

S.22 - Irrelevant



s.22 - Irrelevant



- Email to AGD re Veterans' Affairs Legislation Amendment (Digital Readiness and Other Measures) Bill 2016 (Rebecca – coming due 3/11)

s.22 - Irrelevant



From: [Sophie Higgins](#)
To: [Rebecca Brown](#)
Subject: RE: FOR CLEARANCE: due cob 3 Nov pls - Veterans' Affairs Legislation Amendment (Digital Readiness and Other Measures) Bill 2016 [DLM=Sensitive:Legal]
Date: Wednesday, 2 November 2016 8:07:00 PM
Attachments: [image001.png](#)

Hi Beck

Thanks for reviewing the provisions of the Bill and drafting this response so well. It looks good to me – my only changes were two small typos I noticed (highlighted in yellow below). Maybe just add that these are officer level comments (Angelene suggested we added that to Clare's email to AGD earlier this week as she had not reviewed it, but it looks like AGD took that out when forwarding on to OPC). Anyway, let's put it in again in our response to AGD!

Happy for you to send to Kathryn tomorrow.

Thanks again

Sophie

From: Rebecca Brown
Sent: Wednesday, 2 November 2016 6:00 PM
To: Sophie Higgins s.22 - Irrelevant
Subject: FOR CLEARANCE: due cob 3 Nov pls - Veterans' Affairs Legislation Amendment (Digital Readiness and Other Measures) Bill 2016 [DLM=Sensitive:Legal]

Hi Sophie

Please see our draft comments re this Bill below. I've also attached a Word doc containing the text below in case that's easier to edit. Happy to incorporate any feedback/amendments you may have.

Beck

Thank you for the opportunity to comment on the Veterans' Affairs Legislation Amendment (Digital Readiness and Other Measures) Bill 2016 (the Bill).

We understand the Bill will make a number of amendments to the *Military Rehabilitation and Compensation Act 2004* (MRCA), the *Safety, Rehabilitation and Compensation (Defence-related Claims) Act 1988* (SRCA) and the *Veterans' Entitlements Act 1986* (VEA). Our comments below relate to Schedule 2 of the Bill, which will amend the three Acts to enable the disclosure of information in certain circumstances.

Schedule 2 of the Bill will insert a 'public interest disclosure' provision in the MRCA, SRCA and VEA. This provision provides that the Secretary may, if the Secretary certifies that it is necessary in the public interest to do so in a particular case or class of cases, disclose any information obtained by any person in the performance of that person's duties under the relevant Act to such persons or for such purposes as the Secretary determines.

The Bill will also insert a provision in each Act that states that the disclosure is authorised by law for the purposes of the Australian Privacy Principles (APPs). Specifically, the disclosure of personal information under the new provisions will be permitted by the 'required or authorised

by or under law' exception in APP 6.2(b). This authorisation means that the privacy protections in APP 6, which limit the circumstances in which personal information can be used and disclosed, will not apply to any disclosures made in accordance with the new provisions.

Where legislation proposes to authorise the disclosure of personal information, the OAIC generally suggests that consideration should be given to whether those measures are reasonable, proportionate and necessary. That is, whether they appropriately balance the intrusion on individuals' privacy with the overall public policy objectives of the proposal. This is consistent with the approach taken in applying Article 17 of the International Covenant on Civil and Political Rights and are matters which the Department will likely need to address in its Statement of Compatibility with Human Rights. Further, any such provisions should be drafted in a manner that is consistent with the spirit and intent of the Privacy Act. This includes ensuring that any authorisation is drafted narrowly, and, to the extent possible, clearly describes:

- the types of personal information that may be disclosed
- who may disclose the information, and who may receive the information
- the purpose for which the personal information may be disclosed, and, once received, for which the information may be subsequently disclosed by the recipient.

The current drafting of the disclosure provisions in the Bill is broad, and authorises the Secretary to disclose any information to any persons and for any purposes that the Secretary certifies is in the public interest. Greater certainty and transparency about the scope of the disclosures allowed under the provisions could be achieved by specifying some of the detail in the Bill (such as the types of information that may be disclosed and the main purposes for which information may be disclosed). Alternatively, limitations on the operation of the disclosure provision could be prescribed by regulations. The provisions in the Bill enable the Minister to, by legislative instrument, make rules for **and** in relation to the exercise of the Secretary's power to give certificates under the provision. We note that existing legislation (such as the *Social Security (Administration) Act 1999* and the *Paid Parental Leave Act 2010*) includes similar disclosure provisions and Rules issued under those Acts set out the matters to which the Secretary must have regard in giving a public interest certificate and the circumstances in which a public interest certificate may be given, which include: to prevent, or lessen, a threat to the life, health or welfare of a person; for the enforcement of laws; to correct a mistake of fact; to brief a Minister or to locate missing persons etc. For example, see the [Paid Parental Leave Rules 2010](#), [Social Security \(Administration\) \(Public Interest Certificate Guidelines\) \(DEEWR\) Determination 2013](#), [Social Security \(Public Interest Certificate Guidelines\) \(DSS\) Determination 2015](#).

We note that the Bill does contain some privacy protections, including the requirement for the Secretary to notify an individual of the Secretary's intention to disclose their personal information. This provision also states that the individual must be provided with the opportunity to make comments on the proposed disclosure and that these comments must be considered by the Secretary. The Bill also makes it an offence if the Secretary fails to comply with the provision in relation to any disclosures made under that provision. **These** protections in the Bill could be further enhanced by, for example, addressing the issues raised above in terms of limiting the purposes for which disclosures can be made and by making it clear, either in the Bill or in regulations, that the privacy of individuals is a relevant matter for the Secretary to consider before disclosing personal information.

Pages 5 through 6 redacted for the following reasons:

s.22

7 November 2016

s.22 - Irrelevant



- Email to AGD re Veterans' Affairs Legislation Amendment (Digital Readiness and Other Measures) Bill 2016. The Bill would insert a provision in Military Rehabilitation and Compensation Act 2004, the Safety, Rehabilitation and Compensation (Defence-related Claims) Act 1988 and the Veterans' Entitlements Act 1986 that states that the disclosure is authorised by law for the purposes of the APPs. We provided our usual comments about proportionality and including greater certainty in the Bill about the scope of disclosures (or in the regs).

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Released under FOI - OAIC



THE SENATE

STANDING COMMITTEE ON FOREIGN AFFAIRS, DEFENCE AND TRADE

6 December 2016

Mr Timothy Pilgrim PSM
Australian Information Commissioner and Australian Privacy Commissioner
Office of the Australian Information Commissioner

Email: xxxxxxxxxx@xxxx.xxx.xx

Dear Mr Pilgrim

Veterans' Affairs Legislation Amendment (Digital Readiness and Other Measures) Bill 2016 [provisions]

On 1 December 2016, the Senate referred the provisions of the Veterans' Affairs Legislation Amendment (Digital Readiness and Other Measures) Bill 2016 to the Senate Foreign Affairs, Defence and Trade Legislation Committee for inquiry and report by 14 February 2017.

The purpose of this letter is to draw your attention to the inquiry and to invite you, or your organisation, to make a written submission to the committee.

Also, the committee is seeking to publicise its work as widely as possible and would appreciate you referring this letter of invitation to any individual, group or organisation that you think would like to contribute to the inquiry.

Information and notes to assist in preparing submissions are available from the website www.aph.gov.au/senate_fadt or the secretariat (ph: s.22 - Irrelevant fax: 02 6277 5818).

The committee asks that submissions be lodged by 25 January 2017 to allow members adequate time before the committee considers its public hearing program.

The committee would prefer to receive written submissions in electronic form submitted online or sent by email to fadt.sen@aph.gov.au as an attached Adobe PDF or MS Word format document. The email must include full postal address and contact details.

Alternatively, written submissions may be sent to:

Committee Secretary
Senate Foreign Affairs, Defence and Trade Committee
PO Box 6100
Parliament House
Canberra ACT 2600

At some stage during the inquiry, the committee normally makes submissions public. Please indicate if you want your submission kept confidential.

The committee hopes to hear from you soon. If you would like further information, please do not hesitate to contact me.

Yours sincerely



Senator Chris Back
Chair
Senate Foreign Affairs, Defence and Trade Legislation Committee

From: [Melanie Drayton](#)
To: [Sophie Higgins](#)
Subject: FW: Call from CW Ombudsman re Veterans affairs bill [SEC=UNCLASSIFIED]
Date: Monday, 13 February 2017 10:19:13 AM

From: Angelene Falk
Sent: Friday, 3 February 2017 4:34 PM
To: Sarah Ghali **s.22 - Irrelevant** Jacob Suidgeest **s.22 - Irrelevant** Melanie Drayton
s.22 - Irrelevant
Subject: Call from CW Ombudsman re Veterans affairs bill [SEC=UNCLASSIFIED]

Hello

I had a call from the Legal officer on Richard Glenn's ask to give us the heads up that they are making a second submission to this inquiry
http://www.aph.gov.au/Parliamentary_Business/Committees/Senate/Foreign_Affairs_Defence_and_Trade/VetAffairsDigitalBill
and will be stating that any development of legislation or policy relating to disclosure of PI should occur in consultation with us. There are apparently new disclosure provisions.

Can you please remind me if we had been consulted and if we made comment on the Bill: Veterans' Affairs Legislation Amendment (Digital Readiness and Other Measures) Bill 2016 [provisions]?

If we haven't, can someone take a look at the privacy impacts and let me know if there are any issues (so I can brief TP in case he's asked about it) and whether we need to make any last minute representations to the Committee or the Department?

Many thanks

Angelene

Angelene Falk | Deputy Commissioner |
Office of the Australian Information Commissioner
GPO Box 5218 SYDNEY NSW 2001 | www.oaic.gov.au |
s.22 - Irrelevant

From: [Melanie Drayton](#)
To: [Sophie Higgins](#)
Subject: Fwd: Public Hearing Invitation - Inquiry into the Digital Readiness Bill - Senate Foreign Affairs, Defence and Trade Committee [SEC=UNCLASSIFIED]
Date: Monday, 13 February 2017 7:30:35 AM

Hello Sophie

Can we please discuss this request first thing this morning?

Thanks very much
Mel

Sent from my iPhone

Begin forwarded message:

From: Melanie Drayton s.22 - Irrelevant
Date: 10 February 2017 at 4:06:14 PM AEDT
To: Timothy Pilgrim s.22 - Irrelevant Angelene Falk
 s.22 - Irrelevant
Cc: Brenton Attard s.22 - Irrelevant
Subject: RE: Public Hearing Invitation - Inquiry into the Digital Readiness Bill - Senate Foreign Affairs, Defence and Trade Committee [SEC=UNCLASSIFIED]

Hello

Sorry for the delay on this one.

I put in a call to the Committee's Research Officer and she has sent me the questions the Committee intends to ask. They're quite specific.

- 1) Under the bill's proposed public interest disclosure provision, the Secretary of DVA will have the power to correct 'mistakes' or 'misinformation'.
 - a. Please advise the committee what is the current situation that DVA or other agencies require this power?
 - b. Why does DVA require these provisions so urgently?
 - c. Is there not already a mechanism for agencies to report crimes to police?
 - d. Over the last 5 years, how many cases were there of mistake and/or misinformation that agencies did not have the power to respond to?

I told them we will get back to them either this afternoon or Monday about our attendance. Obviously it'll be Monday now.

I will send you a more fulsome email about the issue later today.

We could possibly provide a written response if those are the issues the Committee

wants to hear about. I will give it more thought.

Thanks
M

From: Timothy Pilgrim
Sent: Friday, 10 February 2017 1:21 PM
To: Angelene Falk [s.22 - Irrelevant]
Cc: Brenton Attard [s.22 - Irrelevant] Melanie Drayton
[s.22 - Irrelevant]
Subject: Re: Public Hearing Invitation - Inquiry into the Digital Readiness Bill - Senate Foreign Affairs, Defence and Trade Committee [SEC=UNCLASSIFIED]

Ok

On 10 Feb 2017, at 1:20 pm, Angelene Falk [s.22 - Irrelevant] wrote:

Yes a bit. I'll get Melanie to fill you in on the details. I had a call from the cw ombos legal officer to let us know they were submitting.

On 10 Feb 2017, at 1:16 pm, Timothy Pilgrim
[s.22 - Irrelevant] wrote:

Do we know much about this?

On 10 Feb 2017, at 1:08 pm, Angelene Falk
[s.22 - Irrelevant] wrote:

FYI possible Committee appearance next Thursday evening. Please hold the diary

Melanie will come to us.

Begin forwarded message:

From: Melanie Drayton
[s.22 - Irrelevant]

Date: 10 February 2017 at
12:01:40 pm AEDT

To: Angelene Falk
[s.22 - Irrelevant]

**Subject: FW: Public Hearing
Invitation - Inquiry into the
Digital Readiness Bill - Senate
Foreign Affairs, Defence and
Trade Committee
[SEC=UNCLASSIFIED]**

Hello

This came in this morning.

Stay tuned for a plan of attack.

M

From: Jacob Suidgeest
Sent: Friday, 10 February
 2017 10:02 AM
To: Melanie Drayton
 s.22 - Irrelevant

Subject: FW: Public Hearing
 Invitation - Inquiry into the
 Digital Readiness Bill - Senate
 Foreign Affairs, Defence and
 Trade Committee
 [SEC=UNCLASSIFIED]

Hi Mel

Can I give this one to you to
 consider and action. See the
 attached email for previous
 comments. I'll acknowledge
 the email.

Regards,

Jacob

From: Balaga, Kimberley (SEN)
 s.22 - Irrelevant

On Behalf Of FADT,
 Committee (SEN)

Sent: Friday, 10 February
 2017 9:16 AM

To: Enquiries
 <xxxxxxxx@xxx.xxx.xx>

Cc: FADT, Committee (SEN)
 <xxx.xxx@xxx.xxx.xx>

Subject: Public Hearing
 Invitation - Inquiry into the
 Digital Readiness Bill - Senate
 Foreign Affairs, Defence and
 Trade Committee

Good morning

I called yesterday afternoon in regards to the following matter and was advised to send an email to your office so that it may be directed to the relevant officers.

The Senate Foreign Affairs, Defence and Trade Committee is currently conducting an inquiry into the Veterans' Affairs Legislation Amendment (Digital Readiness) Bill 2016.

The committee is holding a public hearing next Thursday, 16 February 2017 from 5.00pm to 6.00pm at Parliament House and would like to invite the Office of the Information Commissioner to appear and give evidence. The Commonwealth Ombudsman and officers of DVA have also been invited to appear.

If you could please call me on s.22 - Irrelevant to discuss, I would be most appreciative.

Regards

Kimberley Balaga | Research Officer

<image001.gif>

Standing Committee on Foreign Affairs, Defence and Trade | Department of the Senate
s.22 - Irrelevant

Disclaimer

This email, and any attachments, may be confidential and may be protected by privilege. You should not copy, use or disclose it for any unauthorised purpose.

<mime-attachment>

From: [Sophie Higgins](#)
To: [Melanie Drayton](#)
Subject: FOR CLEARANCE: draft email to TP - Veterans' Affairs Legislation Amendment (Digital Readiness and Other Measures) Bill 2016 [SEC=UNCLASSIFIED]
Date: Monday, 13 February 2017 11:15:00 AM

Hi Mel

Below is a draft email to TP with overview and chronology. I will ask Renee to prepare the briefing paper and response to the Committee's questions today. Please let me know if you need any additional info for TP in the meantime, or if you would like to discuss approach further

Thanks
 Sophie

Hi Timothy

You have been invited to appear before the Senate Foreign Affairs, Defence and Trade Legislation Committee on **Thursday, 16 February from 5-6pm** in relation to the [Veterans' Affairs Legislation Amendment \(Digital Readiness and Other Measures\) Bill 2016](#) (the Bill). A brief overview and chronology of our involvement with the Bill is below. We will also prepare and send you more a detailed briefing paper for the hearing, including written responses to specific questions the Committee has sent us, by COB tomorrow.

In the meantime, please let us know if you would like to discuss.

Sophie

Overview

The Bill:

- inserts a provision in each of the *Veterans' Entitlements Act 1986* (VEA), *Military Rehabilitation and Compensation Act 2004* (MRCA) and the *Safety Rehabilitation and Compensation (Defence-related Claims) Act 1988* (DRCA), that would enable the Secretary to authorise the use of computer programmes to make decisions and determinations, exercise powers or comply with obligations etc under those Acts. Safeguards include that the Commissioner may make a decision or determination in substitution for a decision or determination made by a computer program, if satisfied that decision or determination is incorrect.
- also inserts a provision in each of the VEA, MRCA and DRCA that would enable the Secretary to disclose information about a particular case or class of cases to such persons and for such purposes as the Secretary determines, if he or she certifies that it is necessary in the public interest to do so. Safeguards include that the power cannot be delegated by the Secretary to anyone, the Secretary must act in accordance with rules that the Minister makes, the Minister cannot delegate his or her rule making power, and, unless the Secretary complies with certain notification requirements before disclosing personal information, he or she commits an offence, punishable by 60 penalty units.

- inserts three information sharing provisions in the DRCA between the Military Rehabilitation and Compensation Commission and the Secretary of the Department of Defence or the Chief of the Defence Force.

Chronology

- On 31 October 2016, OPC contacted AGD seeking comment on the Bill. AGD contacted OAIC seeking any comments by 3 November 2016. The OAIC was only provided with the Bill and not any EM.
- On 3 November 2016, Rebecca Brown emailed AGD, the OAIC's comments on the Bill (cleared by me, as acting Director). The comments focused on the scope of broad new disclosure powers. We suggested that any authorisation which permits secondary disclosures under the Privacy Act should clearly describe the types of PI that may be disclosed; who may disclose the information and who may receive the information and the purpose for which the information may be disclosed and on-disclosed.
- The AGD sent these comments to OPC on 3 November 2017, along with a very brief AGD comment that 'public interest disclosure provisions in the Bill would need to be justified in the EM including in its Statement of Compatibility with Human Rights [D2016/008459](#).
- On 7 November 2016, DVA confirmed by email that 'it is intended that, should this Bill be enacted, the Minister for Veterans' Affairs would make rules setting out the circumstances in which the Secretary may make a public interest disclosure (subitem (3) of items 1, 7 and 10 of Schedule 2) before the Secretary exercises that power. The nature and content of those rules is likely to be similar to the *Social Security (Public Interest Certificate Guidelines) (DSS) Determination 2015*. They also noted that the sorts of situations in which we envisage the public interest disclosure power being exercised are: where there is a threat to life, health or welfare, for the enforcement of laws, in relation to proceeds of crime orders, mistakes of fact, research and statistical analysis, APS code of conduct investigations, misinformation in the community and provider inappropriate practices (this is subject to the Minister agreeing to make rules along these lines.)' [D2016/008500](#)
- The [Bill](#) was introduced and read for a first and second time in Parliament on 24 November 2016. It was referred to the Senate Foreign Affairs, Defence and Trade Legislation Committee on 1 December 2016, with a reporting dated of 14 February 2017 (the [Committee Inquiry](#)). Submissions closed on 25 January 2017. The OAIC did not make a submission.
- On 3 February 2017, a Legal Officer from the Commonwealth Ombudsman contacted AF and noted that they would be making a second submission to the Committee Inquiry – noting that any development of legislation or policy relating to disclosure of PI should occur in consultation with the OAIC.
- On 10 February 2017, a Research Officer from the Senate Committee contacted the OAIC to advise that it is holding a public hearing on Thursday, 16 February 2017 and invites the information Commissioner to appear from 5:00pm – 6:00pm. The Commonwealth Ombudsman and officers of DVA have also been invited to appear. They have provided the OAIC with specific questions in relation to the public interest disclosure provisions – which the OAIC intends to submit a written response to before the hearing, as well as other questions [D2017/001180](#).

Sophie Higgins | Director (a/g) | Regulation & Strategy Branch

Office of the Australian Information Commissioner

GPO Box 5218 SYDNEY 2001 | www.oaic.gov.au

s.22 - Irrelevant

-

Commissioner brief: Briefing notes – Inquiry into the Digital Readiness Bill – Senate Foreign Affairs, Defence and Trade Committee

Type: **Commissioner brief**

Purpose: **Senate Foreign Affairs, Defence and Trade Committee public hearing inquiry into the Digital Readiness Bill**

For: **The Australian Information Commissioner**

Key points

1. The Veteran's Affairs Legislation Amendment (Digital Readiness) Bill 2016 seeks to amend the *Veteran's Entitlements Act 1986* (VEA), *Military Rehabilitation and Compensation Act 2004* (MRCA) and the *Safety Rehabilitation and Compensation (Defence-related claims) Act 1988* (DRCA). The Bill and Explanatory memorandum are at **Annexure A**.
2. On 31 October 2016, the Attorney General's Department Information Law Unit (AGD) requested that the OAIC provide any comments on the Bill, and these would be provided to the Office of Parliamentary Counsel (OPC). On 3 November 2016, the OAIC provided comments on the Bill to the AGD, which AGD passed on to OPC and then to Department of Veterans' Affairs (DVA).
3. The OAIC's comments focused on the public interest disclosure provisions in Schedule 2 of the Bill. These authorise the Secretary to make disclosures that the Secretary certifies as 'necessary in the public interest', and invoke the 'required or authorised' by law exception in APP 6 in the Privacy Act. The AGD did not make any substantive comments on the Bill.
4. The Commonwealth Ombudsman outlined in their second submission on the disclosure provisions (and also notified Angelene Falk by telephone of their intention to make such a submission) that any development of legislation or policy relating to the disclosure of personal information should occur in consultation with the OAIC.
5. The Bill states that the Secretary must, in giving such a 'public interest certificate', act in accordance with Rules made by legislative instrument, by the Minister. While not included in the OAIC's comments to OPC, the OAIC's email to the Committee on 14 February noted that the OAIC would welcome the opportunity to be consulted on any such draft rules. The OAIC will have regard to whether any permitted disclosures accord with the social license given to government to handle and disclose individuals'

Content Author: Renee Alchin	Responsible Director: Sophie Higgins	Responsible Assistant Commissioner
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personal information, and are generally consistent with the spirit and intent of the Privacy Act.

6. Even where the disclosure is required or authorised by law under APP 6, the APPs will still govern the Department of Veteran's Affairs (DVA) information handling practices and would continue to apply to that personal information held by the DVA (such as the requirements in relation to transparency, data quality, security, and rights to access and correction).
7. The OAIC welcomes the safeguard in the Bill that before disclosing personal information about a person under the 'public interest disclosure' provisions, the Secretary must notify the person in writing of the Secretary's intention to disclose the information; give the person a reasonable opportunity to make written comments on the proposed disclosure of the information and consider any written comments made by the person. This is consistent with the emphasis on transparency in the Privacy Act, and may in some circumstances give the individual a 'reasonable expectation' that their personal information will be disclosed for a particular purpose.
8. The OAIC acknowledges that automated decision-making is likely to provide a number of advantages for DVA and for Australians accessing their services, particularly in regards to efficiencies. However, the OAIC would encourage consideration be given at an early stage, to ensuring that any privacy impacts are identified and minimised to the extent possible, including by undertaking a privacy impact assessment, and that an integrated approach to privacy management is taken.

Background – the Digital Readiness Bill

- The Bill will insert a provision into the VEA, MRCA, and DRCA to enable the Secretary to authorise the use of computer programmes to make decisions and determinations, exercise powers or comply with obligations etc. under these Acts (Schedule 1).
- Safeguards in the Bill include that the Secretary may make a decision or determination in substitution for a decision or determination made by a computer program, if satisfied that the decision or determination is incorrect (Schedule 1).
- The Bill will also insert a provision into each of these Acts that give the Secretary broad disclosure powers: 'the Secretary may, if the Secretary certifies that it is necessary in the public interest to do so in a particular case or class of cases, disclose any information obtained by any person in the performance of that person's duties under this Act to such persons and for such purposes as the Secretary determines' (Schedule 2).

- Safeguards in the Bill include that:
 - the power cannot be delegated by the Secretary to anyone
 - the Secretary must act in accordance with rules that the Minister makes and the Minister cannot delegate his or her rule making power
 - before disclosing information, the Secretary must notify the person concerned in writing about the proposed disclosure and consider any written comments made by the person, and
 - unless the Secretary complies with the above notification requirements before disclosing personal information, he or she commits an offence, punishable by 60 penalty units (Schedule 2).
- The Explanatory Memorandum to the Bill gives as examples of circumstances in which it might be appropriate for the Secretary to disclose such information as including 'where there is a threat to life, health or welfare, for the enforcement of laws, in relation to proceeds of crime orders, mistakes of fact, research and statistical analysis, APS code of conduct investigations, misinformation in the community and provider inappropriate practices' (p. 11).
- The Bill also inserts three information sharing provisions in the DRCA between the Military Rehabilitation and Compensation Commission and the Secretary of the Department of Defence or the Chief of the Defence Force.

OAIC's responsibilities to examine proposed enactments impact privacy

- A range of the OAIC's responsibilities involve examining proposals that may restrict the exercise of individuals' privacy protections in favour of another public interest objective.
- The Privacy Act recognises that the protection of individuals' privacy, through the protection of their personal information, is not an absolute right. Rather, those interests must be balanced with the broader interest of the community in ensuring that APP entities are able to carry out their legitimate functions and activities.
- This balancing is reflected in the exceptions to a number of the APPs, which except from the operation of those APPs, certain information handling practices considered to be in the public interest when balanced with the interest in protecting an individual's privacy.

Disclosures of personal information

- APP 6 outlines when an APP entity may use or disclose personal information. It generally provides that an APP entity can only use or disclose personal information for a purpose for which the information was collected (known as the 'primary purpose'), or for a

secondary purpose where one of the exceptions listed in APP 6 apply. The exceptions include where 'a use or disclosure of personal information is authorised or required by Australian law' (APP 6.2(b)).

- The OAIC is regularly invited to comment on draft laws that require or authorise the collection, use or disclosure of personal information in a manner that would otherwise be inconsistent with one or more of the APPs. The effect of such laws is that one or more APPs will not apply to the use or disclosure of personal information, described in the law.
- Consistent with the approach taken in applying Article 17 in the International Covenant on Civil and Political Right (ICCPR), the OAIC's advice generally suggests consideration should be given to whether those measures are proportionate and necessary. That is, whether they appropriately balance the intrusion on individuals' privacy with the overall public policy objectives of the proposal. Additionally, when handling of individuals' personal information is authorised in the broader interests of the community, it is generally recommended that those activities be accompanied by an appropriate level of privacy safeguards and accountability. Should such a proposal be considered to appropriately balance these objectives, it is generally recommended that the scope of the proposal be drafted consistent with the spirit and intent of the Privacy Act.
- Even where the disclosure is required or authorised by law under APP 6, the APPs will still govern the Department of Veteran's Affairs (DVA) information handling practices and would continue to apply to that personal information held by the DVA (such as the requirements in relation to transparency, data quality, security, and rights to access and correction).

Content Author: Renee Alchin	Responsible Director: Sophie Higgins	Responsible Assistant Commissioner
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OAIC engagement with the Bill

- On 31 October 2016, the OPC contacted the AGD seeking comment on the Bill, and that request was passed onto the OAIC for comment. The OAIC was not provided with the Explanatory Memorandum. The OAIC's comments on the Bill were provided to AGD, and passed on to the OPC on 3 November 2016. The AGD did not make any substantive comments on the Bill. The comments provided to OPC, along with a response provided by DVA are at **Annexure B**.
- The OAIC's comments focused on the public interest disclosure provisions in Schedule 2 of the Bill outlined above.
- Key points made in the OAIC's comments were:
 - the OAIC noted that the disclosure of personal information under the new provisions will be permitted by the 'required or authorised by or under law' exception in APP 6.2(b).
 - The OAIC suggested that where a Bill invokes this exception in the Privacy Act, consideration should be given to whether those measures are reasonable, proportionate and necessary.
 - The OAIC referred to similar disclosure provisions in the *Social Security (Administration) Act 1999* and the *Paid Parental Leave Act 2010*, noting that rules issued under that legislation set out the matters to which the Secretary must have regard to in giving a public interest certificate and the circumstances in which a public interest certificate may be given, which include: to prevent, or lessen, a threat to the life, health or welfare of a person; for the enforcement of laws; to correct a mistake of fact; to brief a Minister or to locate missing persons etc.
- On 7 November 2017, DVA responded by email to the OAIC that:
 - rules would be made setting out the circumstances in which the Secretary may make a public interest disclosure before the Secretary exercises that power. The nature and content of those rules is likely to be similar to the Social Security (Public Interest Certificate Guidelines) (DSS) Determination 2015, mentioned below.

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s.22 - Irrelevant		Melanie Drayton

- The sorts of situations in which it is envisage the public interest disclosure power being exercised are will be set out in the EM, including: where there is a threat to life, health or welfare, for the enforcement of laws, in relation to proceeds of crime orders, mistakes of fact, research and statistical analysis, APS code of conduct investigations, misinformation in the community and provider inappropriate practices (this is subject to the Minister agreeing to make rules along these lines.)
- On 6 December 2016, the Committee invited the OAIC to make a comment on the Bill, but the OAIC inadvertently did not action this request. Melanie has apologised to the Committee for this oversight.
- Seven submissions have been made to the Committee – see **Annexure C**. These include a lengthy submission from DVA and two submissions made by the Commonwealth Ombudsman.
- Key matters to note from the DVA submission include:
 - DVA sets out a range of efficiency-related justifications for provisions in the Bill that automate the decision-making process
 - the Committee appears to have raised concerns with DVA about the breadth of the disclosures that may be made under the Bill, including disclosures to ‘correct misinformation’ and the submission purports to respond to these concerns.
 - DVA notes that the proposed public interest disclosure provisions ‘are modelled on paragraph 208(1)(a) of the *Social Security (Administration) Act 1999*. That public interest disclosure provision has been in operation for 17 years and has operated successfully with the approval of Parliament. The Privacy Commissioner has not raised any concern about the Department of Social Services/ Department of Human Services’ provision...’
- The most recent iteration of the *Social Security (Public Interest Certificate Guidelines) (DSS) Determination 2015* were registered on FRLI in August 2015. The explanatory memorandum refers to consultation with the AGD and others, but does not specifically refer to consultation with the OAIC. We have not been able to find any engagement with the OAIC on the Determination following a brief TRIM search and discussion with Sarah Ghali. A more fulsome search could be undertaken if necessary.
- The Commonwealth Ombudsman has made a submission to the Committee in relation to automation aspects of the Bill (see below).

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s.22 - Irrelevant		Melanie Drayton

- They also made a second submission on the new disclosure provisions, (and notified Angelene Falk by telephone, of their intention to make such a submission). This supplementary submission recommends that any development of legislation or policy relating to disclosure of PI should occur in consultation with the OAIC.
- On 10 February 2017, a Research Officer from the Senate Committee contacted the OAIC to advise that it is holding a public hearing on Thursday, 16 February 2017 and invites the information Commissioner to appear from 5:00pm – 6:00pm. The Commonwealth Ombudsman and officers of DVA have also been invited to appear. They have provided the OAIC with specific questions in relation to the public interest disclosure provisions – which the OAIC intends to submit a written response to before the hearing, as well as other questions
- On 14 February, Melanie Drayton, Assistant Commissioner, sent a detailed response to the Committee noting that the Information Commissioner and Deputy Commissioner would appear at the public hearing; outlining the OAIC's role; attaching the OAIC's comments on the Bill that were sent to OPC (via AGD); and responding to the specific questions where possible (noting that a number of the questions may be directed to DVA). This email also noted that the OAIC would welcome the opportunity to be consulted on the draft rules to be made by the Minister in relation to public interest disclosures. The OAIC's email to the Committee is at **Annexure D**. The OAIC's answers to the Committee's questions are at **Annexure E**.
- Key additional points that the Commissioner may make at the Committee meeting are:
 - The OAIC welcomes the safeguard in the Bill that before disclosing personal information about a person under the 'public interest disclosure' provisions, the Secretary must notify the person in writing of the Secretary's intention to disclose the information; give the person a reasonable opportunity to make written comments on the proposed disclosure of the information and consider any written comments made by the person. This is consistent with the emphasis on transparency in the Privacy Act, and may in some circumstances give the individual a 'reasonable expectation' that their personal information will be disclosed for a particular purpose (consistent with the 'reasonable expectation' exception in APP 6.2(a).

Content Author: Renee Alchin	Responsible Director: Sophie Higgins	Responsible Assistant Commissioner
s.22 - Irrelevant		Melanie Drayton

- The Bill states that the Secretary must, in giving such a 'public interest certificate', act in accordance with Rules made by legislative instrument, by the Minister. The OAIC would welcome the opportunity to be consulted on any such draft rules. The OAIC will have regard to whether any permitted disclosures accord with the social license given to government to handle and disclose individuals' personal information, and are generally consistent with the spirit and intent of the Privacy Act.

Automated decision-making

- The Commonwealth Ombudsman's written submission to the Committee commented on several matters that related to automated decisions. These comments related to accuracy of automated decisions, and errors that can arise from incorrect data entry and system errors, and the fact that the onus is predominately placed on the customer to identify these errors.
- The Commonwealth Ombudsman also outlined issues with automated decisions following basic legal values of lawfulness, fairness, transparency and efficiency.
- The objects of the Privacy Act recognise that the protection of individuals' privacy is balanced with the interests of entities in carrying out their functions or activities (s 3(b)). The OAIC acknowledges that automated decision-making is likely to provide a number of advantages for DVA and for Australians accessing their services, including associated with reduced costs and enhanced efficiency. However, consideration should be given at an early stage, to ensuring that any privacy impacts are identified and minimised to the extent possible, and that an integrated approach to privacy management is taken.
- Some key privacy considerations that may arise where decision-making is automated include:
 - whether the entity has taken reasonable steps to implement practices, procedures and systems to ensure that the entity complies with the APPs and to enable the entity to deal with inquiries and complaints from individuals about the entity's compliance with the APPs (APP 1.2). Entities will be better placed to meet these obligations if they embed privacy protections in the design of the information handling practice at an early stage.

Content Author: Renee Alchin	Responsible Director: Sophie Higgins	Responsible Assistant Commissioner
s.22 - Irrelevant		Melanie Drayton

- whether the entity has taken reasonable steps to ensure that the personal information it collects, uses and discloses is accurate, up-to-date and complete (as required by APP 10). This may be particularly challenging where the onus is on the individual to identify errors or discrepancies with automated decisions.
 - whether the entity has processes in place to allow the individual to request access to, and correction of his or her personal information used in automated processes (APPs 11 and 12).
- The OAIC also suggests consideration be given to the privacy risks arising from personal information processed as part of an automated decision-making process. For example, due to the higher privacy risks involved with handling sensitive information, the OAIC would generally suggest greater caution be exercised when considering whether this information should be subject to automated processing. The OAIC welcomes the DVA's comments in its written submission to the Committee that 'in regards to automated debt collection, the Department does not intend this provision for this purpose'. This intent could be included in the Bill or the Explanatory Memorandum.
- DVA could conduct a privacy impact assessment (PIA) of the amendments proposed by the Bill that have privacy implications to identify and assess the privacy risks associated with the amendments. A PIA is a written assessment which may assist in identifying the privacy impacts of the proposal, and provides an opportunity to set out any recommendations for managing, minimising or eliminating those impacts.

Content Author: Renee Alchin	Responsible Director: Sophie Higgins	Responsible Assistant Commissioner
s.22 - Irrelevant		Melanie Drayton

Commissioner brief: Opening statement talking points for Australian Information Commissioner

Type: **Commissioner brief**

Purpose: **Senate Foreign Affairs, Defence and Trade Committee public hearing inquiry into the Digital Readiness Bill**

For: **The Australian Information Commissioner**

- Thank you for the opportunity to appear before the Committee today in relation to *the Veteran's Affairs Legislation Amendment (Digital Readiness and Other Measures) Bill 2016*.
- As the Australian Information Commissioner and Australian Privacy Commissioner, I am responsible for ensuring compliance with the Privacy Act, and promoting access to government information through the Freedom of Information Act.
- The Privacy Act regulates the handling of personal information by most Australian Government agencies and many private sector organisations. The cornerstone of this privacy protection framework are the Australian Privacy Principles (or APPs). These set out standards, rights and obligations in relation to the way individuals' personal information is handled.
- The APPs are underpinned by notions of transparency and accountability. In general terms, this requires entities to give careful consideration to ensuring that individuals are aware of an entity's information handling practices, so that the individual may make appropriate choices about their personal information. Accountability includes ensuring good privacy governance mechanisms are implemented at an early stage.
- The Privacy Act recognises that the protection of individual's privacy, through the protection of their personal information, is not an absolute right. Rather, those interests must be balanced with the broader interest of the community in ensuring that Australian government agencies and private sector organisations are able to carry out their legitimate functions and activities.

- This balancing is reflected in the exceptions to a number of the Australian Privacy Principles, which exclude from the operation of those APPs, certain information handling practices considered to be in the public interest when balanced with the interest in protecting an individual's privacy.
- The OAIC's responsibilities include examining proposals that may restrict the exercise of individuals' privacy protections in favour of another public interest objective. Our approach is generally to ensure that any changes that authorise a disclosure of personal information by invoking an exception in the Privacy Act, are reasonable, necessary and proportionate to the expected benefits.
- My Office provided comments to the Office of Parliamentary Counsel (through Attorney General's Department), on a draft version of the Bill on 3 November 2016. These comments focused on the public interest disclosure provisions in Schedule 2 of the Bill. These permit the Secretary to make 'public interest' disclosures and have the effect that the privacy protections in the 'use and disclosure' APP - Australian Privacy Principle 6 - would not apply. I understand my Office has provided a copy of these comments to the Senate Committee inquiry for its information.
- There are, however, a few additional matters which I believe warrant further mention before the Committee. In summary these are:
 - Even though the disclosure is required or authorised by law, the Australian Privacy Principles govern the Department of Veteran's Affairs (DVA) information handling practices and would continue to apply to that personal information held by the DVA (such as the requirements in relation to transparency, data quality, security, and rights to access and correction).
 - The OAIC would welcome the opportunity to be consulted on draft rules to be made by the Minister under the 'public interest disclosure' provisions in Schedule 2 of the Bill.
 - The OAIC acknowledges that automated decision-making is likely to provide a number of advantages for DVA and for Australians accessing their services, particularly in regards to efficiencies. However, I would encourage consideration to be given at an early stage, to ensuring that any privacy impacts are identified

and minimised to the extent possible, and that an integrated approach to privacy management is taken.

- If it has not done so already, the Department of Veteran's Affairs could conduct a privacy impact assessment of the amendments proposed by the Bill that have privacy implications to identify and assess the privacy risks associated with the amendments. A privacy impact assessment is a written assessment which may assist in identifying the privacy impacts of the proposal, and provides an opportunity to set out any recommendations for managing, minimising or eliminating those impacts.
- I would be happy to answer any questions the Committee has.

