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Committee Secretary
Senate Legal and Constitutional Affairs Committee

By submission: https://www.aph.gov.au/Parliamentary_Business/Committees/OnlineSubmission

RE: Privacy and Other Legislation Amendment Bill 2024

The Internet Association of Australia (**IAA**) thanks the Senate Legal and Constitutional Affairs Committee (**Committee**) for the opportunity to respond to the consultation on *Privacy and Other Legislation Amendment Bill 2024* (**Bill**).

IAA is a member-based association representing Australia's Internet community. Our membership is largely comprised of small to medium sized internet service providers (**ISPs**) that also provide other telecommunications services. Our response is therefore in representation of these members, many of which would be considered small businesses that are often disproportionately affected by new regulatory obligations, especially when not clearly or appropriately drafted. In addition, given the increasing significance of data and personal information in today's digital age, and therefore the privacy concerns that arise accordingly, we offer below our responses in light of our members' and indeed our own role and interest in the broader Internet ecosystem.

IAA and our members recognise the great importance of privacy to our lives, and as it relates to the Internet, believe that having a robust legislative framework to ensure the privacy of individuals is paramount to ensure trust in Internet systems, and therefore appropriate use of the Internet. We have thus been actively engaging with the Attorney General Department's consultation processes for the review of the *Privacy Act 1988* (**Act**) to contribute to the development of an appropriate privacy framework in Australia. We therefore welcome the objectives and intent of the Bill to bring about reform to the Act in efforts to ensure it is fit for purpose in today's digitally connected landscape, and for the future.

However, we are also concerned that many of the provisions proposed by the Bill do not seem to recognise the importance of consultation and gaining input from the relevant stakeholders in creating regulation that will be effective and feasible. Given this is also the first tranche of reforms that will continue to achieve a major overhaul of the privacy regime, we are also concerned about the regulatory burdens that will be disproportionately felt by smaller businesses and make recommendations about the educative approach that should be adopted by government to ensure meaningful compliance with new obligations. We reiterate our commitment to contributing to this important body of work to ensure the privacy of Australians, and to that end, offer our response below.

OUR RESPONSE

PART 2 – APP CODES

We recommend that the proposed subsections 26GA(6) and 26GB(6) are amended to state that the Commissioner ***must*** consult with entities that would be subject to the APP Code or temporary APP Code (as the case may be), and any other person the Commissioner considers appropriate in the development of APP Codes and temporary APP Codes. We believe that consultation with relevant stakeholders is part of best practice in developing regulation. It fosters better relationship between government and those affected by the regulation, such as those that would be subject to any regulatory obligations. It is also important to ensuring that any such obligation is feasible and practicable to ensure meaningful compliance – without which the privacy of individuals cannot be ensured.

We appreciate that paragraphs 26GA(7)(b) already stipulates that the Commissioner must hold a public consultation process prior to registering any APP Code. Firstly, we request that a similar provision is also included in relation to temporary APP Codes under section 26GB. However, in our experience, in addition to holding a public consultation once the regulation is drafted prior to coming into effect, it is also crucial to consult with select stakeholders to assist the initial drafting of any regulatory reform. It is our view that this is the stage at which the general direction of the regulation is shaped, and consultation at later stages of the regulatory drafting process is significantly less likely to have impact for stakeholders.

PART 4 – CHILDREN'S PRIVACY

In general, we recognise and support the development of a specific privacy code to ensure the safety of children and young people. However, we consider that subsection 26GC(5) which sets out the entities bound by the Children's Online Privacy Code is too broad. We note the extremely broad terms of 'relevant electronic service' or 'designated internet service' under the *Online Safety Act 2021*. There are also many entities whose primary business may be unrelated to social media services, relevant electronic service or designated internet service, but such services may be an ancillary component of their service offering. As such, at the least, it should be clear that the obligations set out in the Children's Online Privacy Code only apply to the types of services intended to be captured under subsection 26GC(5) that are being accessed by or provided to children.

In addition, we repeat our comments above about the importance of consulting with relevant stakeholders from the outset, any not only prior to a code being registered. As such, we respectfully request the Committee to recommend the amendment of paragraph 26GC(8)(a) to stipulate the Commissioner must consult with entities that will be subject to the Children's Online Privacy Code in addition to the other entities currently stipulated under the paragraph. Again, while we appreciate that subsection 26GC(8)(b) provides that other persons may be consulted, this does not sufficiently ensure that those entities that will actually be subject to the regulation will be consulted. Nor is the public consultation provision under subsection 26GC(9)(b) sufficient, for reasons aforementioned in our response to Part 2. There needs to be input from industry and those entities that will be affected to ensure the workability and practical feasibility from the outset. In our experience, it is difficult to influence regulation once it has already been drafted.

Given the importance of the Children's Online Privacy Code, we believe that subsections 26GC(11) and (12) should stipulate that the Commissioner ***must*** make guidelines and ***must*** publish such

guidelines on the Children's Online Privacy Code. We note such guidelines would be very helpful for industry to understand their regulatory obligations, and as a result, ensure better compliance which is in the best interest of all parties. We note that the Commissioner's guidance material for the Australian Privacy Principles is a valuable resource that is very helpful for industry. Having similar guidelines for any new codes would be appreciated by industry.

