



Australian Government

Government Response to the Senate Legal and Constitutional Affairs Legislation Committee Report on the: *Privacy Amendment (Enhancing Privacy Protection) Bill 2012*

November 2012

Australian Government response to recommendations of Senate Legal and Constitutional Affairs Legislation Committee report on the Privacy Amendment (Enhancing Privacy Protection) Bill 2012

Summary table of Government response to recommendations

The following tables summarise the Government's response to the recommendations from the Committee's report.

Of the Committee's twenty one recommendations:

- 10 have been accepted in full;
- 10 have been accepted in principle; and
- 1 has been noted.

Recommendation	Response
1	Accept
2	Accept
3	Accept in principle
4	Accept in principle
5	Accept in principle
6	Accept
7	Accept
8	Accept
9	Accept
10	Accept
11	Accept in principle
12	Accept in principle
13	Accept
14	Accept
15	Accept in principle
16	Accept in principle
17	Accept in principle
18	Accept in principle
19	Accept in principle
20	Accept
21	Noted

COMMITTEE RECOMMENDATIONS

Recommendation 1

The committee recommends that the application of the exception in proposed APP 2.2(b) be clarified to make it clear that APP 2.1 does not apply where it is impracticable for the APP entity to deal with 'individuals who have not identified themselves or used a pseudonym'.

Response: Accept

The Government notes the committee's view that a clarification to the provision would be helpful to ensure that it is clear that Australian Privacy Principle (APP) 2.1 does not apply where it is impracticable for the APP entity to deal with individuals who are seeking to use a pseudonym. The Government will develop appropriate amendments to the Privacy Amendment (Enhancing Privacy Protection) Bill 2012 (the Bill).

Recommendation 2

The committee recommends that to avoid confusion, the subheading to proposed APP 7.1 in item 104 of Schedule 1 of the Bill be amended to read 'Use or disclosure' or 'Direct marketing', rather than 'Prohibition on direct marketing'.

Response: Accept

The Government acknowledges that amending the subheading of this section may be helpful in more accurately reflecting the substance of the provisions. The Government will develop appropriate amendments to the Bill.

Recommendation 3

The committee recommends that proposed APP 7.2 and APP 7.6 in item 104 of Schedule 1 of the Bill be amended to ensure consistency with the notification requirement in APP 7.3, and enable individuals the opportunity to opt out of direct marketing communications at any time.

Response: Accept in principle

The Government agrees that consumers should be able to opt out of direct marketing involving the use or disclosure of their personal information at any time. That is the practical effect of APPs 7.2, 7.3 and 7.6 although the point at which they are made aware of the opt-out requirements may differ depending on the relationship between the direct marketer and the consumer.

The Government notes that companies engaged in direct marketing under APP 7.3 will be required to give notice about an opt out mechanism in each direct marketing communication and should consider adopting this approach as good privacy practice. However, given the different forms and contextual nature of online direct marketing, and the likely future developments in this area, the Government's preferred approach would be for additional practical level details to be covered by guidance issued by the Office of the Australian Information Commissioner (OAIC). In that respect, the Government notes that it has already accepted an Australian Law Reform Commission (ALRC) recommendation that the OAIC develop and publish detailed guidance about the new direct marketing principle (see rec 26-7), including some key aspects of proposed APP 7.2 and 7.6.

Recommendation 4

The committee recommends that proposed APP 8.2(b) in item 104 of Schedule 1 of the Bill be amended to require an entity to inform an individual of the practical effect and potential consequences of any informed consent by the individual to APP 8.1 not applying to the disclosure of the individual's personal information to an 'overseas recipient'.

Response: Accept in principle

The Government notes that the provision already requires that information be provided to the individual about the effect of providing consent in these circumstances. The Government considers any further guidance on meeting this requirement would be best placed in guidance material issued by the OAIC. OAIC Guidelines could provide advice on the information to be given to the consumer so that they are clear that the consequences of providing consent in such circumstances are that the entity will no longer be responsible for the protection of their personal information by the overseas recipient, and what, if any, additional information should be provided where it is possible and practicable for the entity to know of other practical effects or potential consequences.

Recommendation 5

The committee recommends that the Explanatory Memorandum to the Bill be revised to clearly explain that an entity will be required to inform an individual of the practical effect and potential consequences of any informed consent by the individual to APP 8.1 not applying to the disclosure of the individual's personal information to an 'overseas recipient'.

Response: Accept in principle

Consistent with the Government's response to recommendation 4, the Government will develop appropriate amendments to the Explanatory Memorandum.