From: [Melanie Drayton](#)
To: [Renee Alchin](#)
Subject: FW: Public Hearing Invitation - Inquiry into the Digital Readiness Bill - Senate Foreign Affairs, Defence and Trade Committee [SEC=UNCLASSIFIED]
Date: Tuesday, 14 March 2017 8:38:06 AM
Attachments: [image001.gif](#)

From: Melanie Drayton
Sent: Tuesday, 14 February 2017 8:46 PM
To: Renee Alchin s.22 - Irrelevant
Subject: FW: Public Hearing Invitation - Inquiry into the Digital Readiness Bill - Senate Foreign Affairs, Defence and Trade Committee [SEC=UNCLASSIFIED]

Another to be filed please, thanks very much
M

From: Balaga, Kimberley (SEN) [[mailto:](#) s.22 - irrelevant] **On Behalf Of** FADT, Committee (SEN)
Sent: Friday, 10 February 2017 3:28 PM
To: Melanie Drayton s.22 - irrelevant
Cc: Enquiries <[xxxxxxxxx@xxx.xxx.xx](#)>; Carl English s.22 - irrelevant Jacob Suidgeest s.22 - irrelevant
Subject: RE: Public Hearing Invitation - Inquiry into the Digital Readiness Bill - Senate Foreign Affairs, Defence and Trade Committee [SEC=UNCLASSIFIED]

Hi Melanie

Thank you for your time on the phone today. As discussed, we look forward to your confirmation either today or on Monday regarding the OAIC's attendance at the hearing. I will issue a formal invitation from the committee once we have confirmation.

In anticipation of the OAIC's attendance, the committee has asked that the OAIC give particular consideration to the following questions in relation to the bill, and come prepared to provide a response at the hearing:

- 1) Under the bill's proposed public interest disclosure provision, the Secretary of DVA will have the power to correct 'mistakes' or 'misinformation'.
 - a. Please advise the committee what is the current situation that DVA or other agencies require this power?
 - b. Why does DVA require these provisions so urgently?
 - c. Is there not already a mechanism for agencies to report crimes to police?
 - d. Over the last 5 years, how many cases were there of mistake and/or misinformation that agencies did not have the power to respond to?

Please contact me if you wish to discuss any of these matters further.

Regards

Kimberley Balaga | Research Officer

Standing Committee on Foreign Affairs, Defence and Trade | Department of the Senate

s.22 - Irrelevant

www.apn.gov.au/senate

Disclaimer

This email, and any attachments, may be confidential and may be protected by privilege. You should not copy, use or disclose it for any unauthorised purpose.

From: Jacob Suidgeest s.22 - Irrelevant

Sent: Friday, 10 February 2017 10:04 AM

To: Balaga, Kimberley (SEN)

Cc: Enquiries; Carl English; Melanie Drayton

Subject: RE: Public Hearing Invitation - Inquiry into the Digital Readiness Bill - Senate Foreign Affairs, Defence and Trade Committee [SEC=UNCLASSIFIED]

Dear Kimberley

Thank you for your email. We'll consider and contact you.

Regards,

Jacob Suidgeest | Director

Regulation and Strategy Branch

Office of the Australian Information Commissioner

GPO Box 5218 SYDNEY NSW 2001 | www.oaic.gov.au

s.22 - Irrelevant

From: Balaga, Kimberley (SEN) s.22 - Irrelevant

Committee (SEN)

Sent: Friday, 10 February 2017 9:16 AM

To: Enquiries <xxxxxxxx@xxx.xxx.xx>

Cc: FADT, Committee (SEN) <xxx.xxx@xxx.xxx.xx>

Subject: Public Hearing Invitation - Inquiry into the Digital Readiness Bill - Senate Foreign Affairs, Defence and Trade Committee

Good morning

I called yesterday afternoon in regards to the following matter and was advised to send an email to your office so that it may be directed to the relevant officers.

The Senate Foreign Affairs, Defence and Trade Committee is currently conducting an inquiry into the Veterans' Affairs Legislation Amendment (Digital Readiness) Bill 2016.

The committee is holding a public hearing next Thursday, 16 February 2017 from 5.00pm to 6.00pm at Parliament House and would like to invite the Office of the Information Commissioner to appear and give evidence. The Commonwealth Ombudsman and officers of DVA have also been invited to appear.

Released under FOI - OAIC

If you could please call me on s.22 - irrelevant to discuss, I would be most appreciative.

Regards

Kimberley Balaga | Research Officer

Standing Committee on Foreign Affairs, Defence and Trade | Department of the Senate

s.22 - irrelevant

www.aph.gov.au/senate

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From: [Melanie Drayton](#)
To: [Renee Alchin](#)
Subject: FW: Invitation to Attend Public Hearing - Veterans' Affairs Legislation Amendment (Digital Readiness and Other Measures) Bill 2016 [SEC=UNCLASSIFIED]
Date: Tuesday, 14 March 2017 8:37:43 AM
Attachments: [image001.jpg](#)
[image002.png](#)

From: Melanie Drayton
Sent: Tuesday, 14 February 2017 6:38 PM
To: Sophie Higgins [s.22 - irrelevant] Renee Alchin [s.22 - irrelevant]
Subject: FW: Invitation to Attend Public Hearing - Veterans' Affairs Legislation Amendment (Digital Readiness and Other Measures) Bill 2016 [SEC=UNCLASSIFIED]

Thank you very much for your work on this issue today. It's much appreciated.

Can you please add this email to the briefing packs?

Thanks again
 Mel

From: Melanie Drayton
Sent: Tuesday, 14 February 2017 6:35 PM
To: [s.22 - irrelevant] FADT, Committee (SEN)
xxxx.xxx@xxx.xxx.xx >
Cc: Sophie Higgins [s.22 - irrelevant]
Subject: RE: Invitation to Attend Public Hearing - Veterans' Affairs Legislation Amendment (Digital Readiness and Other Measures) Bill 2016 [SEC=UNCLASSIFIED]

Good evening

Thank you for inviting the Information Commissioner and Australian Privacy Commissioner, Timothy Pilgrim, and the Deputy Commissioner, Angelene Falk, to appear at the Senate Committee's public hearing into the Veterans' Affairs Legislation Amendment (Digital Readiness and Other Measures) Bill 2016 (the Bill) on Thursday, 16 February 2017. They are pleased to accept.

In advance of the hearing, we thought it may assist the Committee to provide:

- a brief outline of the role and responsibilities of the Office of the Australian Information Commissioner (OAIC)
- an overview of the OAIC's engagement with the Bill
- a response, where possible, to the Committee's questions provided to the OAIC on 10 February 2017.

This email is provided as background information only and is not a submission.

OAIC

The OAIC is an independent Commonwealth statutory agency. It was established by the Australian Parliament to bring together three functions:

- privacy functions (protecting the privacy of individuals under the Privacy Act 1988 (Privacy Act), and other Acts)
- freedom of information functions (access to information held by the Commonwealth Government in accordance with the Freedom of Information Act 1982 (FOI Act)), and
- information management functions (as set out in the Information Commissioner Act 2010).

The integration of these three interrelated functions into one agency has made the OAIC well placed to strike an appropriate balance between promoting the right to privacy and broader information policy goals.

The OAIC's responsibilities include examining proposals that may restrict the exercise of individuals' privacy protections in favour of another public interest objective.

The Privacy Act

The Privacy Act contains thirteen legally-binding Australian Privacy Principles (APPs). These set out standards, rights and obligations relating to the handling, holding, accessing and correction of personal information. Personal information is information or an opinion about an identified individual, or an individual who is reasonably identifiable.

The APPs apply to most Australian Government agencies, all private sector organisations with an annual turnover of more than \$3 million, all private health service providers and some small businesses – collectively referred to as APP entities.

The APPs are principles-based law. This provides APP entities with the flexibility to tailor their personal information handling practices to their diverse needs and business models and to the diverse needs of individuals. The APPs are also technology neutral, applying equally to paper-based and digital environments. This is intended to preserve their relevance and applicability, in a context of continually changing and emerging technologies.

The Privacy Act recognises that the protection of individuals' privacy, through the protection of their personal information, is not an absolute right. Rather, those interests must be balanced with the broader interest of the community in ensuring that APP entities are able to carry out their legitimate functions and activities. This balancing is reflected in the exceptions to a number of the APPs. Exceptions cover a range of matters including where a use or disclosure of personal information is authorised or required by Australian law or where an entity reasonably believes that a use or disclosure is reasonably necessary for an enforcement related activity conducted by an enforcement body.

OAIC comments on the Bill

APP 6 outlines when an APP entity may use or disclose personal information. It generally provides that an APP entity can only use or disclose personal information for a purpose for which the information was collected (known as the 'primary purpose'), or for another purpose where one of the exceptions listed in APP 6 apply. As noted above, the exceptions include where 'a use or disclosure of personal information is authorised or required by Australian law'.

The OAIC is regularly invited to comment on draft laws that require or authorise the collection, use or disclosure of personal information. Consistent with the approach taken in applying Article 17 in the International Covenant on Civil and Political Right (ICCPR), the OAIC's advice generally suggests consideration should be given to whether those measures are proportionate and necessary. That is, whether they appropriately balance the intrusion on individuals' privacy with the overall public policy objectives of the proposal. Additionally, when handling of individuals' personal information is authorised in the broader interests of the community, it is generally recommended that those activities be accompanied by an appropriate level of privacy safeguards and accountability. Should such a proposal be considered to appropriately balance these objectives, it is generally recommended that the scope of the proposal be drafted consistent with the spirit and intent of the Privacy Act.

On 31 October 2016, the OAIC was invited to comment on the Bill, following a request from the Office of Parliamentary Counsel (OPC), via the Attorney General's Department, Information Law Unit (the AGD). The OAIC's comments on the Bill were provided to the AGD on 3 November 2016, and we understand that they were then passed on to the OPC and the Department of Veterans' Affairs (DVA). The comments focused on the public interest disclosure provisions in Schedule 2 of the Bill which permit certain disclosures and invoke the 'required or authorised' by law exception in APP 6 in the Privacy Act. The OAIC's comments are attached.

The OAIC has reviewed the Commonwealth Ombudsman's written submissions to the Committee and notes its suggestion to involve the OAIC in the development of laws and policies raising privacy issues (Commonwealth Ombudsman, [Supplementary submission](#)). In this regard, the OAIC would welcome the opportunity to be consulted on rules made by the Minister in relation to public interest disclosure certificates under the proposed amendments in Schedule 2 of the Bill.

Committee questions

Please advise the committee what is the current situation that DVA or other agencies require this power?

As outlined above, the OAIC's role includes examining proposed enactments that would require or authorise acts or practices that might otherwise interfere with privacy (s 28A(2), Privacy Act) and ensuring that any adverse effects of a proposed enactment on the privacy of individuals are minimised (s 28A(2)(c), Privacy Act). The OAIC provided some brief comments on the Bill. At that time, the OAIC did not have access to the Explanatory Memorandum (including Statement of Compatibility with Human Rights). Details about the current situation that necessitates this power may be a matter for DVA. As the 'public interest disclosure' provisions in Schedule 2 of the Bill broaden the circumstances in which personal information can be used and disclosed, we suggest that DVA use the Explanatory Memorandum (including its Statement of Compatibility

with Human Rights), to explain the need for such provisions.

Why does DVA require these provisions so urgently?

This may be a matter for DVA.

Is there not already a mechanism for agencies to report crimes to police?

As noted above, APP 6 generally provides that an APP entity can only use or disclose personal information for a purpose for which the information was collected (known as the 'primary purpose'), or for another purpose where one of the exceptions listed in APP 6 apply. The following exceptions to APP 6 would permit agencies to disclose personal information to the police, where:

- the APP entity reasonably believes that the use or disclosure of the information is reasonably necessary for one or more enforcement related activities conducted by, or on behalf of, an enforcement body (examples include the Australian Federal Police or a State or Territory Police force or service) (APP 6.2(e)), and
- the entity reasonably believes that the collection, use or disclosure is necessary to lessen or prevent a serious threat to the life, health or safety of any individual, or to public health or safety (and it is unreasonable or impracticable to obtain the individual's consent) (APP 6.2(c) and s 16A, item 1)
- the use or disclosure of the information is required or authorised by or under an Australian law or a court/ tribunal order (APP 6.2(b)).

Over the last 5 years, how many cases were there of mistake and/or misinformation that agencies did not have the power to respond to?

This may be a matter for DVA.

Invitation to make a written submission

I would also like to take this opportunity to thank the Committee for the invitation of 6 December 2016 to make a submission to this inquiry. I apologise that the OAIC did not respond. The OAIC had overlooked the invitation due to a clerical error.

Please feel free to contact Sophie Higgins on s.22 - irrelevant or by email, if we can assist by providing any further information.

Kind regards

Melanie Drayton

Melanie Drayton | Assistant Commissioner, Regulation and Strategy

Office of the Australian Information Commissioner

GPO Box 5218 SYDNEY NSW 2001 | www.oaic.gov.au

s.22 - irrelevant

From: Balaga, Kimberley (SEN) s.22 - irrelevant **On Behalf Of** FADT, Committee (SEN)
Sent: Monday, 13 February 2017 6:20 PM
To: Melanie Drayton s.22 - irrelevant
Cc: Sophie Higgins s.22 - irrelevant FADT, Committee (SEN)
xxxx.xxx@xxx.xxx.xx
Subject: Invitation to Attend Public Hearing - Veterans' Affairs Legislation Amendment (Digital Readiness and Other Measures) Bill 2016



THE SENATE

STANDING COMMITTEE ON FOREIGN AFFAIRS, DEFENCE AND TRADE

13 February 2017

Ms Melanie Drayton
 Office of the Australian Information Commissioner

Email: s.22 - irrelevant

Dear Ms Drayton

Inquiry into the Veterans' Affairs Legislation Amendment (Digital Readiness and Other Measures) Bill 2016

The Senate Foreign Affairs, Defence and Trade Legislation Committee is pleased to confirm arrangements for the Commissioner and the Deputy Commissioner to give evidence at a public hearing for the above inquiry. The public hearing will be held on **Thursday, 16 February 2017** in **Committee Room 2S3, Parliament House, Canberra**. Your appearance time is indicated on the attached public hearing program.

It would be appreciated if you could arrive about 10 minutes before your appearance time and make yourself known to the committee's secretariat staff. I would be grateful if you could advise me if you intend to table any documents with the committee during the hearing.

A Hansard witness form is also attached. Could you please complete it and email back to the secretariat as soon as possible to xxxx.xxx@xxx.xxx.xx or by fax to 02 6277 5818. This is used to ensure details are correctly recorded and to provide contact details so you can check the transcript of evidence.

If persons attending the public hearing have any special requirements please contact the secretariat beforehand so that any necessary arrangements can be made. If there are any additional witnesses whose details you have not already provided, please speak to the secretariat officers as early as possible at the hearing.

After the formalities have been concluded at the beginning of the hearing, the Chair will invite you to make a short opening statement, which should be around three minutes, or you may decline to make any opening remarks. The remainder of the hearing will be devoted to a question and answer session.

Please note that the hearing is open to the public and the media. The committee prefers all evidence to be given in public but should you wish to give any evidence in private, you may make a request to the Chair and the committee will consider the request. You are welcome to listen to the evidence of other witnesses.

A 'proof' (draft) copy of the Hansard transcript of evidence will be forwarded to you for correction of transcription errors. Hansard transcripts of evidence will also be available from the committee's website.

A copy of general information for witnesses, procedures to be observed by Senate Committees for the protection of witnesses, the public hearing program and the chair's opening statement are enclosed for your information.

If you require any further information please contact me on s.22 - irrelevant

Yours sincerely



David Sullivan

Secretary

Senate Standing Committee on Foreign Affairs, Defence and Trade

s.22 - irrelevant

Attachments:

- **Hearing Program**
- **Information Sheet: witnesses at hearings**
- **Information Sheet: protection of witnesses**
- **Chair's opening statement**
- **Hansard Witness Form**

From: Renee Alchin
To: [Sophie Higgins](#)
Subject: RE: [CLEARANCE] Commissioner briefing notes and opening statements - Digital Readiness Bill [SEC=UNCLASSIFIED]
Date: Tuesday, 14 February 2017 3:26:00 PM

Hi Sophie,

I've incorporated the comments and tracks in TRIM into the briefing notes (I'll tidy it up once we're happy with the content)

I've also completed the Hansard Witness Forms for Timothy and Angelene, saved in the same TRIM folder: [15/000188-40](#)

Thanks
 Renee

From: Renee Alchin
Sent: Tuesday, 14 February 2017 12:24 PM
To: Sophie Higgins s.22 - irrelevant
Subject: [CLEARANCE] Commissioner briefing notes and opening statements - Digital Readiness Bill [SEC=UNCLASSIFIED]

Hi Sophie,

These may be a bit 'rough' and could be condensed a bit, but seeing as I'm conscious of the deadline, would you mind having a look over the briefing notes and opening statement:

- Briefing notes: [D2017/001199](#)
- Opening statement talking points: [D2017/001200](#)

I'm happy to keep working on them this afternoon.

Also, with the section that discusses DHS' automated debt recovery program (and possibly relevance the automated decisions the Bill with allow), I haven't actually been able to find any comments in TRIM that we provided to DHS expressing our actual view on the automated process, but I have summarised some of the risks that we identified/discussed with DHS. Happy to discuss this section / research it a bit further to see if I can dig anything else up, subject to what you think.

Thanks
 Renee

Renee Alchin | Adviser
Regulation and Strategy
Office of the Australian Information Commissioner
 GPO Box 5218 SYDNEY NSW 2001 | www.oaic.gov.au
 s.22 - irrelevant

Commissioner brief: Briefing notes – Inquiry into the Digital Readiness Bill – Senate Foreign Affairs, Defence and Trade Committee

Type: Commissioner brief

Purpose: Senate Foreign Affairs, Defence and Trade Committee public hearing inquiry into the Digital Readiness Bill

For: The Australian Information Commissioner

Key points

1. The Veteran's Affairs Legislation Amendment (Digital Readiness) Bill 2016 seeks to amend the *Veteran's Entitlements Act 1986* (VEA), *Military Rehabilitation and Compensation Act 2004* (MRCA) and the *Safety Rehabilitation and Compensation (Defence-related claims) Act 1988* (DRCA). The Bill and Explanatory memorandum are at **Annexure A**.
2. On 31 October 2016, the Attorney General's Department Information Law Unit (AGD) requested that the OAIC provide any comments on the Bill, and these would be provided to the Office of Parliamentary Counsel (OPC). On 3 November 2016, the OAIC provided comments on the Bill to the AGD, which AGD passed on to OPC and then to Department of Veterans' Affairs (DVA).
3. The OAIC's comments focused on the public interest disclosure provisions in Schedule 2 of the Bill. These authorise the Secretary to make disclosures that the Secretary certifies as 'necessary in the public interest', and invoke the 'required or authorised' by law exception in APP 6 in the Privacy Act. The AGD did not make any substantive comments on the Bill.
4. The Commonwealth Ombudsman outlined in their second submission on the disclosure provisions (and also notified Angelene Falk by telephone of their intention to make such a submission) that any development of legislation or policy relating to the disclosure of personal information should occur in consultation with the OAIC.
5. The Bill states that the Secretary must, in giving such a 'public interest certificate', act in accordance with Rules made by legislative instrument, by the Minister. While not included in the OAIC's comments to OPC, the OAIC's email to the Committee on 14 February noted that the OAIC would welcome the opportunity to be consulted on any such draft rules. The OAIC will have regard to whether any permitted disclosures accord with the social license given to government to handle and disclose individuals'

personal information, and are generally consistent with the spirit and intent of the Privacy Act.

6. Even where the disclosure is required or authorised by law under APP 6, the APPs will still govern the Department of Veteran's Affairs (DVA) information handling practices and would continue to apply to that personal information held by the DVA (such as the requirements in relation to transparency, data quality, security, and rights to access and correction).
7. The OAIC welcomes the safeguard in the Bill that before disclosing personal information about a person under the 'public interest disclosure' provisions, the Secretary must notify the person in writing of the Secretary's intention to disclose the information; give the person a reasonable opportunity to make written comments on the proposed disclosure of the information and consider any written comments made by the person. This is consistent with the emphasis on transparency in the Privacy Act, and may in some circumstances give the individual a 'reasonable expectation' that their personal information will be disclosed for a particular purpose.
8. The OAIC acknowledges that automated decision-making is likely to provide a number of advantages for DVA and for Australians accessing their services, particularly in regards to efficiencies. However, the OAIC would encourage consideration be given at an early stage, to ensuring that any privacy impacts are identified and minimised to the extent possible, including by undertaking a privacy impact assessment, and that an integrated approach to privacy management is taken.

Background – the Digital Readiness Bill

- The Bill will insert a provision into the VEA, MRCA, and DRCA to enable the Secretary to authorise the use of computer programmes to make decisions and determinations, exercise powers or comply with obligations etc. under these Acts (Schedule 1).
- Safeguards in the Bill include that the Secretary may make a decision or determination in substitution for a decision or determination made by a computer program, if satisfied that the decision or determination is incorrect (Schedule 1).
- The Bill will also insert a provision into each of these Acts that give the Secretary broad disclosure powers: 'the Secretary may, if the Secretary certifies that it is necessary in the public interest to do so in a particular case or class of cases, disclose any information obtained by any person in the performance of that person's duties under this Act to such persons and for such purposes as the Secretary determines' (Schedule 2).

- Safeguards in the Bill include that:
 - the power cannot be delegated by the Secretary to anyone
 - the Secretary must act in accordance with rules that the Minister makes and the Minister cannot delegate his or her rule making power
 - before disclosing information, the Secretary must notify the person concerned in writing about the proposed disclosure and consider any written comments made by the person, and
 - unless the Secretary complies with the above notification requirements before disclosing personal information, he or she commits an offence, punishable by 60 penalty units (Schedule 2).
- The Explanatory Memorandum to the Bill gives as examples of circumstances in which it might be appropriate for the Secretary to disclose such information as including 'where there is a threat to life, health or welfare, for the enforcement of laws, in relation to proceeds of crime orders, mistakes of fact, research and statistical analysis, APS code of conduct investigations, misinformation in the community and provider inappropriate practices' (p. 11).
- The Bill also inserts three information sharing provisions in the DRCA between the Military Rehabilitation and Compensation Commission and the Secretary of the Department of Defence or the Chief of the Defence Force.

OAIC's responsibilities to examine proposed enactments impact privacy

- A range of the OAIC's responsibilities involve examining proposals that may restrict the exercise of individuals' privacy protections in favour of another public interest objective.
- The Privacy Act recognises that the protection of individuals' privacy, through the protection of their personal information, is not an absolute right. Rather, those interests must be balanced with the broader interest of the community in ensuring that APP entities are able to carry out their legitimate functions and activities.
- This balancing is reflected in the exceptions to a number of the APPs, which except from the operation of those APPs, certain information handling practices considered to be in the public interest when balanced with the interest in protecting an individual's privacy.

Disclosures of personal information

- APP 6 outlines when an APP entity may use or disclose personal information. It generally provides that an APP entity can only use or disclose personal information for a purpose for which the information was collected (known as the 'primary purpose'), or for a

secondary purpose where one of the exceptions listed in APP 6 apply. The exceptions include where 'a use or disclosure of personal information is authorised or required by Australian law' (APP 6.2(b)).

- The OAIC is regularly invited to comment on draft laws that require or authorise the collection, use or disclosure of personal information in a manner that would otherwise be inconsistent with one or more of the APPs. The effect of such laws is that one or more APPs will not apply to the use or disclosure of personal information, described in the law.
- Consistent with the approach taken in applying Article 17 in the International Covenant on Civil and Political Right (ICCPR), the OAIC's advice generally suggests consideration should be given to whether those measures are proportionate and necessary. That is, whether they appropriately balance the intrusion on individuals' privacy with the overall public policy objectives of the proposal. Additionally, when handling of individuals' personal information is authorised in the broader interests of the community, it is generally recommended that those activities be accompanied by an appropriate level of privacy safeguards and accountability. Should such a proposal be considered to appropriately balance these objectives, it is generally recommended that the scope of the proposal be drafted consistent with the spirit and intent of the Privacy Act.
- Even where the disclosure is required or authorised by law under APP 6, the APPs will still govern the Department of Veteran's Affairs (DVA) information handling practices and would continue to apply to that personal information held by the DVA (such as the requirements in relation to transparency, data quality, security, and rights to access and correction).

OAIC engagement with the Bill

- On 31 October 2016, the OPC contacted the AGD seeking comment on the Bill, and that request was passed onto the OAIC for comment. The OAIC was not provided with the Explanatory Memorandum. The OAIC's comments on the Bill were provided to AGD, and passed on to the OPC on 3 November 2016. The AGD did not make any substantive comments on the Bill. The comments provided to OPC, along with a response provided by DVA are at **Annexure B**.
- The OAIC's comments focused on the public interest disclosure provisions in Schedule 2 of the Bill outlined above.
- Key points made in the OAIC's comments were:
 - the OAIC noted that the disclosure of personal information under the new provisions will be permitted by the 'required or authorised by or under law' exception in APP 6.2(b).
 - The OAIC suggested that where a Bill invokes this exception in the Privacy Act, consideration should be given to whether those measures are reasonable, proportionate and necessary.
 - The OAIC referred to similar disclosure provisions in the *Social Security (Administration) Act 1999* and the *Paid Parental Leave Act 2010*, noting that rules issued under that legislation set out the matters to which the Secretary must have regard to in giving a public interest certificate and the circumstances in which a public interest certificate may be given, which include: to prevent, or lessen, a threat to the life, health or welfare of a person; for the enforcement of laws; to correct a mistake of fact; to brief a Minister or to locate missing persons etc.
- On 7 November 2017, DVA responded by email to the OAIC that:
 - rules would be made setting out the circumstances in which the Secretary may make a public interest disclosure before the Secretary exercises that power. The nature and content of those rules is likely to be similar to the Social Security (Public Interest Certificate Guidelines) (DSS) Determination 2015, mentioned below.

- The sorts of situations in which it is envisage the public interest disclosure power being exercised are will be set out in the EM, including: where there is a threat to life, health or welfare, for the enforcement of laws, in relation to proceeds of crime orders, mistakes of fact, research and statistical analysis, APS code of conduct investigations, misinformation in the community and provider inappropriate practices (this is subject to the Minister agreeing to make rules along these lines.)
- On 6 December 2016, the Committee invited the OAIC to make a comment on the Bill, but the OAIC inadvertently did not action this request. Melanie has apologised to the Committee for this oversight.
- Seven submissions have been made to the Committee – see **Annexure C**. These include a lengthy submission from DVA and two submissions made by the Commonwealth Ombudsman.
- Key matters to note from the DVA submission include:
 - DVA sets out a range of efficiency-related justifications for provisions in the Bill that automate the decision-making process
 - the Committee appears to have raised concerns with DVA about the breadth of the disclosures that may be made under the Bill, including disclosures to ‘correct misinformation’ and the submission purports to respond to these concerns.
 - DVA notes that the proposed public interest disclosure provisions ‘are modelled on paragraph 208(1)(a) of the *Social Security (Administration) Act 1999*. That public interest disclosure provision has been in operation for 17 years and has operated successfully with the approval of Parliament. The Privacy Commissioner has not raised any concern about the Department of Social Services/ Department of Human Services’ provision...’
- The most recent iteration of the *Social Security (Public Interest Certificate Guidelines) (DSS) Determination 2015* were registered on FRLI in August 2015. The explanatory memorandum refers to consultation with the AGD and others, but does not specifically refer to consultation with the OAIC. We have not been able to find any engagement with the OAIC on the Determination following a brief TRIM search and discussion with Sarah Ghali. A more fulsome search could be undertaken if necessary.
- The Commonwealth Ombudsman has made a submission to the Committee in relation to automation aspects of the Bill (see below).

- They also made a second submission on the new disclosure provisions, (and notified Angelene Falk by telephone, of their intention to make such a submission). This supplementary submission recommends that any development of legislation or policy relating to disclosure of PI should occur in consultation with the OAIC.
- On 10 February 2017, a Research Officer from the Senate Committee contacted the OAIC to advise that it is holding a public hearing on Thursday, 16 February 2017 and invites the information Commissioner to appear from 5:00pm – 6:00pm. The Commonwealth Ombudsman and officers of DVA have also been invited to appear. They have provided the OAIC with specific questions in relation to the public interest disclosure provisions – which the OAIC intends to submit a written response to before the hearing, as well as other questions
- On 14 February, Melanie Drayton, Assistant Commissioner, sent a detailed response to the Committee noting that the Information Commissioner and Deputy Commissioner would appear at the public hearing; outlining the OAIC's role; attaching the OAIC's comments on the Bill that were sent to OPC (via AGD); and responding to the specific questions where possible (noting that a number of the questions may be directed to DVA). This email also noted that the OAIC would welcome the opportunity to be consulted on the draft rules to be made by the Minister in relation to public interest disclosures. The OAIC's email to the Committee is at **Annexure D**. The OAIC's answers to the Committee's questions are at **Annexure E**.
- Key additional points that the Commissioner may make at the Committee meeting are:
 - The OAIC welcomes the safeguard in the Bill that before disclosing personal information about a person under the 'public interest disclosure' provisions, the Secretary must notify the person in writing of the Secretary's intention to disclose the information; give the person a reasonable opportunity to make written comments on the proposed disclosure of the information and consider any written comments made by the person. This is consistent with the emphasis on transparency in the Privacy Act, and may in some circumstances give the individual a 'reasonable expectation' that their personal information will be disclosed for a particular purpose (consistent with the 'reasonable expectation' exception in APP 6.2(a).

- The Bill states that the Secretary must, in giving such a 'public interest certificate', act in accordance with Rules made by legislative instrument, by the Minister. The OAIC would welcome the opportunity to be consulted on any such draft rules. The OAIC will have regard to whether any permitted disclosures accord with the social license given to government to handle and disclose individuals' personal information, and are generally consistent with the spirit and intent of the Privacy Act.

Automated decision-making

- The Commonwealth Ombudsman's written submission to the Committee commented on several matters that related to automated decisions. These comments related to accuracy of automated decisions, and errors that can arise from incorrect data entry and system errors, and the fact that the onus is predominately placed on the customer to identify these errors.
- The Commonwealth Ombudsman also outlined issues with automated decisions following basic legal values of lawfulness, fairness, transparency and efficiency.
- The objects of the Privacy Act recognise that the protection of individuals' privacy is balanced with the interests of entities in carrying out their functions or activities (s 3(b)). The OAIC acknowledges that automated decision-making is likely to provide a number of advantages for DVA and for Australians accessing their services, including associated with reduced costs and enhanced efficiency. However, consideration should be given at an early stage, to ensuring that any privacy impacts are identified and minimised to the extent possible, and that an integrated approach to privacy management is taken.
- Some key privacy considerations that may arise where decision-making is automated include:
 - whether the entity has taken reasonable steps to implement practices, procedures and systems to ensure that the entity complies with the APPs and to enable the entity to deal with inquiries and complaints from individuals about the entity's compliance with the APPs (APP 1.2). Entities will be better placed to meet these obligations if they embed privacy protections in the design of the information handling practice at an early stage.

- whether the entity has taken reasonable steps to ensure that the personal information it collects, uses and discloses is accurate, up-to-date and complete (as required by APP 10). This may be particularly challenging where the onus is on the individual to identify errors or discrepancies with automated decisions.
 - whether the entity has processes in place to allow the individual to request access to, and correction of his or her personal information used in automated processes (APPs 11 and 12).
- The OAIC also suggests consideration be given to the privacy risks arising from personal information processed as part of an automated decision-making process. For example, due to the higher privacy risks involved with handling sensitive information, the OAIC would generally suggest greater caution be exercised when considering whether this information should be subject to automated processing. The OAIC welcomes the DVA's comments in its written submission to the Committee that 'in regards to automated debt collection, the Department does not intend this provision for this purpose'. This intent could be included in the Bill or the Explanatory Memorandum.
- DVA could conduct a privacy impact assessment (PIA) of the amendments proposed by the Bill that have privacy implications to identify and assess the privacy risks associated with the amendments. A PIA is a written assessment which may assist in identifying the privacy impacts of the proposal, and provides an opportunity to set out any recommendations for managing, minimising or eliminating those impacts.

Commissioner brief: Opening statement talking points for Australian Information Commissioner

Type: **Commissioner brief**

Purpose: **Senate Foreign Affairs, Defence and Trade Committee public hearing inquiry into the Digital Readiness Bill**

For: **The Australian Information Commissioner**

- Thank you for the opportunity to appear before the Committee today in relation to *the Veteran's Affairs Legislation Amendment (Digital Readiness and Other Measures) Bill 2016*.
- As the Australian Information Commissioner and Australian Privacy Commissioner, I am responsible for ensuring compliance with the Privacy Act, and promoting access to government information through the Freedom of Information Act.
- The Privacy Act regulates the handling of personal information by most Australian Government agencies and many private sector organisations. The cornerstone of this privacy protection framework are the Australian Privacy Principles (or APPs). These set out standards, rights and obligations in relation to the way individuals' personal information is handled.
- The APPs are underpinned by notions of transparency and accountability. In general terms, this requires entities to give careful consideration to ensuring that individuals are aware of an entity's information handling practices, so that the individual may make appropriate choices about their personal information. Accountability includes ensuring good privacy governance mechanisms are implemented at an early stage.
- The Privacy Act recognises that the protection of individual's privacy, through the protection of their personal information, is not an absolute right. Rather, those interests must be balanced with the broader interest of the community in ensuring that Australian government agencies and private sector organisations are able to carry out their legitimate functions and activities.

- This balancing is reflected in the exceptions to a number of the Australian Privacy Principles, which exclude from the operation of those APPs, certain information handling practices considered to be in the public interest when balanced with the interest in protecting an individual's privacy.
- The OAIC's responsibilities include examining proposals that may restrict the exercise of individuals' privacy protections in favour of another public interest objective. Our approach is generally to ensure that any changes that authorise a disclosure of personal information by invoking an exception in the Privacy Act, are reasonable, necessary and proportionate to the expected benefits.
- My Office provided comments to the Office of Parliamentary Counsel (through Attorney General's Department), on a draft version of the Bill on 3 November 2016. These comments focused on the public interest disclosure provisions in Schedule 2 of the Bill. These permit the Secretary to make 'public interest' disclosures and have the effect that the privacy protections in the 'use and disclosure' APP - Australian Privacy Principle 6 - would not apply. I understand my Office has provided a copy of these comments to the Senate Committee inquiry for its information.
- There are, however, a few additional matters which I believe warrant further mention before the Committee. In summary these are:
 - Even though the disclosure is required or authorised by law, the Australian Privacy Principles govern the Department of Veteran's Affairs (DVA) information handling practices and would continue to apply to that personal information held by the DVA (such as the requirements in relation to transparency, data quality, security, and rights to access and correction).
 - The OAIC would welcome the opportunity to be consulted on draft rules to be made by the Minister under the 'public interest disclosure' provisions in Schedule 2 of the Bill.
 - The OAIC acknowledges that automated decision-making is likely to provide a number of advantages for DVA and for Australians accessing their services, particularly in regards to efficiencies. However, I would encourage consideration to be given at an early stage, to ensuring that any privacy impacts are identified

and minimised to the extent possible, and that an integrated approach to privacy management is taken.

- If it has not done so already, the Department of Veteran's Affairs could conduct a privacy impact assessment of the amendments proposed by the Bill that have privacy implications to identify and assess the privacy risks associated with the amendments. A privacy impact assessment is a written assessment which may assist in identifying the privacy impacts of the proposal, and provides an opportunity to set out any recommendations for managing, minimising or eliminating those impacts.
- I would be happy to answer any questions the Committee has.

From: [Melanie Drayton](#)
To: [Renee Alchin](#)
Subject: FW: Invitation to Attend Public Hearing - Veterans' Affairs Legislation Amendment (Digital Readiness and Other Measures) Bill 2016 [SEC=UNCLASSIFIED]
Date: Tuesday, 14 March 2017 8:37:16 AM
Attachments: [image001.jpg](#)
[image002.png](#)

From: Melanie Drayton
Sent: Tuesday, 14 February 2017 6:24 PM
To: Melanie Drayton s.22 - irrelevant
Subject: RE: Invitation to Attend Public Hearing - Veterans' Affairs Legislation Amendment (Digital Readiness and Other Measures) Bill 2016 [SEC=UNCLASSIFIED]

Good evening

Thank you for inviting the Information Commissioner, Timothy Pilgrim, and the Deputy Commissioner, Angelene Falk, to appear at the Senate Committee's public hearing into the Veterans' Affairs Legislation Amendment (Digital Readiness and Other Measures) Bill 2016 (the Bill) on Thursday, 16 February 2017. They are pleased to accept.

In advance of the hearing, we thought it may assist the Committee to provide:

- a brief outline of the role and responsibilities of the Office of the Australian Information Commissioner (OAIC)
- an overview of the OAIC's engagement with the Bill
- a response, where possible, to the Committee's questions provided to the OAIC on 10 February 2017.

This email is provided as background information only and is not a submission.

OAIC

The OAIC is an independent Commonwealth statutory agency. It was established by the Australian Parliament to bring together three functions:

- privacy functions (protecting the privacy of individuals under the Privacy Act 1988 (Privacy Act), and other Acts)
- freedom of information functions (access to information held by the Commonwealth Government in accordance with the Freedom of Information Act 1982 (FOI Act)), and
- information management functions (as set out in the Information Commissioner Act 2010).

The integration of these three interrelated functions into one agency has made the OAIC well placed to strike an appropriate balance between promoting the right to privacy and broader information policy goals.

The OAIC's responsibilities include examining proposals that may restrict the exercise of

Released under FOI - OAIC

individuals' privacy protections in favour of another public interest objective.

The Privacy Act

The Privacy Act contains thirteen legally-binding Australian Privacy Principles (APPs). These set out standards, rights and obligations relating to the handling, holding, accessing and correction of personal information. Personal information is information or an opinion about an identified individual, or an individual who is reasonably identifiable.

The APPs apply to most Australian Government agencies, all private sector organisations with an annual turnover of more than \$3 million, all private health service providers and some small businesses – collectively referred to as APP entities.

The APPs are principles-based law. This provides APP entities with the flexibility to tailor their personal information handling practices to their diverse needs and business models and to the diverse needs of individuals. The APPs are also technology neutral, applying equally to paper-based and digital environments. This is intended to preserve their relevance and applicability, in a context of continually changing and emerging technologies.

The Privacy Act recognises that the protection of individuals' privacy, through the protection of their personal information, is not an absolute right. Rather, those interests must be balanced with the broader interest of the community in ensuring that APP entities are able to carry out their legitimate functions and activities. This balancing is reflected in the exceptions to a number of the APPs. Exceptions cover a range of matters including where a use or disclosure of personal information is authorised or required by Australian law or where an entity reasonably believes that a use or disclosure is reasonably necessary for an enforcement related activity conducted by an enforcement body.

OAIC comments on the Bill

APP 6 outlines when an APP entity may use or disclose personal information. It generally provides that an APP entity can only use or disclose personal information for a purpose for which the information was collected (known as the 'primary purpose'), or for another purpose where one of the exceptions listed in APP 6 apply. As noted above, the exceptions include where 'a use or disclosure of personal information is authorised or required by Australian law'.

The OAIC is regularly invited to comment on draft laws that require or authorise the collection, use or disclosure of personal information. Consistent with the approach taken in applying Article 17 in the International Covenant on Civil and Political Right (ICCPR), the OAIC's advice generally suggests consideration should be given to whether those measures are proportionate and necessary. That is, whether they appropriately balance the intrusion on individuals' privacy with the overall public policy objectives of the proposal. Additionally, when handling of individuals' personal information is authorised in the broader interests of the community, it is generally recommended that those activities be accompanied by an appropriate level of privacy safeguards and accountability. Should such a proposal be considered to appropriately balance these objectives, it is generally recommended that the scope of the proposal be drafted

consistent with the spirit and intent of the Privacy Act.

On 31 October 2016, the OAIC was invited to comment on the Bill, following a request from the Office of Parliamentary Counsel (OPC), via the Attorney General's Department, Information Law Unit (the AGD). The OAIC's comments on the Bill were provided to the AGD on 3 November 2016, and we understand that they were then passed on to the OPC and the Department of Veterans' Affairs (DVA). The comments focused on the public interest disclosure provisions in Schedule 2 of the Bill which permit certain disclosures and invoke the 'required or authorised' by law exception in APP 6 in the Privacy Act. The OAIC's comments are attached.

