

LEGAL AND CONSTITUTIONAL AFFAIRS LEGISLATION COMMITTEE

Inquiry into the Privacy and Other Legislation Amendment Bill 2024 [Provisions]

Questions on notice

Senator Nita Green (Chair) asked the following question on 22 October 2024:

CHAIR: I'll just ask you, if you can, to take the next question on notice, given the time. I have got two questions about the development of codes. The Business Council of Australia—I'm not sure if you've seen their submission—made some recommendations about essentially requiring you, as the commissioner, to collaborate with certain representatives or entities when developing an APP code. Again, they have some recommendations about what should be required to be taken into consideration when developing the Children's Online Privacy Code. I wonder whether, perhaps on notice, you could let the committee know what process you would normally go through in developing a code, because I would have imagined that those things that have been recommended by the Business Council of Australia are part of your process anyway. Perhaps if we get that on notice we might be able to look at those two ideas together.

Ms Kind: Yes, I think your assumptions are correct, Chair, but I will certainly take that on notice.

The response to the Senator's question is as follows:

The OAIC notes the Business Council of Australia (Business Council) recommended, amongst other matters, that the Minister should be required to appoint APP entities or their representatives to collaborate with the Commissioner in developing the code, unless there is a stated reason why doing so would be strictly inappropriate. Consultation with entities that will be bound or impacted by an Australian Privacy Principle (APP) code is a critical component of any code development process.

Under the proposed measures in the Privacy and Other Legislation Amendment Bill 2024 (the Bill), the Information Commissioner must undertake mandatory public consultation for a minimum period of 40 days for any Commissioner-developed APP code. This is to ensure the code is fit for purpose and capable of being implemented by entities bound by the code.

The period of public consultation for a Commissioner-developed code is longer than the period of consultation required for APP codes developed by industry which is a minimum of 28 days under the existing framework (Section 26F of the Privacy Act). The longer consultation period of 40 days provided for in the Bill recognises that industry and other affected stakeholders may require more time to meaningfully consider a Commissioner-developed APP code than one prepared by industry.

APP codes are also disallowable legislative instruments. Section 17 of the *Legislation Act 2003* requires that, prior to an instrument being made, the rule-maker must be satisfied that appropriate consultation was undertaken. This includes considering the extent to which experts and persons likely to be affected were consulted.

The Information Commissioner, as the rule-maker for APP codes, must be satisfied that appropriate consultation has been undertaken before deciding to register an APP code on the Codes Register. In deciding whether to register an APP code, the Commissioner may consult any person the Commissioner considers appropriate. The OAIC has existing [Guidelines for developing codes](#) made under section 26V of the Privacy Act, which set out the process for developing codes under the current framework, including consultation requirements. These Guidelines will be updated to reflect the amendments to the APP code-making framework once the Bill has passed.

The Business Council also recommended that an express provision should be inserted into the Act that, in developing the Children's Online Privacy Code, the Commissioner must have regard to international approaches to children's privacy, including the UK Appropriate Design Code.

As the Business Council has noted in its submission, there is a clear expectation from Government that the Children's Online Privacy Code should align with international approaches including the UK Age-Appropriate Design Code (AADC) to the extent possible. The OAIC, as code developer, will ensure alignment with the UK's AADC and other jurisdictions to the extent possible noting the differences between the underlying legal frameworks. The OAIC intends to draw on our strong regulatory partnerships to leverage the learnings of our international counterparts during the development of the code to promote interoperability, minimise compliance burden and ensure strong protection for Australian children's personal information.