31 March 2023

Attorney-General's Department
Robert Garran Offices
3-5 National Circuit
BARTON ACT 2600

Email: privacyactreview@ag.gov.au

Dear Sir/Madam

Consultation: Privacy Act Review Report

The Actuaries Institute ('the Institute') welcomes the opportunity to comment on the Privacy Act Review Report('the report') published on 16 February 2023. The Institute is the peak professional body for actuaries in Australia and has a longstanding commitment to contribute to public policy debates where our members have relevant expertise. Our members work in a wide range of fields including, insurance, superannuation and retirement incomes, enterprise risk management, data analytics, climate change impacts and government services.

The Institute has a strong record of engaging on issues of data, privacy, and the digital economy, including:

- An anti-discrimination guidance resource regarding the usage of artificial intelligence for insurance pricing and underwriting, produced in conjunction with the Australian Human Rights Commission in December 2022;
- The 5-year Productivity Inquiry about Australia's data and digital dividend from August 2022;
- The Digital Technology Taskforce Issues Paper: Positioning Australia as a leader in Digital Economy Regulation – Automated Decision Making and AI Regulation in March 2022;
- Treasury's Consultation on the Strategic Assessment of the Implementation of the economy-wide Consumer Data Right and implications for the Superannuation Sector from September 2021; and
- The Institute CEO's Paper at the joint ABS/RBA Economic Implications of the Digital Economy Conference in March 2022.

General comments on the Government's response to Privacy Act Review

The Institute welcomes the intention of the Privacy Act Review Report to address contemporary privacy risks and meet current community expectations.

The Institute's policy principles guiding our response to policy development include a commitment to 'good' regulation. 'Good' regulation should hold an appropriate balance between the regulatory solution and the problem it is intended to solve. A poorly designed regulatory solution may fail to solve the problem or cause unintended consequences that undermine the 'public interest'.

Institute of Actuaries of Australia
ABN 69 000 423 656
Level 2, 50 Carrington Street, Sydney NSW Australia 2000
t +61 (0) 2 9239 6100 **f** +61 (0) 2 9239 6170
e actuaries@actuaries.asn.au **w** www.actuaries.asn.au

The Privacy Act Review Report contains 116 proposals to strengthen and modernise Australian privacy law. We support the proposals predominantly, which represent an appropriate balance between the enhanced privacy protections demanded by many in society and the enablement of the emerging digital economy. Importantly, many of the proposals resolve existing gaps or uncertainties in the current Privacy Act,

Noting our general support for the review's recommendations, we focus our feedback on four areas where we feel greater clarity or more detailed guidance or consideration may be warranted:

1) Expanding the scope of the Privacy Act to include inferred or generated information;
2) Rights of Portability;
3) Automated decision-making; and
4) Explanatory materials, to guide institutions and practitioners of their expected conduct, both now and in the future.

1. Inferred or generated information

As the report suggests, there is uncertainty today around the boundaries of 'collection', particularly for inferred data. Clarifying this (in proposal 4.3) by explicitly mentioning inferred or generated information within the definition of 'collects' represents a positive step that we support. and hence represent 'good' regulatory reform proposals.

Specific feedback on proposals

However, we are unsure if this change alone will create full clarity and we encourage further discussion of the intended outcomes from this reform. The discussion should be informed by technical expertise, with carefully drafted guidance that seeks to answer any remaining questions faced by practitioners.

We observe first that humans make many inferences when interacting with each other. Such inferences are generally ephemeral in nature, and many are subconscious. These inferences allow conversations to function correctly. A call centre interaction is a business situation containing many such inferences. The current Privacy Act only captures such inferences when they are recorded, which is a suitable and realistic boundary to apply for human inferences. If a call centre operator infers from a tone of voice that a customer is angry, that only becomes Personal Information if that inference is actually recorded (for example, in a written record of the call).

From this, the Privacy Act captures only a small subset of human inferences. However, non-recorded inferences have not entirely vanished. For example, by listening to a recording of that call, the operator may again infer that the customer was angry. We may surmise that this form of inference is not 'recorded', but it is available on-demand if the human inference process that generates it is reapplied to the stored input data.

Algorithmic inferences have some similarities to the human case, but also some differences which require careful contemplation.

For example, again in a call centre setting, algorithms may be available on-demand to telephone operators. Again, following the previous example, this might include sentiment analysis of a call. This raises a question for legislators: if an algorithm produces a (temporarily available) inference, which is displayed in real-time to a human, and that inference is not

stored in a permanent record, is it 'collected', merely for having been displayed at a point in time?

Answering 'yes' to the question above would create substantial challenges. For example:

- A right to access (proposal 18.1 (a)) might then include the production of potential inferences merely from the existence of algorithms and input data, whether or not those inferences were ever produced, seen or used by any human or machine process. This seems excessive and may also be misleading to consumers.
- A right to erasure (proposal 18.3), if applied to an inference of this sort, might then effectively require algorithm erasure (which would usually extend further than just that individual), which is surely not intended.
- Algorithmic inferences are generally probabilistic. For example, a sentiment detection algorithm might infer a 60% chance that a person is angry, a 30% chance they are sad, and a 10% chance for other emotions. If the intent is to capture such inferences outside of explicit records being kept, the nature of these probabilistic inferences may be confusing or unhelpful to most users.

While the points above may potentially be defeated by Proposal 18.6 (especially(c)), this is currently unclear to us.