The OAIC has reviewed the Commonwealth Ombudsman's written submissions to the Committee and notes its suggestion to involve the OAIC in the development of laws and policies raising privacy issues (Commonwealth Ombudsman, [Supplementary submission](#)). In this regard, the OAIC would welcome the opportunity to be consulted on rules made by the Minister in relation to public interest disclosure certificates under the proposed amendments in Schedule 2 of the Bill.

Committee questions

Please advise the committee what is the current situation that DVA or other agencies require this power?

As outlined above, the OAIC's role includes examining proposed enactments that would require or authorise acts or practices that might otherwise interfere with privacy (s 28A(2), Privacy Act) and ensuring that any adverse effects of a proposed enactment on the privacy of individuals are minimised (s 28A(2)(c), Privacy Act). The OAIC provided some brief comments on the Bill. At that time, the OAIC did not have access to the explanatory memorandum (including Statement of Compatibility with Human Rights).

As the 'public interest disclosure' provisions in Schedule 2 of the Bill broaden the circumstances in which personal information can be used and disclosed, we suggest that DVA may use the Explanatory Memorandum (including its Statement of Compatibility with Human Rights), to explain the need for such provisions.

Why does DVA require these provisions so urgently?

This may be a matter for DVA.

Is there not already a mechanism for agencies to report crimes to police?

As noted above, APP 6 generally provides that an APP entity can only use or disclose personal information for a purpose for which the information was collected (known as the 'primary purpose'), or for another purpose where one of the exceptions listed in APP 6 apply. The following exceptions to APP 6 would permit agencies to disclose personal information to the police, where:

- the APP entity reasonably believes that the use or disclosure of the information is reasonably necessary for one or more enforcement related activities conducted by, or

on behalf of, an enforcement body (examples include the Australian Federal Police or a State or Territory Police force or service) (APP 6.2(e)), and

- the entity reasonably believes that the collection, use or disclosure is necessary to lessen or prevent a serious threat to the life, health or safety of any individual, or to public health or safety (and it is unreasonable or impracticable to obtain the individual's consent) (APP 6.2(c) and s 16A, item 1)
- the use or disclosure of the information is required or authorised by or under an Australian law or a court/ tribunal order (APP 6.2(b)).

Over the last 5 years, how many cases were there of mistake and/or misinformation that agencies did not have the power to respond to?

This may be a matter for DVA.

Invitation to make a written submission

I would also like to take this opportunity to thank the Committee for the invitation of 6 December 2016 to make a submission to this inquiry. I apologise that the OAIC did not respond. The OAIC had overlooked the invitation due to a clerical error.

Please feel free to contact Sophie Higgins on s.22 - irrelevant or by email, if we can assist by providing any further information.

Kind regards

Melanie Drayton

Melanie Drayton | Assistant Commissioner, Regulation and Strategy

Office of the Australian Information Commissioner

GPO Box 5218 SYDNEY NSW 2001 | www.oaic.gov.au

s.22 - irrelevant

From: Balaga, Kimberley (SEN) s.22 - irrelevant **n Behalf Of** FADT, Committee (SEN)

Sent: Monday, 13 February 2017 6:20 PM

To: Melanie Drayton s.22 - irrelevant

Cc: Sophie Higgins s.22 - irrelevant FADT, Committee (SEN)

<xxxx.xxx@xxx.xxx.xx>

Subject: Invitation to Attend Public Hearing - Veterans' Affairs Legislation Amendment (Digital Readiness and Other Measures) Bill 2016



THE SENATE

STANDING COMMITTEE ON FOREIGN AFFAIRS, DEFENCE AND TRADE

13 February 2017

Ms Melanie Drayton
Office of the Australian Information Commissioner

Email: s.22 - irrelevant

Dear Ms Drayton

Inquiry into the Veterans' Affairs Legislation Amendment (Digital Readiness and Other Measures) Bill 2016

The Senate Foreign Affairs, Defence and Trade Legislation Committee is pleased to confirm arrangements for the Commissioner and the Deputy Commissioner to give evidence at a public hearing for the above inquiry. The public hearing will be held on **Thursday, 16 February 2017** in **Committee Room 2S3, Parliament House, Canberra**. Your appearance time is indicated on the attached public hearing program.

It would be appreciated if you could arrive about 10 minutes before your appearance time and make yourself known to the committee's secretariat staff. I would be grateful if you could advise me if you intend to table any documents with the committee during the hearing.

A Hansard witness form is also attached. Could you please complete it and email back to the secretariat as soon as possible to xxxx.xxx@xxx.xxx.xx or by fax to 02 6277 5818. This is used to ensure details are correctly recorded and to provide contact details so you can check the transcript of evidence.

If persons attending the public hearing have any special requirements please contact the secretariat beforehand so that any necessary arrangements can be made. If there are any additional witnesses whose details you have not already provided, please speak to the secretariat officers as early as possible at the hearing.

After the formalities have been concluded at the beginning of the hearing, the Chair will invite you to make a short opening statement, which should be around three minutes, or you may decline to make any opening remarks. The remainder of the hearing will be devoted to a question and answer session.

Please note that the hearing is open to the public and the media. The committee prefers all evidence to be given in public but should you wish to give any evidence in private, you may make a request to the Chair and the committee will consider the request. You are welcome to listen to the evidence of other witnesses.

A 'proof' (draft) copy of the Hansard transcript of evidence will be forwarded to you for correction of transcription errors. Hansard transcripts of evidence will also be available from the committee's website.

A copy of general information for witnesses, procedures to be observed by Senate Committees for the protection of witnesses, the public hearing program and the chair's opening statement are enclosed for your information.

If you require any further information please contact me on s.22 - irrelevant

Yours sincerely



David Sullivan

Secretary

Senate Standing Committee on Foreign Affairs, Defence and Trade

s.22 - irrelevant

Attachments:

- **Hearing Program**
- **Information Sheet: witnesses at hearings**
- **Information Sheet: protection of witnesses**
- **Chair's opening statement**
- **Hansard Witness Form**

Good morning

Thank you for inviting the Information Commissioner, Timothy Pilgrim, and the Deputy Commissioner, Angelene Falk, to appear at the Senate Committee's public hearing into the *Veterans' Affairs Legislation Amendment (Digital Readiness and Other Measures) Bill 2016* (the Bill) on Thursday, 16 February 2017. They are pleased to accept.

In advance of the hearing, we thought it may assist the Committee to provide:

- a brief outline of the role and responsibilities of the Office of the Australian Information Commissioner (OAIC)
- an overview of the OAIC's engagement with the Bill
- a response, where possible, to the Committee's questions provided to the OAIC on 10 February 2017.

This background information is provided for the Committee's information only and is not a submission.

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- privacy functions (protecting the privacy of individuals under the *Privacy Act 1988* (Privacy Act), and other Acts)
- freedom of information functions (access to information held by the Commonwealth Government in accordance with the *Freedom of Information Act 1982* (FOI Act)), and
- information management functions (as set out in the *Information Commissioner Act 2010*).

The integration of these three interrelated functions into one agency has made the OAIC well placed to strike an appropriate balance between promoting the right to privacy and broader information policy goals.

The OAIC's responsibilities include examining proposals that may restrict the exercise of individuals' privacy protections in favour of another public interest objective.

The Privacy Act

The Privacy Act contains thirteen legally-binding Australian Privacy Principles (APPs). These set out standards, rights and obligations relating to the handling, holding, accessing and correction of personal information. Personal information is information or an opinion about an identified individual, or an individual who is reasonably identifiable.

The APPs apply to most Australian Government agencies, all private sector organisations with an annual turnover of more than \$3 million, all private health service providers and some small businesses – collectively referred to as APP entities.

The APPs are principles-based law. This provides APP entities with the flexibility to tailor their personal information handling practices to their diverse needs and business models and to the diverse needs of individuals. The APPs are also technology neutral, applying equally to paper-based

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and digital environments. This is intended to preserve their relevance and applicability, in a context of continually changing and emerging technologies.

The Privacy Act recognises that the protection of individuals' privacy, through the protection of their personal information, is not an absolute right. Rather, those interests must be balanced with the broader interest of the community in ensuring that APP entities are able to carry out their legitimate functions and activities. This balancing is reflected in the exceptions to a number of the APPs, ~~which except from the operation of those APPs, certain information handling practices considered to be in the public interest when balanced with the interest in protecting an individual's privacy.~~ Exceptions cover a range of matters including where a use or disclosure of personal information is authorised or required by Australian law or where an entity reasonably believes that a use or disclosure is reasonably necessary for an enforcement related activity conducted by an enforcement body.

~~The OAIC's responsibilities include examining proposals that may restrict the exercise of individuals' privacy protections in favour of another public interest objective.~~

OAIC comments on the Bill

APP 6 outlines when an APP entity may use or disclose personal information. It generally provides that an APP entity can only use or disclose personal information for a purpose for which the information was collected (known as the 'primary purpose'), or for another purpose where one of the exceptions listed in APP 6 apply. As noted above, the exceptions include where 'a use or disclosure of personal information is authorised or required by Australian law'.

The OAIC is regularly invited to comment on draft laws that require or authorise the collection, use or disclosure of personal information, ~~in a manner that would otherwise be inconsistent with one or more of the APPs. The effect of such laws is that one or more APPs will not apply to the use or disclosure of personal information, described in the law.~~ Consistent with the approach taken in applying Article 17 in the International Covenant on Civil and Political Right (ICCPR), the OAIC's advice generally suggests consideration should be given to whether those measures are proportionate and necessary. That is, whether they appropriately balance the intrusion on individuals' privacy with the overall public policy objectives of the proposal. Additionally, when handling of individuals' personal information is authorised in the broader interests of the community, it is generally recommended that those activities be accompanied by an appropriate level of privacy safeguards and accountability. Should such a proposal be considered to appropriately balance these objectives, it is generally recommended that the scope of the proposal be drafted consistent with the spirit and intent of the Privacy Act.

On 31 October 2016, the OAIC was invited to comment on the Bill, following a request from the Office of Parliamentary Counsel (OPC), ~~and via~~ the Attorney General's Department, Information Law Unit (the AGD). ~~The OAIC's comments on the Bill were provided to the AGD, the OPC and the Department of Veterans' Affairs (DVA) on 3 November 2016.~~ The comments focused on the public interest disclosure provisions in Schedule 2 of the Bill which permit certain disclosures and invoke the 'required or authorised' by law exception in APP 6 in the Privacy Act. The OAIC's comments are attached. **[do I need to take out names?]**

Committee questions

Please advise the committee what is the current situation that DVA or other agencies require this power?

Commented [MD1]: Did we provide to all three or just AGD?

Commented [MD2]: I don't think so. This isn't evidence it's just a general email so it is only for their information.

As outlined above, the OAIC's role includes examining proposed enactments that would require or authorise acts or practices that might otherwise interfere with privacy (s 28A(2), Privacy Act) and ensuring that any adverse effects of a proposed enactment on the privacy of individuals are minimised (s 28A(2)(c), Privacy Act) ~~(noting that an act or practice that is required or authorised by or under an Australian law is generally excepted from the requirements around the collection of sensitive information and the use and disclosure of personal information in the APPs)~~. The OAIC provided some brief comments on the Bill ~~within a compressed timeframe~~. At that time, the OAIC did not have ~~an opportunity to review~~ access to the explanatory memorandum (including Statement of Compatibility with Human Rights).

As the 'public interest disclosure' provisions in Schedule 2 of the Bill broaden the circumstances in which personal information can be used and disclosed, we understand that DVA would be expected to justify in the Explanatory Memorandum (including its Statement of Compatibility with Human Rights), the need for such provisions.

Why does DVA require these provisions so urgently?

This may be a matter for DVA.

Is there not already a mechanism for agencies to report crimes to police?

As noted above, APP 6 generally provides that an APP entity can only use or disclose personal information for a purpose for which the information was collected (known as the 'primary purpose'), or for another purpose where one of the exceptions listed in APP 6 apply. The following exceptions to APP 6 would permit agencies to disclose personal information to the police, where:

- the APP entity reasonably believes that the use or disclosure of the information is reasonably necessary for one or more enforcement related activities conducted by, or on behalf of, an enforcement body (examples include the Australian Federal Police or a State or Territory Police force or service) (APP 6.2(e)), and
- the entity reasonably believes that the collection, use or disclosure is necessary to lessen or prevent a serious threat to the life, health or safety of any individual, or to public health or safety (and it is unreasonable or impracticable to obtain the individual's consent) (APP 6.2(c) and s 16A, item 1)
- the use or disclosure of the information is required or authorised by or under an Australian law or a court/ tribunal order (APP 6.2(b)).

Over the last 5 years, how many cases were there of mistake and/or misinformation that agencies did not have the power to respond to?

This may be a matter for DVA.

Invitation to make a written submission

I would also like to take this opportunity to thank the Committee for the invitation of 6 December to make a submission to the inquiry.

I apologise that the OAIC did not response. The OAIC had overlooked the invitation due to a clerical error.

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Please feel free to contact Sophie Higgins or **s.22 - irrelevant** by email, if we can assist by providing any further information.

Kind regards

From: [Melanie Drayton](#)
To: [Renee Alchin](#)
Subject: FW: Email to committee [SEC=UNCLASSIFIED]
Date: Tuesday, 14 March 2017 8:36:43 AM
Attachments: [Document1.docx](#)
Importance: High

From: Melanie Drayton
Sent: Tuesday, 14 February 2017 3:03 PM
To: Sophie Higgins s.22 - irrelevant Renee Alchin s.22 - irrelevant
Subject: Email to committee [SEC=UNCLASSIFIED]
Importance: High

Hello

I have a few suggestions – let's make this email a little more general.

Thanks
Mel

Good morning

Thank you for inviting the Information Commissioner, Timothy Pilgrim, and the Deputy Commissioner, Angelene Falk, to appear at the Senate Committee's public hearing into the *Veterans' Affairs Legislation Amendment (Digital Readiness and Other Measures) Bill 2016* (the Bill) on Thursday, 16 February 2017. They are pleased to accept.

In advance of the hearing, we thought it may assist the Committee to provide:

- a brief outline of the role and responsibilities of the Office of the Australian Information Commissioner (OAIC)
- an overview of the OAIC's engagement with the Bill
- a response, where possible, to the Committee's questions provided to the OAIC on 10 February 2017.

OAIC

The OAIC is an independent Commonwealth statutory agency. It was established by the Australian Parliament to bring together three functions:

- privacy functions (protecting the privacy of individuals under the *Privacy Act 1988* (Privacy Act), and other Acts)
- freedom of information functions (access to information held by the Commonwealth Government in accordance with the *Freedom of Information Act 1982* (FOI Act)), and
- information management functions (as set out in the *Information Commissioner Act 2010*).

The integration of these three interrelated functions into one agency has made the OAIC well placed to strike an appropriate balance between promoting the right to privacy and broader information policy goals.

The OAIC's responsibilities include examining proposals that may restrict the exercise of individuals' privacy protections in favour of another public interest objective.

The Privacy Act

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The Privacy Act contains thirteen legally-binding Australian Privacy Principles (APPs). These set out standards, rights and obligations relating to the handling, holding, accessing and correction of personal information. Personal information is information or an opinion about an identified individual, or an individual who is reasonably identifiable.

The APPs apply to most Australian Government agencies, all private sector organisations with an annual turnover of more than \$3 million, all private health service providers and some small businesses – collectively referred to as APP entities.

The APPs are principles-based law. This provides APP entities with the flexibility to tailor their personal information handling practices to their diverse needs and business models and to the diverse needs of individuals. The APPs are also technology neutral, applying equally to paper-based and digital environments. This is intended to preserve their relevance and applicability, in a context of continually changing and emerging technologies.

The Privacy Act recognises that the protection of individuals' privacy, through the protection of their personal information, is not an absolute right. Rather, those interests must be balanced with the broader interest of the community in ensuring that APP entities are able to carry out their legitimate functions and activities. This balancing is reflected in the exceptions to a number of the APPs, ~~which except from the operation of those APPs, certain information handling practices considered to be in the public interest when balanced with the interest in protecting an individual's privacy.~~ Exceptions cover a range of matters including where a use or disclosure of personal information is authorised or required by Australian law or where an entity reasonably believes that a use or disclosure is reasonably necessary for an enforcement related activity conducted by an enforcement body.

~~The OAIC's responsibilities include examining proposals that may restrict the exercise of individuals' privacy protections in favour of another public interest objective.~~

OAIC comments on the Bill

APP 6 outlines when an APP entity may use or disclose personal information. It generally provides that an APP entity can only use or disclose personal information for a purpose for which the information was collected (known as the 'primary purpose'), or for another purpose where one of the exceptions listed in APP 6 apply. As noted above, the exceptions include where 'a use or disclosure of personal information is authorised or required by Australian law'.

The OAIC is regularly invited to comment on draft laws that require or authorise the collection, use or disclosure of personal information, ~~in a manner that would otherwise be inconsistent with one or more of the APPs. The effect of such laws is that one or more APPs will not apply to the use or disclosure of personal information, described in the law.~~ Consistent with the approach taken in applying Article 17 in the International Covenant on Civil and Political Right (ICCPR), the OAIC's advice generally suggests consideration should be given to whether those measures are proportionate and necessary. That is, whether they appropriately balance the intrusion on individuals' privacy with the overall public policy objectives of the proposal. Additionally, when handling of individuals' personal information is authorised in the broader interests of the community, it is generally recommended that those activities be accompanied by an appropriate level of privacy safeguards and accountability. Should such a proposal be considered to appropriately balance these objectives, it is generally recommended that the scope of the proposal be drafted consistent with the spirit and intent of the Privacy Act.

On 31 October 2016, the OAIC was invited to comment on the Bill, following a request from the Office of Parliamentary Counsel (OPC), ~~and via~~ the Attorney General's Department, Information Law Unit (the AGD). ~~The OAIC's comments on the Bill were provided to the AGD, the OPC and the Department of Veterans' Affairs (DVA) on 3 November 2016. The comments focused on the public interest disclosure provisions in Schedule 2 of the Bill which permit certain disclosures and invoke the 'required or authorised' by law exception in APP 6 in the Privacy Act. The OAIC's comments are attached.~~ ~~[do I need to take out names?]~~

Commented [MD1]: Did we provide to all three or just AGD?

Commented [MD2]: I don't think so. This isn't evidence it's just a general email so it is only for their information.

Committee questions

Please advise the committee what is the current situation that DVA or other agencies require this power?

As outlined above, the OAIC's role includes examining proposed enactments that would require or authorise acts or practices that might otherwise interfere with privacy (s 28A(2), Privacy Act) and ensuring that any adverse effects of a proposed enactment on the privacy of individuals are

minimised (s 28A(2)(c), Privacy Act) ~~(noting that an act or practice that is required or authorised by or under an Australian law is generally excepted from the requirements around the collection of sensitive information and the use and disclosure of personal information in the APPs).~~ The OAIC provided some brief comments on the Bill ~~within a compressed timeframe.~~ At that time, the OAIC did not have ~~an opportunity to review~~ access to the explanatory memorandum (including Statement of Compatibility with Human Rights).

As the 'public interest disclosure' provisions in Schedule 2 of the Bill broaden the circumstances in which personal information can be used and disclosed, we understand that DVA would be expected to justify in the Explanatory Memorandum (including its Statement of Compatibility with Human Rights), the need for such provisions.

Why does DVA require these provisions so urgently?

This may be a matter for DVA.

Is there not already a mechanism for agencies to report crimes to police?

As noted above, APP 6 generally provides that an APP entity can only use or disclose personal information for a purpose for which the information was collected (known as the 'primary purpose'), or for another purpose where one of the exceptions listed in APP 6 apply. The following exceptions to APP 6 would permit agencies to disclose personal information to the police, where:

- the APP entity reasonably believes that the use or disclosure of the information is reasonably necessary for one or more enforcement related activities conducted by, or on behalf of, an enforcement body (examples include the Australian Federal Police or a State or Territory Police force or service) (APP 6.2(e)), and
- the entity reasonably believes that the collection, use or disclosure is necessary to lessen or prevent a serious threat to the life, health or safety of any individual, or to public health or safety (and it is unreasonable or impracticable to obtain the individual's consent) (APP 6.2(c) and s 16A, item 1)
- the use or disclosure of the information is required or authorised by or under an Australian law or a court/ tribunal order (APP 6.2(b)).

Over the last 5 years, how many cases were there of mistake and/or misinformation that agencies did not have the power to respond to?

This may be a matter for DVA.

Invitation to make a written submission

I would also like to take this opportunity to thank the Committee for the invitation of 6 December to make a submission to the inquiry.

I apologise that the OAIC did not response. The OAIC had overlooked the invitation due to a clerical error.

Please feel free to contact Sophie Higgins on **s.22 - irrele** or by email, if we can assist by providing any further information.

Kind regards

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From: Renee Alchin
To: ["xxxx.xxx@xxx.xxx.xx"](#)
Cc: [Sophie Higgins](#)
Subject: Hansard witness forms - 16 February 2017 Public Hearing - Digital Readiness Bill [SEC=UNCLASSIFIED]
Date: Wednesday, 15 February 2017 9:32:00 AM
Attachments: [Hansard Witness Form - Timothy Pilgrim.doc](#)
[Hansard Witness Form - Angelene Falk.doc](#)

Good morning,

Please find the attached Hansard Witness forms for Timothy Pilgrim, Australian Information Commissioner and Australian Privacy Commissioner and Angelene Falk, Deputy Commissioner, for the Senate Committee's public hearing into the Veteran's Affairs Legislation Amendment (Digital Readiness and Other Measures) Bill 2016.

Regards

Renee

Renee Alchin | Adviser

Regulation and Strategy

Office of the Australian Information Commissioner

GPO Box 5218 SYDNEY NSW 2001 | www.oaic.gov.au

s.22 - irrelevant

Name of Committee (in full): **Senate Standing Committee on Foreign Affairs, Defence and Trade**

☐ House of Representatives ☐ Joint ☒ Senate ☒ Legislation ☐ References

Date & Venue: **Thursday 16 February 2017, Committee Room 2S3, Parliament House, Canberra**

Short reference: **Veterans' Affairs Legislation Amendment (Digital Readiness and Other Measures) Bill 2016**

Hansard may wish to check words, phrases or acronyms after you have given evidence. Be aware that the Hansard editor may need to contact you before you leave. Please also supply the most appropriate telephone number where you may be contacted.

Telephone no: **s.22 - irrelevant**

Mobile no:

To ensure accuracy of the Hansard, please PRINT all information.

NOTE: Your surname and given names will appear in the Hansard transcript and should be provided in full. Your address will not appear in the Hansard.

Surname: Pilgrim

Given name/s: Timothy

Title (eg: Mr, Mrs, Ms, Miss, Prof., Dr): Mr

Address to which you want the Hansard transcript sent:

GPO box 5218, Sydney NSW 2001

E-mail address (if available):

s.22 - irrelevant

☐ Appearing as a private individual

☒ Appearing on behalf of an organisation

Organisation: Office of the Australian Information Commissioner

Address: 175 Pitt St, Sydney NSW 2000

Position: Australian Information Commissioner, Australian Privacy Commissioner

Name of Committee (in full): **Senate Standing Committee on Foreign Affairs, Defence and Trade**

☐ House of Representatives ☐ Joint ☒ Senate ☒ Legislation ☐ References

Date & Venue: **Thursday 16 February 2017, Committee Room 2S3, Parliament House, Canberra**

Short reference: **Veterans' Affairs Legislation Amendment (Digital Readiness and Other Measures) Bill 2016**

Hansard may wish to check words, phrases or acronyms after you have given evidence. Be aware that the Hansard editor may need to contact you before you leave. Please also supply the most appropriate telephone number where you may be contacted.

Telephone no: **s.22 - irrelevant**

Mobile no:

To ensure accuracy of the Hansard, please PRINT all information.

NOTE: Your surname and given names will appear in the Hansard transcript and should be provided in full. Your address will not appear in the Hansard.

Surname: Falk

Given name/s: Angelene

Title (eg: Mr, Mrs, Ms, Miss, Prof., Dr): Ms

Address to which you want the Hansard transcript sent:

GPO box 5218, Sydney NSW 2001

E-mail address (if available):

s.22 - irrelevant

☐ Appearing as a private individual

☒ Appearing on behalf of an organisation

Organisation: Office of the Australian Information Commissioner

Address: 175 Pitt St, Sydney NSW 2000

Position: Deputy Commissioner

From: [Melanie Drayton](#)
To: [Renee Alchin](#)
Subject: FW: Commissioner Brief - Briefing notes - Digital Readiness Bill public hearing (002).docx [SEC=UNCLASSIFIED]
Date: Tuesday, 14 March 2017 8:38:57 AM
Attachments: [Commissioner Brief - Briefing notes - Digital Readiness Bill public hearing \(002\).docx](#)

From: Melanie Drayton
Sent: Wednesday, 15 February 2017 2:31 PM
To: Sophie Higgins s.22 - irrelevant Renee Alchin s.22 - irrelevant
Subject: Commissioner Brief - Briefing notes - Digital Readiness Bill public hearing (002).docx [SEC=UNCLASSIFIED]

My apologies, I have whipped through his document very, very quickly. I have to dash off to do the school pick up.

I have a couple of minor suggestions here and there.

It's probably worthwhile sending it to AF as an attachment for her to run her eye over, to ensure she is generally happy with the content, before you print out.

Thanks
Mel

Commissioner brief: Briefing notes – Inquiry into the Digital Readiness Bill – Senate Foreign Affairs, Defence and Trade Committee

Type: Commissioner brief

Purpose: Senate Foreign Affairs, Defence and Trade Committee public hearing inquiry into the Digital Readiness Bill

For: The Australian Information Commissioner

Key points

1. The Veteran's Affairs Legislation Amendment (Digital Readiness) Bill 2016 seeks to amend the *Veteran's Entitlements Act 1986* (VEA), *Military Rehabilitation and Compensation Act 2004* (MRCA) and the *Safety Rehabilitation and Compensation (Defence-related claims) Act 1988* (DRCA). The Bill and Explanatory memorandum are at **Annexure A**.
2. On 31 October 2016, the Attorney General's Department Information Law Unit (AGD) requested that the OAIC provide any comments on the Bill, and these would be provided to the Office of Parliamentary Counsel (OPC). On 3 November 2016, the OAIC provided comments on the Bill to the AGD, which AGD passed on to OPC and then to Department of Veterans' Affairs (DVA).
3. The OAIC's comments focused on the public interest disclosure provisions in Schedule 2 of the Bill. These authorise the Secretary to make disclosures that the Secretary certifies as 'necessary in the public interest', and invoke the 'required or authorised' by law exception in APP 6 in the Privacy Act. The AGD did not make any substantive comments on the Bill.
4. The Bill states that the Secretary must, in giving such a 'public interest certificate', act in accordance with Rules made by legislative instrument, by the Minister. While not included in the OAIC's comments to OPC, the OAIC's email to the Committee on 14 February noted that the OAIC would welcome the opportunity to be consulted on any such draft rules. The OAIC will have regard to whether any permitted disclosures accord with the social license given to government to handle and disclose individuals' personal information, and are generally consistent with the spirit and intent of the Privacy Act.
5. Even where APP 6 does not apply – by reason that a disclosure is 'authorised by law' – most of the other APPs would continue to apply to that personal information when it is held by the agency or organisation (such as the requirements in relation to transparency, data quality, security, and rights to access and correction).

Commented [MD1]: I think we need to add in here that AF got a call from the Ombo saying it has suggested the Privacy Commissioner be consulted on any draft rules.

Commented [MD2]: Please see comment in opening statement.

6. The OAIC welcomes the safeguard in the Bill that before disclosing personal information about a person under the 'public interest disclosure' provisions, the Secretary must notify the person in writing of the Secretary's intention to disclose the information; give the person a reasonable opportunity to make written comments on the proposed disclosure of the information and consider any written comments made by the person. This is consistent with the emphasis on transparency in the Privacy Act, and may in some circumstances give the individual a 'reasonable expectation' that their personal information will be disclosed for a particular purpose.
7. The OAIC acknowledges that automated decision-making is likely to provide a number of advantages for DVA and for Australians accessing their services, particularly in regards to efficiencies. However, the OAIC would encourage consideration to be given at an early stage, to ensuring that any privacy impacts are identified and minimised to the extent possible, and that an integrated approach to privacy management is taken.

Background – the Digital Readiness Bill

- The Bill will insert a provision into the VEA, MRCA, and DRCA to enable the Secretary to authorise the use of computer programmes to make decisions and determinations, exercise powers or comply with obligations etc. under these Acts (Schedule 1).
- Safeguards in the Bill include that the Secretary may make a decision or determination in substitution for a decision or determination made by a computer program, if satisfied that the decision or determination is incorrect (Schedule 1).
- The Bill will also insert a provision into each of these Acts that give the Secretary broad disclosure powers: ‘the Secretary may, if the Secretary certifies that it is necessary in the public interest to do so in a particular case or class of cases, disclose any information obtained by any person in the performance of that person’s duties under this Act to such persons and for such purposes as the Secretary determines’ (Schedule 2).
- Safeguards in the Bill include that:
 - the power cannot be delegated by the Secretary to anyone
 - the Secretary must act in accordance with rules that the Minister makes and the Minister cannot delegate his or her rule making power
 - before disclosing information, the Secretary must notify the person concerned in writing about the proposed disclosure and consider any written comments made by the person, and
 - unless the Secretary complies with the above notification requirements before disclosing personal information, he or she commits an offence, punishable by 60 penalty units (Schedule 2).
- The Explanatory Memorandum to the Bill gives as examples of circumstances in which it might be appropriate for the Secretary to disclose such information as including ‘where there is a threat to life, health or welfare, for the enforcement of laws, in relation to proceeds of crime orders, mistakes of fact, research and statistical analysis, APS code of conduct investigations, misinformation in the community and provider inappropriate practices’ (p. 11).

OAIC’s responsibilities to examine proposed enactments impact privacy

- A range of the OAIC’s responsibilities involve examining proposals that may restrict the exercise of individuals’ privacy protections in favour of another public interest objective.
- The Privacy Act recognises that the protection of individuals’ privacy, through the protection of their personal information, is not an absolute right. Rather, those interests

must be balanced with the broader interest of the community in ensuring that APP entities are able to carry out their legitimate functions and activities.

- This balancing is reflected in the exceptions to a number of the APPs, which except from the operation of those APPs, certain information handling practices considered to be in the public interest when balanced with the interest in protecting an individual's privacy.

Disclosures of personal information

- APP 6 outlines when an APP entity may use or disclose personal information. It generally provides that an APP entity can only use or disclose personal information for a purpose for which the information was collected (known as the 'primary purpose'), or for a secondary purpose where one of the exceptions listed in APP 6 apply. The exceptions include where 'a use or disclosure of personal information is authorised or required by Australian law' (APP 6.2(b)).
- The OAIC is regularly invited to comment on draft laws that require or authorise the collection, use or disclosure of personal information in a manner that would otherwise be inconsistent with one or more of the APPs. The effect of such laws is that one or more APPs will not apply to the use or disclosure of personal information, described in the law.
- Consistent with the approach taken in applying Article 17 in the International Covenant on Civil and Political Right (ICCPR), the OAIC's advice generally suggests consideration should be given to whether those measures are proportionate and necessary. That is, whether they appropriately balance the intrusion on individuals' privacy with the overall public policy objectives of the proposal. Additionally, when handling of individuals' personal information is authorised in the broader interests of the community, it is generally recommended that those activities be accompanied by an appropriate level of privacy safeguards and accountability. Should such a proposal be considered to appropriately balance these objectives, it is generally recommended that the scope of the proposal be drafted consistent with the spirit and intent of the Privacy Act.
- It should also be noted that even where APP 6 does not apply – by reason that a disclosure is 'authorised by law' - most of the other APPs would continue to apply to that personal information when it is held by the agency or organisation (such as the requirements in relation to transparency, data quality, security, and rights to access and correction).

Commented [MD3]: Please see previous comment re application of APP 6.

OAIC engagement with the Bill

- On 31 October 2016, the OPC contacted the AGD seeking comment on the Bill, and that request was passed onto the OAIC for comment. The OAIC was not provided with the Explanatory Memorandum. The OAIC's comments on the Bill were provided to AGD, and passed on to the OPC on 3 November 2016. The AGD did not make any substantive comments on the Bill. The comments provided to OPC, along with a response provided by DVA are at **Annexure B**.
- The OAIC's comments focused on the public interest disclosure provisions in Schedule 2 of the Bill outlined above.
- Key points made in the OAIC's comments were:
 - the OAIC noted that the disclosure of personal information under the new provisions will be permitted by the 'required or authorised by or under law' exception in APP 6.2(b).
 - The OAIC suggested that where a Bill invokes this exception in the Privacy Act, consideration should be given to whether those measures are reasonable, proportionate and necessary.
 - The OAIC referred to similar disclosure provisions in the *Social Security (Administration) Act 1999* and the *Paid Parental Leave Act 2010*, noting that rules issued under that legislation set out the matters to which the Secretary must have regard to in giving a public interest certificate and the circumstances in which a public interest certificate may be given, which include: to prevent, or lessen, a threat to the life, health or welfare of a person; for the enforcement of laws; to correct a mistake of fact; to brief a Minister or to locate missing persons etc.

- On 7 November 2017, DVA responded by email to the OAIC that:
 - rules would be made setting out the circumstances in which the Secretary may make a public interest disclosure before the Secretary exercises that power. The nature and content of those rules is likely to be similar to the Social Security (Public Interest Certificate Guidelines) (DSS) Determination 2015, mentioned below.
 - The sorts of situations in which it is envisage the public interest disclosure power being exercised are will be set out in the EM, including: where there is a threat to life, health or welfare, for the enforcement of laws, in relation to proceeds of crime orders, mistakes of fact, research and statistical analysis, APS code of conduct investigations, misinformation in the community and provider inappropriate practices (this is subject to the Minister agreeing to make rules along these lines.)
- On 6 December 2016, the Committee invited the OAIC to make a comment on the Bill, but the OAIC inadvertently did not action this request. [Melanie has apologised to the Committee for this oversight.](#)
- Seven submissions have been made to the Committee – see **Annexure C**. These include a lengthy submission from DVA and two submissions made by the Commonwealth Ombudsman.
- Key matters to note from the DVA submission include:
 - DVA sets out a range of efficiency-related justifications for provisions in the Bill that automate the decision-making process
 - the Committee appears to have raised concerns with DVA about the breadth of the disclosures that may be made under the Bill, including disclosures to ‘correct misinformation’ and the submission purports to respond to these concerns.
 - DVA notes that the proposed public interest disclosure provisions ‘are modelled on paragraph 208(1)(a) of the *Social Security (Administration) Act 1999*. That public interest disclosure provision has been in operation for 17 years and has operated successfully with the approval of Parliament. The Privacy Commissioner has not raised any concern about the Department of Social Services/ Department of Human Services’ provision...’

- The most recent iteration of the *Social Security (Public Interest Certificate Guidelines) (DSS) Determination 2015* were registered on FRLI in August 2015. The explanatory memorandum refers to consultation with the AGD and others, but does not specifically refer to consultation with the OAIC. We have not been able to find any engagement with the OAIC on the Determination following a brief TRIM search and discussion with Sarah Ghali. A more fulsome search could be undertaken if necessary.
- The Commonwealth Ombudsman has made a submission to the Committee in relation to automation aspects of the Bill (see below).
- They also made a second submission on the new disclosure provisions, (and notified Angelene Falk by telephone, of their intention to make such a submission). This supplementary submission recommends that any development of legislation or policy relating to disclosure of PI should occur in consultation with the OAIC.
- On 10 February 2017, a Research Officer from the Senate Committee contacted the OAIC to advise that it is holding a public hearing on Thursday, 16 February 2017 and invites the information Commissioner to appear from 5:00pm – 6:00pm. The Commonwealth Ombudsman and officers of DVA have also been invited to appear. They have provided the OAIC with specific questions in relation to the public interest disclosure provisions – which the OAIC intends to submit a written response to before the hearing, as well as other questions
- On 14 February, Melanie Drayton, Assistant Commissioner, sent a detailed response to the Committee noting that the Information Commissioner and Deputy Commissioner would appear at the public hearing; outlining the OAIC's role; attaching the OAIC's comments on the Bill that were sent to OPC (via AGD); and responding to the specific questions where possible (noting that a number of the questions may be directed to DVA). This email also noted that the OAIC would welcome the opportunity to be consulted on the draft rules to be made by the Minister in relation to public interest disclosures. The OAIC's email to the Committee is at **Annexure D**.
- Key additional points that the Commissioner may make at the Committee meeting are:
 - The OAIC welcomes the safeguard in the Bill that before disclosing personal information about a person under the 'public interest disclosure' provisions, the Secretary must notify the person in writing of the Secretary's intention to disclose the information; give the person a reasonable opportunity to make written comments on the proposed disclosure of the information and consider any written comments made by the person. This is consistent with the emphasis on transparency in the Privacy Act, and may in some circumstances give the individual a 'reasonable expectation' that their personal information will be

Commented [MD4]: I wonder if we don't pull these questions out and add them as a separate Annexure? So it's easy for TP to find the answers if the Committee ask him to revisit the questions?

disclosed for a particular purpose (consistent with the 'reasonable expectation' exception in APP 6.2(a).

- The Bill states that the Secretary must, in giving such a 'public interest certificate', act in accordance with Rules made by legislative instrument, by the Minister. The OAIC would welcome the opportunity to be consulted on any such draft rules. The OAIC will have regard to whether any permitted disclosures accord with the social license given to government to handle and disclose individuals' personal information, and are generally consistent with the spirit and intent of the Privacy Act.

Automated decision-making

- The Commonwealth Ombudsman's written submission to the Committee commented on several matters that related to automated decisions. These comments related to accuracy of automated decisions, and errors that can arise from incorrect data entry and system errors, and the fact that the onus is predominately placed on the customer to identify these errors.
- The Commonwealth Ombudsman also outlined issues with automated decisions following basic legal values of lawfulness, fairness, transparency and efficiency.
- The objects of the Privacy Act recognise that the protection of individuals' privacy is balanced with the interests of entities in carrying out their functions or activities (s 3(b)). The OAIC acknowledges that automated decision-making is likely to provide a number of advantages for DVA and for Australians accessing their services, including associated with reduced costs and enhanced efficiency. However, consideration should be given at an early stage, to ensuring that any privacy impacts are identified and minimised to the extent possible, and that an integrated approach to privacy management is taken.

- Some key privacy considerations that may arise where decision-making is automated include:
 - whether the entity has taken reasonable steps to implement practices, procedures and systems to ensure that the entity complies with the APPs and to enable the entity to deal with inquiries and complaints from individuals about the entity's compliance with the APPs (APP 1.2). Entities will be better placed to meet these obligations if they embed privacy protections in the design of the information handling practice at an early stage.
 - whether the entity has taken reasonable steps to ensure that the personal information it collects, uses and discloses is accurate, up-to-date and complete (as required by APP 10). This may be particularly challenging where the onus is on the individual to identify errors or discrepancies with automated decisions.
 - whether the entity has processes in place to allow the individual to request access to, and correction of his or her personal information used in automated processes (APPs 11 and 12).
- The OAIC also suggests consideration be given to the privacy risks arising from personal information processed as part of an automated decision-making process. For example, due to the higher privacy risks involved with handling sensitive information, the OAIC would generally suggest greater caution be exercised when considering whether this information should be subject to automated processing. The OAIC welcomes the DVA's comments in its written submission to the Committee that 'in regards to automated debt collection, the Department does not intend this provision for this purpose'. This intent could be included in the Bill or the Explanatory Memorandum.
- DVA could conduct a privacy impact assessment (PIA) of the amendments proposed by the Bill that have privacy implications to identify and assess the privacy risks associated with the amendments. A PIA is a written assessment which may assist in identifying the privacy impacts of the proposal, and provides an opportunity to set out any recommendations for managing, minimising or eliminating those impacts.