PART 7 – ELIGIBLE DATA BREACHES

In general, we support this proposed new Division 5 to Part IIIC of the Act. It seems to harmonise other obligations and legislation such as those concerning cyber security and critical infrastructure where information sharing may be necessary in certain circumstances.

However, we believe that there should be greater checks and balances to ensure appropriate oversight over such information sharing powers. For example, paragraph 26X(1)(b) should require the Minister to be satisfied that making such a declaration, is on balance, would be more beneficial than the risks posed by allowing for the disclosure of personal information.

Subsection 28X(8) should also state that the Minister ***must*** consult with any person or body the Commissioner considers appropriate. Furthermore, in addition to the Commissioner and the Director-General of the Australian Signals Directorate as currently provided for under the Bill, the Minister should also consult with entities that the personal information may be disclosed to so that the Minister is satisfied that such entities have sufficient safeguards in place to ensure the protection of the personal information that will be disclosed to such entities

We consider that it may be appropriate to insert a provision in relation to section 26XA to provide for when a declaration may be extended beyond 12 months.

Moreover, we request that the Commissioner or other body such as the Australian Signals Directorate provide guidance material to assist entities with navigation of what is a designated secrecy provision for the purposes of compliance with section 26XB.

PART 8 – PENALTIES

We recognise that the penalty regime in relation to the legislative privacy framework needs uplifting to reflect the serious nature of privacy infringement in the modern age. However, we urge the government and Commissioner to take an educative and awareness raising approach in its compliance and enforcement approach for the first 12 months after the reforms come into effect.

We note that that the Department of Home Affairs and the Australian Signals Directorate took this approach following the overhaul of Australia's critical infrastructure framework. In recognition of the large-scale reform of a complex legislative framework and the introduction of many regulatory obligations, the Department actively consulted with industry and other relevant stakeholders, including hosting sector specific consultation forums. The Department also assured stakeholders during these sessions that government would be taking an educative and awareness raising approach for the first 12 months, only enforcing penalties and other enforcement measures in cases of serious infringement or contumelious disregard of the *Security of Critical Infrastructure Act* and its subordinate legislation. We believe this has been helpful for entities in adopting changes to their systems, procedures and operational models, while facilitating a more open and trusting relationship between industry and government, so that entities could seek clarity on their obligations to ensure their compliance approach was correct and appropriate without fear of being penalised.

We therefore request that the Committee recommend that a similar enforcement approach is taken in respect of these privacy reforms.

PART 10 – COMMISSIONER TO MAKE PUBLIC INQUIRIES

For similar reasons noted above, we recommend that section 33F states that the Commissioner ***must*** invite submissions form an entity specified under paragraph 33E(3)(c) or the class(es) of entities specified in accordance with paragraph 33E(3)(d).

Similarly, we believe it is paramount that an entity or entities about whom the public inquiry relates must be given the opportunity to make submissions prior to the report being made public. This should therefore be a provision inserted under section 33J. In addition to subsection 33J(2) which provides the report is provided to the entity or entities to which the report relates, the Commissioner must also invite such entities to provide submissions in response to the report. We believe this would be more fair and reflect best practice to making public inquiries.

SCHEDULE 2 – SERIOUS INVASIONS OF PRIVACY

In general, we understand that introducing a statutory tort of privacy has long-been considered necessary in recognition of the importance of privacy, and in order to allow appropriate redress for individuals whose privacy has been infringed.

However, we are concerned that the current drafting will open the courts up to vexatious claims and place undue stress on the courts. We recommend that there is further clarity provided on when an invasion of privacy was 'serious' for the purposes of paragraph 7(2)(d) of Schedule 2 to the Act.

CONCLUSION

Once again, IAA appreciates the opportunity to contribute to the reform of Australia's privacy legislation. We reiterate our commitment to working with government and other stakeholders to ensure the development of fit for purpose and effective legislation that will ensure the protection of individual privacy, that is also practicable for entities to comply with. We therefore offer our feedback above to ensure that the *Privacy and Other Legislation Amendment Bill* will introduce appropriate reform to our legislative privacy framework. We look forward to continue working with government and other stakeholders as the reform of Australia's *Privacy Act* continues.

ABOUT THE INTERNET ASSOCIATION OF AUSTRALIA

The Internet Association of Australia (IAA) is a member-based association representing the Internet community. Founded in 1995, as the Western Australian Internet Association (WAIA), the Association changed its name in early 2016 to better reflect our national membership and growth.

Our members comprise industry professionals, corporations, and affiliate organisations. IAA provides a range of services and resources for members and supports the development of the Internet industry both within Australia and internationally. Providing technical services as well as social and professional development events, IAA aims to provide services and resources that our members need.

IX-Australia is a service provided by the Internet Association of Australia to Corporate and Affiliate members. It is the longest running carrier neutral Internet Exchange in Australia. Spanning seven

states and territories, IAA operates over 30 points of presence and operates the New Zealand Internet Exchange on behalf of NZIX Inc in New Zealand.

IAA is also a licenced telecommunications carrier, and operates on a not-for-profit basis.

Yours faithfully,

Narelle Clark
Chief Executive Officer
Internet Association of Australia