



THE LAW SOCIETY
OF NEW SOUTH WALES

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3 October 2023

Dr James Popple
Chief Executive Officer
Law Council of Australia
PO Box 5350
Braddon ACT 2612

By email: john.farrell@lawcouncil.au

Dear Dr Popple,

Digital ID Bill 2023 (Exposure Draft) and related documents

Thank you for the opportunity to contribute to the Law Council's submission to the Department of Finance in relation to the Exposure Draft of the Digital ID Bill 2023 (the Bill) and related documents. The Law Society's Privacy and Data Law Committee has contributed to this submission.

General comments

The creation of a legislated, economy-wide, digital identification regime is a highly significant and sensitive proposal which requires careful consideration by government. While we support, in principle, the development of a legislated voluntary accreditation scheme, and the potential expansion of the Australian Government Digital ID System, we are nonetheless concerned about the very limited timeframe provided for consultation, which in our view undermines the capacity for stakeholders to provide detailed and considered responses to the technical matters raised in the Bill. Having this consultation take place immediately prior to the release of the Government's response to the Privacy Act Review Report compounded the problem. Accordingly, our feedback on the Bill and related documents is given at a relatively high-level.

Review of the *Privacy Act 1988*

The Law Society has long supported a holistic approach to privacy and data law reform, that promotes, to the greatest possible extent, consistency and predictability in the relevant law. As such, the Bill should, in our view, be considered in the broader context of the review of the *Privacy Act 1988* (Privacy Act), and in conjunction with other related legislation and law reform initiatives.

We note that fundamental aspects of Australian privacy law have been under consideration following the Attorney General's Privacy Act Review Report, including, for example, the definitions and treatment of 'personal information' and 'sensitive information' under the Privacy Act.¹ The Government's 'in principle' agreement with the majority of the Report's proposals

¹ Australian Government Attorney General's Department, *Privacy Act Review Report 2022*, (February 2023), Proposals 4.1 – 4.10.

under Chapter 4, indicates that further consultation and impact analysis will be required to settle the definitions of 'personal information' and 'sensitive information.'²

In considering the expansive definition of 'personal information' proposed under section 9 of the Bill, which we note would include 'individual attributes', we echo the concerns previously raised by the Law Council in its response to the Exposure Draft of the Trusted Digital Identity Bill 2021, that the creation of another definition under the Bill may further confuse what is already an uncertain concept, and undermine consistency across the relevant legislative schemes.³ In any event, the proposed definition of personal information in the Bill will necessarily require further revision as a result of the review of the Privacy Act, being the primary piece of Australian privacy law.

While we note that the Bill intends to expand upon the safeguards and protections provided under the Privacy Act, it is difficult to assess the appropriateness of such measures given the uncertain legal climate and anticipated reforms to the Privacy Act. Accordingly, we call for reform of the Privacy Act to be advanced as a matter of priority.

Other privacy law reform initiatives

In addition, we note that the Senate Legal and Constitutional Affairs Committee (Committee) is currently considering the Identity Verification Services Bill 2023 and the Identity Verification Services (Consequential Amendments) Bill 2023 (together, the IVS Bills). We note that the IVS Bills were recently introduced and referred for inquiry by the Committee, with a very short timeframe for consultation.

Notably, the Identity Verification Services Bill 2023 seeks to establish new primary legislation to provide a legal framework for the operation of the Commonwealth's identity verification services, allowing government agencies and industry to compare or verify personal information on identity documents against government records.

While we appreciate that the IVS Bills and the Digital ID Bill differ in terms of their objects and scope, we note that both proposals appear to raise similar issues concerning digital identity verification and usage, particularly in relation to accredited identity service providers such as myGovID, which we note employs identity verification services. Based on the information currently provided by Government, it is unclear how and to what extent the two legislative proposals might interact.

In considering the similarities between the two proposals, both thematically and in terms of timing, we call for improved coordination and integration of privacy-related, Federal law reform initiatives, to promote consistency in the law and enable synergies in the various initiatives to be fully realised.

Proposed privacy safeguards and compliance

We support, in principle, legislating a voluntary accreditation scheme for providers of digital ID services, which would strengthen the existing Trusted Digital Identity Framework (TDIF) by introducing a civil penalties regime not currently available under the TDIF.

In particular, the Bill would enhance enforcement of the accreditation scheme, by empowering the Regulator to impose civil penalties for non-compliance with accreditation requirements,

² Australian Government, *Government Response: Privacy Act Review Report*, (September 2023), Proposals 4.1 – 4.10.

³ Law Council of Australia, Submission to the Digital Transformation Agency, *Phase 3 of Australia's Digital Identity legislation*, 28 October 2021, 6.

under proposed Chapter 8, Part 2, Division 2. The Bill also contemplates civil penalties for breaches by accredited entities of the additional privacy safeguards set out in Chapter 3, Part 2, Division 2.

The implementation of financial penalties in these circumstances would, in our view, bolster the accreditation system by providing appropriate deterrents against non-compliance or undue interference with individuals' privacy by relevant entities.

We hope this input is of assistance. Please contact Nathan Saad, Policy Lawyer, on (02) 9926 0174 or nathan.saad@lawsociety.com.au in the first instance if you have any queries.

Yours sincerely,

A handwritten signature in black ink that reads "CBanks". The signature is written in a cursive, flowing style.

Cassandra Banks
President