From: [Melanie Drayton](#)
To: [Renee Alchin](#)
Subject: FW: Commissioner Brief - Opening statement talking points - Digital Readiness Bill public hearing (002).docx [SEC=UNCLASSIFIED]
Date: Tuesday, 14 March 2017 8:38:47 AM
Attachments: [Commissioner Brief - Opening statement talking points - Digital Readiness Bill public hearing \(002\).docx](#)
Importance: High

From: Melanie Drayton
Sent: Wednesday, 15 February 2017 2:17 PM
To: Sophie Higgins s.22 - irrelevant Renee Alchin s.22 - irrelevant
Subject: Commissioner Brief - Opening statement talking points - Digital Readiness Bill public hearing (002).docx [SEC=UNCLASSIFIED]
Importance: High

Once again, thank you both so much for the stellar job you've done in turning this around so quickly – very, very much appreciated.

I have a couple of suggestions in relation to the opening statement. Have a look and see what you think. Happy to discuss if you like.

Thanks
Mel

Commissioner brief: Opening statement talking points for Australian Information Commissioner

Type: **Commissioner brief**

Purpose: **Senate Foreign Affairs, Defence and Trade Committee public hearing inquiry into the Digital Readiness Bill**

For: **The Australian Information Commissioner**

- Thank you for the opportunity to appear before the Committee today in relation to *the Veteran's Affairs Legislation Amendment (Digital Readiness and Other Measures) Bill 2016*.
- As the Australian Information Commissioner and Australian Privacy Commissioner, I am responsible for ensuring compliance with the Privacy Act, and promoting access to government information through the Freedom of Information Act.
- The Privacy Act regulates the handling of personal information by most Australian Government agencies and many private sector organisations. The cornerstone of this privacy protection framework are the Australian Privacy Principles (or APPs). These set out standards, rights and obligations in relation to the way individuals' personal information is handled.
- The APPs are underpinned by notions of transparency and accountability. In general terms, this requires entities to give careful consideration to ensuring that individuals are aware of an entity's information handling practices, so that the individual may make appropriate choices about their personal information. Accountability includes ensuring good privacy governance mechanisms are implemented at an early stage.
- The Privacy Act recognises that the protection of individual's privacy, through the protection of their personal information, is not an absolute right. Rather, those interests must be balanced with the broader interest of the community in ensuring that Australian government agencies and private sector organisations are able to carry out their legitimate functions and activities.

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- This balancing is reflected in the exceptions to a number of the Australian Privacy Principles, which ~~except~~exclude from the operation of those APPs, certain information handling practices considered to be in the public interest when balanced with the interest in protecting an individual's privacy.
- The OAIC's responsibilities include examining proposals that may restrict the exercise of individuals' privacy protections in favour of another public interest objective. Our approach is generally to ensure that any changes that authorise a disclosure of personal information by invoking an exception in the Privacy Act, are reasonable, necessary and proportionate to the expected benefits.
- My Office provided comments to the Office of Parliamentary Counsel (through Attorney General's Department), on a draft version of the Bill on 3 November 2016. These comments focused on the public interest disclosure provisions in Schedule 2 of the Bill. These permit the Secretary to make 'public interest' disclosures and have the effect that the privacy protections in the 'use and disclosure' APP - Australian Privacy Principle 6 - would not apply. I understand my Office has provided a copy of these comments to the Senate Committee inquiry for consideration its information.
- There are, however, a few additional matters which I believe warrant further mention before the Committee. In summary these are:
 - Even though the 'use and disclosure principle' – APP 6 – would not apply to the 'public interest disclosures' proposed in the Bill, most of the other Australian Privacy Principles would continue to apply to that personal information held by DVA (such as the requirements in relation to transparency, data quality, security, and rights to access and correction).
 - The OAIC would welcome the opportunity to be consulted on draft rules to be made by the Minister under the 'public interest disclosure' provisions in Schedule 2 of the Bill.
 - The OAIC acknowledges that automated decision-making is likely to provide a number of advantages for DVA and for Australians accessing their services, particularly in regards to efficiencies. However, I would encourage consideration to be given at an early stage, to ensuring that any privacy impacts are identified

Commented [MD1]: Is it strictly true that APP 6 does not apply? Doesn't APP 6.2(b) apply by way of empowering the disclosure, given it is authorised or required by law?

Is it better to say that even though the disclosure is required or authorised by law, the APPs govern DVA's info handling practices.

and minimised to the extent possible, and that an integrated approach to privacy management is taken.

- I would be happy to answer any questions the Committee has.

Commented [MD2]: Shall we add in that they should do a PIA (unless they already have)?

From: [Melanie Drayton](#)
To: [Renee Alchin](#)
Subject: FW: Invitation to Attend Public Hearing - Veterans' Affairs Legislation Amendment (Digital Readiness and Other Measures) Bill 2016 [SEC=UNCLASSIFIED]
Date: Tuesday, 14 March 2017 8:38:19 AM
Attachments: [image003.gif](#)
[image001.jpg](#)
[image002.png](#)

From: Melanie Drayton
Sent: Wednesday, 15 February 2017 9:27 AM
To: Sophie Higgins [s.22 - irrelevant]
Subject: Fwd: Invitation to Attend Public Hearing - Veterans' Affairs Legislation Amendment (Digital Readiness and Other Measures) Bill 2016 [SEC=UNCLASSIFIED]

Hi Sophie, I just realised I didn't attach Rebecca's email.

Would you mind sending it to Kimberly along with a short note saying you'll send over the Witness Forms.

Thanks
M

Sent from my iPhone

Begin forwarded message:

From: "FADT, Committee (SEN)" <[xxxx.xxx@xxx.xxx.xx](#)>
Date: 15 February 2017 at 9:14:17 AM AEDT
To: 'Melanie Drayton' [s.22 - irrelevant] "FADT, Committee (SEN)" <[xxxx.xxx@xxx.xxx.xx](#)>
Cc: Sophie Higgins [s.22 - irrelevant]
Subject: RE: Invitation to Attend Public Hearing - Veterans' Affairs Legislation Amendment (Digital Readiness and Other Measures) Bill 2016 [SEC=UNCLASSIFIED]

Hi Melanie

Thank you for the additional information, it will shortly be circulated to the committee. Grateful if you could please send through the two completed Hansard Witness forms as well when you can before the hearing tomorrow.

Regards

Kimberley Balaga | Research Officer

Standing Committee on Foreign Affairs, Defence and Trade | Department of the Senate
 [s.22 - irrelevant]
www.apf.gov.au/senate

Disclaimer

This email, and any attachments, may be confidential and may be protected by privilege. You should not copy, use or disclose it for any unauthorised purpose.

From: Melanie Drayton s.22 - irrelevant
Sent: Tuesday, 14 February 2017 6:35 PM
To: Balaga, Kimberley (SEN); FADT, Committee (SEN)
Cc: Sophie Higgins
Subject: RE: Invitation to Attend Public Hearing - Veterans' Affairs Legislation Amendment (Digital Readiness and Other Measures) Bill 2016 [SEC=UNCLASSIFIED]

Good evening

Thank you for inviting the Information Commissioner and Australian Privacy Commissioner, Timothy Pilgrim, and the Deputy Commissioner, Angelene Falk, to appear at the Senate Committee's public hearing into the Veterans' Affairs Legislation Amendment (Digital Readiness and Other Measures) Bill 2016 (the Bill) on Thursday, 16 February 2017. They are pleased to accept.

In advance of the hearing, we thought it may assist the Committee to provide:

- a brief outline of the role and responsibilities of the Office of the Australian Information Commissioner (OAIC)
- an overview of the OAIC's engagement with the Bill
- a response, where possible, to the Committee's questions provided to the OAIC on 10 February 2017.

This email is provided as background information only and is not a submission.

OAIC

The OAIC is an independent Commonwealth statutory agency. It was established by the Australian Parliament to bring together three functions:

- privacy functions (protecting the privacy of individuals under the Privacy Act 1988 (Privacy Act), and other Acts)
- freedom of information functions (access to information held by the Commonwealth Government in accordance with the Freedom of Information Act 1982 (FOI Act)), and
- information management functions (as set out in the Information Commissioner Act 2010).

The integration of these three interrelated functions into one agency has made the OAIC well placed to strike an appropriate balance between promoting the right to privacy and broader information policy goals.

The OAIC's responsibilities include examining proposals that may restrict the exercise of individuals' privacy protections in favour of another public interest objective.

The Privacy Act

The Privacy Act contains thirteen legally-binding Australian Privacy Principles (APPs). These set out standards, rights and obligations relating to the handling, holding,

Released under FOI - OAIC

accessing and correction of personal information. Personal information is information or an opinion about an identified individual, or an individual who is reasonably identifiable.

The APPs apply to most Australian Government agencies, all private sector organisations with an annual turnover of more than \$3 million, all private health service providers and some small businesses – collectively referred to as APP entities.

The APPs are principles-based law. This provides APP entities with the flexibility to tailor their personal information handling practices to their diverse needs and business models and to the diverse needs of individuals. The APPs are also technology neutral, applying equally to paper-based and digital environments. This is intended to preserve their relevance and applicability, in a context of continually changing and emerging technologies.

The Privacy Act recognises that the protection of individuals' privacy, through the protection of their personal information, is not an absolute right. Rather, those interests must be balanced with the broader interest of the community in ensuring that APP entities are able to carry out their legitimate functions and activities. This balancing is reflected in the exceptions to a number of the APPs. Exceptions cover a range of matters including where a use or disclosure of personal information is authorised or required by Australian law or where an entity reasonably believes that a use or disclosure is reasonably necessary for an enforcement related activity conducted by an enforcement body.

OAIC comments on the Bill

APP 6 outlines when an APP entity may use or disclose personal information. It generally provides that an APP entity can only use or disclose personal information for a purpose for which the information was collected (known as the 'primary purpose'), or for another purpose where one of the exceptions listed in APP 6 apply. As noted above, the exceptions include where 'a use or disclosure of personal information is authorised or required by Australian law'.

The OAIC is regularly invited to comment on draft laws that require or authorise the collection, use or disclosure of personal information. Consistent with the approach taken in applying Article 17 in the International Covenant on Civil and Political Right (ICCPR), the OAIC's advice generally suggests consideration should be given to whether those measures are proportionate and necessary. That is, whether they appropriately balance the intrusion on individuals' privacy with the overall public policy objectives of the proposal. Additionally, when handling of individuals' personal information is authorised in the broader interests of the community, it is generally recommended that those activities be accompanied by an appropriate level of privacy safeguards and accountability. Should such a proposal be considered to appropriately balance these objectives, it is generally recommended that the scope of the proposal be drafted consistent with the spirit and intent of the Privacy Act.

On 31 October 2016, the OAIC was invited to comment on the Bill, following a request from the Office of Parliamentary Counsel (OPC), via the Attorney General's

Department, Information Law Unit (the AGD). The OAIC's comments on the Bill were provided to the AGD on 3 November 2016, and we understand that they were then passed on to the OPC and the Department of Veterans' Affairs (DVA). The comments focused on the public interest disclosure provisions in Schedule 2 of the Bill which permit certain disclosures and invoke the 'required or authorised' by law exception in APP 6 in the Privacy Act. The OAIC's comments are attached.

The OAIC has reviewed the Commonwealth Ombudsman's written submissions to the Committee and notes its suggestion to involve the OAIC in the development of laws and policies raising privacy issues (Commonwealth Ombudsman, [Supplementary submission](#)). In this regard, the OAIC would welcome the opportunity to be consulted on rules made by the Minister in relation to public interest disclosure certificates under the proposed amendments in Schedule 2 of the Bill.

Committee questions

Please advise the committee what is the current situation that DVA or other agencies require this power?

As outlined above, the OAIC's role includes examining proposed enactments that would require or authorise acts or practices that might otherwise interfere with privacy (s 28A(2), Privacy Act) and ensuring that any adverse effects of a proposed enactment on the privacy of individuals are minimised (s 28A(2)(c), Privacy Act). The OAIC provided some brief comments on the Bill. At that time, the OAIC did not have access to the Explanatory Memorandum (including Statement of Compatibility with Human Rights). Details about the current situation that necessitates this power may be a matter for DVA. As the 'public interest disclosure' provisions in Schedule 2 of the Bill broaden the circumstances in which personal information can be used and disclosed, we suggest that DVA use the Explanatory Memorandum (including its Statement of Compatibility with Human Rights), to explain the need for such provisions.

Why does DVA require these provisions so urgently?

This may be a matter for DVA.

Is there not already a mechanism for agencies to report crimes to police?

As noted above, APP 6 generally provides that an APP entity can only use or disclose personal information for a purpose for which the information was collected (known as the 'primary purpose'), or for another purpose where one of the exceptions listed in APP 6 apply. The following exceptions to APP 6 would permit agencies to disclose personal information to the police, where:

- the APP entity reasonably believes that the use or disclosure of the information is reasonably necessary for one or more enforcement related activities conducted by, or on behalf of, an enforcement body (examples include the Australian Federal Police or a State or Territory Police force or service) (APP 6.2(e)), and
- the entity reasonably believes that the collection, use or disclosure is

necessary to lessen or prevent a serious threat to the life, health or safety of any individual, or to public health or safety (and it is unreasonable or impracticable to obtain the individual's consent) (APP 6.2(c) and s 16A, item 1)

- the use or disclosure of the information is required or authorised by or under an Australian law or a court/ tribunal order (APP 6.2(b)).

Over the last 5 years, how many cases were there of mistake and/or misinformation that agencies did not have the power to respond to?

This may be a matter for DVA.

Invitation to make a written submission

I would also like to take this opportunity to thank the Committee for the invitation of 6 December 2016 to make a submission to this inquiry. I apologise that the OAIC did not respond. The OAIC had overlooked the invitation due to a clerical error.

Please feel free to contact Sophie Higgins on s.22 - irrelevant or by email, if we can assist by providing any further information.

Kind regards

Melanie Drayton

Melanie Drayton | Assistant Commissioner, Regulation and Strategy
Office of the Australian Information Commissioner
 GPO Box 5218 SYDNEY NSW 2001 | www.oaic.gov.au

s.22 - irrelevant

From: Balaga, Kimberley (SEN) s.22 - irrelevant **On Behalf Of**
 FADT, Committee (SEN)

Sent: Monday, 13 February 2017 6:20 PM

To: Melanie Drayton s.22 - irrelevant

Cc: Sophie Higgins s.22 - irrelevant; FADT, Committee (SEN)

<xxxx.xxx@xxx.xxx.xx>

Subject: Invitation to Attend Public Hearing - Veterans' Affairs Legislation Amendment (Digital Readiness and Other Measures) Bill 2016



THE SENATE

**STANDING COMMITTEE ON FOREIGN AFFAIRS, DEFENCE AND
 TRADE**

Released under FOI - OAIC

13 February 2017

Ms Melanie Drayton
Office of the Australian Information Commissioner

Email: s.22 - irrelevant

Dear Ms Drayton

Inquiry into the Veterans' Affairs Legislation Amendment (Digital Readiness and Other Measures) Bill 2016

The Senate Foreign Affairs, Defence and Trade Legislation Committee is pleased to confirm arrangements for the Commissioner and the Deputy Commissioner to give evidence at a public hearing for the above inquiry. The public hearing will be held on **Thursday, 16 February 2017** in **Committee Room 2S3, Parliament House, Canberra**. Your appearance time is indicated on the attached public hearing program.

It would be appreciated if you could arrive about 10 minutes before your appearance time and make yourself known to the committee's secretariat staff. I would be grateful if you could advise me if you intend to table any documents with the committee during the hearing.

A Hansard witness form is also attached. Could you please complete it and email back to the secretariat as soon as possible to xxxx.xxx@xxx.xxx.xx or by fax to 02 6277 5818. This is used to ensure details are correctly recorded and to provide contact details so you can check the transcript of evidence.

If persons attending the public hearing have any special requirements please contact the secretariat beforehand so that any necessary arrangements can be made. If there are any additional witnesses whose details you have not already provided, please speak to the secretariat officers as early as possible at the hearing.

After the formalities have been concluded at the beginning of the hearing, the Chair will invite you to make a short opening statement, which should be around three minutes, or you may decline to make any opening remarks. The remainder of the hearing will be devoted to a question and answer session.

Please note that the hearing is open to the public and the media. The committee prefers all evidence to be given in public but should you wish to give any evidence in private, you may make a request to the Chair and the committee will consider the request. You are welcome to listen to the evidence of other witnesses.

A 'proof' (draft) copy of the Hansard transcript of evidence will be forwarded to you for correction of transcription errors. Hansard transcripts of evidence will also be available from the committee's website.

A copy of general information for witnesses, procedures to be observed by Senate Committees for the protection of witnesses, the public hearing program and the chair's opening statement are enclosed for your information.

If you require any further information please contact me on s.22 - irrelevant

Yours sincerely



David Sullivan

Secretary

Senate Standing Committee on Foreign Affairs, Defence and Trade

s.22 - irrelevant

Attachments:

- **Hearing Program**
- **Information Sheet: witnesses at hearings**
- **Information Sheet: protection of witnesses**
- **Chair's opening statement**
- **Hansard Witness Form**

WARNING: The information contained in this email may be confidential.

If you are not the intended recipient, any use or copying of any part of this information is unauthorised. If you have received this email in error, we apologise for any inconvenience and request that you notify the sender immediately and delete all copies of this email, together with any attachments.

From: Renee Alchin
To: [Sophie Higgins](#)
Subject: RE: FOR CLEARANCE: draft email to TP - Veterans' Affairs Legislation Amendment (Digital Readiness and Other Measures) Bill 2016 [SEC=UNCLASSIFIED]
Date: Wednesday, 15 February 2017 4:02:00 PM

Hi again,

I spoke with Brenton, he advised to send the pack to Angelene.

He said to include the TRIM links in the email and also attach the all of the documents to the email as well (just in case she has problems with the TRIM links).

We don't need to email her Annexure C (the submissions to the Committee) or Annexure D (Mel's email of 14 Feb to the Committee) as Angelene already has those.

We also need to 'cc him into the email to Angelene, he will then follow up with Angelene re: whether she has capacity to print all the docs or whether he needs to fly up to Brisbane with the briefing pack.

I can pull all this together in an email if you like?

Thanks
 Renee

From: Sophie Higgins
Sent: Wednesday, 15 February 2017 3:52 PM
To: Renee Alchin s.22 - irrelevant
Subject: RE: FOR CLEARANCE: draft email to TP - Veterans' Affairs Legislation Amendment (Digital Readiness and Other Measures) Bill 2016 [SEC=UNCLASSIFIED]

Just changed the highlighted link – thanks!

From: Renee Alchin
Sent: Wednesday, 15 February 2017 3:42 PM
To: Sophie Higgins s.22 - irrelevant
Subject: RE: FOR CLEARANCE: draft email to TP - Veterans' Affairs Legislation Amendment (Digital Readiness and Other Measures) Bill 2016 [SEC=UNCLASSIFIED]

Hi,

I've incorporated Mel's comments into both the opening statement and the briefing notes.

And as discussed, I've added in the third amendment that the Bill proposes (as per the last dot point in the yellow below), into the 'Background' section on page 2 of the briefing notes

Annexures:

Regarding the Annexures, I spoke with Brenton, and he advised he has downloaded all of the

Submissions made to the Committee, and has the email sent by Mel confirming OAIC attendance at the hearing.

So we can easily track all the annexures, I've developed a cover page: [D2017/001247](#), but I'm not sure if we want to add that to the brief?

I've also pulled together all the other Annexures as follows, except for the submissions seeing as Brenton has those (note sure how we're getting this to Angelene and Timothy i.e. if we need to print them or email them through?):

Annexure A: [D2017/001249](#) and [D2017/001250](#)

Annexure B: [D2016/008500](#)

Annexure C: Brenton advised he has the Submissions made to the Committee

Annexure D: [D2017/001251](#)

Annexure E: [D2017/001252](#)

Thanks

Renee

From: Sophie Higgins

Sent: Wednesday, 15 February 2017 2:58 PM

To: Renee Alchin [s.22 - irrelevant](#)

Subject: FW: FOR CLEARANCE: draft email to TP - Veterans' Affairs Legislation Amendment (Digital Readiness and Other Measures) Bill 2016 [SEC=UNCLASSIFIED]

Just wondering if we should add as 'key point 2' in the briefing, the highlighted text below (which summarises the key provisions in the Bill?) As long as this doesn't overlap with other parts of the key points...

From: Melanie Drayton

Sent: Tuesday, 14 February 2017 9:13 AM

To: Timothy Pilgrim [s.22 - irrelevant](#)

Cc: Angelene Falk [s.22 - irrelevant](#) Sophie Higgins [s.22 - irrelevant](#)

Renee Alchin [s.22 - irrelevant](#)

Subject: FW: FOR CLEARANCE: draft email to TP - Veterans' Affairs Legislation Amendment (Digital Readiness and Other Measures) Bill 2016 [SEC=UNCLASSIFIED]

Hi Timothy

As you know, you have been invited to appear before the Senate Foreign Affairs, Defence and Trade Legislation Committee on **Thursday, 16 February from 5-6pm** in relation to the [Veterans' Affairs Legislation Amendment \(Digital Readiness and Other Measures\) Bill 2016](#) (the Bill).

Sophie has prepared a brief overview and chronology of our involvement with the Bill is below. We will prepare and send you more a detailed briefing paper for the hearing, including written responses to specific questions the Committee has sent us.

At the Committee secretariat's request we will also be sending it an informal email today outlining our role, a broad response to the specific questions we have been sent and our Bill scrutiny comments. This is to assist the Committee in drafting questions for you.

In the meantime, please let us know if you would like to discuss.

Thanks
M

Overview

The Bill:

- inserts a provision in each of the *Veterans' Entitlements Act 1986* (VEA), *Military Rehabilitation and Compensation Act 2004* (MRCA) and the *Safety Rehabilitation and Compensation (Defence-related Claims) Act 1988* (DRCA), that would enable the Secretary to authorise the use of computer programmes to make decisions and determinations, exercise powers or comply with obligations etc under those Acts. Safeguards include that the Commissioner may make a decision or determination in substitution for a decision or determination made by a computer program, if satisfied that decision or determination is incorrect.
- also inserts a provision in each of the VEA, MRCA and DRCA that would enable the Secretary to disclose information about a particular case or class of cases to such persons and for such purposes as the Secretary determines, if he or she certifies that it is necessary in the public interest to do so. Safeguards include that the power cannot be delegated by the Secretary to anyone, the Secretary must act in accordance with rules that the Minister makes, the Minister cannot delegate his or her rule making power, and, unless the Secretary complies with certain notification requirements before disclosing personal information, he or she commits an offence, punishable by 60 penalty units.
- inserts three information sharing provisions in the DRCA between the Military Rehabilitation and Compensation Commission and the Secretary of the Department of Defence or the Chief of the Defence Force.

Chronology

- On 31 October 2016, OPC contacted AGD seeking comment on the Bill. AGD contacted OAIC seeking any comments by 3 November 2016. The OAIC was only provided with the Bill and not any EM.
- On 3 November 2016, Rebecca Brown emailed AGD, the OAIC's comments on the Bill (cleared by me, as acting Director). The comments focused on the scope of broad new disclosure powers. We suggested that any authorisation which permits secondary disclosures under the Privacy Act should clearly describe the types of PI that may be disclosed; who may disclose the information and who may receive the information and

the purpose for which the information may be disclosed and on-disclosed.

- The AGD sent these comments to OPC on 3 November 2017, along with a very brief AGD comment that ‘public interest disclosure provisions in the Bill would need to be justified in the EM including in its Statement of Compatibility with Human Rights [D2016/008459](#).
- On 7 November 2016, DVA confirmed by email that ‘it is intended that, should this Bill be enacted, the Minister for Veterans’ Affairs would make rules setting out the circumstances in which the Secretary may make a public interest disclosure (subitem (3) of items 1, 7 and 10 of Schedule 2) before the Secretary exercises that power. The nature and content of those rules is likely to be similar to the *Social Security (Public Interest Certificate Guidelines) (DSS) Determination 2015*. They also noted that the sorts of situations in which we envisage the public interest disclosure power being exercised are: where there is a threat to life, health or welfare, for the enforcement of laws, in relation to proceeds of crime orders, mistakes of fact, research and statistical analysis, APS code of conduct investigations, misinformation in the community and provider inappropriate practices (this is subject to the Minister agreeing to make rules along these lines.)’ [D2016/008500](#)
- The [Bill](#) was introduced and read for a first and second time in Parliament on 24 November 2016. It was referred to the Senate Foreign Affairs, Defence and Trade Legislation Committee on 1 December 2016, with a reporting dated of 14 February 2017 (the [Committee Inquiry](#)). Submissions closed on 25 January 2017. The OAIC did not make a submission.
- On 3 February 2017, a Legal Officer from the Commonwealth Ombudsman contacted AF and noted that they would be making a second submission to the Committee Inquiry – noting that any development of legislation or policy relating to disclosure of PI should occur in consultation with the OAIC.
- On 10 February 2017, a Research Officer from the Senate Committee contacted the OAIC to advise that it is holding a public hearing on Thursday, 16 February 2017 and invites the information Commissioner to appear from 5:00pm – 6:00pm. The Commonwealth Ombudsman and officers of DVA have also been invited to appear. They have provided the OAIC with specific questions in relation to the public interest disclosure provisions – which the OAIC intends to submit a written response to before the hearing, as well as other questions [D2017/001180](#).

From: [Sophie Higgins](#)
To: [xxxx.xxx@xxx.xxx.xx](#)
Cc: [Melanie Drayton](#); [Renee Alchin](#)
Subject: FW: Invitation to Attend Public Hearing - Veterans' Affairs Legislation Amendment (Digital Readiness and Other Measures) Bill 2016 [SEC=UNCLASSIFIED]
Date: Wednesday, 15 February 2017 9:33:45 AM
Attachments: [image003.gif](#)
[image001.jpg](#)
[image002.png](#)
[RE due cob 3 Nov pls - Veterans Affairs Legislation Amendment \(Digital Readiness and Other Measures\) Bill 2016 DLMSensitiveLegal.msg](#)

Hi Kimberley

Further to Melanie's email last night, please find attached the OAIC's comments on the Digital Readiness Bill that were sent to OPC (via AGD) on 3 November 2016. These are referred to in Melanie's email below.

Please feel free to contact me if you need to discuss further.

Kind regards

Sophie

Sophie Higgins | Director (a/g) | Regulation & Strategy Branch

Office of the Australian Information Commissioner

GPO Box 5218 SYDNEY 2001 | www.oaic.gov.au

s.22 - irrelevant

-

Sent from my iPhone

Begin forwarded message:

From: "FADT, Committee (SEN)" <[xxxx.xxx@xxx.xxx.xx](#)>
Date: 15 February 2017 at 9:14:17 AM AEDT
To: 'Melanie Drayton' s.22 - irrelevant "FADT, Committee (SEN)" <[xxxx.xxx@xxx.xxx.xx](#)>
Cc: Sophie Higgins s.22 - irrelevant
Subject: RE: Invitation to Attend Public Hearing - Veterans' Affairs Legislation Amendment (Digital Readiness and Other Measures) Bill 2016 [SEC=UNCLASSIFIED]

Hi Melanie

Thank you for the additional information, it will shortly be circulated to the committee. Grateful if you could please send through the two completed Hansard

Witness forms as well when you can before the hearing tomorrow.

Regards

Kimberley Balaga | Research Officer

Standing Committee on Foreign Affairs, Defence and Trade | Department of the Senate

s.22 - irrelevant

www.aph.gov.au/senate

Disclaimer

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From: Melanie Drayton s.22 - irrelevant

Sent: Tuesday, 14 February 2017 6:35 PM

To: Balaga, Kimberley (SEN); FADT, Committee (SEN)

Cc: Sophie Higgins

Subject: RE: Invitation to Attend Public Hearing - Veterans' Affairs Legislation Amendment (Digital Readiness and Other Measures) Bill 2016 [SEC=UNCLASSIFIED]

Good evening

Thank you for inviting the Information Commissioner and Australian Privacy Commissioner, Timothy Pilgrim, and the Deputy Commissioner, Angelene Falk, to appear at the Senate Committee's public hearing into the Veterans' Affairs Legislation Amendment (Digital Readiness and Other Measures) Bill 2016 (the Bill) on Thursday, 16 February 2017. They are pleased to accept.

In advance of the hearing, we thought it may assist the Committee to provide:

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The integration of these three interrelated functions into one agency has made the

Released under FOI - OAIC

OAIC well placed to strike an appropriate balance between promoting the right to privacy and broader information policy goals.

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The APPs apply to most Australian Government agencies, all private sector organisations with an annual turnover of more than \$3 million, all private health service providers and some small businesses – collectively referred to as APP entities.

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OAIC comments on the Bill

APP 6 outlines when an APP entity may use or disclose personal information. It generally provides that an APP entity can only use or disclose personal information for a purpose for which the information was collected (known as the 'primary purpose'), or for another purpose where one of the exceptions listed in APP 6 apply. As noted above, the exceptions include where 'a use or disclosure of personal information is authorised or required by Australian law'.

The OAIC is regularly invited to comment on draft laws that require or authorise the collection, use or disclosure of personal information. Consistent with the approach taken in applying Article 17 in the International Covenant on Civil and Political Right (ICCPR), the OAIC's advice generally suggests consideration should be given to

whether those measures are proportionate and necessary. That is, whether they appropriately balance the intrusion on individuals' privacy with the overall public policy objectives of the proposal. Additionally, when handling of individuals' personal information is authorised in the broader interests of the community, it is generally recommended that those activities be accompanied by an appropriate level of privacy safeguards and accountability. Should such a proposal be considered to appropriately balance these objectives, it is generally recommended that the scope of the proposal be drafted consistent with the spirit and intent of the Privacy Act.

On 31 October 2016, the OAIC was invited to comment on the Bill, following a request from the Office of Parliamentary Counsel (OPC), via the Attorney General's Department, Information Law Unit (the AGD). The OAIC's comments on the Bill were provided to the AGD on 3 November 2016, and we understand that they were then passed on to the OPC and the Department of Veterans' Affairs (DVA). The comments focused on the public interest disclosure provisions in Schedule 2 of the Bill which permit certain disclosures and invoke the 'required or authorised' by law exception in APP 6 in the Privacy Act. The OAIC's comments are attached.

The OAIC has reviewed the Commonwealth Ombudsman's written submissions to the Committee and notes its suggestion to involve the OAIC in the development of laws and policies raising privacy issues (Commonwealth Ombudsman, [Supplementary submission](#)). In this regard, the OAIC would welcome the opportunity to be consulted on rules made by the Minister in relation to public interest disclosure certificates under the proposed amendments in Schedule 2 of the Bill.

Committee questions

Please advise the committee what is the current situation that DVA or other agencies require this power?

As outlined above, the OAIC's role includes examining proposed enactments that would require or authorise acts or practices that might otherwise interfere with privacy (s 28A(2), Privacy Act) and ensuring that any adverse effects of a proposed enactment on the privacy of individuals are minimised (s 28A(2)(c), Privacy Act). The OAIC provided some brief comments on the Bill. At that time, the OAIC did not have access to the Explanatory Memorandum (including Statement of Compatibility with Human Rights). Details about the current situation that necessitates this power may be a matter for DVA. As the 'public interest disclosure' provisions in Schedule 2 of the Bill broaden the circumstances in which personal information can be used and disclosed, we suggest that DVA use the Explanatory Memorandum (including its Statement of Compatibility with Human Rights), to explain the need for such provisions.

Why does DVA require these provisions so urgently?

This may be a matter for DVA.

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- the entity reasonably believes that the collection, use or disclosure is necessary to lessen or prevent a serious threat to the life, health or safety of any individual, or to public health or safety (and it is unreasonable or impracticable to obtain the individual's consent) (APP 6.2(c) and s 16A, item 1)
- the use or disclosure of the information is required or authorised by or under an Australian law or a court/ tribunal order (APP 6.2(b)).

Over the last 5 years, how many cases were there of mistake and/or misinformation that agencies did not have the power to respond to?

This may be a matter for DVA.

Invitation to make a written submission

I would also like to take this opportunity to thank the Committee for the invitation of 6 December 2016 to make a submission to this inquiry. I apologise that the OAIC did not respond. The OAIC had overlooked the invitation due to a clerical error.

Please feel free to contact Sophie Higgins on (02) 9284 9775 or by email, if we can assist by providing any further information.

Kind regards

Melanie Drayton

Melanie Drayton | Assistant Commissioner, Regulation and Strategy

Office of the Australian Information Commissioner

GPO Box 5218 SYDNEY NSW 2001 | www.oaic.gov.au

s.22 - irrelevant

From: Balaga, Kimberley (SEN) s.22 - irrelevant **On Behalf Of**

FADT, Committee (SEN)

Sent: Monday, 13 February 2017 6:20 PM

To: Melanie Drayton s.22 - irrelevant

Cc: Sophie Higgins s.22 - irrelevant FADT, Committee (SEN)

<xxxx.xxx@xxx.xxx.xx>

Subject: Invitation to Attend Public Hearing - Veterans' Affairs Legislation Amendment (Digital Readiness and Other Measures) Bill 2016



THE SENATE

STANDING COMMITTEE ON FOREIGN AFFAIRS, DEFENCE AND TRADE

13 February 2017

Ms Melanie Drayton
Office of the Australian Information Commissioner

Email: s.22 - irrelevant

Dear Ms Drayton

Inquiry into the Veterans' Affairs Legislation Amendment (Digital Readiness and Other Measures) Bill 2016

The Senate Foreign Affairs, Defence and Trade Legislation Committee is pleased to confirm arrangements for the Commissioner and the Deputy Commissioner to give evidence at a public hearing for the above inquiry. The public hearing will be held on **Thursday, 16 February 2017** in **Committee Room 2S3, Parliament House, Canberra**. Your appearance time is indicated on the attached public hearing program.

It would be appreciated if you could arrive about 10 minutes before your appearance time and make yourself known to the committee's secretariat staff. I would be grateful if you could advise me if you intend to table any documents with the committee during the hearing.

A Hansard witness form is also attached. Could you please complete it and email back to the secretariat as soon as possible to xxx.xxx@xxx.xxx.xx or by fax to 02 6277 5818. This is used to ensure details are correctly recorded and to provide contact details so you can check the transcript of evidence.

If persons attending the public hearing have any special requirements please contact the secretariat beforehand so that any necessary arrangements can be made. If there are any additional witnesses whose details you have not already provided, please speak to the secretariat officers as early as possible at the hearing.

After the formalities have been concluded at the beginning of the hearing, the Chair will invite you to make a short opening statement, which should be around three minutes, or you may decline to make any opening remarks. The remainder of the hearing will be devoted to a question and answer session.

Please note that the hearing is open to the public and the media. The committee prefers all evidence to be given in public but should you wish to give any evidence in private, you may make a request to the Chair and the committee will consider the

request. You are welcome to listen to the evidence of other witnesses.

A 'proof' (draft) copy of the Hansard transcript of evidence will be forwarded to you for correction of transcription errors. Hansard transcripts of evidence will also be available from the committee's website.

A copy of general information for witnesses, procedures to be observed by Senate Committees for the protection of witnesses, the public hearing program and the chair's opening statement are enclosed for your information.

If you require any further information please contact me on s.22 - irrelevant

Yours sincerely



David Sullivan

Secretary

Senate Standing Committee on Foreign Affairs, Defence and Trade
s.22 - irrelevant

Attachments:

- **Hearing Program**
- **Information Sheet: witnesses at hearings**
- **Information Sheet: protection of witnesses**
- **Chair's opening statement**
- **Hansard Witness Form**

WARNING: The information contained in this email may be confidential.
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Annexure E - Committee questions and OAIC answers

Please advise the committee what is the current situation that DVA or other agencies require this power?

As outlined above, the OAIC's role includes examining proposed enactments that would require or authorise acts or practices that might otherwise interfere with privacy (s 28A(2), Privacy Act) and ensuring that any adverse effects of a proposed enactment on the privacy of individuals are minimised (s 28A(2)(c), Privacy Act). The OAIC provided some brief comments on the Bill. At that time, the OAIC did not have access to the Explanatory Memorandum (including Statement of Compatibility with Human Rights). Details about the current situation that necessitates this power may be a matter for DVA. As the 'public interest disclosure' provisions in Schedule 2 of the Bill broaden the circumstances in which personal information can be used and disclosed, we suggest that DVA use the Explanatory Memorandum (including its Statement of Compatibility with Human Rights), to explain the need for such provisions.

Why does DVA require these provisions so urgently?

This may be a matter for DVA.

Is there not already a mechanism for agencies to report crimes to police?

As noted above, APP 6 generally provides that an APP entity can only use or disclose personal information for a purpose for which the information was collected (known as the 'primary purpose'), or for another purpose where one of the exceptions listed in APP 6 apply. The following exceptions to APP 6 would permit agencies to disclose personal information to the police, where:

- the APP entity reasonably believes that the use or disclosure of the information is reasonably necessary for one or more enforcement related activities conducted by, or on behalf of, an enforcement body (examples include the Australian Federal Police or a State or Territory Police force or service) (APP 6.2(e)), and
- the entity reasonably believes that the collection, use or disclosure is necessary to lessen or prevent a serious threat to the life, health or safety of any individual, or to public health or safety (and it is unreasonable or impracticable to obtain the individual's consent) (APP 6.2(c) and s 16A, item 1)
- the use or disclosure of the information is required or authorised by or under an Australian law or a court/ tribunal order (APP 6.2(b)).

Over the last 5 years, how many cases were there of mistake and/or misinformation that agencies did not have the power to respond to?

This may be a matter for DVA.

From: Renee Alchin
To: [Angelene Falk](#)
Cc: [Sophie Higgins](#); [Brenton Attard](#)
Subject: Briefing pack - Senate Committee Public Hearing on the Digital Readiness Bill [SEC=UNCLASSIFIED]
Date: Wednesday, 15 February 2017 4:32:00 PM
Attachments: [Commissioner Brief - Opening statement talking points - Digital Readiness Bill public hearing.docx](#)
[Commissioner Brief - Briefing notes for Digital Readiness Bill.docx](#)
[Annexure A - Digital Readiness Bill.pdf](#)
[Annexure A - Explanatory Memorandum.pdf](#)
[RE Information Law Unit + OAIC comments - Veterans Affairs Legislation Amendment \(Digital Readiness and Other Measures\) Bill 2016 DLMsensitiveLegal.msg](#)
[Annexure E - Committee Questions and Answers.docx](#)

Hi Angelene,

Here is the briefing pack for tomorrow's Senate Committee public hearing on the Digital Readiness Bill.

The Briefing Pack:

The TRIM links are provided, and I've also attached the documents to this email:

- The opening statement and talking points for Timothy: [D2017/001200](#)
- The Commissioner brief: [D2017/001199](#)

If you have any changes to either documents, please let me know.

