

Senator Nita Green
Chair
Senate Legal and Constitutional Affairs Committee
PO Box 6100
Parliament House
Canberra ACT 2600

11 October 2024

Dear Senator,

Privacy and Other Legislation Amendment Bill 2024

The Financial Advice Association of Australia (FAAA) welcomes the opportunity to provide input to the Senate Legal and Constitutional Affairs Committee inquiry into the Privacy and Other Legislation Amendment Bill 2024.

The Privacy Act framework is very important to financial advisers and the Office of the Australian Information Commissioner is one of a number of separate Government regulators and agencies that have an interest in overseeing the financial advice profession.

The FAAA broadly supports the proposed amendments to the Privacy Act framework, both from the viewpoint of the financial advice profession, and also from a societal perspective. It is acknowledged in the Explanatory Memorandum accompanying the legislation that this is the “first tranche” of steps to implement changes to Australian privacy law and ensure it is fit for purpose in light of the rapid changes that are being seen in the activity of gathering data and the uses that this can be put to.

However, we believe there is more work to do to achieve the key themes for reform identified in the Government’s September 2023 response to the Privacy Act review documentation.

Summary of positions:

- Financial advice is one of the most tightly regulated professions in Australia. Due to the high existing regulatory burden, the cost impact on financial advisers and the knock-on cost for consumers, we would urge that a cautious approach is taken before additional regulations are imposed.
- The work of the OAIC should not be funded by an industry levy, as was initially suggested for consideration in the Privacy Act Review Report and the Government Response to the Privacy Act Review – it is our view that in the context of the very broad regulated population of the OAIC, this would be unworkable, and be an unfair imposition on small business. It is positive that the legislation does not take this forward at this time, and we would encourage the Government to consider other options for the funding of the OAIC.
- Clarity and guidance on how any new regulation should be applied are vital for small businesses such as financial advisers. We welcome the steps taken in the legislation to reduce uncertainty and improve clarity, particular in relation to obligations around security, retention and destruction of data.
- Increased rights of action for consumers are important, however cannot be a substitute for official enforcement action.

- We look forward to further iterations of reform to achieve the Government's stated goal of updating privacy protections to protect individuals and to complete the objective to bring the Privacy Act "into the digital age".

Relevance of Privacy legislation to financial advice

Australians have an expectation when engaging a financial adviser that their personal information will be protected, and strong privacy protections benefit financial advisers by building public trust in the profession.

The financial advice profession is based on deep and direct relationship with clients who are seeking guidance on their financial affairs. Financial advisers work to understand their clients through extensive fact-finding interviews, in which clients disclose a wide range of personal information. This personal information will usually include the client's financial position, employment, family ties, health issues, current living arrangements and goals and aspirations for the future, among other things.

A financial adviser will then take this personal information and develop financial advice for the client which may recommend an investment strategy, savings plan, insurance arrangements, management of cash-flow and strategy for achieving the client's financial goals.

Financial advice has traditionally included a recommendation relating to one or more financial products which suit the client's needs. However, the recommendation of a product is not always central to the work of a financial adviser. Though the Corporations Act 2001 links financial advice to the provision of a financial product, it should be seen as a much broader service.

Financial advisers are licensed by an Australian Financial Services License (AFSL) holder (licensee). Under the Anti-Money Laundering and Counter Terrorism Financing (AML/CTF) regime, all AFSL holders that are licensed to provide personal advice must be enrolled with AUSTRAC for the provision of item 54 designated services. Reporting entities that would otherwise be exempt, such as small businesses, have obligations under the Privacy Act because they are a reporting entity under the AML/CTF Act.

Robust handling of individuals' personal and sensitive data is integral to the delivery of this service and so the provisions of this Bill will have a particular relevance to our sector.

Privacy Act and Other legislation Amendment Act 2024

Summary of FAAA's position on updated legislation

Overall, the FAAA is supportive of the direction taken by the updated legislation. However, it should be noted that, such is the pace of technological development in data gathering and processing, we are concerned that the updates proposed do not keep pace with how technology is being used now, and as such do not by itself equip the Commonwealth for perceived future challenges.

By way of example, many financial advisers are adopting technology to assist with day-to-day planning activities, which inevitably involve the handling of client personal and sensitive data. As in many sectors, it is becoming more and more common for AI tools to be used to record client meetings and transcribe these into file notes. Given the breadth and often sensitive nature of client data disclosed during client meetings, the use of AI software for this task, whilst enabling advisers to both deliver a higher quality service and also help more clients, has clear privacy implications – not least being the incidental disclosure of the client's information to the AI provider.

A clarifying framework in relation to this and other technology uses – perhaps in a similar way to the mechanism for identifying third countries deemed to have equivalent data security and privacy regimes - is necessary and is an example of a key area to support sectors across the economy, but which is not clearly addressed by the proposed changes.

In its response to the Privacy Act Review Report (Feb 2023) the Government set out 5 broad themes addressed by its legislation. For consistency we have grouped our response points below under those themes.

