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# The right to privacy in the digital age

## Submission to the Office of the United Nations (UN) High Commissioner for Human Rights (OHCHR)

### Introduction

Australia thanks the UN OHCHR for the opportunity to provide input to the preparation of a thematic report on the right to privacy in the digital age. Australia understands that the report will consider how artificial intelligence (AI), including profiling, automated decision making and machine learning technologies may, without proper safeguards, affect the enjoyment of the right to privacy.

This submission focuses on Australia’s approach to privacy in the digital space and provides information on current initiatives, including Australia’s AI Ethics Framework. We are comfortable with the information provided in this submission to be made available on the OHCHR website.

### Australia’s current privacy framework

The *Privacy Act 1988* (Cth)(Privacy Act)is the principal piece of Australian legislation protecting the handling of ‘personal information’ about individuals. This includes the collection, use, storage and disclosure of personal information in the federal public sector and in the private sector (generally by organisations with an annual turnover above $3 million). Other statutory provisions also affect privacy, and separate privacy regimes apply to state and territory public sectors.

The Privacy Act implements Australia’s international obligations in relation to privacy, including prohibiting arbitrary or unlawful interference with an individual’s privacy, family, home or correspondence in accordance with Article 17 of the *International Covenant on Civil and Political Rights*.

The 13 legally binding principles provided by the Privacy Act, called the Australian Privacy Principles (‘APPs’), aim to balance the protection of the privacy of individuals, with the interests of public and private sector entities in carrying out their lawful and legitimate functions and activities. Any restrictions on privacy must be justified as necessary, reasonable and proportionate to achieving those legitimate interests or policy objectives.

#### Remedies for privacy breaches

The Office of the Australian Information Commissioner (OAIC) is Australia’s independent privacy regulator and is responsible for enforcing compliance with the Privacy Act. The Australian Information Commissioner (Commissioner) has the power to investigate and resolve complaints about instances of non-compliance by entities subject to the Privacy Act; and can conduct self-initiated investigations into an act or practice of an entity.

The Commissioner has a wide range of powers relating to breaches of the Privacy Act including to:

* investigate a matter following a complaint or on the Commissioner’s own initiative
* assist a person to formulate and make a complaint
* attempt to conciliate the complaint
* decline to investigate, or further investigate, a complaint in certain circumstances
* conduct preliminary inquiries to determine whether or not to open an investigation
* require information or documents to be produced, or a person to attend before the Commissioner
* refer a complaint to an alternative complaint body in certain circumstances
* enter premises and inspect relevant documents by consent or with a warrant
* accept an enforceable undertaking
* make a determination about an investigation
* seek an injunction before, during or after an investigation; and
* apply to the court for a civil penalty order for a breach of a civil penalty provision under the Privacy Act.

The Privacy Act places a strong emphasis on the Commissioner to attempt to resolve complaints by conciliation and, failing that, make binding determinations against entities including determinations for compensation and costs.

#### Privacy and AI

The digital economy has brought with it immense benefits including new, faster and better products and services. As we spend more time online, and new technologies emerge, more personal information about individuals is being captured and processed.

The APPs are technology-neutral and apply equally to paper-based and digital environments. Australia considers that its principles-based approach to privacy regulation is adaptable to new and emerging technologies, including AI. The Privacy Act seeks to facilitate control over an individual’s personal information by imposing limitations on the collection of personal information and linking its permitted subsequent use and disclosure to the purposes for which it is collected, subject to permitted exceptions. The Privacy Act requires entities to hold no more information on individuals than they need to fulfil their functions and purposes, and to collect it, as far as possible, from the individual concerned.

The OAIC provides guidance on the privacy risks arising from new data analytics processes and how the APPs apply to data analytics. Some key concepts of privacy protection relevant to AI systems include:

* thinking about how data may be used for purposes other than which they were originally collected; and
* making use of de-identification techniques or data anonymization techniques to maintain and protect privacy of personal information.

On 27 May 2021, the Human Rights Commissioner published his report, “Human Rights and Technology Final Report 2021”. The report provides a roadmap for how Australia should protect and promote human rights, including the right to privacy, in a time of unprecedented change in how we develop and use new technologies.

While there may be efficiency benefits to the use of AI, these benefits should be balanced with appropriate protections. Australia’s current review of the Privacy Act will further consider how Australia’s privacy framework can ensure that new and emerging technologies maintain appropriate protections to ensure the privacy of individuals.

### Current initiatives related to privacy in the digital age

In July 2019 the Australian Competition and Consumer Commission (ACCC) released their Digital Platforms Inquiry (DPI) Report which considered digital platforms and the effect that digital search engines, social media platforms and other digital content aggregation platforms have on competition in media and advertising services markets. The DPI Report emphasised the need to ensure Australian regulatory frameworks keep pace with the changes being driven by digital platforms, including social media platforms.

In response to the DPI Report, the Australian Government committed to building on reforms announced in March 2019 – to increase penalties and enforcement measures and develop a binding privacy code for social media and online platforms – by undertaking a review of the Privacy Act and to consult on options for implementing a number of privacy-specific recommendations to better empower consumers, protect their data and best serve the Australian economy.

The Review is currently underway in the Attorney-General’s Department and is considering:

* the scope and application of the Privacy Act
* whether the Privacy Act effectively protects personal information and provides a practical and proportionate framework for promoting good privacy practices
* whether individuals should have a direct right of action to enforce privacy obligations under the Privacy Act
* whether a statutory tort for serious invasions of privacy should be introduced into Australian law
* the impact of the notifiable data breach scheme and its effectiveness in meeting its objectives
* the effectiveness of enforcement powers and mechanisms under the Privacy Act and how they interact with other Commonwealth regulatory frameworks; and
* the desirability and feasibility of an independent certification scheme to monitor and demonstrate compliance with Australian privacy laws.

Of particular relevance to AI systems, the Privacy Act Review is considering specific issues about:

* the definition of ‘personal information,’ including whether the Act should be amended to more clearly capture inferred personal information – particularly sensitive information, and
* the purposes (including secondary purposes) for which information, once collected, can be used and disclosed .

Through the Privacy Act Review, Australia is working to ensure its privacy framework is best placed to meet the demands of the digital age, including the emergence of new technologies and AI.

### Australia’s AI Ethics Framework and privacy protection

In November 2019, Australia released a national AI Ethics Framework to guide businesses and governments looking to design, develop and implement AI in Australia. It sets out eight voluntary AI Ethics Principles for organisations to strive towards the highest standards of ethical business and good governance when using AI. These principles are consistent with the OECD principles on AI that Australia signed up to in May 2019 and which were later affirmed by the G20 Trade and Digital Economy Ministers in June 2019.

One of the principles, Privacy Protection and Security, aims to ensure AI systems respect and uphold privacy rights and data protection, and security of data. This principle suggests that privacy and data protection should be built into AI systems from the beginning and maintained throughout the AI systems lifecycle and continued to be monitored after it is deployed.

The Department of Industry, Science, Energy and Resources has recently concluded a pilot of the AI Ethics Principles with six Australian organisations to better understand how the principles work in practice. These organisations were: the Commonwealth Bank of Australia; Flamingo AI; Insurance Australia Group; Microsoft; National Australia Bank and Telstra.