The Annexures for the Commissioner brief are as follows (and are also attached to this email):

- Annexure A: [D2017/001249](#) and [D2017/001250](#)
- Annexure B: [D2016/008500](#)
- Annexure C: Brenton gave you a copy of the Submissions made to the Committee
- Annexure D: Brenton has also given you a copy of Mel's email to the Committee dated 14 February 2017
- Annexure E: [D2017/001252](#)

Contacts for tomorrow:

-
 Sophie asked me to include her mobile number in case you need to speak with her tomorrow (as she is not in the office on Thursdays) Ph: [s.22 - irrelevant](#)... she should be available in the morning if you have any questions.

Otherwise, I'm in tomorrow if you need anything.

Other matters

-
 Andrew spoke with DVA today and advised them that Timothy will be attending tomorrow. He advised DVA that the main point in our comments is that we be consulted on the draft rules to

be made by the Minister under the 'public interest disclosure' provisions in the Bill.

Regards

Renee

Renee Alchin | Adviser

Regulation and Strategy

Office of the Australian Information Commissioner

GPO Box 5218 SYDNEY NSW 2001 | www.oaic.gov.au

s.22 - irrelevant

Commissioner brief: Opening statement talking points for Australian Information Commissioner

Type: **Commissioner brief**

Purpose: **Senate Foreign Affairs, Defence and Trade Committee public hearing inquiry into the Digital Readiness Bill**

For: **The Australian Information Commissioner**

- Thank you for the opportunity to appear before the Committee today in relation to *the Veteran's Affairs Legislation Amendment (Digital Readiness and Other Measures) Bill 2016*.
- As the Australian Information Commissioner and Australian Privacy Commissioner, I am responsible for ensuring compliance with the Privacy Act, and promoting access to government information through the Freedom of Information Act.
- The Privacy Act regulates the handling of personal information by most Australian Government agencies and many private sector organisations. The cornerstone of this privacy protection framework are the Australian Privacy Principles (or APPs). These set out standards, rights and obligations in relation to the way individuals' personal information is handled.
- The APPs are underpinned by notions of transparency and accountability. In general terms, this requires entities to give careful consideration to ensuring that individuals are aware of an entity's information handling practices, so that the individual may make appropriate choices about their personal information. Accountability includes ensuring good privacy governance mechanisms are implemented at an early stage.
- The Privacy Act recognises that the protection of individual's privacy, through the protection of their personal information, is not an absolute right. Rather, those interests must be balanced with the broader interest of the community in ensuring that Australian government agencies and private sector organisations are able to carry out their legitimate functions and activities.

- This balancing is reflected in the exceptions to a number of the Australian Privacy Principles, which exclude from the operation of those APPs, certain information handling practices considered to be in the public interest when balanced with the interest in protecting an individual's privacy.
- The OAIC's responsibilities include examining proposals that may restrict the exercise of individuals' privacy protections in favour of another public interest objective. Our approach is generally to ensure that any changes that authorise a disclosure of personal information by invoking an exception in the Privacy Act, are reasonable, necessary and proportionate to the expected benefits.
- My Office provided comments to the Office of Parliamentary Counsel (through Attorney General's Department), on a draft version of the Bill on 3 November 2016. These comments focused on the public interest disclosure provisions in Schedule 2 of the Bill. These permit the Secretary to make 'public interest' disclosures and have the effect that the privacy protections in the 'use and disclosure' APP - Australian Privacy Principle 6 - would not apply. I understand my Office has provided a copy of these comments to the Senate Committee inquiry for its information.
- There are, however, a few additional matters which I believe warrant further mention before the Committee. In summary these are:
 - Even though the disclosure is required or authorised by law, the Australian Privacy Principles govern the Department of Veteran's Affairs (DVA) information handling practices and would continue to apply to that personal information held by the DVA (such as the requirements in relation to transparency, data quality, security, and rights to access and correction).
 - The OAIC would welcome the opportunity to be consulted on draft rules to be made by the Minister under the 'public interest disclosure' provisions in Schedule 2 of the Bill.
 - The OAIC acknowledges that automated decision-making is likely to provide a number of advantages for DVA and for Australians accessing their services, particularly in regards to efficiencies. However, I would encourage consideration to be given at an early stage, to ensuring that any privacy impacts are identified

and minimised to the extent possible, and that an integrated approach to privacy management is taken.

- If it has not done so already, the Department of Veteran's Affairs could conduct a privacy impact assessment of the amendments proposed by the Bill that have privacy implications to identify and assess the privacy risks associated with the amendments. A privacy impact assessment is a written assessment which may assist in identifying the privacy impacts of the proposal, and provides an opportunity to set out any recommendations for managing, minimising or eliminating those impacts.
- I would be happy to answer any questions the Committee has.

Commissioner brief: Briefing notes – Inquiry into the Digital Readiness Bill – Senate Foreign Affairs, Defence and Trade Committee

Type: Commissioner brief

Purpose: Senate Foreign Affairs, Defence and Trade Committee public hearing inquiry into the Digital Readiness Bill

For: The Australian Information Commissioner

Key points

1. The Veteran's Affairs Legislation Amendment (Digital Readiness) Bill 2016 seeks to amend the *Veteran's Entitlements Act 1986* (VEA), *Military Rehabilitation and Compensation Act 2004* (MRCA) and the *Safety Rehabilitation and Compensation (Defence-related claims) Act 1988* (DRCA). The Bill and Explanatory memorandum are at **Annexure A**.
2. On 31 October 2016, the Attorney General's Department Information Law Unit (AGD) requested that the OAIC provide any comments on the Bill, and these would be provided to the Office of Parliamentary Counsel (OPC). On 3 November 2016, the OAIC provided comments on the Bill to the AGD, which AGD passed on to OPC and then to Department of Veterans' Affairs (DVA).
3. The OAIC's comments focused on the public interest disclosure provisions in Schedule 2 of the Bill. These authorise the Secretary to make disclosures that the Secretary certifies as 'necessary in the public interest', and invoke the 'required or authorised' by law exception in APP 6 in the Privacy Act. The AGD did not make any substantive comments on the Bill.
4. The Commonwealth Ombudsman outlined in their second submission on the disclosure provisions (and also notified Angelene Falk by telephone of their intention to make such a submission) that any development of legislation or policy relating to the disclosure of personal information should occur in consultation with the OAIC.
5. The Bill states that the Secretary must, in giving such a 'public interest certificate', act in accordance with Rules made by legislative instrument, by the Minister. While not included in the OAIC's comments to OPC, the OAIC's email to the Committee on 14 February noted that the OAIC would welcome the opportunity to be consulted on any such draft rules. The OAIC will have regard to whether any permitted disclosures accord with the social license given to government to handle and disclose individuals'

personal information, and are generally consistent with the spirit and intent of the Privacy Act.

6. Even where the disclosure is required or authorised by law under APP 6, the APPs will still govern the Department of Veteran's Affairs (DVA) information handling practices and would continue to apply to that personal information held by the DVA (such as the requirements in relation to transparency, data quality, security, and rights to access and correction).
7. The OAIC welcomes the safeguard in the Bill that before disclosing personal information about a person under the 'public interest disclosure' provisions, the Secretary must notify the person in writing of the Secretary's intention to disclose the information; give the person a reasonable opportunity to make written comments on the proposed disclosure of the information and consider any written comments made by the person. This is consistent with the emphasis on transparency in the Privacy Act, and may in some circumstances give the individual a 'reasonable expectation' that their personal information will be disclosed for a particular purpose.
8. The OAIC acknowledges that automated decision-making is likely to provide a number of advantages for DVA and for Australians accessing their services, particularly in regards to efficiencies. However, the OAIC would encourage consideration be given at an early stage, to ensuring that any privacy impacts are identified and minimised to the extent possible, including by undertaking a privacy impact assessment, and that an integrated approach to privacy management is taken.

Background – the Digital Readiness Bill

- The Bill will insert a provision into the VEA, MRCA, and DRCA to enable the Secretary to authorise the use of computer programmes to make decisions and determinations, exercise powers or comply with obligations etc. under these Acts (Schedule 1).
- Safeguards in the Bill include that the Secretary may make a decision or determination in substitution for a decision or determination made by a computer program, if satisfied that the decision or determination is incorrect (Schedule 1).
- The Bill will also insert a provision into each of these Acts that give the Secretary broad disclosure powers: 'the Secretary may, if the Secretary certifies that it is necessary in the public interest to do so in a particular case or class of cases, disclose any information obtained by any person in the performance of that person's duties under this Act to such persons and for such purposes as the Secretary determines' (Schedule 2).

- Safeguards in the Bill include that:
 - the power cannot be delegated by the Secretary to anyone
 - the Secretary must act in accordance with rules that the Minister makes and the Minister cannot delegate his or her rule making power
 - before disclosing information, the Secretary must notify the person concerned in writing about the proposed disclosure and consider any written comments made by the person, and
 - unless the Secretary complies with the above notification requirements before disclosing personal information, he or she commits an offence, punishable by 60 penalty units (Schedule 2).
- The Explanatory Memorandum to the Bill gives as examples of circumstances in which it might be appropriate for the Secretary to disclose such information as including 'where there is a threat to life, health or welfare, for the enforcement of laws, in relation to proceeds of crime orders, mistakes of fact, research and statistical analysis, APS code of conduct investigations, misinformation in the community and provider inappropriate practices' (p. 11).
- The Bill also inserts three information sharing provisions in the DRCA between the Military Rehabilitation and Compensation Commission and the Secretary of the Department of Defence or the Chief of the Defence Force.

OAIC's responsibilities to examine proposed enactments impact privacy

- A range of the OAIC's responsibilities involve examining proposals that may restrict the exercise of individuals' privacy protections in favour of another public interest objective.
- The Privacy Act recognises that the protection of individuals' privacy, through the protection of their personal information, is not an absolute right. Rather, those interests must be balanced with the broader interest of the community in ensuring that APP entities are able to carry out their legitimate functions and activities.
- This balancing is reflected in the exceptions to a number of the APPs, which except from the operation of those APPs, certain information handling practices considered to be in the public interest when balanced with the interest in protecting an individual's privacy.

Disclosures of personal information

- APP 6 outlines when an APP entity may use or disclose personal information. It generally provides that an APP entity can only use or disclose personal information for a purpose for which the information was collected (known as the 'primary purpose'), or for a

secondary purpose where one of the exceptions listed in APP 6 apply. The exceptions include where 'a use or disclosure of personal information is authorised or required by Australian law' (APP 6.2(b)).

- The OAIC is regularly invited to comment on draft laws that require or authorise the collection, use or disclosure of personal information in a manner that would otherwise be inconsistent with one or more of the APPs. The effect of such laws is that one or more APPs will not apply to the use or disclosure of personal information, described in the law.
- Consistent with the approach taken in applying Article 17 in the International Covenant on Civil and Political Right (ICCPR), the OAIC's advice generally suggests consideration should be given to whether those measures are proportionate and necessary. That is, whether they appropriately balance the intrusion on individuals' privacy with the overall public policy objectives of the proposal. Additionally, when handling of individuals' personal information is authorised in the broader interests of the community, it is generally recommended that those activities be accompanied by an appropriate level of privacy safeguards and accountability. Should such a proposal be considered to appropriately balance these objectives, it is generally recommended that the scope of the proposal be drafted consistent with the spirit and intent of the Privacy Act.
- Even where the disclosure is required or authorised by law under APP 6, the APPs will still govern the Department of Veteran's Affairs (DVA) information handling practices and would continue to apply to that personal information held by the DVA (such as the requirements in relation to transparency, data quality, security, and rights to access and correction).

OAIC engagement with the Bill

- On 31 October 2016, the OPC contacted the AGD seeking comment on the Bill, and that request was passed onto the OAIC for comment. The OAIC was not provided with the Explanatory Memorandum. The OAIC's comments on the Bill were provided to AGD, and passed on to the OPC on 3 November 2016. The AGD did not make any substantive comments on the Bill. The comments provided to OPC, along with a response provided by DVA are at **Annexure B**.
- The OAIC's comments focused on the public interest disclosure provisions in Schedule 2 of the Bill outlined above.
- Key points made in the OAIC's comments were:
 - the OAIC noted that the disclosure of personal information under the new provisions will be permitted by the 'required or authorised by or under law' exception in APP 6.2(b).
 - The OAIC suggested that where a Bill invokes this exception in the Privacy Act, consideration should be given to whether those measures are reasonable, proportionate and necessary.
 - The OAIC referred to similar disclosure provisions in the *Social Security (Administration) Act 1999* and the *Paid Parental Leave Act 2010*, noting that rules issued under that legislation set out the matters to which the Secretary must have regard to in giving a public interest certificate and the circumstances in which a public interest certificate may be given, which include: to prevent, or lessen, a threat to the life, health or welfare of a person; for the enforcement of laws; to correct a mistake of fact; to brief a Minister or to locate missing persons etc.
- On 7 November 2017, DVA responded by email to the OAIC that:
 - rules would be made setting out the circumstances in which the Secretary may make a public interest disclosure before the Secretary exercises that power. The nature and content of those rules is likely to be similar to the Social Security (Public Interest Certificate Guidelines) (DSS) Determination 2015, mentioned below.

- The sorts of situations in which it is envisage the public interest disclosure power being exercised are will be set out in the EM, including: where there is a threat to life, health or welfare, for the enforcement of laws, in relation to proceeds of crime orders, mistakes of fact, research and statistical analysis, APS code of conduct investigations, misinformation in the community and provider inappropriate practices (this is subject to the Minister agreeing to make rules along these lines.)
- On 6 December 2016, the Committee invited the OAIC to make a comment on the Bill, but the OAIC inadvertently did not action this request. Melanie has apologised to the Committee for this oversight.
- Seven submissions have been made to the Committee – see **Annexure C**. These include a lengthy submission from DVA and two submissions made by the Commonwealth Ombudsman.
- Key matters to note from the DVA submission include:
 - DVA sets out a range of efficiency-related justifications for provisions in the Bill that automate the decision-making process
 - the Committee appears to have raised concerns with DVA about the breadth of the disclosures that may be made under the Bill, including disclosures to ‘correct misinformation’ and the submission purports to respond to these concerns.
 - DVA notes that the proposed public interest disclosure provisions ‘are modelled on paragraph 208(1)(a) of the *Social Security (Administration) Act 1999*. That public interest disclosure provision has been in operation for 17 years and has operated successfully with the approval of Parliament. The Privacy Commissioner has not raised any concern about the Department of Social Services/ Department of Human Services’ provision...’
- The most recent iteration of the *Social Security (Public Interest Certificate Guidelines) (DSS) Determination 2015* were registered on FRLI in August 2015. The explanatory memorandum refers to consultation with the AGD and others, but does not specifically refer to consultation with the OAIC. We have not been able to find any engagement with the OAIC on the Determination following a brief TRIM search and discussion with Sarah Ghali. A more fulsome search could be undertaken if necessary.
- The Commonwealth Ombudsman has made a submission to the Committee in relation to automation aspects of the Bill (see below).

- They also made a second submission on the new disclosure provisions, (and notified Angelene Falk by telephone, of their intention to make such a submission). This supplementary submission recommends that any development of legislation or policy relating to disclosure of PI should occur in consultation with the OAIC.
- On 10 February 2017, a Research Officer from the Senate Committee contacted the OAIC to advise that it is holding a public hearing on Thursday, 16 February 2017 and invites the information Commissioner to appear from 5:00pm – 6:00pm. The Commonwealth Ombudsman and officers of DVA have also been invited to appear. They have provided the OAIC with specific questions in relation to the public interest disclosure provisions – which the OAIC intends to submit a written response to before the hearing, as well as other questions
- On 14 February, Melanie Drayton, Assistant Commissioner, sent a detailed response to the Committee noting that the Information Commissioner and Deputy Commissioner would appear at the public hearing; outlining the OAIC's role; attaching the OAIC's comments on the Bill that were sent to OPC (via AGD); and responding to the specific questions where possible (noting that a number of the questions may be directed to DVA). This email also noted that the OAIC would welcome the opportunity to be consulted on the draft rules to be made by the Minister in relation to public interest disclosures. The OAIC's email to the Committee is at **Annexure D**. The OAIC's answers to the Committee's questions are at **Annexure E**.
- Key additional points that the Commissioner may make at the Committee meeting are:
 - The OAIC welcomes the safeguard in the Bill that before disclosing personal information about a person under the 'public interest disclosure' provisions, the Secretary must notify the person in writing of the Secretary's intention to disclose the information; give the person a reasonable opportunity to make written comments on the proposed disclosure of the information and consider any written comments made by the person. This is consistent with the emphasis on transparency in the Privacy Act, and may in some circumstances give the individual a 'reasonable expectation' that their personal information will be disclosed for a particular purpose (consistent with the 'reasonable expectation' exception in APP 6.2(a).

- The Bill states that the Secretary must, in giving such a 'public interest certificate', act in accordance with Rules made by legislative instrument, by the Minister. The OAIC would welcome the opportunity to be consulted on any such draft rules. The OAIC will have regard to whether any permitted disclosures accord with the social license given to government to handle and disclose individuals' personal information, and are generally consistent with the spirit and intent of the Privacy Act.

Automated decision-making

- The Commonwealth Ombudsman's written submission to the Committee commented on several matters that related to automated decisions. These comments related to accuracy of automated decisions, and errors that can arise from incorrect data entry and system errors, and the fact that the onus is predominately placed on the customer to identify these errors.
- The Commonwealth Ombudsman also outlined issues with automated decisions following basic legal values of lawfulness, fairness, transparency and efficiency.
- The objects of the Privacy Act recognise that the protection of individuals' privacy is balanced with the interests of entities in carrying out their functions or activities (s 3(b)). The OAIC acknowledges that automated decision-making is likely to provide a number of advantages for DVA and for Australians accessing their services, including associated with reduced costs and enhanced efficiency. However, consideration should be given at an early stage, to ensuring that any privacy impacts are identified and minimised to the extent possible, and that an integrated approach to privacy management is taken.
- Some key privacy considerations that may arise where decision-making is automated include:
 - whether the entity has taken reasonable steps to implement practices, procedures and systems to ensure that the entity complies with the APPs and to enable the entity to deal with inquiries and complaints from individuals about the entity's compliance with the APPs (APP 1.2). Entities will be better placed to meet these obligations if they embed privacy protections in the design of the information handling practice at an early stage.

- whether the entity has taken reasonable steps to ensure that the personal information it collects, uses and discloses is accurate, up-to-date and complete (as required by APP 10). This may be particularly challenging where the onus is on the individual to identify errors or discrepancies with automated decisions.
 - whether the entity has processes in place to allow the individual to request access to, and correction of his or her personal information used in automated processes (APPs 11 and 12).
- The OAIC also suggests consideration be given to the privacy risks arising from personal information processed as part of an automated decision-making process. For example, due to the higher privacy risks involved with handling sensitive information, the OAIC would generally suggest greater caution be exercised when considering whether this information should be subject to automated processing. The OAIC welcomes the DVA's comments in its written submission to the Committee that 'in regards to automated debt collection, the Department does not intend this provision for this purpose'. This intent could be included in the Bill or the Explanatory Memorandum.
- DVA could conduct a privacy impact assessment (PIA) of the amendments proposed by the Bill that have privacy implications to identify and assess the privacy risks associated with the amendments. A PIA is a written assessment which may assist in identifying the privacy impacts of the proposal, and provides an opportunity to set out any recommendations for managing, minimising or eliminating those impacts.

Annexure E - Committee questions and OAIC answers

Please advise the committee what is the current situation that DVA or other agencies require this power?

As outlined above, the OAIC's role includes examining proposed enactments that would require or authorise acts or practices that might otherwise interfere with privacy (s 28A(2), Privacy Act) and ensuring that any adverse effects of a proposed enactment on the privacy of individuals are minimised (s 28A(2)(c), Privacy Act). The OAIC provided some brief comments on the Bill. At that time, the OAIC did not have access to the Explanatory Memorandum (including Statement of Compatibility with Human Rights). Details about the current situation that necessitates this power may be a matter for DVA. As the 'public interest disclosure' provisions in Schedule 2 of the Bill broaden the circumstances in which personal information can be used and disclosed, we suggest that DVA use the Explanatory Memorandum (including its Statement of Compatibility with Human Rights), to explain the need for such provisions.

Why does DVA require these provisions so urgently?

This may be a matter for DVA.

Is there not already a mechanism for agencies to report crimes to police?

As noted above, APP 6 generally provides that an APP entity can only use or disclose personal information for a purpose for which the information was collected (known as the 'primary purpose'), or for another purpose where one of the exceptions listed in APP 6 apply. The following exceptions to APP 6 would permit agencies to disclose personal information to the police, where:

- the APP entity reasonably believes that the use or disclosure of the information is reasonably necessary for one or more enforcement related activities conducted by, or on behalf of, an enforcement body (examples include the Australian Federal Police or a State or Territory Police force or service) (APP 6.2(e)), and
- the entity reasonably believes that the collection, use or disclosure is necessary to lessen or prevent a serious threat to the life, health or safety of any individual, or to public health or safety (and it is unreasonable or impracticable to obtain the individual's consent) (APP 6.2(c) and s 16A, item 1)
- the use or disclosure of the information is required or authorised by or under an Australian law or a court/ tribunal order (APP 6.2(b)).

Over the last 5 years, how many cases were there of mistake and/or misinformation that agencies did not have the power to respond to?

This may be a matter for DVA.

From: Renee Alchin
To: [Sophie Higgins](#)
Subject: RE: FOR REVIEW: draft briefing re Digital Readiness Inquiry [SEC=UNCLASSIFIED]
Date: Wednesday, 15 February 2017 12:14:00 PM

Hi

FYI – I've gone through the briefing notes in TRIM and made just a couple of minor changes (typos mostly)

Renee

From: Sophie Higgins
Sent: Wednesday, 15 February 2017 11:36 AM
To: Melanie Drayton [s.22 - irrelevant] Andrew Solomon
 [s.22 - irrelevant]
Cc: Emma Jelenic [s.22 - irrelevant] Renee Alchin [s.22 - irrelevant]
 Brenton Attard [s.22 - irrelevant]
Subject: FOR REVIEW: draft briefing re Digital Readiness Inquiry [SEC=UNCLASSIFIED]

Hi Mel and Andrew

Attached for your review and clearance is a draft briefing for TP and AF for the Digital Readiness Committee Inquiry to be held tomorrow afternoon [D2017/001199](#). Please let me know any comments you may have as soon as possible, so we can send through to AF this afternoon. Apologies for such a short turn-around time.

Thanks to Renee for all her work on this. Given the timing, we thought it best to send through to you now, but will have another quick read through to check for typos etc.

I will send through the opening statement in the next half hour.

Sophie

Sophie Higgins | Director (a/g) | Regulation & Strategy Branch
Office of the Australian Information Commissioner
 GPO Box 5218 SYDNEY 2001 | www.oaic.gov.au
 [s.22 - irrelevant]

-

From: Renee Alchin
To: [Angelene Falk](#)
Subject: Additional information for the Hearing [SEC=UNCLASSIFIED]
Date: Thursday, 16 February 2017 11:53:00 AM

Hi Angelene,

As discussed, additional information is provided below in three sections:

1. Public Interest Disclosure provisions and whether APP 6 exceptions already permits this disclosure:

I've provided some further info below on the DVAs reasons provided in their submission to the Committee. I've also copied APP 6 for you. The reasons pretty much align with the Social Security (Public Interest Certificate Guidelines) (DSS) Determination 2015 (Social Security Determination).

In explaining why DVA is currently unable to disclose certain information under the APPs, the DVA's submission, starting on Page 7 states:

In summary, the DVA outline several areas where it needs the public interest disclosure provisions:

- **Threat to life** – DVA basically considers it is currently unable to assist clients who are planning/threatening self harm to themselves or others in cases where it is not unreasonable or impracticable to obtain the person's consent to disclose their personal information. DVA states such situations may not allow sufficient time to obtain consent to reduce the threat to life.

I note that the APP Guidelines provide the following examples of where it might be unreasonable or impracticable to obtain consent, in instances where lessening or preventing a serious threat to life, health or safety is necessary (they don't cover situations where someone is threatening self harm):

1. where an individual is seriously injured while interstate and, due to their injuries, cannot give informed consent, the individual's usual health service provider may be able to disclose personal information about the individual to another health service provider who is treating the individual's serious injuries on the basis that it is impracticable to obtain the individual's consent
2. where an APP entity that provides child protection services has evidence that a child is at risk of physical or sexual abuse by their parent, the entity may be able to disclose the personal information of the parent to another child protection service on the basis that it would be unreasonable to obtain the parent's consent.

- **Threat to health or welfare** – DVA states it is unable to share certain information with third parties where the health and welfare of the client is at risk. For example, with local council community advisors, if DVA was able to make them aware of significant health issues of a DVA client (provided that this disclosure was allowed under the Public Interest Disclosure Rules), this would enable DVA to contact the community advisors to discuss DVA client health problems. Sharing such information would provide proper treatment for the clients condition.

s.47C - deliberative processes

- **Provider inappropriate practices** – I'm not sure that this relates to Personal Information, as they discuss restrictions on DVA releasing information that would reveal the circumstances of contract providers to DVA clients. It's rather information about contract providers, not individuals.
- **Mistake/misinformation in the community** – DVA states misinformation or claims that are not factual can impact on the integrity of programmes or prevent veterans from seeking assistance. DVA states it does not have the ability to correct misinformation or mistake of fact as doing so may disclose information about a veteran or class of veterans.

s.47C - deliberative processes

- **APS Code of Conduct Investigation** – DVA's submission discusses instances where personal information may need to be provided to an investigation firm when investigating staff conduct issues, where a file has been inappropriately access or client details released. Public Interest disclosure powers could be used to assist with APS Code of Conduct investigations. The Social Security Determination also has this provision.

In addition to the above, the Explanatory Memorandum also outlines further situations that it is envisaged the power might be exercised (subject to the Minister agreeing to the Rules), including enforcement of laws, proceeds of crime orders, and research and statistical analysis - these are largely similar to the instances outlined in the Social Security (Public Interest Certificate Guidelines) (DSS) Determination 2015.

2. Social Security (Public Interest Certificate Guidelines) (DSS)

Determination 2015

Dome of the instances outlined in the Social Security Determination where a public interest certificate may be given:

- Threat to life, health or welfare
- Enforcement of laws (includes proceeds of crime orders)
- Mistake of fact
- Ministerial briefing
- Missing person
- Deceased person
- School enrolment and attendance
- School infrastructure
- Public housing administration
- Vulnerable Welfare Payment Income Management measure
- Establishment and operation of the Family Responsibilities Commission
- Matters of relevance (to portfolio responsibilities)
- Research and Statistical analysis
- APS Code of Conduct investigations

APP 6 is copied below for you:

6 Australian Privacy Principle 6—use or disclosure of personal information

Use or disclosure

6.1 If an APP entity holds personal information about an individual that was collected for a particular purpose (the **primary purpose**), the entity must not use or disclose the information for another purpose (the **secondary purpose**) unless:

- (a) the individual has consented to the use or disclosure of the information; or
- (b) subclause 6.2 or 6.3 applies in relation to the use or disclosure of the information.

Note: Australian Privacy Principle 8 sets out requirements for the disclosure of personal information to a person who is not in Australia or an external Territory.

6.2 This subclause applies in relation to the use or disclosure of personal information about an individual if:

- (a) the individual would reasonably expect the APP entity to use or disclose the information for the secondary purpose and the secondary purpose is:
 - (i) if the information is sensitive information—directly related to the primary purpose; or
 - (ii) if the information is not sensitive information—related to the primary purpose; or
- (b) the use or disclosure of the information is required or authorised by or under an Australian law or a court/tribunal order; or

(c) a permitted general situation exists in relation to the use or disclosure of the information by the APP entity; or

(d) the APP entity is an organisation and a permitted health situation exists in relation to the use or disclosure of the information by the entity; or

(e) the APP entity reasonably believes that the use or disclosure of the information is reasonably necessary for one or more enforcement related activities conducted by, or on behalf of, an enforcement body.

Note: For **permitted general situation**, see section 16A. For **permitted health situation**, see section 16B.

6.3 This subclause applies in relation to the disclosure of personal information about an individual by an APP entity that is an agency if:

(a) the agency is not an enforcement body; and

(b) the information is biometric information or biometric templates; and

(c) the recipient of the information is an enforcement body; and

(d) the disclosure is conducted in accordance with the guidelines made by the Commissioner for the purposes of this paragraph.

6.4 If:

(a) the APP entity is an organisation; and

(b) subsection 16B(2) applied in relation to the collection of the personal information by the entity;

the entity must take such steps as are reasonable in the circumstances to ensure that the information is de-identified before the entity discloses it in accordance with subclause 6.1 or 6.2.

Written note of use or disclosure

6.5 If an APP entity uses or discloses personal information in accordance with paragraph 6.2(e), the entity must make a written note of the use or disclosure.

Related bodies corporate

6.6 If:

(a) an APP entity is a body corporate; and

(b) the entity collects personal information from a related body corporate;

this principle applies as if the entity's primary purpose for the collection of the information were the primary purpose for which the related body corporate collected the information.

Exceptions

6.7 This principle does not apply to the use or disclosure by an organisation of:

(a) personal information for the purpose of direct marketing; or

(b) government related identifiers.

3. Information Sharing provisions:

Referring to the below point on page 3 of the briefing notes:

The Bill also inserts three information sharing provisions in the DRCA between the Military Rehabilitation and Compensation Commission and the Secretary of the Department of Defence or the Chief of the Defence Force.

These information sharing provisions are outlined at Schedule 2, Item 3, 4 and 5 of the Bill.

Let me know if you need anything else.

Thanks

Renee

Renee Alchin | Adviser

Regulation and Strategy

Office of the Australian Information Commissioner

GPO Box 5218 SYDNEY NSW 2001 | www.oaic.gov.au

s.22 - irrelevant

From: [Timothy Pilgrim](#)
To: [Sophie Higgins](#); [Renee Alchin](#)
Cc: [Angelene Falk](#); [Melanie Drayton](#); [Brenton Attard](#)
Subject: Emailing - report.pdf [DLM=For-Official-Use-Only]
Date: Tuesday, 21 February 2017 11:20:12 AM
Attachments: [report.pdf](#)

Hello all

Here is the report. As I mentioned to Renee, DVA have already called seeking to meet with us to discuss the recommendations.

Thanks

TP

From: Renee Alchin
To: [Angelene Falk](#)
Subject: Accepted: [HOLD] DVA consultation [SEC=UNCLASSIFIED]

From: [Angelene Falk](#)
To: [Brenton Attard](#)
Subject: Accepted: OAIC/DVA consultation on Public Interest Disclosure Rule [SEC=UNCLASSIFIED]

From: [Angelene Falk](#)
To: [Timothy Pilgrim](#); [Renee Alchin](#); [Melanie Drayton](#)
Subject: Pre meeting DVA [SEC=UNCLASSIFIED]

Pages 129 through 134 redacted for the following reasons:

s.47E(d)

From: [Sophie Higgins](#)
To: [Angelene Falk](#)
Cc: [Renee Alchin](#)
Subject: FW: Consultation on Public Interest Disclosure Rule [DLM=For-Official-Use-Only]
Date: Wednesday, 22 February 2017 5:27:19 PM
Attachments: [PID rules 1 of 10.pdf](#)

Hi Angelene

Attached is a memorandum prepared by Renee on the draft DVA Public Interest Disclosure Certificate Rules [D2017/001397](#). Three key points to note are:

- The disclosures permitted by the draft Rules are very similar to those permitted under the DSS Rules.
- Some of the disclosures under the draft Rules would already be permitted by the exceptions (or such disclosures may be consistent with the primary purpose of collection/ an 'individual's reasonable expectation').
- The draft Rules potentially permit disclosures to a very broad range of recipients 'a person who has a genuine and legitimate interest in the information'.

I won't be in tomorrow, but can be contacted if needed on my mobile.

Sophie

s.22 - irrelevant

From: Angelene Falk
Sent: Wednesday, 22 February 2017 2:59 PM
To: Renee Alchin s.22 - irrelevant
Cc: Sophie Higgins s.22 - irrelevant
Subject: FW: Consultation on Public Interest Disclosure Rule [DLM=For-Official-Use-Only]

Renee can you please consider these and advise thank you

Angelene

From: Brenton Attard
Sent: Wednesday, 22 February 2017 2:56 PM
To: Timothy Pilgrim s.22 - irrelevant Angelene Falk
s.22 - irrelevant Sophie Higgins s.22 - irrelevant
Subject: FW: Consultation on Public Interest Disclosure Rule [DLM=For-Official-Use-Only]

Hi all

Please see email below.

I will acknowledge receipt — please let me know if there is anything else you would like me to flag with DVA.

B

From: Spiers, Carolyn [s.22 - irrelevant]
Sent: Wednesday, 22 February 2017 2:25 PM
To: Brenton Attard [s.22 - irrelevant]
Cc: Foreman, Lisa [s.22 - irrelevant] Whyte, Angela [s.22 - irrelevant]
Subject: Consultation on Public Interest Disclosure Rule [DLM=For-Official-Use-Only]

Hi Brenton

I understand you have been discussing with Kristy Egan from DVA the proposed meeting this Thursday 23 February @ 12.00pm – 1.00pm for OAIC members to meet with Ms Lisa Foreman (First Assistant Secretary Rehabilitation and Support Division) and myself to discuss the draft Public Interest Disclosure Rules that will be part of the Digital Readiness Bill. While Kristy arranged for Lisa and I to meet with OIAC in Sydney, we will need to change plans now and instead have the meeting via telephone. I understand that this arrangement is suitable for OAIC. Can you confirm which telephone number will be the most appropriate for us to call.

Also to assist in the preparation of this meeting is a draft copy of the proposed rules. Please understand this is a confidential draft prepared for the Minister and should be used for the purpose of the consultation only.

If you have any questions, please call Angela Whyte on [s.22 - irrelevant]

Regards

Carolyn Spiers
Principal Legal Advisor

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From: [Sophie Higgins](#)
To: [Renee Alchin](#)
Subject: RE: Memo - Analysis of DVA's Public Interest Disclosure Certificate Rules [SEC=UNCLASSIFIED]
Date: Wednesday, 22 February 2017 5:33:17 PM
Attachments: [Memo - DVA Public Interest Disclosure Certificate Rules - with tracking.docx](#)

Thanks Renee for putting this together. I made a few small changes and sent to AF as she wanted to review tonight.

Hope it goes well tomorrow!

Sophie

From: Renee Alchin
Sent: Wednesday, 22 February 2017 3:53 PM
To: s.22 - irrelevant
Subject: Memo - Analysis of DVA's Public Interest Disclosure Certificate Rules [SEC=UNCLASSIFIED]

Hi Sophie,

As discussed, I've prepared a memo with an analysis of the DVA's Public Interest Disclosure Certificate Rules: [D2017/001397](#)

Thanks
Renee

Renee Alchin | Adviser
Regulation and Strategy
Office of the Australian Information Commissioner
GPO Box 5218 SYDNEY NSW 2001 | www.oaic.gov.au
s.22 - irrelevant

Pages 138 through 143 redacted for the following reasons:

s.47E(d)

From: [Angelene Falk](#)
To: [Timothy Pilgrim](#); [Melanie Drayton](#); [Brenton Attard](#)
Subject: FW: Consultation on Public Interest Disclosure Rule [DLM=For-Official-Use-Only]
Date: Wednesday, 22 February 2017 5:33:00 PM
Attachments: [PID rules 1 of 10.pdf](#)

For our meeting with DVA tomorrow.

Angelene

From: Sophie Higgins
Sent: Wednesday, 22 February 2017 5:27 PM
To: Angelene Falk s.22 - irrelevant
Cc: Renee Alchin s.22 - irrelevant
Subject: FW: Consultation on Public Interest Disclosure Rule [DLM=For-Official-Use-Only]

Hi Angelene

Attached is a memorandum prepared by Renee on the draft DVA Public Interest Disclosure Certificate Rules [D2017/001397](#). Three key points to note are:

- The disclosures permitted by the draft Rules are very similar to those permitted under the DSS Rules.
- Some of the disclosures under the draft Rules would already be permitted by the exceptions (or such disclosures may be consistent with the primary purpose of collection/ an 'individual's reasonable expectation').
- The draft Rules potentially permit disclosures to a very broad range of recipients 'a person who has a genuine and legitimate interest in the information'.

I won't be in tomorrow, but can be contacted if needed on my mobile.

Sophie

s.22 - irrelevant

From: Angelene Falk
Sent: Wednesday, 22 February 2017 2:59 PM
To: Renee Alchin s.22 - irrelevant
Cc: Sophie Higgins s.22 - irrelevant
Subject: FW: Consultation on Public Interest Disclosure Rule [DLM=For-Official-Use-Only]

Renee can you please consider these and advise thank you

Angelene

From: Brenton Attard
Sent: Wednesday, 22 February 2017 2:56 PM
To: Timothy Pilgrim s.22 - irrelevant Angelene Falk

s.22 - irrelevant

Sophie Higgins s.22 - irrelevant

Subject: FW: Consultation on Public Interest Disclosure Rule [DLM=For-Official-Use-Only]

Hi all

Please see email below.

I will acknowledge receipt — please let me know if there is anything else you would like me to flag with DVA.

B

From: Spiers, Carolyn s.22 - irrelevant**Sent:** Wednesday, 22 February 2017 2:25 PM**To:** Brenton Attard s.22 - irrelevant**Cc:** Foreman, Lisa s.22 - irrelevant Whyte, Angela s.22 - irrelevant**Subject:** Consultation on Public Interest Disclosure Rule [DLM=For-Official-Use-Only]

Hi Brenton

I understand you have been discussing with Kristy Egan from DVA the proposed meeting this Thursday 23 February @ 12.00pm – 1.00pm for OAIC members to meet with Ms Lisa Foreman (First Assistant Secretary Rehabilitation and Support Division) and myself to discuss the draft Public Interest Disclosure Rules that will be part of the Digital Readiness Bill. While Kristy arranged for Lisa and I to meet with OIAC in Sydney, we will need to change plans now and instead have the meeting via telephone. I understand that this arrangement is suitable for OAIC. Can you confirm which telephone number will be the most appropriate for us to call.

Also to assist in the preparation of this meeting is a draft copy of the proposed rules. Please understand this is a confidential draft prepared for the Minister and should be used for the purpose of the consultation only.

If you have any questions, please call Angela Whyte on s.22 - irrelevant

Regards

Carolyn Spiers
Principal Legal Advisor

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From: Renee Alchin
To: [Angelene Falk](#)
Subject: Accepted: Pre meeting DVA [SEC=UNCLASSIFIED]

From: [Renee Alchin](#)
To: [Angelene Falk](#); [Timothy Pilgrim](#); [Melanie Drayton](#)
Subject: Memo - Analysis of the Military Rehabilitation and Compensation (Public Interest Disclosure Certification) Rules 2017 [SEC=UNCLASSIFIED]
Date: Thursday, 23 February 2017 9:53:32 AM

Hi everyone,

Here is a link to the memo for today's meeting with DVA, providing an analysis of the Military Rehabilitation and Compensation (Public Interest Disclosure Certification) Rules 2017:

[D2017/001397](#)

Regards

Renee

Renee Alchin | Adviser

Regulation and Strategy

Office of the Australian Information Commissioner

GPO Box 5218 SYDNEY NSW 2001 | www.oaic.gov.au

s.22 - irrelevant

From: [Brenton Attard](#)
To: [Timothy Pilgrim](#); [Angelene Falk](#); [Melanie Drayton](#)
Subject: [Phone message] Call from Ombo regarding DVA [DLM=For-Official-Use-Only]
Date: Thursday, 23 February 2017 7:19:05 PM

Hi All

As flagged with Timothy this afternoon, we received a phone call from Kate Wandmaker, Principal Legal Officer, Commonwealth Ombudsman's Office, requesting to touch base with Angelene on our discussion with DVA.