1. Bring the Privacy Act into the digital age

- Given the pace of technological advance, particularly the broad role-out of sophisticated AI technology, there is a clear potential for personal data to be used outside the bounds of societal and consumer expectations. In particular, the use of consent notices and privacy policies in some cases may not, by themselves, provide information sufficiently clearly or in a format that it is reasonable to expect a consumer to fully understand or grasp the implications of.
- Whilst the legislation achieves some important protections in this space, there is still some distance to go to bring the legislation up to date with the current state of industry, and as the technology continues to develop at pace, the legislation as it stands will continue to fall further behind.
- The specific inclusion of doxing as a crime (draft legislation schedule 3) is welcome and should enhance confidence for consumers in disclosing data that it will not end up being used in this way.
- It is vital that the ultimate mandate for the OAIC requires it to react to and manage the privacy implications of developments in digital technology, and that it is appropriately resourced to fulfill this function.
- In its response to the Privacy Act Review, the Government proposed a strategic review of the OAIC, to include its powers and funding. Whilst some changes have been made to the OAIC's powers (including around its power to organise itself), it is our view that further review should be undertaken to consider how the OAIC can best keep up with the pace of change in technological uses of personal data. We look forward to reviewing future tranches of legislative steps intended to ensure that privacy protections and data usage aligns with consumer and societal expectations.

2. Uplift Protections

- Protecting Australians from misuse of their data and enhancing their rights and protections is an important theme of this bill.
- However, this must be accompanied by more clarity and detail of guidance, particularly targeted at small business, to equip them with a clear understanding of how to fulfil their obligations. This is particularly important in relation to data destruction, as financial advice firms are under an obligation to retain some data for specific periods, and so without guidance and clarity, an enhanced obligation to also destroy data will likely increase regulatory costs for business and result in inconsistent outcomes for consumers.
- An organisation like the OAIC would be best placed to provide the detail required to achieve the sought after clarity.
- The steps relating to automated decision making provide an important protection to individuals to enable understanding about what data is being used to make automated decisions in relation to them, and to have these corrected. However, as noted previously, it is our view that consumer rights, whilst vital in empowering individuals, cannot be a replacement for concerted and collective action by Government targeted at the misuse of information in this space. (see part 15).
- The introduction of a new tort for consumers whose data is misused is also welcome (Schedule 2), but again it is important that enforcement in this space is not just left up to consumers.

3. Increasing clarity and simplicity

- Steps to increase clarity and simplicity for businesses – especially small business – and consumers are vital.

- In particular, it is our view that specifying that “reasonable steps” include organisational and technical measures around security, retention and destruction of data is helpful (Schedule 1 Part 5).
- Prescribing a mechanism to specifying equivalent overseas regimes to make data transfer easier is also useful (Schedule 1 Part 6).
- The OAIC should have an obligation to engage with industry partners to provide greater clarity and guidance where this is required, and sufficient budget to do this effectively.
- The experience in the financial advice sector with the Financial Adviser Standards and Ethics Authority (FASEA) - which was budgeted and maintained for only four years, and whose areas of responsibility have to some extent been neglected since its disbanding - is illustrative of the risk in not maintaining responsibility and budgeting on an indefinite basis.

4. Improving control and transparency

- Equipping individuals with greater control over their data and improved rights of action in the event of misuse, is important and welcome. However, responsibility cannot be devolved to consumers and individuals as a substitute for regulatory action.
- Specifying improvements to clarity around notice and consent are important. Again care needs to be taken that consumers are not left in a situation where rights are given away without a full understanding, due to a lack of clarity or unnecessary complexity in a privacy statement or consent notice. Clear controls on data usage, and enforcement of these by appropriate Governmental bodies, must remain an ongoing requirement.
- As noted, the introduction of a new tort for consumers whose data is misused is also welcome (see Schedule 2), but again as noted, it is important that enforcement in this space is not simply left to consumers.

5. Strengthen enforcement

- As has been noted several times above, official enforcement action is vital in this space, given the disparity between consumers and large organisations in the handling of data.
- Expanding the scope of orders that a court can make in this space is a useful step. The use of the new powers should be kept under review to ensure that they are appropriately targeted and that they prove a suitable deterrent to data misuse.
- Again, empowering the courts to consider applications for relief made by specific individuals is important, however the general expectation should be that official action will be taken in the more serious cases.
- Any ongoing strategic review of OAIC should have a wide-ranging focus, particularly to ensure that the organisation is properly equipped to meet the challenges of regulating personal data use in the rapidly evolving digital economy.
- The Government Response to the Privacy Act Review suggested that consideration would be given to an industry funding model for the OAIC. However, whilst it is important that the work of the OAIC is properly funded, we would caution against the use of industry funding for the OAIC as, due to the breadth of economic activity where personal data is utilised, it is not clear how this could be effectively targeted or apportioned. This is likely to also increase the costs of trading for small businesses, where the regulatory burden already falls disproportionately. This would impose a double cost for businesses incurring increased compliance expense plus an industry levy. Any industry levy would flow through to increase the cost of services for consumers.

- Given the wide application of the work of the OAIC across the economy, we would argue that funding directly from Government is more appropriate in this instance.

Conclusion

The protection of consumer data is becoming increasingly complex in the fast paced and ever-evolving tech-world. While technology advancements assist in the protection of Australians' personal and sensitive data, it can also expose consumers to unknown vulnerabilities and the risk of data breaches. The legislative framework must be flexible to keep pace with future privacy protection advancements and risks. The FAAA supports the need for enhanced protections of consumers' data, particularly through increased powers for the OAIC.

We would welcome the opportunity to discuss the matters raised in our submission with the Committee. If you have any questions about our submission, please do not hesitate to contact me on phil.anderson@faaa.au or 02 9220 4500.

Yours sincerely



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