



9 July 2012

Committee Secretary
Senate Legal and Constitutional Affairs Committee
PO Box 6100
Parliament House
Canberra ACT 2600
Australia

By email: legcon.sen@aph.gov.au

Dear Committee Secretary

Inquiry into the Privacy Amendment (Enhancing Privacy Protection) Bill 2012 (Cth)

The Law Institute of Victoria (LIV) welcomes the opportunity to provide comments on the *Privacy Amendment (Enhancing Privacy Protection) Bill 2012 (Cth)* (the Bill).

The LIV is Victoria's peak representative body for lawyers and those who work with them in the legal sector, representing over 14,500 members. The LIV has actively advocated change to Commonwealth privacy laws in recent years. In particular, we provided the attached comments on the Exposure Draft of the *Australian Privacy Principles*¹ and the Exposure Draft of the *Australian Privacy Amendment Legislation - Credit Reporting* (Exposure Drafts).² In November 2011, the LIV adopted the attached policy on privacy to guide our advocacy for better privacy protections at the state and federal levels.

We consider the Bill an important first step in implementing the recommendations of the Australian Law Reform Commission (ALRC) report *For Your Information: Australian Privacy Law and Practice*. Rapid advances in information, communication, storage, surveillance and other relevant technologies have significant implications for individual privacy. Persons have a right not to have their privacy unlawfully or arbitrarily interfered with (protected, for example, in Article 17 of the *International Covenant on Civil and Political Rights*). The LIV considers that principles such as Australian Privacy Principle 8 (cross-border disclosure of personal information), in conjunction with proposed section 16C (acts and practices of overseas recipients of personal information), are important responses to the challenge of maintaining an individual's privacy in a global context of varying standards and capacities to protect privacy.

We very much appreciate the Government and Parliament's willingness to consult with the public on these significant reforms, both through the Exposure Drafts and this inquiry. We are, however, disappointed that most of the comments we made on the Exposure Drafts are not reflected in the Bill. We request that you consider our comments on the Exposure Drafts in your inquiry and report on the Bill. In particular, the LIV is concerned that the Bill does not adequately empower people to protect

¹LIV Submission to Senate Finance and Public Administration Committee on 'Exposure Draft of the Australian Privacy Principles' 19 August 2010 <http://www.liv.asn.au/Membership/Practice-Sections/Administrative-Law---Human-Rights/Submissions/Exposure-Draft-of-the-Australian-Privacy-Principle.aspx?rep=1&qlist=0&sdiag=0&h2=1&h1=0>.

² LIV submission to the Secretary, Senate Standing Committee on Finance and Public Administration on the Exposure Draft of the *Australian Privacy Amendment Legislation - Credit Reporting* 31 March 2011 <http://www.liv.asn.au/Membership/Practice-Sections/Administrative-Law---Human-Rights/Submissions/Inquiry-into-Exposure-Drafts-of-the-Australian-Privacy-Amendment-Legislation-Credit-Reporting.aspx?rep=1&qlist=0&sdiag=0>; See also See LIV Submission to Senate Standing Committee on Environment, Communications and the Arts on 'The adequacy of protections for the privacy of Australians online' (29 July 2010) at <http://www.liv.asn.au/Membership/Practice-Sections/Administrative-Law---Human-Rights/Submissions/The-adequacy-of-protections-for-the-privacy-of-Aus?qlist=0&rep=1&sdiag=0>.

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and control their information. In this regard, we highlight the following points from our comments on the Exposure Drafts.

1. With respect to Australian Privacy Principle 3 (collection of solicited personal information), we remain concerned that:
 - a) The phrase 'reasonably necessary for... one or more of the entity's functions or activities' is too broad. The LIV considers that this is a unilateral test that focuses only on the entity's functions and not on the individual's reasons for disclosing personal information or dealing with the entity. The test permits the collection of personal information for any of the entity's purposes, even if the individual has transacted in respect of a confined, limited function or activity. The LIV recommends that this test, wherever appearing, should be amended to 'reasonably necessary for the function or activity in which the individual is engaging' or similar.
 - b) 'Consent' remains defined to mean express consent or implied consent (s.6 of the *Privacy Act 1988* (Cth)). The LIV submits that individuals cannot consent to the collection of sensitive personal information where consent is obtained in a coercive or unreasonable way. We submit that the definition of consent requires further development and clarification because it does not preclude consent from being obtained unreasonably or in a way that undermines the objectives or purpose of the Australian Privacy Principles.
2. With respect to the credit reporting provisions (Schedule 2 of the Bill), the LIV remains concerned that the Bill seeks to regularise current business practices with limited provision for the rights and interests of individuals and fundamental principles of privacy. We consider that:
 - a) The value of any protections available to individuals seeking to protect their privacy is undermined by the technical and complex framework and by burdensome and costly requirements. Provisions imposing excessive requirements on individuals should be amended. For example:
 - The requirement on individuals to opt out of use of credit information for direct marketing (s.20G(5)):³ in our view, information collected for one legitimate purpose should not then be sold and used for purposes which are beneficial to companies without the consent of individuals.
 - The requirement on the individual to renew the ban period every 21 days (s.20K(3)):⁴ in our view, the ban period should apply until after appropriate investigations have been conducted and concluded.
 - The option of 'not excessive' charges on individuals where they request access to their information more than once in 12 months (s.20R(6)):⁵ in our view, people should always be able to access to their information free of charge. If charges are to be permitted, they should be 'reasonable'.
 - b) Where they are required to make written notes of disclosure and use of information (s.20E(5), s.20G(7), s.21D(6), s.21G(6)), credit reporting bodies and credit providers should also be required to notify the relevant individual of the disclosure and use so that individuals are able to act on any inappropriate disclosures and uses.

³ An individual may request a credit reporting body that holds credit information about the individual not to use the information under subsection (2).

⁴ The **ban period** for credit reporting information about an individual is the period that:

(a) starts when the individual makes a request under paragraph (1)(c); and

(b) ends: (i) 21 days after the day on which the request is made; or (ii) if the period is extended under subsection (4)—on the day after the extended period ends.

⁵ S.20R(5) If a request under subsection (1) in relation to the individual has not been made to the credit reporting body in the previous 12 months, the body must not charge the access seeker for the making of the request or for giving access to the information.

(6) If subsection (5) does not apply, any charge by the credit reporting body for giving access to the information must not be excessive and must not apply to the making of the request.

The LIV believes that the protection of an individual's privacy is fundamental to human dignity and is central to many other human rights such as the right of freedom of association, movement and expression. We urge that you recommend amendments to the Bill consistent with our comments on the Exposure Drafts and that the Government acts quickly to implement the remaining ALRC recommendations – including a cause of action for invasions of privacy⁶ – to ensure that Australia is able to adequately protect the privacy of its citizens and residents.

Please contact _____, at _____ with any questions in relation to this submission.

Yours sincerely,

Michael Holcroft
President
Law Institute of Victoria

Attach.

⁶ LIV submission to the Privacy and FOI Policy Branch, Department of the Prime Minister and Cabinet comments on the Issues paper, *A Commonwealth Statutory Cause of Action for Serious Invasion of Privacy* 18 November 2011, <http://www.liv.asn.au/Membership/Practice-Sections/Administrative-Law---Human-Rights/Submissions/Issues-paper-%E2%80%93-A-Commonwealth-Statutory-Cause-of-A.aspx?rep=1&glist=0&sdiag=0&h2=1&h1=0>