The Ombudsman's Office has a phone call with DVA tomorrow morning (at 9.30am) and they would like background details of what we discussed, including our position.

I have flagged that it will be either the Commissioner, Deputy or Assistant Commissioner that will return the call. I have placed this across the diaries. If some could please return the call at **9.00am Friday morning**.

Kate's contact number is s.22 - irrelevant

Thanks

Brenton

Brenton Attard | Executive Officer |
Office of the Australian Information Commissioner |
GPO Box 5218 SYDNEY NSW 2001 | www.oaic.gov.au |
s.22 - irrelevant



Memorandum

From:	Renee Alchin
To:	Sophie Higgins
Copies:	Melanie Drayton
File ref:	15/000188-40
Date:	24 February 2017
Subject:	Contact report – meeting of 23 February 2017 – OAIC meeting with DVA to discuss the Military Rehabilitation and Compensation (Public Interest Disclosure Certificate) Rules 2017

Attendees:

Lisa Foreman and Carolyn Spiers – DVA

Timothy Pilgrim, Angelene Falk, Melanie Drayton and Renee Alchin – OAIC

Key points

- The meeting was arranged to discuss DVA's draft Military Rehabilitation and Compensation (Public Interest Disclosure Certificate) Rules 2017 (the Rules).
- DVA advised that the Rules largely reflect some of the provisions in the DSS Determination, with the exception of a few matters:
 - Section 6(2) of the rules differs
 - The level of disclosure at 10(2) is new
 - Section 11 s.47E(d) - operations of agencies) is new
 - Section 16 is new
- Timothy and Angelene advised that section 6(b)(ii) of the Rules reference to s.47E(d) - operations of agencies s broad and queried whether this wording could be tightened. It was further discussed whether the Rules could include requirements that s.47E(d) - operations of agencies s.47E(d) - operations of agencies
- s.47E(d) - operations of agencies

s.47E(d) - operations of agencies

DVA will consider and send through a

revision of the Rules shortly.

- DVA advised that it currently already addresses matters that could be considered under the Rules via de-identification however, this is not always effective as they are unable to directly relate their comments to the particular case at hand. In the past 4 years DVA has identified 12 cases that could have been more effectively addressed via Public Interest Disclosure provisions.
- s.47E(d) - operations of agencies
- We proceeded to talk through some of the matters listed under the Rules, Timothy explained that while the OAIC does not have examples to illustrate these matters, it appears disclosure in many of these matters would already be permitted under the Privacy Act and APPs.
- **Threat to life, health and welfare:** While DVA currently uses APP 6 for such disclosures, in some cases the threat is subtle.
 - For example, a client suffering a mental illness was refusing help and had uncharacteristically sold all of his possessions and was living out of his car, parking in public car spaces. Local Council officers were having difficulty engaging with the client and were unaware of his mental illness. Eventually the council officers became aware that the individual was a DVA client and initiated contact with DVA. However, as the client was at risk of being robbed or mugged by sleeping in public places, DVA considers it could have assisted this client better if the Rules were in place.
- OAIC noted that 'reasonable expectations' under APP 6.2(a) could permit the disclosure in such cases, however DVA advised it is seeking clearer Rules on this matter.
- **Law Enforcement and proceeds of crime:** DVA provided an example where the client was threatening overseas consulate staff. In this case DVA was able to inform the AFP as the client was also threatening DVA Department staff. The threat to DVA staff was deemed low risk as the client was living overseas at the time, however the DVA considers it could not take action on the threats to overseas consulate staff. DVA informed the AFP of the threat to DVA staff, and AFP was able to ascertain and act on the threat the overseas consulate staff as this was included in the clients email trail.
- OAIC advised many disclosures for this matter would already be permitted under privacy law. OAIC also advised that we will consider the example provided by DVA further, as there are extraterritorial provisions in the APP Guidelines that may cover this example.
- DVA explained that in general, the reasonable person test under the APPs is not clear, and it is essentially seeking to eliminate the risk of breaching privacy law by implementing the Rules. DVA considers this is an important provision, s.47E(d) - operations of agencies
- s.47E(d) - operations of agencies
- Melanie explained that Parliament sought to implement flexible privacy law for a reason, and questioned why departments would therefore need to implement rules to circumvent this flexibility. The reasonable person tests are contextual and a deliberate product of the APPs, it was noted that all departments would face the same issues in applying this test.

- DVA advised it is aiming to implement elements of natural justice and procedural fairness into the Rules. Such as by requiring the Secretary to write to the individual first and provide the individual an opportunity to comment – DVA confirmed such decisions would be subject to ADJR.
- **Mistake of fact and misinformation in the community:** DVA advised that mistake of fact would relate to matters such as media reports that include incorrect information. Misinformation in the community would relate more so to, for example, comments made by an individual (including social media comments) in public forums that they are not receiving benefits, when in fact they may actually be receiving assistance under various DVA programs but just not the particular assistance/program that they wanted.
- s.47E(d) - operations of agencies
s.47E(d) - operations of agencies While other Departments, such as DHS, may receive similar criticism, individuals will still seek assistance from DHS when in need. However, DVA clients tend to boycott DVA programs even if they need the assistance. s.47E(d) - operations of agencies
s.47E(d) - operations of agencies
- Timothy discussed the concept of reasonable expectations - APP 6.2(a) and a past case involving a s.47F - personal privacy
- s.47F - personal privacy
- Angelene queried how correcting a statement made on Facebook would practically work, as it could result in a never-ending engagement by the department and the ex-veterans involved, especially where veterans disagree with the Departments views.
- The meeting ran out of time to discuss all matters. Timothy and Angelene both acknowledged the complex environment that DVA is trying to navigate through however reiterated that consideration needs to be given to whether the disclosure provisions they are seeking under the Rules are already permitted under privacy law. It appears privacy law would permit disclosures for most of the matters in the Rules.
- DVA advised that the Minister is keen to have the Bill debated in the next sitting.
- Timothy advised the OAIC will provide comments on the Rules, however noted that a quick turnaround may not be possible due to upcoming Estimates next week.

Follow up actions

- DVA to consider section 6 provisions of the Rules and to consider whether de-identification and s.47E(d) can be incorporated (as discussed above).
- OAIC to provide written comments on the Rules.

From: [Sophie Higgins](#)
To: [Renee Alchin](#)
Subject: RE: [Correspondence from phone call] New section 6 - Draft PID rules [DLM=For-Official-Use-Only]
Date: Friday, 24 February 2017 1:26:50 PM

Sounds like a very interesting meeting – thanks for the contact report

From: Renee Alchin
Sent: Friday, 24 February 2017 10:31 AM
To: Sophie Higgins [s.22 - irrelevant]
Subject: FW: [Correspondence from phone call] New section 6 - Draft PID rules [DLM=For-Official-Use-Only]

Hi Sophie,

Forwarding the below email trail to you as it relates to the meeting with DVA yesterday to discuss the Rules.

I've written up a contact report for this meeting for you: [D2017/001516](#)

You will see below DVA have made some adjustments to the Rules since the meeting, and I'm currently compiling a letter for our written comments on the Rules.

I'm also considering Angelene's query below as to whether a requirement could be included in the Rules for the Secretary to specifically seek consent from the individual (where appropriate).

Happy to discuss next week,

Regards
 Renee

From: Angelene Falk
Sent: Thursday, 23 February 2017 10:25 PM
To: Timothy Pilgrim [s.22 - irrelevant] Melanie Drayton
 [s.22 - irrelevant] Renee Alchin [s.22 - irrelevant]
Subject: RE: [Correspondence from phone call] New section 6 - Draft PID rules [DLM=For-Official-Use-Only]

Hello

So the redraft picks up most issues but not the issue of seeking consent first where practicable (ie for research).

Renee, can you go back to the rules please and think about whether it would be reasonable to seek consent as a first option, and then only apply the rules where its not practicable, or whether that wouldn't work in the circumstances?

Jane may have some thoughts based on the s95 guidelines.

I may be pursuing something that wouldn't work in this context, so please let me know if you think that's the case.

Thank you

Angelene

From: Brenton Attard
Sent: Thursday, 23 February 2017 7:09 PM
To: Timothy Pilgrim [s.22 - irrelevant]; Angelene Falk
[s.22 - irrelevant]; Melanie Drayton [s.22 - irrelevant]; Renee Alchin
[s.22 - irrelevant]
Subject: FW: [Correspondence from phone call] New section 6 - Draft PID rules [DLM=For-Official-Use-Only]
Importance: High

Hi All

Please see email below from DVA regarding the phone call.

Thanks,

Brenton

From: Spiers, Carolyn [mailto:[s.22 - irrelevant]]
Sent: Thursday, 23 February 2017 4:32 PM
To: Brenton Attard [s.22 - irrelevant]
Cc: Foreman, Lisa [s.22 - irrelevant]; Cairns, Louise [s.22 - irrelevant]
Subject: New section 6 - Draft PID rules [DLM=For-Official-Use-Only]

Dear Brenton

At today's telephone meeting with the Privacy Commissioner and others, DVA agreed to redraft a provision of the draft PID rules to be more specific on the use of de-identified data.

The following is a replacement section 6. Could you provide to Commissioner Pilgram and the others in attendance at the meeting.

Regards

Carolyn Spiers

s.47E(d) - operations of agencies

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6. Finally, please do not remove this notice.

From: Renee Alchin
To: [Sophie Higgins](#)
Subject: CLEARANCE - Letter to DVA - Comments on the Military Rehabilitation and Compensation (Public Interest Disclosure Certificate) Rules [SEC=UNCLASSIFIED]
Date: Wednesday, 1 March 2017 10:22:00 AM

Hi Sophie,

As discussed, I've printed this draft for Angelene.

For clearance, the letter is in TRIM: [D2017/001636](#)

It is largely based on the memo that we originally drafted for last week's meeting, however I'm not sure how far we want to go with our comments – I've focused on whether or not the matters covered by the Rules are already permitted by the APPs.

Happy to discuss

Thanks
Renee

Renee Alchin | Adviser
Regulation and Strategy
Office of the Australian Information Commissioner
GPO Box 5218 SYDNEY NSW 2001 | www.oaic.gov.au

s.22 - irrelevant

Pages 157 through 163 redacted for the following reasons:

s.47E(d)

From: [Melanie Drayton](#)
To: [Timothy Pilgrim](#); [Angelene Falk](#)
Cc: [Renee Alchin](#)
Subject: FW: DVA PIA on the Public Interest Disclosure Provisions [SEC=UNCLASSIFIED]
Date: Friday, 3 March 2017 9:47:55 AM

Good morning

Please see Renee's email below.

Thanks

M

From: Renee Alchin
Sent: Friday, 3 March 2017 9:13 AM
To: Melanie Drayton s.22 - irrelevant
Subject: DVA PIA on the Public Interest Disclosure Provisions [SEC=UNCLASSIFIED]

Hi,

Yesterday when I listened in on the second reading debate for the Digital Readiness Bill in the house of reps, they mentioned a PIA.

There is an Executive Summary of the PIA now on DVA's website:

http://www.dva.gov.au/sites/default/files/files/site-information/drbbpi_execsumm.pdf

Thanks

Renee

Renee Alchin | Adviser
Regulation and Strategy
Office of the Australian Information Commissioner
GPO Box 5218 SYDNEY NSW 2001 | www.oaic.gov.au
s.22 - irrelevant

Pages 165 through 177 redacted for the following reasons:

s.47E(d)

From: [Renee Alchin](#)
To: [Timothy Pilgrim](#); [Angelene Falk](#); [Melanie Drayton](#)
Subject: UPDATED DRAFT - Comments to DVA on the Military Rehabilitation and Compensation (Public Interest Disclosure Certificate) Rules [SEC=UNCLASSIFIED]
Date: Friday, 3 March 2017 1:41:37 PM

Hi everyone,

Here is the link the latest version of the draft letter to DVA: [D2017/001692](#)

Regards
 Renee

Renee Alchin | Adviser
Regulation and Strategy
Office of the Australian Information Commissioner
 GPO Box 5218 SYDNEY NSW 2001 | www.oaic.gov.au
 s.22 - irrelevant

From: Renee Alchin
Sent: Thursday, 2 March 2017 8:47 AM
To: RS Clearance s.22 - irrelevant Deputy Commissioner s.22 - irrelevant
Cc: Sophie Higgins s.22 - irrelevant
Subject: CLEARANCE - Comments to DVA on the Military Rehabilitation and Compensation (Public Interest Disclosure Certificate) Rules [SEC=UNCLASSIFIED]

Snapshot	
Due date	2 March 2017
Fixed or flexible	Fixed
If fixed, why?	As discussed - Aiming to get comments to DVA asap.
Topic for clearance	Comments to DVA on the Military Rehabilitation and Compensation (Public Interest Disclosure Certificate) Rules
Product	Letter
Length / no. of pages	7
External party?	DVA
Clearance & consultation	Sophie

Hi Mel and Angelene,

I'm sending this to both of you, as I know we're keen to get these comments out as soon as possible.

Ready for clearance - The letter to DVA providing comments on the public interest disclosure certificate rules is in TRIM: [D2017/001636](#)

Happy to discuss,

Thanks

Renee

Renee Alchin | Adviser

Regulation and Strategy

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Pages 180 through 209 redacted for the following reasons:

s.47E(d) - operations of agencies

Commissioner brief: Briefing notes – Inquiry into the Digital Readiness Bill – Senate Foreign Affairs, Defence and Trade Committee

Type: **Commissioner brief**

Purpose: **Senate Foreign Affairs, Defence and Trade Committee public hearing inquiry into the Digital Readiness Bill**

For: **The Australian Information Commissioner**

Key points

1. The Veteran's Affairs Legislation Amendment (Digital Readiness Bill) 2016 seeks to amend the Veteran's Entitlements Act 1986 (VEA), *Military Rehabilitation and Compensation Act 2004* (MRCA) and the *Safety Rehabilitation and Compensation (Defence-related claims) Act 1988* (DRCA).
2. The OAIC provided Bill scrutiny comments on the Digital Readiness Bill on 3 November 2016.
3. The OAIC's comments focused on the public interest disclosure provisions in Schedule 2 of the Bill which permit certain disclosures and invoke the 'required or authorised' by law exception in APP 6 in the Privacy Act.

Background – the Digital Readiness Bill

- The Bill will insert a provision into the VEA, MRCA, and DRCA to enable the Secretary to authorise the use of computer programmes to make decisions and determinations, exercise powers or comply with obligations etc. under these Acts
- Safe Safeguards to this provision include that the Commissioner may make a decision or determination in substitution for a decision or determination made by a computer program, if satisfied that decision or determination is incorrect
- The Bill will also insert a provision into each of these Acts that will enable the Secretary to disclose information about a particular case or class of cases to such persons as the Secretary determines if he or she certifies that it is necessary in the public interest to do so.

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- Safeguards include that the power cannot be delegated by the Secretary to anyone, the Secretary must act in accordance with rules that the Minister makes, the Minister cannot delegate his or her rule making power, and, unless the Secretary complies with certain notification requirements before disclosing personal information, he or she commits an offence, punishable by 60 penalty units.

Protection of personal information

- A range of the OAIC's responsibilities involve examining proposals that may restrict the exercise of individuals' privacy protections in favour of another public interest objective.
- The Privacy Act recognises that the protection of individuals' privacy, through the protection of their personal information, is not an absolute right. Rather, those interests must be balanced with the broader interest of the community in ensuring that APP entities are able to carry out their legitimate functions and activities.
- This balancing is reflected in the exceptions to a number of the APPs, which except from the operation of those APPs, certain information handling practices considered to be in the public interest when balanced with the interest in protecting an individual's privacy.
- Exceptions cover a range of matters including where a use or disclosure of personal information is authorised or required by Australian law or where an entity reasonably believes that a use or disclosure is reasonably necessary for an enforcement related activity conducted by an enforcement body.

Disclosures of personal information

- APP 6 outlines when an APP entity may use or disclose personal information. It generally provides that an APP entity can only use or disclose personal information for a purpose for which the information was collected (known as the 'primary purpose'), or for a secondary purpose where one of the exceptions listed in APP 6 apply. The exceptions include where 'a use or disclosure of personal information is authorised or required by Australian law'.
- The OAIC is regularly invited to comment on draft laws that require or authorise the collection, use or disclosure of personal information in a manner that would otherwise be inconsistent with one or more of the APPs. The effect of such laws is that one or more APPs will not apply to the use or disclosure of personal information, described in the law.
- Consistent with the approach taken in applying Article 17 in the International Covenant on Civil and Political Right (ICCPR), the OAIC's advice generally suggests consideration should be given to whether those measures are proportionate and necessary. That is, whether they appropriately balance the intrusion on individuals' privacy with the overall public policy objectives of the proposal. Additionally, when handling of individuals'

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personal information is authorised in the broader interests of the community, it is generally recommended that those activities be accompanied by an appropriate level of privacy safeguards and accountability. Should such a proposal be considered to appropriately balance these objectives, it is generally recommended that the scope of the proposal be drafted consistent with the spirit and intent of the Privacy Act.

Summary of OAIC Bill scrutiny comments

- On 31 October 2016, the Office of Parliamentary Counsel contacted the Attorney General's Department seeking comment on the Bill, and that request was passed onto the OAIC for comment. The OAIC's comments on the Bill were provided to the OPC on 3 November 2016. These comments are provided at **Annexure A**.
- The comments focused on the public interest disclosure provisions in Schedule 2 of the Bill, which would enable the Secretary to disclose information about a particular case or class of cases to such persons and for such purposes as the Secretary determines, if he or she certifies that it is necessary in the public interest to do so.
- The OAIC noted that the Bill would also insert a provision in the *Veterans' Entitlements Act 1986* (VEA), *Military Rehabilitation and Compensation Act 2004* (MRCA) and the *Safety Rehabilitation and Compensation (Defence-related Claims) Act 1988* (DRCA), that states that the disclosure is authorised by law for the purposes of the Australian Privacy Principles (APPs).
- Specifically, the disclosure of personal information under the new provisions will be permitted by the 'required or authorised by or under law' exception in APP 6.2(b). This authorisation means that the privacy protections in APP 6, which limit the circumstances in which personal information can be used and disclosed, will not apply to any disclosures made in accordance with the new provisions.
- The OAIC suggested that where a Bill invokes this exception in the Privacy Act, consideration should be given to whether those measures are reasonable, proportionate and necessary, and made some specific suggestions for consideration. The OAIC's comments are attached.

OAIC position on automated processes

- It appears that the amendments that the Bill is proposing, that will authorise computer programmes to make administrative decisions, will not result in any procedural changes as to how decisions are made. It is therefore unlikely that any comparisons to the Department of Human services automated debt recovery will be raised by the Committee.

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- A key point to note in the event this topic is discussed: DVA should ensure that the provisions of APP 10 are upheld with any automated processes to ensure the personal information being used to make automated decisions is accurate, up-to-date and complete. This can particularly be a challenge where the onus is on the individual to identify errors or discrepancies with automated decisions. DVA should ensure that it has appropriately assessed and addressed the risks in this regard.
- To this end, DVA could conduct a privacy impact assessment (PIA) of the amendments proposed by the Bill that have privacy implications. A PIA is a written assessment which may assist in identifying the privacy impacts of the proposal, and provides an opportunity to set out any recommendations for managing, minimising or eliminating those impacts.

Committee Questions

Please advise the committee what is the current situation that DVA or other agencies require this power?

- The OAIC's role includes examining proposed enactments that would require or authorise acts or practices that might otherwise interfere with privacy and ensuring that any adverse effects of a proposed enactment on the privacy of individuals are minimised. An act or practice that is required or authorised by or under an Australian law is generally excepted from the requirements around the collection of sensitive information and the use and disclosure of personal information in the APPs.
- The OAIC provided some comments to the OPC, which we understand were provided to DVA in relation to aspects of the Bill that authorised disclosures under the Privacy Act. However, it is a matter for DVA to justify in the Explanatory Memorandum including its Statement of Compatibility with Human Rights, 'public interest disclosure' provisions. We understand that the Explanatory memorandum outlines some of DVA's reasons.

Why does DVA require these provisions so urgently?

- This may be a matter for DVA. Again, we understand that the Explanatory memorandum outlines some of DVA's reasons.

Is there not already a mechanism for agencies to report crimes to police?

- APP 6 generally provides that an APP entity can only use or disclose personal information for a purpose for which the information was collected (known as the 'primary purpose'), or for a secondary purpose where one of the exceptions listed in APP 6 apply. The following exceptions to APP 6 would permit agencies to disclose personal information held by the agency to police (in the circumstances described):

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- the APP entity reasonably believes that the use or disclosure of the information is reasonably necessary for one or more enforcement related activities conducted by, or on behalf of, an enforcement body (examples include the Australian Federal Police or a State or Territory Police force or service) (APP 6.2(e)), and
- the entity reasonably believes that the collection, use or disclosure is necessary to lessen or prevent a serious threat to the life, health or safety of any individual, or to public health or safety (and it is unreasonable or impracticable to obtain the individual's consent) (APP 6.2(c) and s 16A, item 1)
- the use or disclosure of the information is required or authorised by or under an Australian law or a court/ tribunal order (APP 6.2(b)).

Over the last 5 years, how many cases were there of mistake and/or misinformation that agencies did not have the power to respond to?

- Information about the number of cases of mistake or misinformation, may be a matter for DVA.

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Commissioner brief: Briefing notes – Inquiry into the Digital Readiness Bill – Senate Foreign Affairs, Defence and Trade Committee

Type: **Commissioner brief**

Purpose: **Senate Foreign Affairs, Defence and Trade Committee public hearing inquiry into the Digital Readiness Bill**

For: **The Australian Information Commissioner**

Key points

1. The Veteran's Affairs Legislation Amendment (Digital Readiness Bill) 2016 seeks to amend the Veteran's Entitlements Act 1986 (VEA), *Military Rehabilitation and Compensation Act 2004* (MRCA) and the *Safety Rehabilitation and Compensation (Defence-related claims) Act 1988* (DRCA).
2. The OAIC provided Bill scrutiny comments on the Digital Readiness Bill on 3 November 2016.
3. The OAIC's comments focused on the public interest disclosure provisions in Schedule 2 of the Bill which permit certain disclosures and invoke the 'required or authorised' by law exception in APP 6 in the Privacy Act.

Background – the Digital Readiness Bill

- The Bill will insert a provision into the VEA, MRCA, and DRCA to enable the Secretary to authorise the use of computer programmes to make decisions and determinations, exercise powers or comply with obligations etc. under these Acts
- Safe Safeguards to this provision include that the Commissioner may make a decision or determination in substitution for a decision or determination made by a computer program, if satisfied that decision or determination is incorrect
- The Bill will also insert a provision into each of these Acts that will enable the Secretary to disclose information about a particular case or class of cases to such persons as the Secretary determines if he or she certifies that it is necessary in the public interest to do so.

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Protection of personal information

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- Consistent with the approach taken in applying Article 17 in the International Covenant on Civil and Political Right (ICCPR), the OAIC's advice generally suggests consideration should be given to whether those measures are proportionate and necessary. That is, whether they appropriately balance the intrusion on individuals' privacy with the overall public policy objectives of the proposal. Additionally, when handling of individuals'

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Summary of OAIC Bill scrutiny comments

- On 31 October 2016, the Office of Parliamentary Counsel contacted the Attorney General's Department seeking comment on the Bill, and that request was passed onto the OAIC for comment. The OAIC's comments on the Bill were provided to the OPC on 3 November 2016. These comments are provided at **Annexure A**.
- The comments focused on the public interest disclosure provisions in Schedule 2 of the Bill, which would enable the Secretary to disclose information about a particular case or class of cases to such persons and for such purposes as the Secretary determines, if he or she certifies that it is necessary in the public interest to do so.
- The OAIC noted that the Bill would also insert a provision in the *Veterans' Entitlements Act 1986* (VEA), *Military Rehabilitation and Compensation Act 2004* (MRCA) and the *Safety Rehabilitation and Compensation (Defence-related Claims) Act 1988* (DRCA), that states that the disclosure is authorised by law for the purposes of the Australian Privacy Principles (APPs).
- Specifically, the disclosure of personal information under the new provisions will be permitted by the 'required or authorised by or under law' exception in APP 6.2(b). This authorisation means that the privacy protections in APP 6, which limit the circumstances in which personal information can be used and disclosed, will not apply to any disclosures made in accordance with the new provisions.
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Possible similarities with DHS' automated debt recovery

- It appears that the amendments that the Bill is proposing, that will authorise computer programmes to make administrative decisions, will not result in any procedural changes as to how decisions are made. It is therefore unlikely that any comparisons to the Department of Human Services (DHS) automated debt recovery will be raised by the Committee.

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- A key point to note in the event this topic is discussed: DVA should ensure that the provisions of APP 10 are upheld with any automated decisions to ensure the personal information being used to make these decisions is accurate, up-to-date and complete. This can particularly be a challenge where the onus is on the individual to identify errors or discrepancies with automated decisions. DVA should ensure that it has appropriately assessed and addressed the risks in this regard.
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- The OAIC provided some comments to the OPC, which we understand were provided to DVA in relation to aspects of the Bill that authorised disclosures under the Privacy Act. However, it is a matter for DVA to justify in the Explanatory Memorandum including its Statement of Compatibility with Human Rights, 'public interest disclosure' provisions. We understand that the Explanatory memorandum outlines some of DVA's reasons.

Why does DVA require these provisions so urgently?

- This may be a matter for DVA. Again, we understand that the Explanatory memorandum outlines some of DVA's reasons.

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Over the last 5 years, how many cases were there of mistake and/or misinformation that agencies did not have the power to respond to?

- Information about the number of cases of mistake or misinformation, may be a matter for DVA.

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Commissioner brief: Briefing notes – Inquiry into the Digital Readiness Bill – Senate Foreign Affairs, Defence and Trade Committee

Type: **Commissioner brief**

Purpose: **Senate Foreign Affairs, Defence and Trade Committee public hearing inquiry into the Digital Readiness Bill**

For: **The Australian Information Commissioner**

Key points

1. The Veteran's Affairs Legislation Amendment (Digital Readiness Bill) 2016 seeks to amend the Veteran's Entitlements Act 1986 (VEA), *Military Rehabilitation and Compensation Act 2004* (MRCA) and the *Safety Rehabilitation and Compensation (Defence-related claims) Act 1988* (DRCA).
2. The OAIC provided Bill scrutiny comments on the Digital Readiness Bill on 3 November 2016.
3. The OAIC's comments focused on the public interest disclosure provisions in Schedule 2 of the Bill which permit certain disclosures and invoke the 'required or authorised' by law exception in APP 6 in the Privacy Act.
4. **[Appreciate the opportunity to be consulted on the rules]**

Background – the Digital Readiness Bill

- The Bill will insert a provision into the VEA, MRCA, and DRCA to enable the Secretary to authorise the use of computer programmes to make decisions and determinations, exercise powers or comply with obligations etc. under these Acts
- Safeguards to this provision include that the Commissioner may make a decision or determination in substitution for a decision or determination made by a computer program, if satisfied that the decision or determination is incorrect.
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Responsible Director: **Sophie Higgins**

Responsible Assistant Commissioner
Melanie Drayton

- The Explanatory Memorandum to the Bill gives as examples of circumstances in which it might be appropriate for the Secretary to disclose such information as including 'where there is a threat to life, health or welfare, for the enforcement of laws, in relation to proceeds of crime orders, mistakes of fact, research and statistical analysis, APS code of conduct investigations, misinformation in the community and provider inappropriate practices.'
- Safeguards include that the power cannot be delegated by the Secretary to anyone, the Secretary must act in accordance with rules that the Minister makes, the Minister cannot delegate his or her rule making power, and, unless the Secretary complies with certain notification requirements before disclosing personal information, he or she commits an offence, punishable by 60 penalty units.
- concerns raised by the Committee – it appears that the Committee has concerns about the breadth of the disclosures that may be made under the Bill, including disclosures to correct misinformation

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Commented [SH1]: Renee- would you mind fleshing this out a little please?

Protection of personal information

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- The Privacy Act recognises that the protection of individuals' privacy, through the protection of their personal information, is not an absolute right. Rather, those interests must be balanced with the broader interest of the community in ensuring that APP entities are able to carry out their legitimate functions and activities.
- This balancing is reflected in the exceptions to a number of the APPs, which except from the operation of those APPs, certain information handling practices considered to be in the public interest when balanced with the interest in protecting an individual's privacy.
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Disclosures of personal information

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include where 'a use or disclosure of personal information is authorised or required by Australian law'.

- The OAIC is regularly invited to comment on draft laws that require or authorise the collection, use or disclosure of personal information in a manner that would otherwise be inconsistent with one or more of the APPs. The effect of such laws is that one or more APPs will not apply to the use or disclosure of personal information, described in the law.
- Consistent with the approach taken in applying Article 17 in the International Covenant on Civil and Political Right (ICCPR), the OAIC's advice generally suggests consideration should be given to whether those measures are proportionate and necessary. That is, whether they appropriately balance the intrusion on individuals' privacy with the overall public policy objectives of the proposal. Additionally, when handling of individuals' personal information is authorised in the broader interests of the community, it is generally recommended that those activities be accompanied by an appropriate level of privacy safeguards and accountability. Should such a proposal be considered to appropriately balance these objectives, it is generally recommended that the scope of the proposal be drafted consistent with the spirit and intent of the Privacy Act.

Summary of OAIC Bill scrutiny comments

- On 31 October 2016, the Office of Parliamentary Counsel contacted the Attorney General's Department seeking comment on the Bill, and that request was passed onto the OAIC for comment. The OAIC's comments on the Bill were provided to the OPC on 3 November 2016. These comments are provided at **Annexure A**.
- The comments focused on the public interest disclosure provisions in Schedule 2 of the Bill, which would enable the Secretary to disclose information about a particular case or class of cases to such persons and for such purposes as the Secretary determines, if he or she certifies that it is necessary in the public interest to do so.
- The OAIC noted that the Bill would also insert a provision in the *Veterans' Entitlements Act 1986* (VEA), *Military Rehabilitation and Compensation Act 2004* (MRCA) and the *Safety Rehabilitation and Compensation (Defence-related Claims) Act 1988* (DRCA), that states that the disclosure is authorised by law for the purposes of the Australian Privacy Principles (APPs).

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- Specifically, the disclosure of personal information under the new provisions will be permitted by the 'required or authorised by or under law' exception in APP 6.2(b). This authorisation means that the privacy protections in APP 6, which limit the circumstances in which personal information can be used and disclosed, will not apply to any disclosures made in accordance with the new provisions.
- The OAIC suggested that where a Bill invokes this exception in the Privacy Act, consideration should be given to whether those measures are reasonable, proportionate and necessary, and made some specific suggestions for consideration. The OAIC's comments are attached.
- The OAIC's comments referred to similar disclosure provisions in the *Social Security (Administration) Act 1999* and the *Paid Parental Leave Act 2010*, noting that rules issued under that legislation set out the matters to which the Secretary must have regard in giving a public interest certificate and the circumstances in which a public interest certificate may be given, which include: to prevent, or lessen, a threat to the life, health or welfare of a person; for the enforcement of laws; to correct a mistake of fact; to brief a Minister or to locate missing persons etc.
- We understand from DVA's submission to the Committee, that these matters are very similar to the matters that the Minister proposes to include in the rules to be made under the Bill. DVA also notes in that submission that 'the proposed provisions are modelled on paragraph 208(1)(a) of the *Social Security (Administration) Act 1999*. That public interest disclosure provision has been in operation for 17 years and has operated successfully with the approval of Parliament. The Privacy Commissioner has not raised any concern about the Department of Social Services/ Department of Human Services' provision...'

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Commented [SH2]: Renee – would you mind checking this on TRIM please? I understand that the most recent iteration of the Social Security (Public Interest Certificate Guidelines) Determination was in 2015. Sarah G might know, otherwise we can check if Mel knows

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Content Author: Renee Alchin

Responsible Director: Sophie Higgins

Responsible Assistant Commissioner

s.22 - irrelevant

Melanie Drayton

- On 6 December 2016, the Committee invited the OAIC to make a comment on the Bill, but the OAIC inadvertently did not action this request.
- The Commonwealth Ombudsman has made a submission to the Committee in relation to automation aspects of the Bill. They also notified the OAIC that they intend to make a second submission to the Committee in relation to the new disclosure provisions, which recommends that any development of legislation or policy relating to disclosure of PI should occur in consultation with the OAIC.
- The OAIC would welcome being consulted on any draft Rules that the Minister makes (noting the requirement that the Minister makes these rules before the Secretary can make a 'public interest' disclosure under the proposed amendments to the VEA, MRCA, and DRCA).

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Possible similarities with DHS' automated debt recovery

- The Commonwealth Ombudsman's written submission to the Committee commented on,
- A key point to note in the event this topic is discussed: DVA should ensure that the provisions of APP 10 are upheld with any automated decisions to ensure the personal information being used to make these decisions is accurate, up-to-date and complete. This can particularly be a challenge where the onus is on the individual to identify errors or discrepancies with automated decisions. DVA should ensure that it has appropriately assessed and addressed the risks in this regard.
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Commented [SH4]: Could you please pop in a very brief overview of the matters set out in the Ombudsman's submission.

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Commented [SH5]: Should we also outline that entities need to have processes in place that enable individuals to seek correction of incorrect information? Some key issues to make sure we cover off – take reasonable steps to ensure PI is accurate, up-to-date and complete etc; and correction avenues available; also maybe APP 1.2(b) – need to implement practices, procedures and systems to 'enable entity to deal with inquiries and complaints from individuals about the entity's compliance with the APPs'. We might also say that the Dept should be cautious about make decisions based on 'sensitive PI' due the higher privacy risks involved with handling such information if it is inaccurate.

For example, while not defined as 'sensitive' under the Privacy Act, we know that debt information is often considered to be sensitive in nature by many Australians. We welcome comments made by the Dept in its written submission to the Committee that 'in regards to automated debt collection, the Department does not intend this provision for this purpose' and query whether it may be appropriate to refer to these sorts of limitations around the types of matters automated decision making won't be used for, in the Bill itself or in the EM.

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Committee Questions

Please advise the committee what is the current situation that DVA or other agencies require this power?

- The OAIC's role includes examining proposed enactments that would require or authorise acts or practices that might otherwise interfere with privacy and ensuring that any adverse effects of a proposed enactment on the privacy of individuals are minimised. An act or practice that is required or authorised by or under an Australian law is generally excepted from the requirements around the collection of sensitive information and the use and disclosure of personal information in the APPs.
- The OAIC provided some comments to the OPC, which we understand were provided to DVA in relation to aspects of the Bill that authorised disclosures under the Privacy

Content Author: Renee AlchinResponsible Director: Sophie Higgins

Responsible Assistant Commissioner

s.22 - irrelevant

Melanie Drayton

Act. However, it is a matter for DVA to justify in the Explanatory Memorandum including its Statement of Compatibility with Human Rights, 'public interest disclosure' provisions. We understand that the Explanatory memorandum outlines some of DVA's reasons.

Why does DVA require these provisions so urgently?

- This may be a matter for DVA. Again, we understand that the Explanatory memorandum outlines some of DVA's reasons.

Is there not already a mechanism for agencies to report crimes to police?

- APP 6 generally provides that an APP entity can only use or disclose personal information for a purpose for which the information was collected (known as the 'primary purpose'), or for a secondary purpose where one of the exceptions listed in APP 6 apply. The following exceptions to APP 6 would permit agencies to disclose personal information held by the agency to police (in the circumstances described):
 - the APP entity reasonably believes that the use or disclosure of the information is reasonably necessary for one or more enforcement related activities conducted by, or on behalf of, an enforcement body (examples include the Australian Federal Police or a State or Territory Police force or service) (APP 6.2(e)), and
 - the entity reasonably believes that the collection, use or disclosure is necessary to lessen or prevent a serious threat to the life, health or safety of any individual, or to public health or safety (and it is unreasonable or impracticable to obtain the individual's consent) (APP 6.2(c) and s 16A, item 1)
 - the use or disclosure of the information is required or authorised by or under an Australian law or a court/ tribunal order (APP 6.2(b)).

Over the last 5 years, how many cases were there of mistake and/or misinformation that agencies did not have the power to respond to?

- Information about the number of cases of mistake or misinformation, may be a matter for DVA.

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Content Author: [Renee Alchin](#)

Responsible Director: [Sophie Higgins](#)

Responsible Assistant Commissioner

s.22 - irrelevant

Melanie Drayton

Commissioner brief: Briefing notes – Inquiry into the Digital Readiness Bill – Senate Foreign Affairs, Defence and Trade Committee

Type: Commissioner brief

Purpose: Senate Foreign Affairs, Defence and Trade Committee public hearing inquiry into the Digital Readiness Bill

For: The Australian Information Commissioner

Key points

1. The Veteran's Affairs Legislation Amendment (Digital Readiness Bill) 2016 seeks to amend the Veteran's Entitlements Act 1986 (VEA), *Military Rehabilitation and Compensation Act 2004* (MRCA) and the *Safety Rehabilitation and Compensation (Defence-related claims) Act 1988* (DRCA).
2. The OAIC provided Bill scrutiny comments on the Digital Readiness Bill on 3 November 2016.
3. The OAIC's comments focused on the public interest disclosure provisions in Schedule 2 of the Bill which permit certain disclosures and invoke the 'required or authorised' by law exception in APP 6 in the Privacy Act.
4. The OAIC would welcome the opportunity to be consulted on any draft Rules that the Minister makes (noting the requirement that the Minister makes these rules before the Secretary can make a 'public interest' disclosure under the proposed amendments to the VEA, MRCA, and DRCA).

Background – the Digital Readiness Bill

- The Bill will insert a provision into the VEA, MRCA, and DRCA to enable the Secretary to authorise the use of computer programmes to make decisions and determinations, exercise powers or comply with obligations etc. under these Acts
- Safeguards to this provision include that the Commissioner may make a decision or determination in substitution for a decision or determination made by a computer program, if satisfied that the decision or determination is incorrect.

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Responsible Director: Sophie Higgins

Responsible Assistant Commissioner

s.22 - irrelevant

Melanie Drayton

- The Bill will also insert a provision into each of these Acts that will enable the Secretary to disclose information about a particular case or class of cases to such persons as the Secretary determines if he or she certifies that it is necessary in the public interest to do so.
- The Explanatory Memorandum to the Bill gives as examples of circumstances in which it might be appropriate for the Secretary to disclose such information as including 'where there is a threat to life, health or welfare, for the enforcement of laws, in relation to proceeds of crime orders, mistakes of fact, research and statistical analysis, APS code of conduct investigations, misinformation in the community and provider inappropriate practices.'
- Safeguards include that the power cannot be delegated by the Secretary to anyone, the Secretary must act in accordance with rules that the Minister makes, the Minister cannot delegate his or her rule making power, and, unless the Secretary complies with certain notification requirements before disclosing personal information, he or she commits an offence, punishable by 60 penalty units.
- Based on the information available, it appears that the Committee has concerns about the breadth of the disclosures that may be made under the Bill, including disclosures to correct misinformation. The Committee intends to ask questions focused on matters such as why the Secretary of the DVA requires these powers, whether there are already mechanisms in place to report crimes to law enforcement bodies, and whether there have been any instances of mistake or misinformation in the last five years that agencies did not have the power to respond to.

