Data. However, if steps are taken to create additional sanctions or controls for uses of, and specifically, the reverse engineering of de-identified data, serious consideration should be given to protection of other data sets (not just those contemplated by data as sought to be addressed by this Bill).

² *Privacy Commissioner v Telstra Corporation Limited* (2016) FCA (VID38/2016).

³ See, e.g., the Productivity Commission's recommendations and findings in its draft [Data Availability and Use Report](#) and the work being undertaken by the Office of the Information Commission in this field, e.g. Timothy Pilgrim, 'Privacy, Data and De-identification' (Speech delivered at CeBIT, Sydney 2 May 2016) <<https://www.oaic.gov.au/media-and-speeches/speeches/privacy-data-de-identification>>.

Drafting issues

16. The identified structural issues are particularly concerning in light of the problematic drafting of the Bill. If the Bill is to proceed notwithstanding the Law Council's comments above, there are a number of drafting issues which must as a minimum be addressed prior to enactment.

Re-identification exemption connected to agency functions or associated with court/tribunal order

17. Proposed subsection 16D(2) provides that the offence in subsection 16D(1) relating to re-identifying de-identified personal information does not apply if the entity is an agency⁴ and the act was done in connection with the performance of the agency's functions or activities; or was required or authorised to be done by or under an Australian law or a court/tribunal order.⁵
18. The exemption in proposed paragraph 16D(2)(b) is to enable agencies to perform their ordinary functions and activities. The concern in relation to the need to protect personal information remains where an agency, other than the responsible agency, re-identifies information that is published by another agency for its functions and activities. This would mean an individual's personal information could potentially be obtained by any agency through the re-identification of de-identified data. Individuals may not expect other agencies, which are not the responsible agency, to have access to their personal information without their consent.
19. The Law Council and Law Society of NSW notes that a Commonwealth agency is still bound by APP 3.6(a) which requires an agency to collect personal information only from an individual, unless the individual consents to collection from someone else (in this case, collection by re-identifying information published by the responsible agency); or the agency is authorised by law to collect from someone else (APP3.6(a)(ii)). It is not clear whether subsection 16D(2) is intended to give the authorisation under APP3.6(a)(ii). This should be clarified.

Retrospectivity

20. The Law Council is opposed in principle to the enactment of legislation with retrospective effect, particularly in cases that create retroactive criminal offences or which impose additional punishment for past offences. This position stands in relation to the present Bill. If the criminal offences are to be enacted, they should be prospective only.
21. The High Court has held that there is no absolute prohibition on the Parliament enacting laws that have retrospective effect.⁶ However, the Law Council's objection

⁴ Privacy Amendment (Re-identification Offence) Bill 2016, para 16D(2)(a).

⁵ *Ibid*, para 16D(2)(b).

⁶ *R v Kidman* (1915) 20 CLR 425, 442-3 (Isaacs J), 451-4 (Higgins J), 462 (Powers J); *Knight v Corrections Victoria* [2009] VSC 607 [33] (Vickery J); *Belmore v State of Tasmania* (2006) 16 Tas R 364 [10] (Crawford J); *Ex parte Walsh; Re Yates* (1925) 37 CLR 36, 86 (Isaacs J), 124-5 (Higgins J); *Millner v Raith* (1942) 66 CLR 1, 9; *Australian Communist Party v Commonwealth (Communist Party Case)* (1951) 83 CLR 1, 172 (Latham CJ); *University of Wollongong v Metwally* (1984) 158 CLR 447, 461, 484 (Mason and Dawson JJ); *Polyukhovich v Commonwealth (War Crimes Act Case)* (1991) 172 CLR 501, 538-40 (Mason CJ), 644-5 (Dawson J), 718-21 (McHugh J). See, for example, *R v Snow* (1917) 23 CLR 256, 265 (Barton ACJ).

can be traced to principles enshrined in the rule of law. Acts by the legislature which are inconsistent with the rule of law have a tendency to undermine the very democratic values upon which the rule of law is based.

22. Such objection has informed the approach of courts to the interpretation of statutes, such that courts will not readily interpret a statute as having retrospective effect unless the intention of the legislature to do so is clear.
23. The High Court has cautioned against retrospective legislation that may interfere with vested rights or make unlawful conduct which was lawful when done.⁷ Indeed, the presumption against retrospective statutory construction is based on 'the presumption that the Legislature does not intend what is unjust'.⁸
24. Retrospective measures generally offend rule of law principles that the law must be readily known and available, and certain and clear.⁹
25. In *Director of Public Prosecutions (Cth) v Keating* (2013) 248 CLR 459, a majority of the High Court emphasised the common law principle that the criminal law 'should be certain and its reach ascertainable by those who are subject to it'.¹⁰ This concept is 'fundamental to criminal responsibility' and 'underpins the strength of the presumption against retrospectivity in the interpretation of statutes that impose criminal liability'.¹¹

