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Legal and Constitutional Affairs Legislation Committee
Senate – Australian Parliament

By email: LegCon.Sen@aph.gov.au

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Dear Committee,

Identity Verification Services Bill 2023 inquiry: response to questions on notice

On 30 October 2023, I gave evidence to the Committee's inquiry regarding the Identity Verification Services Bill 2023 and Identity Verification Services (Consequential Amendments) Bill. This letter sets out my response to a number of questions on notice.

The first question was posed by the Deputy Chair, the Hon Senator Scarr, and can be gleaned from the following exchange as recorded in Hansard:

Senator SCARR: I appreciate the answers you've both given to those questions. It is likely—I'm just trying to be realistic here—that this bill is going to be put forward without substantive amendment for consideration of the parliament. Unless those changes which you're proposing in terms of protection of privacy are made, do you think the parliament should pass the legislation? Professor Santow.

Prof. Santow: I think we're put in an invidious position here, because, at the moment—

Senator SCARR: We are, but that's the position we're in, I'm afraid.

Prof. Santow: I accept that. So, being pragmatic, in a perfect world, you'd go first with the privacy reform and then move forward with this idea. Still, I understand why the government may not wish to do that. I think what that then means is that you need to bring those two bills in line. I absolutely endorse Professor Bennett Moses's suggestion of sunseting, but you could bring the digital ID bill in line with this bill. Most of chapter 3 of the digital ID bill can be imported into this bill. That would be very easy to do. If there were such extraordinary urgency, then it could be done through subordinate legislation. That's the least attractive option, but it would still be better than the bill as it currently appears. It would require a relatively small amendment to clause 44 of the bill. That would then put the onus on the minister to uplift those privacy protections so you don't have a completely fragmented regime, which would not only be very difficult for business and government agencies to comply with but also would leave Australians inadequately protected with respect to their privacy rights.

Senator SCARR: What if none of those things occur and the parliament is left with the bill unamended, without the sunseting, without the regulations and without the privacy obligations being imported from the draft digital ID bill?

Prof. Santow: I feel very uncomfortable answering that question because it's entirely within the gift of the parliament, and especially the minister, the government, to fix that. I need to, perhaps, take that question on notice. But it would not be difficult to, at the very least amend, clause 44 in the way I just described.

Senator SCARR: Could you take the question on notice? I'm anticipating that could well be

the position that parliament's in.

My answer to this question is as follows. The Government has not made a compelling argument that it would be impossible or impractical to improve the privacy protections applicable to these two Bills – at least by adopting one of the solutions proposed in the Human Technology Institute's written submission. I recommend that these Bills proceed only if those privacy protections have been enhanced, adopting one of the solutions proposed in the Institute's submission or another mechanism proposed by the Government itself.

The second question was also posed by the Deputy Chair:

Senator SCARR: Would you be happy to take a question on notice? I'll give you some actual text for it. I also sit on the Scrutiny of Delegated Legislation Committee and there are provisions in the Biosecurity Act which provide that there can be a declaration of national emergency. In that situation, the minister for health can issue orders and regulations which are not disallowable and which effectively enable him to amend any law which would include these laws and which would, on my understanding, include all of the privacy protections contained in this legislation. Would you be prepared to take that on notice if I give you a specific form of question?

My answer to this question is as follows. It is a fundamental principle of liberal democratic government, and the separation of powers, that Parliament be ultimately responsible for all legislation. Parliament therefore is empowered to disallow legislative instruments made by a minister or another member of the executive branch of government.

Where a minister has the power to issue a non-disallowable legislative instrument, this departs from ordinary liberal democratic government. In a genuine emergency, there is a case for such a departure, but only insofar as is necessary and proportionate to address the emergency. Hence, before forming a view on whether this is appropriate, the Government should first make a public case in favour of non-disallowable instruments in the context of this Bill.

The third question was posed by the Chair, the Hon Senator Green, who requested more information regarding the Human Technology Institute's model law for facial recognition technology. The model law is outlined in a report available online at the following web address: <https://www.uts.edu.au/sites/default/files/2022-09/Facial%20recognition%20model%20law%20report.pdf>.

Yours faithfully,

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