Protection of personal information

- A range of the OAIC's responsibilities involve examining proposals that may restrict the exercise of individuals' privacy protections in favour of another public interest objective.
- The Privacy Act recognises that the protection of individuals' privacy, through the protection of their personal information, is not an absolute right. Rather, those interests must be balanced with the broader interest of the community in ensuring that APP entities are able to carry out their legitimate functions and activities.
- This balancing is reflected in the exceptions to a number of the APPs, which except from the operation of those APPs, certain information handling practices considered to be in the public interest when balanced with the interest in protecting an individual's privacy.
- Exceptions cover a range of matters including where a use or disclosure of personal information is authorised or required by Australian law or where an entity reasonably

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Responsible Assistant Commissioner

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believes that a use or disclosure is reasonably necessary for an enforcement related activity conducted by an enforcement body.

Disclosures of personal information

- APP 6 outlines when an APP entity may use or disclose personal information. It generally provides that an APP entity can only use or disclose personal information for a purpose for which the information was collected (known as the 'primary purpose'), or for a secondary purpose where one of the exceptions listed in APP 6 apply. The exceptions include where 'a use or disclosure of personal information is authorised or required by Australian law'.
- The OAIC is regularly invited to comment on draft laws that require or authorise the collection, use or disclosure of personal information in a manner that would otherwise be inconsistent with one or more of the APPs. The effect of such laws is that one or more APPs will not apply to the use or disclosure of personal information, described in the law.
- Consistent with the approach taken in applying Article 17 in the International Covenant on Civil and Political Right (ICCPR), the OAIC's advice generally suggests consideration should be given to whether those measures are proportionate and necessary. That is, whether they appropriately balance the intrusion on individuals' privacy with the overall public policy objectives of the proposal. Additionally, when handling of individuals' personal information is authorised in the broader interests of the community, it is generally recommended that those activities be accompanied by an appropriate level of privacy safeguards and accountability. Should such a proposal be considered to appropriately balance these objectives, it is generally recommended that the scope of the proposal be drafted consistent with the spirit and intent of the Privacy Act.

Summary of OAIC Bill scrutiny comments

- On 31 October 2016, the Office of Parliamentary Counsel contacted the Attorney General's Department seeking comment on the Bill, and that request was passed onto the OAIC for comment. The OAIC's comments on the Bill were provided to the OPC on 3 November 2016. These comments are provided at **Annexure A**.
- The comments focused on the public interest disclosure provisions in Schedule 2 of the Bill, which would enable the Secretary to disclose information about a particular case or class of cases to such persons and for such purposes as the Secretary determines, if he or she certifies that it is necessary in the public interest to do so.

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- The OAIC noted that the Bill would also insert a provision in the *Veterans' Entitlements Act 1986* (VEA), *Military Rehabilitation and Compensation Act 2004* (MRCA) and the *Safety Rehabilitation and Compensation (Defence-related Claims) Act 1988* (DRCA), that states that the disclosure is authorised by law for the purposes of the Australian Privacy Principles (APPs).
- Specifically, the disclosure of personal information under the new provisions will be permitted by the 'required or authorised by or under law' exception in APP 6.2(b). This authorisation means that the privacy protections in APP 6, which limit the circumstances in which personal information can be used and disclosed, will not apply to any disclosures made in accordance with the new provisions.
- The OAIC suggested that where a Bill invokes this exception in the Privacy Act, consideration should be given to whether those measures are reasonable, proportionate and necessary, and made some specific suggestions for consideration. The OAIC's comments are attached.
- The OAIC's comments referred to similar disclosure provisions in the *Social Security (Administration) Act 1999* and the *Paid Parental Leave Act 2010*, noting that rules issued under that legislation set out the matters to which the Secretary must have regard to in giving a public interest certificate and the circumstances in which a public interest certificate may be given, which include: to prevent, or lessen, a threat to the life, health or welfare of a person; for the enforcement of laws; to correct a mistake of fact; to brief a Minister or to locate missing persons etc.
- We understand from DVA's submission to the Committee, that these matters are very similar to the matters that the Minister proposes to include in the rules to be made under the Bill. DVA also notes in that submission that 'the proposed provisions are modelled on paragraph 208(1)(a) of the *Social Security (Administration) Act 1999*. That public interest disclosure provision has been in operation for 17 years and has operated successfully with the approval of Parliament. The Privacy Commissioner has not raised any concern about the Department of Social Services/ Department of Human Services' provision...'

Commented [RA1]: That's correct, the current guidelines are: [Social Security \(Public Interest Certificate Guidelines\) \(DSS\) Determination 2015](#)

Commented [SH2]: Renee – would you mind checking this on TRIM please? I understand that the most recent iteration of the Social Security (Public Interest Certificate Guidelines) Determination was in 2015. Sarah G might know, otherwise we can check if Mel knows

Content Author: Renee Alchin

Responsible Director: Sophie Higgins

Responsible Assistant Commissioner

s.22 - irrelevant

Melanie Drayton

- On 6 December 2016, the Committee invited the OAIC to make a comment on the Bill, but the OAIC inadvertently did not action this request.
- The Commonwealth Ombudsman has made a submission to the Committee in relation to automation aspects of the Bill. They also notified the OAIC that they intend to make a second submission to the Committee in relation to the new disclosure provisions, which recommends that any development of legislation or policy relating to disclosure of PI should occur in consultation with the OAIC.
- The OAIC would welcome being consulted on any draft Rules that the Minister makes (noting the requirement that the Minister makes these rules before the Secretary can make a 'public interest' disclosure under the proposed amendments to the VEA, MRCA, and DRCA).

Government automated decisions

- The Commonwealth Ombudsman's written submission to the Committee commented on several matters that related to automated decisions. These comments related to accuracy of automated decisions, and errors that can arise from incorrect data entry and system errors, and the fact that the onus is predominately placed on the customer to identify these errors.
- The Commonwealth Ombudsman also outlined issues with automated decisions following basic legal values of lawfulness, fairness, transparency and efficiency.
- In the end this topic is discussed: DVA should ensure that the provisions of APP 10 are upheld with any automated decisions to ensure the personal information being used to make these decisions is accurate, up-to-date and complete. This can particularly be a challenge where the onus is on the individual to identify errors or discrepancies with automated decisions. DVA should ensure that it has appropriately assessed and addressed the risks in this regard.

Content Author: Renee Alchin

Responsible Director: Sophie Higgins

Responsible Assistant Commissioner

s.22 - irrelevant

Melanie Drayton

- Additionally, DVA must ensure it has processes in place to allow the access and correction of personal information used in automated processes, as well as sufficient practices, procedures and systems in place to enable the agency to handle inquiries and complaints from individual's about the agency's compliance with the APPs in regards to automated decisions.
- DVA should also be cautious about making automated decisions based on personal information that is sensitive information, due to the higher privacy risks involved with handling such information if it is inaccurate. The OAIC welcomes the DVA's comments in its written submission that 'in regards to automated debt collection, the Department does not intend this provision for this purpose'. For transparency purposes and to avoid function creep, this intent could be included in the Bill or the Explanatory Memorandum.
- DVA could conduct a privacy impact assessment (PIA) of the amendments proposed by the Bill that have privacy implications to identify and assess the privacy risks associated with the amendments. A PIA is a written assessment which may assist in identifying the privacy impacts of the proposal, and provides an opportunity to set out any recommendations for managing, minimising or eliminating those impacts.

Committee Questions

Please advise the committee what is the current situation that DVA or other agencies require this power?

- The OAIC's role includes examining proposed enactments that would require or authorise acts or practices that might otherwise interfere with privacy and ensuring that any adverse effects of a proposed enactment on the privacy of individuals are minimised. An act or practice that is required or authorised by or under an Australian law is generally excepted from the requirements around the collection of sensitive information and the use and disclosure of personal information in the APPs.
- The OAIC provided some comments to the OPC, which we understand were provided to DVA in relation to aspects of the Bill that authorised disclosures under the Privacy Act. However, it is a matter for DVA to justify in the Explanatory Memorandum including its Statement of Compatibility with Human Rights, 'public interest disclosure' provisions. We understand that the Explanatory memorandum outlines some of DVA's reasons.

Why does DVA require these provisions so urgently?

- This may be a matter for DVA. Again, we understand that the Explanatory memorandum outlines some of DVA's reasons.

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s.22 - irrelevant

Melanie Drayton

Is there not already a mechanism for agencies to report crimes to police?

- APP 6 generally provides that an APP entity can only use or disclose personal information for a purpose for which the information was collected (known as the 'primary purpose'), or for a secondary purpose where one of the exceptions listed in APP 6 apply. The following exceptions to APP 6 would permit agencies to disclose personal information held by the agency to police (in the circumstances described):
 - the APP entity reasonably believes that the use or disclosure of the information is reasonably necessary for one or more enforcement related activities conducted by, or on behalf of, an enforcement body (examples include the Australian Federal Police or a State or Territory Police force or service) (APP 6.2(e)), and
 - the entity reasonably believes that the collection, use or disclosure is necessary to lessen or prevent a serious threat to the life, health or safety of any individual, or to public health or safety (and it is unreasonable or impracticable to obtain the individual's consent) (APP 6.2(c) and s 16A, item 1)
 - the use or disclosure of the information is required or authorised by or under an Australian law or a court/ tribunal order (APP 6.2(b)).

Over the last 5 years, how many cases were there of mistake and/or misinformation that agencies did not have the power to respond to?

- Information about the number of cases of mistake or misinformation, may be a matter for DVA.

Content Author: Renee Alchin

Responsible Director: Sophie Higgins

Responsible Assistant Commissioner

s.22 - irrelevant

Melanie Drayton

Commissioner brief: Briefing notes – Inquiry into the Digital Readiness Bill – Senate Foreign Affairs, Defence and Trade Committee

Type: Commissioner brief

Purpose: Senate Foreign Affairs, Defence and Trade Committee public hearing inquiry into the Digital Readiness Bill

For: The Australian Information Commissioner

Key points

1. The Veteran's Affairs Legislation Amendment (Digital Readiness Bill) 2016 seeks to amend the Veteran's Entitlements Act 1986 (VEA), *Military Rehabilitation and Compensation Act 2004* (MRCA) and the *Safety Rehabilitation and Compensation (Defence-related claims) Act 1988* (DRCA).
2. The OAIC provided Bill scrutiny comments on the Digital Readiness Bill on 3 November 2016.
3. The OAIC's comments focused on the public interest disclosure provisions in Schedule 2 of the Bill which permit certain disclosures and invoke the 'required or authorised' by law exception in APP 6 in the Privacy Act.
4. The OAIC would welcome the opportunity to be consulted on any draft rules to made by the Minister in relation to public interest disclosure certificates, under the proposed amendments in Schedule 2 of the Bill.

Background – the Digital Readiness Bill

- The Bill will insert a provision into the VEA, MRCA, and DRCA to enable the Secretary to authorise the use of computer programmes to make decisions and determinations, exercise powers or comply with obligations etc. under these Acts.
- Safeguards to this provision include that the Commissioner may make a decision or determination in substitution for a decision or determination made by a computer program, if satisfied that the decision or determination is incorrect.

Commented [SH1]: Could you pls add references to relevant parts of the Bill for each of the dot points in this section?

Content Author: Renee Alchin

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Responsible Assistant Commissioner

s.22 - irrelevant

Melanie Drayton

- The Bill will also insert a provision into each of these Acts that will enable the Secretary to disclose information about a particular case or class of cases to such persons as the Secretary determines if he or she certifies that it is necessary in the public interest to do so.
- The Explanatory Memorandum to the Bill gives as examples of circumstances in which it might be appropriate for the Secretary to disclose such information as including 'where there is a threat to life, health or welfare, for the enforcement of laws, in relation to proceeds of crime orders, mistakes of fact, research and statistical analysis, APS code of conduct investigations, misinformation in the community and provider inappropriate practices' (p. 11).
- Safeguards include that the power cannot be delegated by the Secretary to anyone, the Secretary must act in accordance with rules that the Minister makes, the Minister cannot delegate his or her rule making power, and, unless the Secretary complies with certain notification requirements before disclosing personal information, he or she commits an offence, punishable by 60 penalty units.
- Based on the information available, it appears that the Committee has concerns about the breadth of the disclosures that may be made under the Bill, including disclosures to correct **misinformation**. Please see Attachment A for further details. The Committee has notified the OAIC that it intends to ask questions focused on matters such as why the Secretary of the DVA requires these powers, whether there are already mechanisms in place to report crimes to law enforcement bodies, and whether there have been any instances of mistake or misinformation in the last five years that agencies did not have the power to respond to.

Commented [SH2]: Perhaps we need to extract from DVA's submission (as an attachment to the briefing), the description of the circumstances in which DVA plans to disclose this information (including what they mean by misinformation/

Protection of personal information

- A range of the OAIC's responsibilities involve examining proposals that may restrict the exercise of individuals' privacy protections in favour of another public interest objective.
- The Privacy Act recognises that the protection of individuals' privacy, through the protection of their personal information, is not an absolute right. Rather, those interests must be balanced with the broader interest of the community in ensuring that APP entities are able to carry out their legitimate functions and activities.
- This balancing is reflected in the exceptions to a number of the APPs, which except from the operation of those APPs, certain information handling practices considered to be in the public interest when balanced with the interest in protecting an individual's privacy.

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- Exceptions cover a range of matters including where a use or disclosure of personal information is authorised or required by Australian law or where an entity reasonably believes that a use or disclosure is reasonably necessary for an enforcement related activity conducted by an enforcement body.

Disclosures of personal information

- APP 6 outlines when an APP entity may use or disclose personal information. It generally provides that an APP entity can only use or disclose personal information for a purpose for which the information was collected (known as the 'primary purpose'), or for a secondary purpose where one of the exceptions listed in APP 6 apply. The exceptions include where 'a use or disclosure of personal information is authorised or required by Australian law'.
- The OAIC is regularly invited to comment on draft laws that require or authorise the collection, use or disclosure of personal information in a manner that would otherwise be inconsistent with one or more of the APPs. The effect of such laws is that one or more APPs will not apply to the use or disclosure of personal information, described in the law.
- Consistent with the approach taken in applying Article 17 in the International Covenant on Civil and Political Right (ICCPR), the OAIC's advice generally suggests consideration should be given to whether those measures are proportionate and necessary. That is, whether they appropriately balance the intrusion on individuals' privacy with the overall public policy objectives of the proposal. Additionally, when handling of individuals' personal information is authorised in the broader interests of the community, it is generally recommended that those activities be accompanied by an appropriate level of privacy safeguards and accountability. Should such a proposal be considered to appropriately balance these objectives, it is generally recommended that the scope of the proposal be drafted consistent with the spirit and intent of the Privacy Act.

Summary of OAIC Bill scrutiny comments

- On 31 October 2016, the Office of Parliamentary Counsel contacted the Attorney General's Department seeking comment on the Bill, and that request was passed onto the OAIC for comment. The OAIC's comments on the Bill were provided to the OPC on 3 November 2016. These comments are provided at **Annexure A**.
- The comments focused on the public interest disclosure provisions in Schedule 2 of the Bill, which would enable the Secretary to disclose information about a particular case or class of cases to such persons and for such purposes as the Secretary determines, if he or she certifies that it is necessary in the public interest to do so.

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- The OAIC noted that the Bill would also insert a provision in the *Veterans' Entitlements Act 1986* (VEA), *Military Rehabilitation and Compensation Act 2004* (MRCA) and the *Safety Rehabilitation and Compensation (Defence-related Claims) Act 1988* (DRCA), that states that the disclosure is authorised by law for the purposes of the Australian Privacy Principles (APPs).
- Specifically, the disclosure of personal information under the new provisions will be permitted by the 'required or authorised by or under law' exception in APP 6.2(b). This authorisation means that the privacy protections in APP 6, which limit the circumstances in which personal information can be used and disclosed, will not apply to any disclosures made in accordance with the new provisions.
- The OAIC suggested that where a Bill invokes this exception in the Privacy Act, consideration should be given to whether those measures are reasonable, proportionate and necessary, and made some specific suggestions for consideration. The OAIC's comments are attached.
- The OAIC's comments referred to similar disclosure provisions in the *Social Security (Administration) Act 1999* and the *Paid Parental Leave Act 2010*, noting that rules issued under that legislation set out the matters to which the Secretary must have regard to in giving a public interest certificate and the circumstances in which a public interest certificate may be given, which include: to prevent, or lessen, a threat to the life, health or welfare of a person; for the enforcement of laws; to correct a mistake of fact; to brief a Minister or to locate missing persons etc.
- We understand from DVA's submission to the Committee, that these matters are very similar to the matters that the Minister proposes to include in the rules to be made under the Bill. DVA also notes in that submission that 'the proposed provisions are modelled on paragraph 208(1)(a) of the *Social Security (Administration) Act 1999*. That public interest disclosure provision has been in operation for 17 years and has operated successfully with the approval of Parliament. The Privacy Commissioner has not raised any concern about the Department of Social Services/ Department of Human Services' provision...'

Commented [RA3]: That's correct, the current guidelines are: [Social Security \(Public Interest Certificate Guidelines\) \(DSS\) Determination 2015](#)

Commented [SH4]: Renee – would you mind checking this on TRIM please? I understand that the most recent iteration of the Social Security (Public Interest Certificate Guidelines) Determination was in 2015. Sarah G might know, otherwise we can check if Mel knows

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- The Commonwealth Ombudsman also outlined issues with automated decisions following basic legal values of lawfulness, fairness, transparency and efficiency.
- In the end this topic is discussed: DVA should ensure that the provisions of APP 10 are upheld with any automated decisions to ensure the personal information being used to make these decisions is accurate, up-to-date and complete. This can particularly be a challenge where the onus is on the individual to identify errors or discrepancies with automated decisions. DVA should ensure that it has appropriately assessed and addressed the risks in this regard.

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Responsible Director: Sophie Higgins

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s.22 - irrelevant

- Additionally, DVA must ensure it has processes in place to allow the access and correction of personal information used in automated processes, as well as sufficient practices, procedures and systems in place to enable the agency to handle inquiries and complaints from individual's about the agency's compliance with the APPs in regards to automated decisions.
- DVA should also be cautious about making automated decisions based on personal information that is sensitive information, due to the higher privacy risks involved with handling such information if it is inaccurate. The OAIC welcomes the DVA's comments in its written submission that 'in regards to automated debt collection, the Department does not intend this provision for this purpose'. For transparency purposes and to avoid function creep, this intent could be included in the Bill or the Explanatory Memorandum.
- DVA could conduct a privacy impact assessment (PIA) of the amendments proposed by the Bill that have privacy implications to identify and assess the privacy risks associated with the amendments. A PIA is a written assessment which may assist in identifying the privacy impacts of the proposal, and provides an opportunity to set out any recommendations for managing, minimising or eliminating those impacts.

Committee Questions

Please advise the committee what is the current situation that DVA or other agencies require this power?

- The OAIC's role includes examining proposed enactments that would require or authorise acts or practices that might otherwise interfere with privacy and ensuring that any adverse effects of a proposed enactment on the privacy of individuals are minimised. An act or practice that is required or authorised by or under an Australian law is generally excepted from the requirements around the collection of sensitive information and the use and disclosure of personal information in the APPs.
- The OAIC provided some comments to the OPC, which we understand were provided to DVA in relation to aspects of the Bill that authorised disclosures under the Privacy Act. However, it is a matter for DVA to justify in the Explanatory Memorandum including its Statement of Compatibility with Human Rights, 'public interest disclosure' provisions. We understand that the Explanatory memorandum outlines some of DVA's reasons.

Why does DVA require these provisions so urgently?

- This may be a matter for DVA. Again, we understand that the Explanatory memorandum outlines some of DVA's reasons.

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Responsible Director: Sophie Higgins

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Melanie Drayton

s.22 - irrelevant

Is there not already a mechanism for agencies to report crimes to police?

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 - the APP entity reasonably believes that the use or disclosure of the information is reasonably necessary for one or more enforcement related activities conducted by, or on behalf of, an enforcement body (examples include the Australian Federal Police or a State or Territory Police force or service) (APP 6.2(e)), and
 - the entity reasonably believes that the collection, use or disclosure is necessary to lessen or prevent a serious threat to the life, health or safety of any individual, or to public health or safety (and it is unreasonable or impracticable to obtain the individual's consent) (APP 6.2(c) and s 16A, item 1)
 - the use or disclosure of the information is required or authorised by or under an Australian law or a court/ tribunal order (APP 6.2(b)).

Over the last 5 years, how many cases were there of mistake and/or misinformation that agencies did not have the power to respond to?

- Information about the number of cases of mistake or misinformation, may be a matter for DVA.

Content Author: Renee Alchin	Responsible Director: Sophie Higgins	Responsible Assistant Commissioner
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Commissioner brief: Briefing notes – Inquiry into the Digital Readiness Bill – Senate Foreign Affairs, Defence and Trade Committee

Type: Commissioner brief

Purpose: Senate Foreign Affairs, Defence and Trade Committee public hearing inquiry into the Digital Readiness Bill

For: The Australian Information Commissioner

Key points

1. The Veteran's Affairs Legislation Amendment (Digital Readiness Bill) 2016 seeks to amend the *Veteran's Entitlements Act 1986* (VEA), *Military Rehabilitation and Compensation Act 2004* (MRCA) and the *Safety Rehabilitation and Compensation (Defence-related claims) Act 1988* (DRCA). The Bill and Explanatory memorandum are at **Annexure A**.
2. On 31 October 2016, the Attorney General's Department Information Law Unit (AGD), requested that the OAIC provide any comments on the Bill, and these would be provided to the Office of Parliamentary Counsel (OPC). On 3 November 2016, the OAIC provided comments on the Bill to the AGD, which AGD passed on to OPC and then to Department of Veterans' Affairs (DVA).
3. The OAIC's comments focused on the public interest disclosure provisions in Schedule 2 of the Bill. These authorise the Secretary to make disclosures that the Secretary certifies as 'necessary in the public interest', and invoke the 'required or authorised' by law exception in APP 6 in the Privacy Act. The AGD did not make any substantive comments on the Bill.
4. The Bill states that the Secretary must, in giving such a 'public interest certificate', act in accordance with Rules made by legislative instrument, by the Minister. While not included in the OAIC's comments to OPC, the OAIC's email to the Committee on 14 February noted that the OAIC would welcome the opportunity to be consulted on any such draft rules. The OAIC will have regard to whether any permitted disclosures accord with the social license given to government to handle and disclose individuals' personal information, and are generally consistent with the spirit and intent of the Privacy Act.
5. The OAIC also welcomes the safeguard in the Bill that before disclosing personal information about a person under the 'public interest disclosure' provisions, the Secretary must notify the person in writing of the Secretary's intention to disclose the information; give the person a reasonable opportunity to make written comments on

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Responsible Assistant Commissioner
Melanie Drayton

s.22 - irrelevant

the proposed disclosure of the information and consider any written comments made by the person. This is consistent with the emphasis on transparency in the Privacy Act, and may in some circumstances give the individual a 'reasonable expectation' that their personal information will be disclosed for a particular purpose.

Background – the Digital Readiness Bill

- The Bill will insert a provision into the VEA, MRCA, and DRCA to enable the Secretary to authorise the use of computer programmes to make decisions and determinations, exercise powers or comply with obligations etc. under these Acts (Schedule 1).
- Safeguards in the Bill include that the Secretary may make a decision or determination in substitution for a decision or determination made by a computer program, if satisfied that the decision or determination is incorrect (Schedule 1).
- The Bill will also insert a provision into each of these Acts that give the Secretary broad disclosure powers: 'the Secretary may, if the Secretary certifies that it is necessary in the public interest to do so in a particular case or class of cases, disclose any information obtained by any person in the performance of that person's duties under this Act to such persons and for such purposes as the Secretary determines' (Schedule 2).
- Safeguards in the Bill include that:
 - the power cannot be delegated by the Secretary to anyone
 - the Secretary must act in accordance with rules that the Minister makes and the Minister cannot delegate his or her rule making power
 - before disclosing information, the Secretary must notify the person concerned in writing about the proposed disclosure and consider any written comments made by the person, and
 - unless the Secretary complies with the above notification requirements before disclosing personal information, he or she commits an offence, punishable by 60 penalty units (Schedule 2).
- The Explanatory Memorandum to the Bill gives as examples of circumstances in which it might be appropriate for the Secretary to disclose such information as including 'where there is a threat to life, health or welfare, for the enforcement of laws, in relation to proceeds of crime orders, mistakes of fact, research and statistical analysis, APS code of conduct investigations, misinformation in the community and provider inappropriate practices' (p. 11).

Commented [SH1]: Could you pls add references to relevant parts of the Bill for each of the dot points in this section?

Content Author: Renee Alchin	Responsible Director: Sophie Higgins	Responsible Assistant Commissioner
s.22 - irrelevant		Melanie Drayton

OAIC's responsibilities to examine proposed enactments impact privacy

- A range of the OAIC's responsibilities involve examining proposals that may restrict the exercise of individuals' privacy protections in favour of another public interest objective.
- The Privacy Act recognises that the protection of individuals' privacy, through the protection of their personal information, is not an absolute right. Rather, those interests must be balanced with the broader interest of the community in ensuring that APP entities are able to carry out their legitimate functions and activities.
- This balancing is reflected in the exceptions to a number of the APPs, which except from the operation of those APPs, certain information handling practices considered to be in the public interest when balanced with the interest in protecting an individual's privacy.

Disclosures of personal information

- APP 6 outlines when an APP entity may use or disclose personal information. It generally provides that an APP entity can only use or disclose personal information for a purpose for which the information was collected (known as the 'primary purpose'), or for a secondary purpose where one of the exceptions listed in APP 6 apply. The exceptions include where 'a use or disclosure of personal information is authorised or required by Australian law' (APP 6.2(b)).
- The OAIC is regularly invited to comment on draft laws that require or authorise the collection, use or disclosure of personal information in a manner that would otherwise be inconsistent with one or more of the APPs. The effect of such laws is that one or more APPs will not apply to the use or disclosure of personal information, described in the law.
- Consistent with the approach taken in applying Article 17 in the International Covenant on Civil and Political Right (ICCPR), the OAIC's advice generally suggests consideration should be given to whether those measures are proportionate and necessary. That is, whether they appropriately balance the intrusion on individuals' privacy with the overall public policy objectives of the proposal. Additionally, when handling of individuals' personal information is authorised in the broader interests of the community, it is generally recommended that those activities be accompanied by an appropriate level of privacy safeguards and accountability. Should such a proposal be considered to appropriately balance these objectives, it is generally recommended that the scope of the proposal be drafted consistent with the spirit and intent of the Privacy Act.

Content Author: Renee Alchin

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s.22 - irrelevant

OAIC engagement with the Bill

- On 31 October 2016, the OPC contacted the AGD seeking comment on the Bill, and that request was passed onto the OAIC for comment. The OAIC was not provided with the Explanatory Memorandum. The OAIC's comments on the Bill were provided to AGD, and passed on to the OPC on 3 November 2016. The AGD did not make any substantive comments on the Bill. The comments provided to OPC, along with a response provided by DVA are at **Annexure B**.
- The OAIC's comments focused on the public interest disclosure provisions in Schedule 2 of the Bill outlined above.
- Key points made in the OAIC's comments were:
 - the OAIC noted that the disclosure of personal information under the new provisions will be permitted by the 'required or authorised by or under law' exception in APP 6.2(b).
 - The OAIC suggested that where a Bill invokes this exception in the Privacy Act, consideration should be given to whether those measures are reasonable, proportionate and necessary.
 - The OAIC referred to similar disclosure provisions in the *Social Security (Administration) Act 1999* and the *Paid Parental Leave Act 2010*, noting that rules issued under that legislation set out the matters to which the Secretary must have regard to in giving a public interest certificate and the circumstances in which a public interest certificate may be given, which include: to prevent, or lessen, a threat to the life, health or welfare of a person; for the enforcement of laws; to correct a mistake of fact; to brief a Minister or to locate missing persons etc.

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s.22 - irrelevant		Melanie Drayton

- On 7 November 2017, DVA responded by email to the OAIC that:
 - rules would be made setting out the circumstances in which the Secretary may make a public interest disclosure before the Secretary exercises that power. The nature and content of those rules is likely to be similar to the Social Security (Public Interest Certificate Guidelines) (DSS) Determination 2015, mentioned below.
 - The sorts of situations in which it is envisage the public interest disclosure power being exercised are will be set out in the EM, including: where there is a threat to life, health or welfare, for the enforcement of laws, in relation to proceeds of crime orders, mistakes of fact, research and statistical analysis, APS code of conduct investigations, misinformation in the community and provider inappropriate practices (this is subject to the Minister agreeing to make rules along these lines.)
- On 6 December 2016, the Committee invited the OAIC to make a comment on the Bill, but the OAIC inadvertently did not action this request.
- Seven submissions have been made to the Committee – see **Annexure C**. These include a lengthy submission from DVA and two submissions made by the Commonwealth Ombudsman.
- Key matters to note from the DVA submission include:
 - DVA sets out a range of efficiency-related justifications for provisions in the Bill that automate the decision-making process
 - the Committee appears to have raised concerns with DVA about the breadth of the disclosures that may be made under the Bill, including disclosures to ‘correct misinformation’ and the submission purports to respond to these concerns.
 - DVA notes that the proposed public interest disclosure provisions ‘are modelled on paragraph 208(1)(a) of the *Social Security (Administration) Act 1999*. That public interest disclosure provision has been in operation for 17 years and has operated successfully with the approval of Parliament. The Privacy Commissioner has not raised any concern about the Department of Social Services/ Department of Human Services’ provision...’
- The most recent iteration of the *Social Security (Public Interest Certificate Guidelines) (DSS) Determination 2015* were registered on FRLI in August 2015. The explanatory memorandum refers to consultation with the AGD and others, but does not specifically refer to consultation with the OAIC. We have not been able to find any engagement with the OAIC on the Determination following a brief TRIM search and discussion with Sarah Ghali. A more fulsome search could be undertaken if necessary.

Commented [SH2]: Perhaps we need to extract from DVA's submission (as an attachment to the briefing), the description of the circumstances in which DVA plans to disclose this information (including what they mean by misinformation/

Commented [RA3]: That's correct, the current guidelines are: [Social Security \(Public Interest Certificate Guidelines\) \(DSS\) Determination 2015](#)

Commented [SH4]: Renee – would you mind checking this on TRIM please? I understand that the most recent iteration of the Social Security (Public Interest Certificate Guidelines) Determination was in 2015. Sarah G might know, otherwise we can check if Mel knows

Content Author: Renee Alchin

Responsible Director: Sophie Higgins

Responsible Assistant Commissioner
Melanie Drayton

s.22 - irrelevant

- The Commonwealth Ombudsman has made a submission to the Committee in relation to automation aspects of the Bill (see below).
- They also made a second submission on the new disclosure provisions, (and notified Angelene Falk by telephone, of their intention to make such a submission). This supplementary submission recommends that any development of legislation or policy relating to disclosure of PI should occur in consultation with the OAIC.
- On 10 February 2017, a Research Officer from the Senate Committee contacted the OAIC to advise that it is holding a public hearing on Thursday, 16 February 2017 and invites the information Commissioner to appear from 5:00pm – 6:00pm. The Commonwealth Ombudsman and officers of DVA have also been invited to appear. They have provided the OAIC with specific questions in relation to the public interest disclosure provisions – which the OAIC intends to submit a written response to before the hearing, as well as other questions
- On 14 February, Melanie Drayton, Assistant Commissioner, sent a detailed response to the Committee noting that the Information Commissioner and Deputy Commissioner would appear at the public hearing; outlining the OAIC's role; attaching the OAIC's comments on the Bill that were sent to OPC (via AGD); and responding to the specific questions where possible (noting that a number of the questions may be directed to DVA). This email also noted that the OAIC would welcome the opportunity to be consulted on the draft rules to be made by the Minister in relation to public interest disclosures. The OAIC's email to the Committee is at [Annexure D](#).
- Key additional points that the Commissioner may make at the Committee meeting are:
 - The OAIC welcomes the safeguard in the Bill that before disclosing personal information about a person under the 'public interest disclosure' provisions, the Secretary must notify the person in writing of the Secretary's intention to disclose the information; give the person a reasonable opportunity to make written comments on the proposed disclosure of the information and consider any written comments made by the person. This is consistent with the emphasis on transparency in the Privacy Act, and may in some circumstances give the individual a 'reasonable expectation' that their personal information will be disclosed for a particular purpose (consistent with the 'reasonable expectation' exception in APP 6.2(a).

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s.22 - irrelevant		Melanie Drayton

- The Bill states that the Secretary must, in giving such a 'public interest certificate', act in accordance with Rules made by legislative instrument, by the Minister. The OAIC would welcome the opportunity to be consulted on any such draft rules. The OAIC will have regard to whether any permitted disclosures accord with the social license given to government to handle and disclose individuals' personal information, and are generally consistent with the spirit and intent of the Privacy Act.

Automated decision-making

- The Commonwealth Ombudsman's written submission to the Committee commented on several matters that related to automated decisions. These comments related to accuracy of automated decisions, and errors that can arise from incorrect data entry and system errors, and the fact that the onus is predominately placed on the customer to identify these errors.
- The Commonwealth Ombudsman also outlined issues with automated decisions following basic legal values of lawfulness, fairness, transparency and efficiency.
- The objects of the Privacy Act recognise that the protection of individuals' privacy is balanced with the interests of entities in carrying out their functions or activities (s 3(b)). The OAIC acknowledges that automated decision-making is likely to provide a number of advantages for DVA and for Australians accessing their services, including associated with reduced costs and enhanced efficiency. However, consideration should be given at an early stage, to ensuring that any privacy impacts are identified and minimised to the extent possible, and that an integrated approach to privacy management is taken.

Content Author: Renee Alchin	Responsible Director: Sophie Higgins	Responsible Assistant Commissioner
s.22 - irrelevant		Melanie Drayton

- Some key privacy considerations that may arise where decision-making is automated include:
 - whether the entity has taken reasonable steps to implement practices, procedures and systems to ensure that the entity complies with the APPs and to enable the entity to deal with inquiries and complaints from individuals about the entity's compliance with the APPs (APP 1.2). Entities will be better placed to meet these obligations if they embed privacy protections in the design of the information handling practice at an early stage.
 - whether the entity has taken reasonable steps to ensure that the personal information it collects, uses and discloses is accurate, up-to-date and complete (as required by APP 10). This may be particularly challenging where the onus is on the individual to identify errors or discrepancies with automated decisions.
 - whether the entity has processes in place to allow the individual to request access to, and correction of his or her personal information used in automated processes (APPs 11 and 12).
- The OAIC also suggests consideration be given to the privacy risks arising from personal information processed as part of an automated decision-making process. For example, due to the higher privacy risks involved with handling sensitive information, the OAIC would generally suggest greater caution be exercised when considering whether this information should be subject to automated processing. The OAIC welcomes the DVA's comments in its written submission to the Committee that 'in regards to automated debt collection, the Department does not intend this provision for this purpose'. This intent could be included in the Bill or the Explanatory Memorandum.
- DVA could conduct a privacy impact assessment (PIA) of the amendments proposed by the Bill that have privacy implications to identify and assess the privacy risks associated with the amendments. A PIA is a written assessment which may assist in identifying the privacy impacts of the proposal, and provides an opportunity to set out any recommendations for managing, minimising or eliminating those impacts.

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Responsible Director: Sophie Higgins

Responsible Assistant Commissioner
Melanie Drayton

s.22 - irrelevant

Commissioner brief: Briefing notes – Inquiry into the Digital Readiness Bill – Senate Foreign Affairs, Defence and Trade Committee

Type: **Commissioner brief**

Purpose: **Senate Foreign Affairs, Defence and Trade Committee public hearing inquiry into the Digital Readiness Bill**

For: **The Australian Information Commissioner**

Key points

1. The Veteran's Affairs Legislation Amendment (Digital Readiness) Bill 2016 seeks to amend the *Veteran's Entitlements Act 1986* (VEA), *Military Rehabilitation and Compensation Act 2004* (MRCA) and the *Safety Rehabilitation and Compensation (Defence-related claims) Act 1988* (DRCA). The Bill and Explanatory memorandum are at **Annexure A**.
2. On 31 October 2016, the Attorney General's Department Information Law Unit (AGD) requested that the OAIC provide any comments on the Bill, and these would be provided to the Office of Parliamentary Counsel (OPC). On 3 November 2016, the OAIC provided comments on the Bill to the AGD, which AGD passed on to OPC and then to Department of Veterans' Affairs (DVA).
3. The OAIC's comments focused on the public interest disclosure provisions in Schedule 2 of the Bill. These authorise the Secretary to make disclosures that the Secretary certifies as 'necessary in the public interest', and invoke the 'required or authorised' by law exception in APP 6 in the Privacy Act. The AGD did not make any substantive comments on the Bill.
4. The Bill states that the Secretary must, in giving such a 'public interest certificate', act in accordance with Rules made by legislative instrument, by the Minister. While not included in the OAIC's comments to OPC, the OAIC's email to the Committee on 14 February noted that the OAIC would welcome the opportunity to be consulted on any such draft rules. The OAIC will have regard to whether any permitted disclosures accord with the social license given to government to handle and disclose individuals' personal information, and are generally consistent with the spirit and intent of the Privacy Act.
5. Even where APP 6 does not apply – by reason that a disclosure is 'authorised by law' – most of the other APPs would continue to apply to that personal information when it is held by the agency or organisation (such as the requirements in relation to transparency, data quality, security, and rights to access and correction).

Content Author: Renee Alchin	Responsible Director: Sophie Higgins	Responsible Assistant Commissioner
s.22 - irrelevant		Melanie Drayton

6. The OAIC welcomes the safeguard in the Bill that before disclosing personal information about a person under the 'public interest disclosure' provisions, the Secretary must notify the person in writing of the Secretary's intention to disclose the information; give the person a reasonable opportunity to make written comments on the proposed disclosure of the information and consider any written comments made by the person. This is consistent with the emphasis on transparency in the Privacy Act, and may in some circumstances give the individual a 'reasonable expectation' that their personal information will be disclosed for a particular purpose.
7. The OAIC acknowledges that automated decision-making is likely to provide a number of advantages for DVA and for Australians accessing their services, particularly in regards to efficiencies. However, the OAIC would encourage consideration to be given at an early stage, to ensuring that any privacy impacts are identified and minimised to the extent possible, and that an integrated approach to privacy management is taken.

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Background – the Digital Readiness Bill

- The Bill will insert a provision into the VEA, MRCA, and DRCA to enable the Secretary to authorise the use of computer programmes to make decisions and determinations, exercise powers or comply with obligations etc. under these Acts (Schedule 1).
- Safeguards in the Bill include that the Secretary may make a decision or determination in substitution for a decision or determination made by a computer program, if satisfied that the decision or determination is incorrect (Schedule 1).
- The Bill will also insert a provision into each of these Acts that give the Secretary broad disclosure powers: ‘the Secretary may, if the Secretary certifies that it is necessary in the public interest to do so in a particular case or class of cases, disclose any information obtained by any person in the performance of that person’s duties under this Act to such persons and for such purposes as the Secretary determines’ (Schedule 2).
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 - the Secretary must act in accordance with rules that the Minister makes and the Minister cannot delegate his or her rule making power
 - before disclosing information, the Secretary must notify the person concerned in writing about the proposed disclosure and consider any written comments made by the person, and
 - unless the Secretary complies with the above notification requirements before disclosing personal information, he or she commits an offence, punishable by 60 penalty units (Schedule 2).
- The Explanatory Memorandum to the Bill gives as examples of circumstances in which it might be appropriate for the Secretary to disclose such information as including ‘where there is a threat to life, health or welfare, for the enforcement of laws, in relation to proceeds of crime orders, mistakes of fact, research and statistical analysis, APS code of conduct investigations, misinformation in the community and provider inappropriate practices’ (p. 11).

