Australian Government
Office of the Australian Information Commissioner

Ms Julie Dennett
Committee Secretary
Senate Standing Committee on Legal and Constitutional Affairs

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

Dear Ms Dennett

Privacy Amendment (Enhancing Privacy Protection) Bill 2012 – Supplementary submission

The Senate Standing Committee on Legal and Constitutional Affairs (the Committee) is conducting an inquiry into the *Privacy Amendment (Enhancing Privacy Protection) Bill 2012* (the Bill),[1] which amends the *Privacy Act 1988* (Cth) (the Privacy Act). The Office of the Australian Information Commissioner (OAIC) recently made a submission to the Committee (the OAIC's submission),[2] and also appeared at the public hearings held by the Committee on 10 and 21 August 2012.

I appreciate the Committee affording me the opportunity to now make a supplementary submission. This supplementary submission addresses some additional matters arising during the hearing process:

1. cross-border disclosure of personal information and accountability
2. the concept of 'Australian link'
3. complaint handling by the Commissioner

1. Cross-border disclosure of personal information and accountability

I consider that the intention to incorporate the concept of accountability into the Bill is an important aspect of the reforms. The Bill provides that in some instances, government and business remain accountable for the subsequent handling of personal information they send overseas.[3]

However, I am concerned that this accountability may be displaced where an individual has consented to their personal information being sent overseas.[4] In that situation, individuals

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[1] Information about the Committee's inquiry is available at http://www.aph.gov.au/Parliamentary_Business/Committees/Senate_Committees?url=legcon_ctte/privacy_2012/index.htm.

[2] The OAIC's submission is available at http://www.oaic.gov.au/publications/submissions/2012_07_privacy_amendment_bill_senate.html.

[3] See clause 16C in Schedule 1 of the Bill.

[4] The accountability in clause 16C only applies if APP 8.1 applies to the disclosure of the personal information by the entity (see clause 16C(1)(b)). APP 8.2 sets out a number of instances where APP 8.1 does not apply to the disclosure of personal information, including where the individual consents to the disclosure after being expressly informed by the entity that APP 8.1 will not apply to the disclosure if the individual consents to the disclosure (see APP 8.1(b)).

whose information is sent overseas may not have access to remedies if their personal information is subsequently mishandled.

While the proposed APP 1 will require entities to have a privacy policy which contains information on whether the entity is likely to disclose personal information to overseas recipients, and if it is practicable to specify the countries in which such recipients are likely to be located, in many cases there may be little real "choice" for an individual but to consent to their information being handled in that way. Once an individual does provide their consent, in many circumstances they are in effect abrogating any ability to seek redress for any mishandling by the overseas recipient.

I recommend the Committee give consideration to whether Australian entities should remain accountable when they send personal information offshore, and that accountability should not be displaced by consent.

2. The concept of 'Australian link'

A number of stakeholders have raised concerns about the concept of 'Australian link' as it is used in the Bill. Stakeholders' concerns differ depending on whether they relate to the use of the term 'Australian link' in the Privacy Act (as amended by the Bill) more broadly, or the use of that term in the credit reporting provisions. Below, I outline my understanding of the issues about the use of the term 'Australian link' in the Act more broadly and its use in the credit reporting provisions separately.

'Australian link' in the Privacy Act more broadly

Under the proposed amendments, section 5B will provide that the Privacy Act extends to an act done or practice engaged in outside Australia and the external territories by an agency, organisation or small business operator (SBO) that has an 'Australian link'. Effectively, the meaning of 'Australian link' will determine the entities that are subject to the Privacy Act.

One of the conditions that must be satisfied for an entity or SBO to have an Australian link is that it must have collected or held the relevant personal information 'in Australia or an external Territory' either before or at the time of the relevant act or practice.[5]

The Explanatory Memorandum to the Bill (Explanatory Memorandum) clarifies that information is considered to have been collected 'in Australia' where it is collected from a person who is physically located in Australia. As stated in the OAIC's submission, I support that interpretation and suggest that it be made explicit in the Bill; for example, by amending 'in Australia' to 'from Australia'.[6]

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[5] See s 5B(3) of the Privacy Act, as amended by items 5-7 of Schedule 4 of the Bill.
[6] See paragraphs 46-49 of the OAIC's submission

'Australian link' in the credit reporting provisions

However, the issue becomes more complex when considering the use of the term 'Australian link' in the credit reporting provisions.

Excluding foreign credit providers

I understand that the Government's policy objective is that the credit reporting system should be closed to foreign credit providers.[7] That is, it should not:

- contain any foreign credit information (i.e. information about credit provided by foreign credit providers)
- contain information provided by foreign credit providers
- be able to be accessed by foreign credit providers.

I further understand that the Government has sought to give effect to this intention by requiring, in each provision dealing with the handling of information by credit reporting bodies and credit providers that either:

- the relevant entity have an 'Australian link', or
- the relevant information relates to credit that has been 'provided, or applied for, in Australia'.[8]

My concern is that when the interpretation of the terms 'Australian link' and 'in Australia' discussed above, is applied to those terms when they are used in the credit reporting provisions, the Government's policy objective may not be achieved. I outline in my initial submission these concerns in more detail.[9]

The Explanatory Memorandum attempts to deal with this by stating that the term 'Australian link' will have a slightly different operation when it is applied to the credit reporting provisions, as opposed to other parts of the Privacy Act.[10] However, it is unclear from the Explanatory Memorandum how this would operate in practice.