Reverse onus provisions

26. The Law Council does not consider that the reverse onus provisions are appropriate. If the Bill is to proceed, the reverse onus provisions should be removed from the Bill.
27. The defences in sections 16D, 16E and 16F of the Bill require entities to demonstrate that their behaviour was consistent with the relevant defences in each section, for example that the act was done for the purpose of meeting (directly or indirectly) an obligation under the contract; in accordance with an agreement with the responsible agency; or for a purpose specified in a relevant determination and in compliance with any conditions specified in the determination.
28. This is contrary to the general situation where consistency with the presumption of innocence under article 14(2) of the *International Convention on Civil and Political Rights* and the rule of law requires the prosecution to prove each element of a criminal offence beyond reasonable doubt.
29. In general, a reversal of the burden of proof is justified only where it can be argued that the defence might be said to be peculiarly within the knowledge of the defendant and/or where a particular matter would be extremely difficult or expensive for the prosecution to prove whereas it could be readily and cheaply provided by the

⁷ *Polyukhovich v Commonwealth (War Crimes Act Case)* (1991) 172 CLR 501, 611-12, 642, 687-9, 718 (Deane, Dawson, Toohey and McHugh JJ respectively).

⁸ *Australian Education Union v Fair Work Australia* (2012) 246 CLR 117 [28] (French CJ, Crennan and Kiefel JJ citing Isaacs J and 6th edition of *Maxwell on Statutes*).

⁹ Law Council of Australia, *Policy Statement: Rule of Law Principles* (March 2011), Principle 1.

¹⁰ *Director of Public Prosecutions (Cth) v Keating* (2013) 248 CLR 459, 479 [48] (French CJ, Hayne, Crennan, Kiefel, Bell, Keane JJ).

¹¹ *Ibid* [48] (French CJ, Hayne, Crennan, Kiefel, Bell, and Keane JJ).

accused.¹² However, as noted by the Senate Standing Committee for the Scrutiny of Bills 'it appears that statement of compatibility has applied a less exacting standard, namely, to ask whether it would be unreasonably difficult for an accused to prove a particular matter.¹³ Further, the Law Council considers that the matters to be established would not be extremely difficult or expensive for the prosecution to prove as it would have access to relevant contracts, agreements and determinations.

Contracted service provider exemption

30. Proposed paragraph 16D(3)(a) provides that the offence in subsection 16D(1) relating to re-identifying de-identified personal information does not apply if the entity is a contracted service provider for a Commonwealth contract to provide services to the responsible agency; and the act was done for the purposes of meeting (directly or indirectly) an obligation under the contract.
31. In order for the exemption in proposed paragraph 16D(3)(a) to operate the contract would appear to need to be between the entity, as the contracted service provider, and the *responsible* agency, and not just a contract between the entity and for example, another agency. If this is the intention, the drafting of the section should be clarified.
32. It is not clear whether this exemption is intended to apply to sub-contractors of the entity which is the main contracted service provider. The Explanatory Memorandum states the intention of the exemption is to allow entities to engage in functions and activities such as information security tests.¹⁴ It would not be uncommon for such tests to be carried out by sub-contractors. The current drafting doesn't extend the exemption to sub-contractors but should do so.

Framework for data-sharing

33. Proposed subsection 16F(3) creates a civil penalty and provides that an entity must, as soon as practicable after becoming aware that the information is no longer de-identified, notify the responsible agency, in writing, of that fact. Proposed section 16F(4) provides that an entity must not use the information, or disclose the information to a person or entity other than the responsible agency, after becoming aware that the information is no longer de-identified.
34. The Explanatory Memorandum provides, similarly to the commentary in relation to paragraph 16D(2)(b), that this exemption is to allow for data-matching.¹⁵ If the intention is to facilitate better access and availability of data across agencies, then the Law Council and Law Society of NSW support having a proper framework for data sharing, as is proposed in the Productivity Commission report¹⁶, as opposed to giving a blanket exemption to agencies.

¹² Senate Standing Committee for the Scrutiny of Bills, Parliament of Australia, *Alert Digest*, No. 8 of 2016, 9 November 2016, 33.

¹³ *Ibid.*

¹⁴ Explanatory Memorandum, Privacy Amendment (Re-identification Offence) Bill 2016, [36].

¹⁵ *Ibid* [84].

¹⁶ Australian Government Productivity Commission, *Productivity Commission Draft Report: Data Availability and Use* (2016).

Education campaign

35. There needs to be a public education campaign to increase awareness of the proposal that individuals, not operating as a business, and small businesses, are not exempt from the proposed offences under this Bill. This is a substantial shift from the current position. The Law Council and Law Society of NSW suggest that the OAIC should consider running such a public education campaign to increase awareness of these new offences.