

Senate Legal and Constitutional Affairs References Committee

QUESTIONS ON NOTICE

Office of the Australian Information Commissioner, 30 October 2023

Senator Green and Senator Shoebridge asked the OAIC following question:

CHAIR: Thank you. We are running out of time. My next question was around your recommendations 3 and 4. Can I just understand: do you consider that these are changes that might be made through an amendment to the explanatory memorandum, rather than the bill itself? As I understand it, they talk to agreements that will be made rather than—I'm struggling to point to a clause that could be amended to bring effect to that, but an amendment to the explanatory memorandum might be able to bring those recommendations to life.

...

Senator SHOEBRIDGE: It is. Surely, if you were going to put some meat on the bones of participation agreements, you'd do it in, say, clause 10, which puts in the obligations of parties to participations; or perhaps in clause 9, where you articulate the privacy obligations. Wouldn't that be where you'd do it, Ms Falk, rather than the explanatory memorandum, which wouldn't be binding or legally enforceable?

...

CHAIR: Ms Falk, maybe to assist Senator Shoebridge and myself, you could take that question on notice and consider that clause and those recommendations and how we can give effect to a recommendation of that kind. Thank you.

Response:

Recommendations 3 and 4 from the OAIC's submission refer to participation agreements as set out in clauses 8 -12 of the Bill, and their interaction with the Australian Privacy Principles (APPs).

As set out in the Explanatory Memorandum (EM) to the Bill, one of the key privacy safeguards of the scheme is that entities using the identity verification services will generally be subject to both the Privacy Act (or other relevant privacy law) and a participation agreement.

Given the likely overlap between the obligations contained in participation agreements and the APPs, particularly in relation to consent and notification (see e.g. cl 9(2)(b) and (c) of the Bill and APPs 3 and 5), the OAIC recommended that the Bill should clarify that participation agreements must be privacy-enhancing and consistent with the APPs, and that the compliance obligations under the Bill do not alter a participating entity's obligations under the Privacy Act.

We consider that such amendments could be made to clause 9 of the Bill, which refers to the general privacy obligations of parties to a participation agreement. While the OAIC considers that it would provide greater certainty if such amendments were made in the Bill, it may be sufficient to provide clarification on these points in the EM as clause 9(1) ensures parties to a participation agreement are subject to a relevant privacy law or agree to comply through the participation agreement.