Cross-border disclosure of credit-related information for legitimate business purposes

I also understand that some stakeholders are concerned that the 'Australian link' requirements in the credit reporting provisions will mean than an Australian based entity

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[7] Explanatory Memorandum, pp 91-92.
[8] Explanatory Memorandum, p 91.
[9] See paragraphs 73-79 of the OAIC's submission.
[10] Explanatory Memorandum, p 92.

will not be able to disclose credit-related information to an offshore agent or related entity for legitimate business purposes in some circumstances.[11]

Stakeholders have suggested that this restriction is not in-keeping with other provisions in the Privacy Act that allow the cross-border disclosure of information provided the Australian entity takes reasonable steps to ensure that the information disclosed will be handled in compliance with the requirements of the Privacy Act.

In principle, I do not object to the concept of permitting the cross-border disclosure of personal information in the credit context for legitimate business purposes (such as agency arrangements) provided that:

- the information is handled in a way that affords privacy protection
- individuals have access to remedies if it is mishandled, and
- the information is not being disclosed to the overseas recipient for the purposes of assessing an individual's credit worthiness to receive foreign credit.

However, I re-iterate my concerns about the accountability provisions above, and the ability of an individual's consent to displace accountability.

3. Complaint handling by the Commissioner

Powers of the Commissioner to investigate complaints

As the Committee is aware, the Privacy Act provides the Commissioner with the power to investigate complaints.[12] The Commissioner may decide not to investigate a complaint, or not to investigate further, for several reasons, including if the Commissioner is satisfied that the respondent has adequately dealt with the complaint.[13] If the Commissioner decides to investigate the complaint, the Bill requires the Commissioner to make a reasonable attempt to conciliate the complaint.[14] The Privacy Act also provides the Commissioner with the power to make a determination following an investigation.[15]

Review rights

I understand that all decisions made by the Commissioner, including a decision not to investigate a complaint or investigate further, are reviewable by the Federal Court or

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[11] I note that although s 13B of the Privacy Act (as amended by items 43-45 of Schedule 4 of the Bill) permits disclosures to related bodies corporate that are not otherwise authorised by the Act, that provision only applies in relation to the APPs and any APP codes. It will not permit disclosures to related bodies corporate that would otherwise breach the credit reporting provisions.

[12] See s 40(1) of the Privacy Act.

[13] See s 41(2)(a) of the Privacy Act.

[14] See clause 40A of Schedule 4 of the Bill. Section 27(1)(ab) of the current Privacy Act provides the Commissioner with the power to attempt to conciliate a complaint if he or she considers it appropriate to do so.

[15] See s 52(1) of the Privacy Act.

Federal Magistrates Court under the *Administrative Decisions (Judicial Review) Act 1977* (Cth) (ADJR Act). The Commissioner and the OAIC are also subject to review by the Commonwealth Ombudsman with respect to 'a matter of administration'.[16]

Further, the Bill provides that a decision of the Commissioner under s 52(1) to make a determination will be subject to merit review by the Administrative Appeals Tribunal (AAT).[17] I support this significant expansion of circumstances in which a merit review is available. Currently, the right to merit review of determinations made by the Commissioner is limited to where the respondent is an agency, and is available only in relation to the Commissioner's decision to include or not include a declaration for compensation or costs.[18]

Criticisms of Commissioners' use of investigation and determination powers

I am aware that in their submissions to the Committee, and at the Committee's public hearings, some stakeholders have criticised the past and present Privacy Commissioners' use of the investigation and determination powers in the Privacy Act. As I understand them, those criticisms include that:

- the decision to not investigate a complaint, or not investigate a complaint further, is made by the Commissioner, and some stakeholders claim that dissatisfied complainants are denied access to justice because they cannot readily have this decision reviewed
- the Commissioners' preference for confidential conciliated settlements of disputes over determinations has led to the suggestion that the Commissioner is an ineffective regulator because privacy is not publically regulated by example
- the fact that successive Commissioners have made relatively few determinations, has led to claims that the Commissioners' decisions have not been subject to the public scrutiny, and there has been little opportunity for jurisprudence to interpret and provide guidance on the Privacy Act.