Recommendation 6

The committee recommends that the Attorney-General's Department revise and reissue the Explanatory Memorandum to the Bill to clearly explain the enforcement-related functions and activities of the Department of Immigration and Citizenship, as justification for the classification of the 'Immigration Department' as an 'enforcement body' in item 17 of Schedule 1 of the Bill.

Response: Accept

The Government will develop appropriate amendments to the Explanatory Memorandum.

Recommendation 7

The committee recommends that the Attorney-General's Department revise and reissue the Explanatory Memorandum to the Bill to clearly explain the scope and intended application of the terms 'surveillance activities', 'intelligence gathering activities', and 'monitoring activities' in item 20 of Schedule 1 of the Bill.

Response: Accept

The Government will develop appropriate amendments to the Explanatory Memorandum.

Recommendation 8

The committee recommends that the provisions contained in item 82 of Schedule 1 of the Bill and for each Australian Privacy Principle which contains a 'permitted general situation' or 'permitted health situation' exception, a note should be added at the end of the relevant principle to cross-reference proposed new section 16A of the Privacy Act 1988 and/or proposed new section 16B of the Privacy Act 1988, as appropriate.

Response: Accept

The Government notes the committee's views that the legislation could be more 'user-friendly' and that a cross-reference located in some of the APPs to the exceptions in clauses 16A and 16B may be appropriate. The Government will develop appropriate amendments to the Bill.

Recommendation 9

The committee recommends that the Attorney-General's Department revise and reissue the Explanatory Memorandum to the Bill to explain the intended scope and application of the 'diplomatic or consular functions or activities' exception set out in item 6 in the table to proposed new subsection 16A(1) of the Privacy Act in item 82 of Schedule 1 of the Bill.

Response: Accept

The Government will develop appropriate amendments to the Explanatory Memorandum.

Recommendation 10

The committee recommends that proposed new subsection 6Q(1) in item 69 of Schedule 2 of the Bill be amended to require an appropriate amount of time, such as 14 days, to have elapsed from the date of a written notice before a default listing can occur.

Response: Accept

The Government accepts the recommendation and will insert a requirement that at least 14 days must elapse from the date of the written notice before default information can be disclosed to a credit reporting body.

Recommendation 11

The committee recommends that the written notification in proposed new subsection 6Q(1) in item 69 of Schedule 2 of the Bill be amended to include a warning about the potential for a default listing by a 'credit provider' in the event that an overdue amount is not paid within a set period of time.

Response: Accept in principle

The Government agrees that further information should be provided to consumers about the consequences of failure to pay. However, the Government considers that the Credit Reporting Code of Conduct (CR code) is the most appropriate place to set out requirements on the information to be provided to consumers in the written notice required under 6Q(1). This will ensure that the written notice provides comprehensive advice on what matters must be included, for example additional information about credit reporting and how to obtain a credit report.

Recommendation 12

The committee recommends that proposed new subparagraph 6Q(1)(d)(i) in item 69 of Schedule 2 of the Bill be amended to reflect \$300, or such higher amount as the Australian Government considers appropriate, as the minimum amount for which a consumer credit default listing can be made.

Response: Accept in principle

The Government agrees that the minimum amount for a default should be reasonable. The Government recognises that there are strong arguments proposed both for and against changing the current amount of \$100. A regulation-making power is included in paragraph (d) of the definition to provide flexibility to vary the minimum amount to a higher level. The Government considers that economic modelling of the impact of changing the minimum amount for the listing of a default to \$300 is necessary. The Government will consult with stakeholders on this issue in the development of the Privacy Regulations.

Recommendation 13

The committee recommends that the Office of the Australian Information Commissioner, in formulating guidelines under proposed new section 26V in item 29 of Schedule 3 of the Bill, include as a criterion the timeframe within which an individual's 'default information' can be listed by a 'credit provider'.

Response: Accept

The Government agrees that there would be benefit in providing further guidance around the timing of listing default information in the CR Code, and encourages the OAIC, in formulating guidelines under proposed new section 26V as to what should be included in the CR Code, to include as a criterion the timeframe within which an individual's 'default information' can be listed by a 'credit provider'. This will ensure guidance around the issue of reasonable timeframes within which a listing should be made is considered as part of the CR Code drafting process.

Recommendation 14

The committee recommends that the Office of the Australian Information Commissioner, in formulating guidelines under proposed new section 26V in item 29 of Schedule 3 of the Bill, include a requirement for credit providers to fully consider an application for financial difficulty assistance under the National Consumer Credit Protection Act 2009 before an individual's 'default information' can be listed.