OAIC’s responsibilities to examine proposed enactments impact privacy

- A range of the OAIC’s responsibilities involve examining proposals that may restrict the exercise of individuals’ privacy protections in favour of another public interest objective.
- The Privacy Act recognises that the protection of individuals’ privacy, through the protection of their personal information, is not an absolute right. Rather, those interests

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- This balancing is reflected in the exceptions to a number of the APPs, which except from the operation of those APPs, certain information handling practices considered to be in the public interest when balanced with the interest in protecting an individual's privacy.

Disclosures of personal information

- APP 6 outlines when an APP entity may use or disclose personal information. It generally provides that an APP entity can only use or disclose personal information for a purpose for which the information was collected (known as the 'primary purpose'), or for a secondary purpose where one of the exceptions listed in APP 6 apply. The exceptions include where 'a use or disclosure of personal information is authorised or required by Australian law' (APP 6.2(b)).
- The OAIC is regularly invited to comment on draft laws that require or authorise the collection, use or disclosure of personal information in a manner that would otherwise be inconsistent with one or more of the APPs. The effect of such laws is that one or more APPs will not apply to the use or disclosure of personal information, described in the law.
- Consistent with the approach taken in applying Article 17 in the International Covenant on Civil and Political Right (ICCPR), the OAIC's advice generally suggests consideration should be given to whether those measures are proportionate and necessary. That is, whether they appropriately balance the intrusion on individuals' privacy with the overall public policy objectives of the proposal. Additionally, when handling of individuals' personal information is authorised in the broader interests of the community, it is generally recommended that those activities be accompanied by an appropriate level of privacy safeguards and accountability. Should such a proposal be considered to appropriately balance these objectives, it is generally recommended that the scope of the proposal be drafted consistent with the spirit and intent of the Privacy Act.
- It should also be noted that even where APP 6 does not apply – by reason that a disclosure is 'authorised by law' - most of the other APPs would continue to apply to that personal information when it is held by the agency or organisation (such as the requirements in relation to transparency, data quality, security, and rights to access and correction).

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OAIC engagement with the Bill

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- The OAIC's comments focused on the public interest disclosure provisions in Schedule 2 of the Bill outlined above.
- Key points made in the OAIC's comments were:
 - the OAIC noted that the disclosure of personal information under the new provisions will be permitted by the 'required or authorised by or under law' exception in APP 6.2(b).
 - The OAIC suggested that where a Bill invokes this exception in the Privacy Act, consideration should be given to whether those measures are reasonable, proportionate and necessary.
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 - The sorts of situations in which it is envisage the public interest disclosure power being exercised are will be set out in the EM, including: where there is a threat to life, health or welfare, for the enforcement of laws, in relation to proceeds of crime orders, mistakes of fact, research and statistical analysis, APS code of conduct investigations, misinformation in the community and provider inappropriate practices (this is subject to the Minister agreeing to make rules along these lines.)
- On 6 December 2016, the Committee invited the OAIC to make a comment on the Bill, but the OAIC inadvertently did not action this request.
- Seven submissions have been made to the Committee – see **Annexure C**. These include a lengthy submission from DVA and two submissions made by the Commonwealth Ombudsman.
- Key matters to note from the DVA submission include:
 - DVA sets out a range of efficiency-related justifications for provisions in the Bill that automate the decision-making process
 - the Committee appears to have raised concerns with DVA about the breadth of the disclosures that may be made under the Bill, including disclosures to ‘correct misinformation’ and the submission purports to respond to these concerns.
 - DVA notes that the proposed public interest disclosure provisions ‘are modelled on paragraph 208(1)(a) of the *Social Security (Administration) Act 1999*. That public interest disclosure provision has been in operation for 17 years and has operated successfully with the approval of Parliament. The Privacy Commissioner has not raised any concern about the Department of Social Services/ Department of Human Services’ provision...’
- The most recent iteration of the *Social Security (Public Interest Certificate Guidelines) (DSS) Determination 2015* were registered on FRLI in August 2015. The explanatory memorandum refers to consultation with the AGD and others, but does not specifically refer to consultation with the OAIC. We have not been able to find any engagement with the OAIC on the Determination following a brief TRIM search and discussion with Sarah Ghali. A more fulsome search could be undertaken if necessary.

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- On 10 February 2017, a Research Officer from the Senate Committee contacted the OAIC to advise that it is holding a public hearing on Thursday, 16 February 2017 and invites the information Commissioner to appear from 5:00pm – 6:00pm. The Commonwealth Ombudsman and officers of DVA have also been invited to appear. They have provided the OAIC with specific questions in relation to the public interest disclosure provisions – which the OAIC intends to submit a written response to before the hearing, as well as other questions
- On 14 February, Melanie Drayton, Assistant Commissioner, sent a detailed response to the Committee noting that the Information Commissioner and Deputy Commissioner would appear at the public hearing; outlining the OAIC's role; attaching the OAIC's comments on the Bill that were sent to OPC (via AGD); and responding to the specific questions where possible (noting that a number of the questions may be directed to DVA). This email also noted that the OAIC would welcome the opportunity to be consulted on the draft rules to be made by the Minister in relation to public interest disclosures. The OAIC's email to the Committee is at **Annexure D**.
- Key additional points that the Commissioner may make at the Committee meeting are:
 - The OAIC welcomes the safeguard in the Bill that before disclosing personal information about a person under the 'public interest disclosure' provisions, the Secretary must notify the person in writing of the Secretary's intention to disclose the information; give the person a reasonable opportunity to make written comments on the proposed disclosure of the information and consider any written comments made by the person. This is consistent with the emphasis on transparency in the Privacy Act, and may in some circumstances give the individual a 'reasonable expectation' that their personal information will be disclosed for a particular purpose (consistent with the 'reasonable expectation' exception in APP 6.2(a).

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Automated decision-making

- The Commonwealth Ombudsman's written submission to the Committee commented on several matters that related to automated decisions. These comments related to accuracy of automated decisions, and errors that can arise from incorrect data entry and system errors, and the fact that the onus is predominately placed on the customer to identify these errors.
- The Commonwealth Ombudsman also outlined issues with automated decisions following basic legal values of lawfulness, fairness, transparency and efficiency.
- The objects of the Privacy Act recognise that the protection of individuals' privacy is balanced with the interests of entities in carrying out their functions or activities (s 3(b)). The OAIC acknowledges that automated decision-making is likely to provide a number of advantages for DVA and for Australians accessing their services, including associated with reduced costs and enhanced efficiency. However, consideration should be given at an early stage, to ensuring that any privacy impacts are identified and minimised to the extent possible, and that an integrated approach to privacy management is taken.

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- Some key privacy considerations that may arise where decision-making is automated include:
 - whether the entity has taken reasonable steps to implement practices, procedures and systems to ensure that the entity complies with the APPs and to enable the entity to deal with inquiries and complaints from individuals about the entity's compliance with the APPs (APP 1.2). Entities will be better placed to meet these obligations if they embed privacy protections in the design of the information handling practice at an early stage.
 - whether the entity has taken reasonable steps to ensure that the personal information it collects, uses and discloses is accurate, up-to-date and complete (as required by APP 10). This may be particularly challenging where the onus is on the individual to identify errors or discrepancies with automated decisions.
 - whether the entity has processes in place to allow the individual to request access to, and correction of his or her personal information used in automated processes (APPs 11 and 12).
- The OAIC also suggests consideration be given to the privacy risks arising from personal information processed as part of an automated decision-making process. For example, due to the higher privacy risks involved with handling sensitive information, the OAIC would generally suggest greater caution be exercised when considering whether this information should be subject to automated processing. The OAIC welcomes the DVA's comments in its written submission to the Committee that 'in regards to automated debt collection, the Department does not intend this provision for this purpose'. This intent could be included in the Bill or the Explanatory Memorandum.
- DVA could conduct a privacy impact assessment (PIA) of the amendments proposed by the Bill that have privacy implications to identify and assess the privacy risks associated with the amendments. A PIA is a written assessment which may assist in identifying the privacy impacts of the proposal, and provides an opportunity to set out any recommendations for managing, minimising or eliminating those impacts.

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Commissioner brief: Briefing notes – Inquiry into the Digital Readiness Bill – Senate Foreign Affairs, Defence and Trade Committee

Type: **Commissioner brief**

Purpose: **Senate Foreign Affairs, Defence and Trade Committee public hearing inquiry into the Digital Readiness Bill**

For: **The Australian Information Commissioner**

Key points

1. The Veteran's Affairs Legislation Amendment (Digital Readiness) Bill 2016 seeks to amend the *Veteran's Entitlements Act 1986* (VEA), *Military Rehabilitation and Compensation Act 2004* (MRCA) and the *Safety Rehabilitation and Compensation (Defence-related claims) Act 1988* (DRCA). The Bill and Explanatory memorandum are at **Annexure A**.
2. On 31 October 2016, the Attorney General's Department Information Law Unit (AGD) requested that the OAIC provide any comments on the Bill, and these would be provided to the Office of Parliamentary Counsel (OPC). On 3 November 2016, the OAIC provided comments on the Bill to the AGD, which AGD passed on to OPC and then to Department of Veterans' Affairs (DVA).
3. The OAIC's comments focused on the public interest disclosure provisions in Schedule 2 of the Bill. These authorise the Secretary to make disclosures that the Secretary certifies as 'necessary in the public interest', and invoke the 'required or authorised' by law exception in APP 6 in the Privacy Act. The AGD did not make any substantive comments on the Bill.
4. The Commonwealth Ombudsman outlined in their second submission on the disclosure provisions (and also notified Angelene Falk by telephone of their intention to make such a submission) that any development of legislation or policy relating to the disclosure of personal information should occur in consultation with the OAIC.
5. The Bill states that the Secretary must, in giving such a 'public interest certificate', act in accordance with Rules made by legislative instrument, by the Minister. While not included in the OAIC's comments to OPC, the OAIC's email to the Committee on 14 February noted that the OAIC would welcome the opportunity to be consulted on any such draft rules. The OAIC will have regard to whether any permitted disclosures accord with the social license given to government to handle and disclose individuals' personal information, and are generally consistent with the spirit and intent of the Privacy Act.

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s.22 - irrelevant		Melanie Drayton

6. Even where the disclosure is required or authorised by law under APP 6, the APPs will still govern the Department of Veteran's Affairs (DVA) information handling practices and would continue to apply to that personal information held by the DVA (such as the requirements in relation to transparency, data quality, security, and rights to access and correction).
7. The OAIC welcomes the safeguard in the Bill that before disclosing personal information about a person under the 'public interest disclosure' provisions, the Secretary must notify the person in writing of the Secretary's intention to disclose the information; give the person a reasonable opportunity to make written comments on the proposed disclosure of the information and consider any written comments made by the person. This is consistent with the emphasis on transparency in the Privacy Act, and may in some circumstances give the individual a 'reasonable expectation' that their personal information will be disclosed for a particular purpose.
8. The OAIC acknowledges that automated decision-making is likely to provide a number of advantages for DVA and for Australians accessing their services, particularly in regards to efficiencies. However, the OAIC would encourage consideration to be given at an early stage, to ensuring that any privacy impacts are identified and minimised to the extent possible, and that an integrated approach to privacy management is taken.

Background – the Digital Readiness Bill

- The Bill will insert a provision into the VEA, MRCA, and DRCA to enable the Secretary to authorise the use of computer programmes to make decisions and determinations, exercise powers or comply with obligations etc. under these Acts (Schedule 1).
- Safeguards in the Bill include that the Secretary may make a decision or determination in substitution for a decision or determination made by a computer program, if satisfied that the decision or determination is incorrect (Schedule 1).
- The Bill will also insert a provision into each of these Acts that give the Secretary broad disclosure powers: 'the Secretary may, if the Secretary certifies that it is necessary in the public interest to do so in a particular case or class of cases, disclose any information obtained by any person in the performance of that person's duties under this Act to such persons and for such purposes as the Secretary determines' (Schedule 2).

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- Safeguards in the Bill include that:
 - the power cannot be delegated by the Secretary to anyone
 - the Secretary must act in accordance with rules that the Minister makes and the Minister cannot delegate his or her rule making power
 - before disclosing information, the Secretary must notify the person concerned in writing about the proposed disclosure and consider any written comments made by the person, and
 - unless the Secretary complies with the above notification requirements before disclosing personal information, he or she commits an offence, punishable by 60 penalty units (Schedule 2).
- The Explanatory Memorandum to the Bill gives as examples of circumstances in which it might be appropriate for the Secretary to disclose such information as including 'where there is a threat to life, health or welfare, for the enforcement of laws, in relation to proceeds of crime orders, mistakes of fact, research and statistical analysis, APS code of conduct investigations, misinformation in the community and provider inappropriate practices' (p. 11).
- The Bill also inserts three information sharing provisions in the DRCA between the Military Rehabilitation and Compensation Commission,

OAIC's responsibilities to examine proposed enactments impact privacy

- A range of the OAIC's responsibilities involve examining proposals that may restrict the exercise of individuals' privacy protections in favour of another public interest objective.
- The Privacy Act recognises that the protection of individuals' privacy, through the protection of their personal information, is not an absolute right. Rather, those interests must be balanced with the broader interest of the community in ensuring that APP entities are able to carry out their legitimate functions and activities.
- This balancing is reflected in the exceptions to a number of the APPs, which except from the operation of those APPs, certain information handling practices considered to be in the public interest when balanced with the interest in protecting an individual's privacy.

Disclosures of personal information

- APP 6 outlines when an APP entity may use or disclose personal information. It generally provides that an APP entity can only use or disclose personal information for a purpose for which the information was collected (known as the 'primary purpose'), or for a

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s.22 - irrelevant		Melanie Drayton

secondary purpose where one of the exceptions listed in APP 6 apply. The exceptions include where 'a use or disclosure of personal information is authorised or required by Australian law' (APP 6.2(b)).

- The OAIC is regularly invited to comment on draft laws that require or authorise the collection, use or disclosure of personal information in a manner that would otherwise be inconsistent with one or more of the APPs. The effect of such laws is that one or more APPs will not apply to the use or disclosure of personal information, described in the law.
- Consistent with the approach taken in applying Article 17 in the International Covenant on Civil and Political Right (ICCPR), the OAIC's advice generally suggests consideration should be given to whether those measures are proportionate and necessary. That is, whether they appropriately balance the intrusion on individuals' privacy with the overall public policy objectives of the proposal. Additionally, when handling of individuals' personal information is authorised in the broader interests of the community, it is generally recommended that those activities be accompanied by an appropriate level of privacy safeguards and accountability. Should such a proposal be considered to appropriately balance these objectives, it is generally recommended that the scope of the proposal be drafted consistent with the spirit and intent of the Privacy Act.
- Even where the disclosure is required or authorised by law under APP 6, the APPs will still govern the Department of Veteran's Affairs (DVA) information handling practices and would continue to apply to that personal information held by the DVA (such as the requirements in relation to transparency, data quality, security, and rights to access and correction).

1.

OAIC engagement with the Bill

- On 31 October 2016, the OPC contacted the AGD seeking comment on the Bill, and that request was passed onto the OAIC for comment. The OAIC was not provided with the Explanatory Memorandum. The OAIC's comments on the Bill were provided to AGD, and passed on to the OPC on 3 November 2016. The AGD did not make any substantive comments on the Bill. The comments provided to OPC, along with a response provided by DVA are at **Annexure B**.

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s.22 - irrelevant		Melanie Drayton

- The OAIC's comments focused on the public interest disclosure provisions in Schedule 2 of the Bill outlined above.
- Key points made in the OAIC's comments were:
 - the OAIC noted that the disclosure of personal information under the new provisions will be permitted by the 'required or authorised by or under law' exception in APP 6.2(b).
 - The OAIC suggested that where a Bill invokes this exception in the Privacy Act, consideration should be given to whether those measures are reasonable, proportionate and necessary.
 - The OAIC referred to similar disclosure provisions in the *Social Security (Administration) Act 1999* and the *Paid Parental Leave Act 2010*, noting that rules issued under that legislation set out the matters to which the Secretary must have regard to in giving a public interest certificate and the circumstances in which a public interest certificate may be given, which include: to prevent, or lessen, a threat to the life, health or welfare of a person; for the enforcement of laws; to correct a mistake of fact; to brief a Minister or to locate missing persons etc.
- On 7 November 2017, DVA responded by email to the OAIC that:
 - rules would be made setting out the circumstances in which the Secretary may make a public interest disclosure before the Secretary exercises that power. The nature and content of those rules is likely to be similar to the Social Security (Public Interest Certificate Guidelines) (DSS) Determination 2015, mentioned below.
 - The sorts of situations in which it is envisage the public interest disclosure power being exercised are will be set out in the EM, including: where there is a threat to life, health or welfare, for the enforcement of laws, in relation to proceeds of crime orders, mistakes of fact, research and statistical analysis, APS code of conduct investigations, misinformation in the community and provider inappropriate practices (this is subject to the Minister agreeing to make rules along these lines.)
- On 6 December 2016, the Committee invited the OAIC to make a comment on the Bill, but the OAIC inadvertently did not action this request. Melanie has apologised to the Committee for this oversight.
- Seven submissions have been made to the Committee – see **Annexure C**. These include a lengthy submission from DVA and two submissions made by the Commonwealth Ombudsman.

Content Author: Renee Alchin	Responsible Director: Sophie Higgins	Responsible Assistant Commissioner
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- Key matters to note from the DVA submission include:
 - DVA sets out a range of efficiency-related justifications for provisions in the Bill that automate the decision-making process
 - the Committee appears to have raised concerns with DVA about the breadth of the disclosures that may be made under the Bill, including disclosures to ‘correct misinformation’ and the submission purports to respond to these concerns.
 - DVA notes that the proposed public interest disclosure provisions ‘are modelled on paragraph 208(1)(a) of the *Social Security (Administration) Act 1999*. That public interest disclosure provision has been in operation for 17 years and has operated successfully with the approval of Parliament. The Privacy Commissioner has not raised any concern about the Department of Social Services/ Department of Human Services’ provision...’
- The most recent iteration of the *Social Security (Public Interest Certificate Guidelines) (DSS) Determination 2015* were registered on FRLI in August 2015. The explanatory memorandum refers to consultation with the AGD and others, but does not specifically refer to consultation with the OAIC. We have not been able to find any engagement with the OAIC on the Determination following a brief TRIM search and discussion with Sarah Ghali. A more fulsome search could be undertaken if necessary.
- The Commonwealth Ombudsman has made a submission to the Committee in relation to automation aspects of the Bill (see below).
- They also made a second submission on the new disclosure provisions, (and notified Angelene Falk by telephone, of their intention to make such a submission). This supplementary submission recommends that any development of legislation or policy relating to disclosure of PI should occur in consultation with the OAIC.
- On 10 February 2017, a Research Officer from the Senate Committee contacted the OAIC to advise that it is holding a public hearing on Thursday, 16 February 2017 and invites the information Commissioner to appear from 5:00pm – 6:00pm. The Commonwealth Ombudsman and officers of DVA have also been invited to appear. They have provided the OAIC with specific questions in relation to the public interest disclosure provisions – which the OAIC intends to submit a written response to before the hearing, as well as other questions

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- On 14 February, Melanie Drayton, Assistant Commissioner, sent a detailed response to the Committee noting that the Information Commissioner and Deputy Commissioner would appear at the public hearing; outlining the OAIC's role; attaching the OAIC's comments on the Bill that were sent to OPC (via AGD); and responding to the specific questions where possible (noting that a number of the questions may be directed to DVA). This email also noted that the OAIC would welcome the opportunity to be consulted on the draft rules to be made by the Minister in relation to public interest disclosures. The OAIC's email to the Committee is at **Annexure D**. The OAIC's answers to the Committee's questions are at **Annexure E**.
- Key additional points that the Commissioner may make at the Committee meeting are:
 - The OAIC welcomes the safeguard in the Bill that before disclosing personal information about a person under the 'public interest disclosure' provisions, the Secretary must notify the person in writing of the Secretary's intention to disclose the information; give the person a reasonable opportunity to make written comments on the proposed disclosure of the information and consider any written comments made by the person. This is consistent with the emphasis on transparency in the Privacy Act, and may in some circumstances give the individual a 'reasonable expectation' that their personal information will be disclosed for a particular purpose (consistent with the 'reasonable expectation' exception in APP 6.2(a).
 - The Bill states that the Secretary must, in giving such a 'public interest certificate', act in accordance with Rules made by legislative instrument, by the Minister. The OAIC would welcome the opportunity to be consulted on any such draft rules. The OAIC will have regard to whether any permitted disclosures accord with the social license given to government to handle and disclose individuals' personal information, and are generally consistent with the spirit and intent of the Privacy Act.

Automated decision-making

- The Commonwealth Ombudsman's written submission to the Committee commented on several matters that related to automated decisions. These comments related to accuracy of automated decisions, and errors that can arise from incorrect data entry and system errors, and the fact that the onus is predominately placed on the customer to identify these errors.

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- The Commonwealth Ombudsman also outlined issues with automated decisions following basic legal values of lawfulness, fairness, transparency and efficiency.
- The objects of the Privacy Act recognise that the protection of individuals' privacy is balanced with the interests of entities in carrying out their functions or activities (s 3(b)). The OAIC acknowledges that automated decision-making is likely to provide a number of advantages for DVA and for Australians accessing their services, including associated with reduced costs and enhanced efficiency. However, consideration should be given at an early stage, to ensuring that any privacy impacts are identified and minimised to the extent possible, and that an integrated approach to privacy management is taken.
- Some key privacy considerations that may arise where decision-making is automated include:
 - whether the entity has taken reasonable steps to implement practices, procedures and systems to ensure that the entity complies with the APPs and to enable the entity to deal with inquiries and complaints from individuals about the entity's compliance with the APPs (APP 1.2). Entities will be better placed to meet these obligations if they embed privacy protections in the design of the information handling practice at an early stage.
 - whether the entity has taken reasonable steps to ensure that the personal information it collects, uses and discloses is accurate, up-to-date and complete (as required by APP 10). This may be particularly challenging where the onus is on the individual to identify errors or discrepancies with automated decisions.
 - whether the entity has processes in place to allow the individual to request access to, and correction of his or her personal information used in automated processes (APPs 11 and 12).
- The OAIC also suggests consideration be given to the privacy risks arising from personal information processed as part of an automated decision-making process. For example, due to the higher privacy risks involved with handling sensitive information, the OAIC would generally suggest greater caution be exercised when considering whether this information should be subject to automated processing. The OAIC welcomes the DVA's comments in its written submission to the Committee that 'in regards to automated debt collection, the Department does not intend this provision for this purpose'. This intent could be included in the Bill or the Explanatory Memorandum.

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- DVA could conduct a privacy impact assessment (PIA) of the amendments proposed by the Bill that have privacy implications to identify and assess the privacy risks associated with the amendments. A PIA is a written assessment which may assist in identifying the privacy impacts of the proposal, and provides an opportunity to set out any recommendations for managing, minimising or eliminating those impacts.

Commissioner brief

Content Author: Renee Alchin	Responsible Director: Sophie Higgins	Responsible Assistant Commissioner
s.22 - irrelevant		Melanie Drayton

Commissioner brief: Briefing notes – Inquiry into the Digital Readiness Bill – Senate Foreign Affairs, Defence and Trade Committee

Type: **Commissioner brief**

Purpose: **Senate Foreign Affairs, Defence and Trade Committee public hearing inquiry into the Digital Readiness Bill**

For: **The Australian Information Commissioner**

Key points

1. The Veteran's Affairs Legislation Amendment (Digital Readiness) Bill 2016 seeks to amend the *Veteran's Entitlements Act 1986* (VEA), *Military Rehabilitation and Compensation Act 2004* (MRCA) and the *Safety Rehabilitation and Compensation (Defence-related claims) Act 1988* (DRCA). The Bill and Explanatory memorandum are at **Annexure A**.
2. On 31 October 2016, the Attorney General's Department Information Law Unit (AGD) requested that the OAIC provide any comments on the Bill, and these would be provided to the Office of Parliamentary Counsel (OPC). On 3 November 2016, the OAIC provided comments on the Bill to the AGD, which AGD passed on to OPC and then to Department of Veterans' Affairs (DVA).
3. The OAIC's comments focused on the public interest disclosure provisions in Schedule 2 of the Bill. These authorise the Secretary to make disclosures that the Secretary certifies as 'necessary in the public interest', and invoke the 'required or authorised' by law exception in APP 6 in the Privacy Act. The AGD did not make any substantive comments on the Bill.
4. The Commonwealth Ombudsman outlined in their second submission on the disclosure provisions (and also notified Angelene Falk by telephone of their intention to make such a submission) that any development of legislation or policy relating to the disclosure of personal information should occur in consultation with the OAIC.
5. The Bill states that the Secretary must, in giving such a 'public interest certificate', act in accordance with Rules made by legislative instrument, by the Minister. While not included in the OAIC's comments to OPC, the OAIC's email to the Committee on 14 February noted that the OAIC would welcome the opportunity to be consulted on any such draft rules. The OAIC will have regard to whether any permitted disclosures accord with the social license given to government to handle and disclose individuals' personal information, and are generally consistent with the spirit and intent of the Privacy Act.

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6. Even where the disclosure is required or authorised by law under APP 6, the APPs will still govern the Department of Veteran's Affairs (DVA) information handling practices and would continue to apply to that personal information held by the DVA (such as the requirements in relation to transparency, data quality, security, and rights to access and correction).
7. The OAIC welcomes the safeguard in the Bill that before disclosing personal information about a person under the 'public interest disclosure' provisions, the Secretary must notify the person in writing of the Secretary's intention to disclose the information; give the person a reasonable opportunity to make written comments on the proposed disclosure of the information and consider any written comments made by the person. This is consistent with the emphasis on transparency in the Privacy Act, and may in some circumstances give the individual a 'reasonable expectation' that their personal information will be disclosed for a particular purpose.
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Background – the Digital Readiness Bill

- The Bill will insert a provision into the VEA, MRCA, and DRCA to enable the Secretary to authorise the use of computer programmes to make decisions and determinations, exercise powers or comply with obligations etc. under these Acts (Schedule 1).
- Safeguards in the Bill include that the Secretary may make a decision or determination in substitution for a decision or determination made by a computer program, if satisfied that the decision or determination is incorrect (Schedule 1).
- The Bill will also insert a provision into each of these Acts that give the Secretary broad disclosure powers: 'the Secretary may, if the Secretary certifies that it is necessary in the public interest to do so in a particular case or class of cases, disclose any information obtained by any person in the performance of that person's duties under this Act to such persons and for such purposes as the Secretary determines' (Schedule 2).

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 - unless the Secretary complies with the above notification requirements before disclosing personal information, he or she commits an offence, punishable by 60 penalty units (Schedule 2).
- The Explanatory Memorandum to the Bill gives as examples of circumstances in which it might be appropriate for the Secretary to disclose such information as including 'where there is a threat to life, health or welfare, for the enforcement of laws, in relation to proceeds of crime orders, mistakes of fact, research and statistical analysis, APS code of conduct investigations, misinformation in the community and provider inappropriate practices' (p. 11).
- The Bill also inserts three information sharing provisions in the DRCA between the Military Rehabilitation and Compensation Commission and the Secretary of the Department of Defence or the Chief of the Defence Force.

OAIC's responsibilities to examine proposed enactments impact privacy

- A range of the OAIC's responsibilities involve examining proposals that may restrict the exercise of individuals' privacy protections in favour of another public interest objective.
- The Privacy Act recognises that the protection of individuals' privacy, through the protection of their personal information, is not an absolute right. Rather, those interests must be balanced with the broader interest of the community in ensuring that APP entities are able to carry out their legitimate functions and activities.
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- APP 6 outlines when an APP entity may use or disclose personal information. It generally provides that an APP entity can only use or disclose personal information for a purpose

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for which the information was collected (known as the 'primary purpose'), or for a secondary purpose where one of the exceptions listed in APP 6 apply. The exceptions include where 'a use or disclosure of personal information is authorised or required by Australian law' (APP 6.2(b)).

- The OAIC is regularly invited to comment on draft laws that require or authorise the collection, use or disclosure of personal information in a manner that would otherwise be inconsistent with one or more of the APPs. The effect of such laws is that one or more APPs will not apply to the use or disclosure of personal information, described in the law.
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- Seven submissions have been made to the Committee – see **Annexure C**. These include a lengthy submission from DVA and two submissions made by the Commonwealth Ombudsman.

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- Key additional points that the Commissioner may make at the Committee meeting are:
 - The OAIC welcomes the safeguard in the Bill that before disclosing personal information about a person under the 'public interest disclosure' provisions, the Secretary must notify the person in writing of the Secretary's intention to disclose the information; give the person a reasonable opportunity to make written comments on the proposed disclosure of the information and consider any written comments made by the person. This is consistent with the emphasis on transparency in the Privacy Act, and may in some circumstances give the individual a 'reasonable expectation' that their personal information will be disclosed for a particular purpose (consistent with the 'reasonable expectation' exception in APP 6.2(a).
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- The Commonwealth Ombudsman's written submission to the Committee commented on several matters that related to automated decisions. These comments related to accuracy of automated decisions, and errors that can arise from incorrect data entry and system errors, and the fact that the onus is predominately placed on the customer to identify these errors.

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- Some key privacy considerations that may arise where decision-making is automated include:
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Commissioner brief

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Commissioner brief: Opening statement talking points for Australian Information Commissioner

Type: **Commissioner brief**

Purpose: **Senate Foreign Affairs, Defence and Trade Committee public hearing inquiry into the Digital Readiness Bill**

For: **The Australian Information Commissioner**

- Thank you for the opportunity to appear before the Committee today in relation to the Veteran's Affairs Legislation Amendment (Digital Readiness and Other Measures) Bill 2016.
- As the Australian Information Commissioner and Australian Privacy Commissioner, I am responsible for ensuring compliance with the Privacy Act, and promoting access to government information through the Freedom of Information Act.
- The Privacy Act regulates the handling of personal information by most Australian Government agencies and many private sector organisations. The Freedom of Information Act supports an open government agenda and the objects of that Act make it clear that government held information is to be managed for public purposes and is a national resource.
- The Privacy Act recognises that the protection of individual's privacy, through the protection of their personal information, is not an absolute right. Rather, those interests must be balanced with the broader interest of the community in ensuring that APP entities are able to carry out their legitimate functions and activities.
- This balancing is reflected in the exceptions to a number of the Australian Privacy Principles, which except from the operation of those APPs, certain information handling practices considered to be in the public interest when balanced with the interest in protecting an individual's privacy.

- Exceptions cover a range of matters including where a use or disclosure of personal information is authorised or required by Australian law or where an entity reasonably believes that a use or disclosure is reasonably necessary for an enforcement related activity conducted by an enforcement body.
- The OAIC's responsibilities include examining proposals that may restrict the exercise of individuals' privacy protections in favour of another public interest objective.
- My Office had the opportunity to provide comments on draft versions of the Bill, with comments provided on 3 November 2016. These comments focused on the public interest disclosure provisions in Schedule 2 of the Bill which permit certain disclosures and involve the 'required or authorised by law exception in APP 6 in the Privacy Act. I understand my Office has provided a copy of these comments to the Senate Committee inquiry for consideration.
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Commissioner brief: Opening statement talking points for Australian Information Commissioner

Type: Commissioner brief

Purpose: Senate Foreign Affairs, Defence and Trade Committee public hearing inquiry into the Digital Readiness Bill

For: The Australian Information Commissioner

- Thank you for the opportunity to appear before the Committee today in relation to the Veteran's Affairs Legislation Amendment (Digital Readiness and Other Measures) Bill 2016.
- As the Australian Information Commissioner and Australian Privacy Commissioner, I am responsible for ensuring compliance with the Privacy Act, and promoting access to government information through the Freedom of Information Act.
- The Privacy Act regulates the handling of personal information by most Australian Government agencies and many private sector organisations. The Freedom of Information Act supports an open government agenda and the objects of that Act make it clear that government held information is to be managed for public purposes and is a national resource.
- The Privacy Act recognises that the protection of individual's privacy, through the protection of their personal information, is not an absolute right. Rather, those interests must be balanced with the broader interest of the community in ensuring that APP entities are able to carry out their legitimate functions and activities.
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- There are, however, a few issues which I believe warrant further consideration. In summary these are:
 - [insert from briefing if wish to pursue]
- I would be happy to answer any questions the Committee has.

Commented [SH1]: Shall we say we are aware that the Ombo is intending to make a second sub and support that we be consulted on the Rules.

Suggest that a PIA be done to help the Department ascertain which types of decisions may not be appropriate for computer-based decision making.

Consider whether to bring up automated decision-making here, or leave it given it was not raised in our comments

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- There are, however, a few additional matters which I believe warrant further mention before the Committee. In summary these are:
 - Even though the 'use and disclosure principle' – APP 6 – would not apply to the 'public interest disclosures' proposed in the Bill, most of the other Australian Privacy Principles would continue to apply to that personal information held by DVA (such as the requirements in relation to transparency, data quality, security, and rights to access and correction).
 - The OAIC would welcome the opportunity to be consulted on draft rules to be made by the Minister under the 'public interest disclosure' provisions in Schedule 2 of the Bill.
 - The OAIC acknowledges that automated decision-making is likely to provide a number of advantages for DVA and for Australians accessing their services, particularly in regards to efficiencies. However, consideration should be given at an early stage, to ensuring that any privacy impacts are identified and minimised

to the extent possible, and that an integrated approach to privacy management is taken.

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Commissioner brief: Opening statement talking points for Australian Information Commissioner

Type: Commissioner brief

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- There are, however, a few additional matters which I believe warrant further mention before the Committee. In summary these are:
 - Even though the 'use and disclosure principle' – APP 6 – would not apply to the 'public interest disclosures' proposed in the Bill, most of the other Australian Privacy Principles would continue to apply to that personal information held by DVA (such as the requirements in relation to transparency, data quality, security, and rights to access and correction).
 - The OAIC would welcome the opportunity to be consulted on draft rules to be made by the Minister under the 'public interest disclosure' provisions in Schedule 2 of the Bill.
 - The OAIC acknowledges that automated decision-making is likely to provide a number of advantages for DVA and for Australians accessing their services, particularly in regards to efficiencies. However, I would encourage consideration to be given at an early stage, to ensuring that any privacy impacts are identified

and minimised to the extent possible, and that an integrated approach to privacy management is taken.

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Commissioner brief: Opening statement talking points for Australian Information Commissioner

Type: Commissioner brief

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- The Privacy Act regulates the handling of personal information by most Australian Government agencies and many private sector organisations. The cornerstone of this privacy protection framework are the Australian Privacy Principles (or APPs). These set out standards, rights and obligations in relation to the way individuals' personal information is handled.
- The APPs are underpinned by notions of transparency and accountability. In general terms, transparency requires entities to give careful consideration to ensuring that individuals are aware of an entity's information handling practices, so that the individual may make appropriate choices about their personal information. Accountability includes ensuring good privacy governance mechanisms are implemented at an early stage.
- The Privacy Act recognises that the protection of individual's privacy, through the protection of their personal information, is not an absolute right. Rather, those interests must be balanced with the broader interest of the community in ensuring that Australian government agencies and private sector organisations are able to carry out their legitimate functions and activities.

- This balancing is reflected in the exceptions to a number of the Australian Privacy Principles, which except from the operation of those APPs, certain information handling practices considered to be in the public interest when balanced with the interest in protecting an individual's privacy.
- The OAIC's responsibilities include examining proposals that may restrict the exercise of individuals' privacy protections in favour of another public interest objective. Our approach is generally to ensure that any changes that authorise a disclosure of personal information by invoking an exception in the Privacy Act, are reasonable, necessary and proportionate to the expected benefits and include privacy safeguards.
- My Office provided comments to the Office of Parliamentary Counsel (through AGD), on a draft version of the Bill on 3 November 2016. These comments focused on the public interest disclosure provisions in Schedule 2 of the Bill. These permit the Secretary to make 'public interest' disclosures and have the effect that the privacy protections in the 'use and disclosure' APP - Australian Privacy Principle 6 - would not apply. I understand my Office has provided a copy of these comments to the Senate Committee inquiry for consideration.
- There are, however, a few additional matters which I believe warrant further mention before the Committee. In summary these are:
 - My office recognises that the Bill includes some privacy safeguards including that the Minister may make rules, by legislative instrument, that must be complied with before the Secretary gives a public interest disclosure certificate; and that disclosures may only be made if the individual is first notified of the disclosure and given an opportunity to respond.
 - Another privacy safeguard is that even though the 'use and disclosure principle' – APP 6 – would not apply to the 'public interest disclosures' proposed in the Bill, most of the other Australian Privacy Principles would continue to apply to that personal information held by DVA (such as the requirements in relation to transparency, data quality, security, and rights to access and correction).

- Given the rules act as a privacy safeguard, my office would welcome the opportunity to be consulted on draft rules to be made by the Minister under the 'public interest disclosure' provisions in Schedule 2 of the Bill.
- As regards the automated decision-making provisions in the Bill, while I acknowledge that these may provide a number of advantages including improved efficiencies, I would encourage consideration be given at an early stage, to ensuring that any privacy impacts are identified and minimised to the extent possible, and that an integrated approach to privacy management be taken in implementing these provisions.
- I would be happy to answer any questions the Committee has.

Commissioner brief: Opening statement talking points for Australian Information Commissioner

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- Thank you for the opportunity to appear before the Committee today in relation to *the Veteran's Affairs Legislation Amendment (Digital Readiness and Other Measures) Bill 2016*.
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- This balancing is reflected in the exceptions to a number of the Australian Privacy Principles, which exclude from the operation of those APPs, certain information handling practices considered to be in the public interest when balanced with the interest in protecting an individual's privacy.
- The OAIC's responsibilities include examining proposals that may restrict the exercise of individuals' privacy protections in favour of another public interest objective. Our approach is generally to ensure that any changes that authorise a disclosure of personal information by invoking an exception in the Privacy Act, are reasonable, necessary and proportionate to the expected benefits.
- My Office provided comments to the Office of Parliamentary Counsel (through Attorney General's Department), on a draft version of the Bill on 3 November 2016. These comments focused on the public interest disclosure provisions in Schedule 2 of the Bill. These permit the Secretary to make 'public interest' disclosures and have the effect that the privacy protections in the 'use and disclosure' APP - Australian Privacy Principle 6 - would not apply. I understand my Office has provided a copy of these comments to the Senate Committee inquiry for its information.
- There are, however, a few additional matters which I believe warrant further mention before the Committee. In summary these are:
 - Even though the disclosure is required or authorised by law, the Australian Privacy Principles govern DVA's information handling practices and would continue to apply to that personal information held by DVA (such as the requirements in relation to transparency, data quality, security, and rights to access and correction).
 - The OAIC would welcome the opportunity to be consulted on draft rules to be made by the Minister under the 'public interest disclosure' provisions in Schedule 2 of the Bill.
 - The OAIC acknowledges that automated decision-making is likely to provide a number of advantages for DVA and for Australians accessing their services, particularly in regards to efficiencies. However, I would encourage consideration to be given at an early stage, to ensuring that any privacy impacts are identified

and minimised to the extent possible, and that an integrated approach to privacy management is taken.

- The Department of Veteran's Affairs could conduct a privacy impact assessment of the amendments proposed by the Bill that have privacy implications to identify and assess the privacy risks associated with the amendments. A privacy impact assessment is a written assessment which may assist in identifying the privacy impacts of the proposal, and provides an opportunity to set out any recommendations for managing, minimising or eliminating those impacts.
- I would be happy to answer any questions the Committee has.

Pages 293 through 325 redacted for the following reasons:

s.47E(d)