In response to these concerns, I note that the OAIC publishes various items on its website to support a culture of transparency in its complaint and investigative practices. These items include the OAIC's privacy complaint handling manual and the OAIC's privacy complaint assessment sheet.[19] The OAIC's annual report includes information and statistics on numbers and types of complaints received and finalised, including reasons for closing complaints and the types of remedies involved. The annual report also includes information

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[16] See s 5 of the *Ombudsman Act 1976* (Cth).
[17] See clause 96 of Schedule 4 of the Bill.
[18] See section 61 of the Privacy Act.
[19] Available at http://www.oaic.gov.au/publications/other_operational.html#other_operational_privacy.

about the industry and government sectors, agencies and organisations which are the subject of the most complaints.[20]

Additionally, the OAIC publishes summaries of privacy complaints, known as 'case notes'.[21] Particular complaints are chosen to be the subject of case notes because they involve interpretation of the *Privacy Act* or associated legislation in new circumstances, illustrate systemic issues or illustrate the application of the law to a particular industry or subject area. The OAIC has also recently started publishing reports of its own motion investigations.[22]

I note that the amendments proposed in the Bill will provide the Commissioner with a range of new powers, including the power to make a determination following an own motion investigation[23] and to accept enforceable undertakings.[24] I support these new powers, which will assist in addressing serious and systemic interferences with individuals' privacy, and provide a clear message to entities of the need to take privacy seriously.

Further, there are many instances of complainants being satisfied with both the process and outcomes achieved by the intervention of our office. Of course, there are those who are dissatisfied for a variety of reasons, including because the resolution falls short of their expectations. It is regrettable that in some cases a party may also be dissatisfied with the process. We continually seek to learn from those matters and to improve our processes as far as resourcing levels will allow.

Requirement to make a determination

I understand that some stakeholders have suggested that the Commissioner should be required to make a determination under s 52(1) of the Privacy Act wherever a complainant so requests.

The Government did not support a similar recommendation made by the ALRC in its *Report 108: For your information – Australian privacy law and practice*.[25] In rejecting the ALRC's recommendation, the Government stated that such a requirement would fetter the Commissioner's discretion to determine the most effective way to resolve a complaint and could undermine the incentives for parties to engage actively in conciliation.

The Government has decided that the Commissioner, an independent statutory officer, should be responsible for exercising the administrative decision making powers under the

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[20] The annual reports are available at http://www.oaic.gov.au/publications/reports.html#annual_reports.
[21] Available at http://www.oaic.gov.au/publications/case_notes.html.
[22] Available at http://www.oaic.gov.au/publications/reports.html#omi_reports.
[23] See clause 52(1A) of Schedule 4 of the Bill.
[24] See clause 33E of Schedule 4 of the Bill.
[25] The Australian Government 2009, Enhancing National Privacy Protection, Australian Government First Stage Response to the Australian Law Reform Commission Report 108 (Government first stage response), Recommendation 49-5, pp 92- 93, available at www.ag.gov.au/Privacy/Pages/Privacy-Reforms.aspx.

Privacy Act; including to investigate complaints and to make reasonable attempts to resolve them by conciliation. I consider that the conferral of this responsibility is an appropriate method of ensuring that decisions related to the investigation and resolution of complaints are informed by the Commissioner's experience and understanding of the jurisdiction, and for ensuring a responsible utilisation of resources in resolving matters.

I consider that the investigation and resolution of complaints is an area where the privacy framework needs to balance a number of important factors. These include the level of formality, efficiency of process and access to justice.

A decision to close a complaint on the basis that a respondent has adequately dealt with it[26] is an administrative decision that takes into account all relevant considerations, including, where appropriate, an assessment of what a complainant may be awarded should the matter be determined. That assessment is based on the Commissioner's experience and on case law in other jurisdictions. In some cases that assessment may differ from the complainant's. A determination by the Commissioner may not provide a quantitatively different result.

However, I acknowledge that if the Commissioner was required to make a determination, the Bill would allow the parties to seek merit review in the AAT (see above). That process may be less costly than seeking review under the ADJR Act in the Federal Court or Federal Magistrates Court, where a party considers that the Commissioner should have made a determination but he or she has not. I note that hardship provisions exist in the Federal Court and Federal Magistrates Court and may apply to reduce those costs in certain circumstances.[27]

A compulsive power to make determinations could also have resource implications for the OAIC. The conciliation process used by the Commissioner seeks to resolve matters with relatively little formality or need for engaging legal advisors. However, a determination is by its nature a more formal and potentially more adversarial process and more resource intensive.

I acknowledge that the Bill allows the Commissioner to make a determination without holding a hearing in certain circumstances.[28] I support that provision, which is similar to s 55 of the *FOI Act 1982* (Cth). It has the potential to create a more streamlined determination process. This may be appropriate in a number of circumstances, for instance where there has been an extensive investigation and all relevant materials are already before the Commissioner.

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[26] Under s 42(1)(a) of the Privacy Act.
[27] Regulation 11B of the Federal Court of Australia Regulations 2004 and reg 9 of the Federal Magistrates Regulations 2000.
[28] See item 94 of Schedule 4 of the Bill.

A compulsive power to make determinations may require the diversion of existing resources from the exercise of the Commissioner's other functions. This would have adverse consequences, including the potential to increase the time taken to resolve complaints. It would also seem to run counter to the direction of government reform in the area of dispute resolution which is to place a heavy emphasis on alternative dispute resolution as opposed to formal dispute resolution.

I hope this supplementary submission further assists the Committee with its consideration of this important reform Bill.

Yours sincerely

Timothy Pilgrim
Australian Privacy Commissioner

30 August 2012