Response: Accept

The Government agrees that there would be benefit in providing guidance in the CR Code around the consideration of applications for financial difficulty assistance before listing default information. The Government notes that this will only be relevant where a person has applied for hardship assistance prior to default.

Recommendation 15

The committee recommends that the Australian Government consider prohibiting the re-identification of 'credit reporting information' which has been de-identified for research purposes in accordance with proposed new subsection 20M(2) in item 72 of Schedule 2 of the Bill, and whether a proportionate civil penalty should apply to any breach of that prohibition.

Response: Accept in principle

The Government agrees that the risk of re-identification of previously de-identified personal information is an important issue. However, the Government considers that further evidence on the nature and scope of the risk of re-identification is necessary. The Government notes that the Commissioner will issue rules relating to the use of de-identified information for research purposes. The Government will review the situation 12 months after the Commissioner issues rules to determine whether additional measures dealing with the risk of re-identification are necessary.

The Government is aware of concerns expressed to the Committee that the provision may prohibit research currently conducted on credit issues in the community. In order to ensure that such research is permitted to continue, the Government will amend clause 20M to provide that research must be in relation to 'credit', rather than the narrower concept of the 'credit worthiness of individuals'.

Recommendation 16

The committee recommends that proposed new sections 20T and 21V in item 72 of Schedule 2 of the Bill be amended to:

- create an obligation for the recipient of a request to take reasonable steps to have the information corrected by the entity which holds the disputed information
- create an obligation for the entity which holds the disputed information to correct the information within 30 days, if satisfied that the information is inaccurate, out-of-date, incomplete, irrelevant or misleading, and
- create an obligation for the recipient of a request to notify the individual about the outcome of their request if that request has been determined by another entity which holds the disputed information.

Response: Accept in principle

The Government accepts that all entities that hold information should correct it if found to be incorrect. This was the Government's clear intention in drafting the correction obligations, including the notification requirements. The general quality obligation in 20S and 21U would operate to require the entity holding the disputed information to make the correction. However, the Government considers that the clarification recommended by the Committee would be useful, and that this kind of detail would be best placed in the CR Code.

Recommendation 17

The committee recommends that the regulations made pursuant to section 100 of the Privacy Act 1988 provide a mechanism for 'credit reporting bodies' and 'credit providers' who have received a request for the correction of an individual's personal information to note on the individual's credit file that a correction is under investigation, with the notation to be removed upon completion of that investigation.

Response: Accept in principle

The Government considers this to be an operational matter best dealt with in the CR Code. The matter could also be dealt with as part of education processes to inform individuals about exercising rights already available to obtain credit reports and request corrections. The Government considers that it is important that the suggested notation requirements do not add lengthy procedural steps which extend the length of time required, and add costs to, a process that is intended to be simple and user friendly.

Recommendation 18

The committee recommends that the Bill be amended to enable a 'credit reporting body' or 'credit provider' to correct an individual's personal information in exceptional circumstances, such as in the case of natural disasters, bank error, fraud, medical incapacity, and mail theft.

Response: Accept in principle

The Government agrees that certain exceptional circumstances should be considered by credit providers and credit reporting bodies when listing defaults or considering whether to correct information on an individual's file. The Government considers that guidance relating to the consideration of exceptional circumstances could be dealt with in the CR Code. The Government considers it a matter for stakeholders to determine the kinds of exceptional circumstances that should be addressed and the way in which these matters should be addressed. As well as this, consumer education initiatives surrounding the Bill should make individuals aware of existing rights in relation to hardship variations, and any other National Consumer Credit Protection (NCCP) Act issues.

Recommendation 19

The committee recommends that the commencement date for the Bill remain at nine months after the Bill receives Royal Assent in order to provide certainty for all relevant stakeholders.

Response: Accept in principle

The Government agrees that a defined commencement date is necessary to provide certainty to stakeholders. However, recognising work to be completed prior to commencement, the Government considers that a period of 15 months is necessary to provide sufficient time for all necessary elements to be in place for an effective transition to the new privacy and credit reporting systems.

Recommendation 20

The committee recommends that before the Bill's commencement date, the Office of the Australian Information Commissioner – in consultation with the Attorney-General's Department, as appropriate – develop and publish material informing consumers of the key changes to privacy legislation as proposed by the Bill, and providing guidance to Commonwealth agencies and private sector organisations to ensure compliance with the new legislative requirements.

Response: Accept

The Government agrees that consumer education surrounding the changes to be made by the Bill is important and supports the OAIC's plans to produce relevant guidance material.

Recommendation 21

The committee recommends that subject to the preceding recommendations, the Senate pass the Bill.

Response: Noted

