



**Australian
Privacy
Foundation**

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8 November 2022

Sophie Dunstone
Committee Secretary
Legal and Constitutional Affairs Legislation Committee
The Senate

Dear Ms Dunstone

Submission to the Senate Standing Committee on Legal and Constitutional Affairs re the *Privacy Legislation Amendment (Enforcement and Other Measures) Bill 2022*

The Australian Privacy Foundation (APF) welcomes the opportunity to provide a submission with regard to the Privacy Legislation Amendment (Enforcement and Other Measures) Bill 2022 ('the Bill').

It notes, however, that the provision of 5 working days for responses is indicative of a badly broken democratic system.

As a general comment on the reform of Australian privacy law, we refer to previous relevant submissions made by the APF, including our responses to:

- Privacy Act Review Discussion Paper (published January 2021), at: <https://privacy.org.au/wp-content/uploads/2022/11/AGD-PActReview-220124.pdf>
- Privacy Act Review Issues Paper (published November 2020), at: <https://privacy.org.au/wp-content/uploads/2021/02/SSRN-id3752152.pdf>

The APF strongly recommends that any amendments to the Privacy Act only be made as part of the comprehensive reforms that have been under consideration by the Australian government for three years. The APF and other civil society groups have invested significantly in the review and submission of feedback on those proposed reforms, which are sorely needed.

The APF regards the proposed changes to penalties and the powers of the Office of the Australian Information Commissioner (OAIC) in the Bill as just one part of the complete overhaul that is required to bring Australia's privacy laws into line with both community expectation as to the level of protection that should be afforded to their personal information, and international standards.

Subject to the above, and our preference for the introduction of comprehensive reform, the APF is generally in favour of the proposed amendments. However, we submit the following changes for consideration:

- Remove the limitation on penalties only applying to 'serious or repeated interferences with privacy'. Instead, leave it to the court to determine the appropriate penalty in the particular circumstances. The inclusion of this threshold is a barrier to the use of the power by the OAIC;
- Simplify the calculation of the new civil penalty, recognising that the benefits from a privacy interference will rarely be quantifiable;

- Increase the spectrum of enforcement mechanisms and penalty options available to the Information Commissioner, at least in line with the recommendations of the Privacy Act Review Discussion Paper;
- Legislate a direct right of action allowing individuals to bring claims for breach of the *Privacy Act 1988*, so individuals have the option to directly pursue recourse for interferences with privacy;
- Specifically recognise the right for class action suits based on a new individual right to sue, to help drive urgent improvement in the compliance landscape in Australia;
- Align the extra-territoriality provisions with those in Article 3(2) of the European Union General Data Protection Regulation to provide consistency between the privacy regimes of Australia and the EU and other jurisdictions;
- Require entities impacted by the proposed extra-territoriality provisions to have a local establishment or appoint an Australian representative (to support enforcement under the extended territoriality provisions);
- Include limitations around the right to share information, including notice to affected individuals, specific limitations on purpose of sharing and a specific time limit for retention.

Finally, and perhaps most importantly, it is imperative that OAIC be guaranteed appropriate funding, on an ongoing basis. Unless the regulator has the capacity to use the additional powers contemplated by the Bill, they, and the OAIC generally, will be of very limited deterrent effect.

Thank you for your consideration.

Yours sincerely

A handwritten signature in black ink, appearing to read 'D Vaile', written in a cursive style.

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