We suggest the answer to our explanatory question should be 'no'. Inferences that algorithms can make should only be considered 'collected' if they are stored in a manner akin to a permanent record, and should not be considered 'collected' if they are merely able to be produced on demand, nor if they were available for a limited period of time but not stored for future use. This results in similar logic to human inferences. Drafting of the legislation and associated guidance should ensure that this is made clear. Or, if it is intended that such ephemeral or potential inferences are captured, guidance should contemplate any practical challenges such as those identified above.

2. Rights of Portability

Section 18.1 of the report notes that a right to portability will be established as part of the Consumer Data Right (CDR), and therefore the Privacy Act Review does not contemplate this further. We observe, however, that the CDR contains its own privacy standards, and some commentators have observed that this may inhibit the effectiveness of the CDR as a data portability regime, particularly when those standards are more stringent.[1] We suggest that consideration should be given to creating consistency of the CDR's privacy rules with the augmented Privacy Act, such that any disincentives for the use of the CDR regime are removed. The Privacy Act review may still be an appropriate place for such considerations.

[1] For an example co-authored by actuaries see Bednarz, Dolman & Weatherall (2022) 'Insurance Underwriting in an Open Data Era - Opportunities, Challenges and Uncertainties' presented to All-Actuaries Summit 2022, available here: https://actuaries.logicaldoc.cloud/download-ticket?ticketId=09c77750-aa90-4ba9-835e-280ae347487b

3. Automated decision-making

It is noted in this section that there is broader work being undertaken to consider regulation of artificial intelligence, including the consultation of the Department of Industry, Science and Resources, to which the Institute has responded.[2] We support this general direction – it would be unproductive for the Privacy Act review also to contemplate this topic in any substantial depth.

We are somewhat concerned about the ability of privacy policies to effectively deliver the outcomes envisaged by proposals 19.1 and 19.3. Consumer advocacy groups regularly criticise privacy policies for their length and complexity, and note that consumers rarely if ever access such documents. Adding detail and complexity into documents that are already criticised for their length or complexity is unlikely to resolve the issues identified by the paper. This would be particularly acute for organisations that have multiple algorithms meeting the threshold suggested by this chapter, which might be the case in many organisations where our members work.

We support, as a minimum, a simple statement than an entity 'may use personal information to make substantially automated decisions with legal or similarly significant effect'. Beyond this, we suggest that rather than making firm recommendations in this section to augment privacy policies, an evidence-based approach to disclosure should be considered. Options could be tested with consumers, with the aim of selecting a disclosure methodology that best meets the purposes of the reform. Furthermore, once the disclosure methodology has been selected, the Office of the Australian Information Commissioner (OAIC) should consider whether producing standardised templates that streamline the format and content of information shared with consumers would be beneficial.

4.Explanatory material

The Privacy Act Review Report recommends OAIC guidance be generated as supplementary material to several of the proposals. This is sound advice that assists practitioners to understand the intent of the Privacy Act while also supporting the rights of individuals. We suggest additional guidance would be beneficial to facilitate understanding of the proposals.

Proposal 4.2 is to add a "non-exhaustive list of information that may be personal information" to the Privacy Act, and to supplement the list with more specific examples in explanatory materials and OAIC Guidance. Page 29 of the report contemplates the creation of a list of datasets that are not *personal information*, but rejects this on the grounds that "an exclusive list would be counter-productive because the information would not necessarily never be personal information." We suggest that this illustrates how important such guidance is - the fact that an exclusive list cannot easily be articulated due to its context-sensitive nature indicates the challenge faced by practitioners.

Guidance is still possible in such situations and can be extremely helpful for practitioners and the public. For example, case studies could be used to demonstrate situations where a specific type of personal information would be classed as personal information, and a contrasting situation where it would not. These case studies would be very tightly defined so as to not necessarily generalise fully, but would help practitioners and the public understand how to make such decisions in their own businesses. The Institute recently partnered with the Australian Human Rights Commission to produce this form of guidance to help support compliance with

[2] https://www.actuaries.asn.au/Library/Submissions/2022/Technology.pdf

federal antidiscrimination laws in the context of algorithmic decision making – a highly contextual subject where guidance was previously lacking.[3]

Similarly, proposal 19.2 is to add "high-level indicators of the types of decisions with a legal or similarly significant effect" to the Privacy Act, along with OAIC guidance. This proposal could be complemented by including examples of decisions that would *not* have a legal or similarly significant effect. By providing the contrasting view in clear, accessible guidance, practitioners and the public can better see where the boundary ought to be drawn. This would likely result in fewer disputes and less pressure on the legal system to manage such disputes.

Generally, where guidance is contemplated for a binary, boundary decision, we suggest that wherever possible both sides of the boundary should be contemplated in such guidance.

Proposal 11.1 is to amend the definition of consent to provide that it must be "current". Furthermore, page 105 of the report states "Periodic renewal of consent should not generally be required. However, the time that has elapsed since consent was given may be relevant in certain circumstances." Considering the potential intricacies referenced here, OAIC guidance would support practitioners in understanding the factors that determine an appropriate 'duration' of consent.

The Institute would be pleased to discuss this submission. If you would like to do so, please contact me on (02) 9239 6100 or elayne.grace@actuaries.asn.au.

Yours sincerely,

Elayne Grace
CEO

[3] https://humanrights.gov.au/sites/default/files/guidance_resource_ai_-_2022_v7-2_0.pdf