

Response to *Privacy Amendment (Personal Data Protection) Bill 2026 (Cth) and Consultation Paper*

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Justice and Equity Centre
ABN 77 002 773 524
www.jec.org.au

Gadigal Country
Level 5, 175 Liverpool St
Sydney NSW 2000
Phone + 61 2 8898 6500
Email contact@jec.org.au



About the Justice and Equity Centre

The Justice and Equity Centre stands for a society that is fair and free from discrimination and disadvantage. Established in 1982 as the Public Interest Advocacy Centre (PIAC), we use the law and policy advocacy to challenge injustice and inequality. We do this through:

- legal advice and representation, specialising in test cases and strategic casework;
- research, analysis and policy development; and
- advocacy for systems change to deliver social justice.

We collaborate and partner in our work with people and communities who are experiencing marginalisation and disadvantage and focus on finding practical solutions. We work across five focus areas:

Disability rights: challenging discrimination and making the NDIS fairer to ensure people with disability can participate equally in economic, social, cultural and political life.

Justice for First Nations people: challenging the systems that are causing ongoing harm to First Nations people, including through reforming the child protection system, tackling discriminatory policing and supporting truth-telling.

Homelessness: reducing homelessness and defending the rights of people experiencing homelessness through the Homeless Persons' Legal Service and StreetCare's lived experience advocacy.

Civil rights: defending the rights of people in prisons and detention, including asylum seekers, modernising legal protection against discrimination, raising the age of criminal responsibility to 14, advancing LGBTIQ+ equality and advocating for open and accountable government.

Energy and water justice: working for affordable and sustainable energy and water and promoting a just transition to a zero-carbon energy system.

Contact

Ellen Tilbury
The Justice and Equity Centre
Gadigal Country
Level 5, 175 Liverpool St
Sydney NSW 2000

T: +61 2 8898 6553

E: etilbury@jec.org.au

Website: www.jec.org.au

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Recommendations

Recommendation 1 – Strengthen fair and reasonable test

- (a) Replace the proposed wording in APP 3.2(c), which asks whether collection, use or disclosure ‘relates to’ an APP entity’s functions or activities, with the original wording of Proposal 12.2(c) of the Privacy Act Review Report 2023, requiring that collection, use or disclosure be reasonably necessary for, or directly related to, those functions or activities.*
- (b) Explicitly include in the list of matters which must be considered in APP 3.2 whether the person or people about whom the APP entity is collecting, using or disclosing information are experiencing vulnerability which could impact on the sensitivity of the information or the risk of harm.*

Recommendation 2 – Clarify Permitted General Situation 2

Amend the proposed permitted general situation for suspected serious wrongdoing, or develop accompanying OAIC guidance, to clarify that the exception is confined to reasonably suspected serious wrongdoing supported by objective evidence, and that any collection, use or disclosure must be necessary and proportionate.

Recommendation 3 – Further clarify definition of ‘consent’

- (a) Express the proposed definition of consent as requiring a voluntary, informed, current, specific and unambiguous indication through clear action.*
- (b) Include clear definitions of each element of consent in the legislation, or otherwise in OAIC guidance, with examples of practices that would and would not satisfy those*

elements, including clear confirmation that preselected settings or pre-ticked boxes are insufficient.

Recommendation 4 – Complaints process

- (a) Maintain complaint options that include allowing a person to complain directly to the OAIC without having to complain directly to an APP entity before doing so.*
- (b) Introduce a compliance framework to hold APP entities accountable for providing accessible complaints mechanisms, including an avenue for affected persons to complain to the OAIC and for the OAIC to take enforcement action for non-compliance.*

Recommendation 5 – Additional regulation for facial recognition technology

Introduce specific regulation for facial recognition technology, beyond general privacy protections for biometric information.

Recommendation 6 – Direct right of action

Introduce a direct right of action into the Privacy Act 1988 (Cth), available to individuals and groups whose privacy has been interfered with by an APP entity, with applicants able to choose whether to proceed directly to court or seek conciliation through the OAIC.

1. Support for reform

The Justice and Equity Centre (**JEC**) (formerly the Public Interest Advocacy Centre or PIAC) welcomes the opportunity to respond a submission to the Attorney-General's Department in relation to the exposure draft of the *Privacy Amendment (Personal Data Protection) Bill 2026* (Cth) (**the Bill**) and accompanying Consultation Paper.

The JEC works with people and communities who are marginalised and facing disadvantage, and helps to change laws, policies and practices that cause injustice and inequality. As part of this work, we have a long history as a strong advocate for the protection of privacy rights of Australians and have contributed to numerous reviews over the past two decades on privacy reform both at federal and state levels.

The JEC provided submissions at multiple stages of the Government's lengthy review process examining the *Privacy Act 1988* (Cth) (**Privacy Act**) in 2020, 2021 and 2023.¹ The JEC also provided submissions to the Senate Legal and Constitutional Affairs Legislation Committee in relation to the *Privacy and Other Legislation Amendment Bill 2024* (**the Previous Bill**).² The 2024 Bill implemented some of the reforms recommended in the *Privacy Act Review Report 2023* (**Review Report**) when it was enacted in December 2024.

The amendments proposed in the Bill and Consultation Draft are an important step in implementing the Review Report's outstanding recommendations to update the privacy framework and to regulate emerging technology.

We note that the Bill does not include, and the Consultation Paper does not address, the introduction of a direct right of action for individuals to litigate a claim for breach of privacy under the Privacy Act. We again strongly urge the government to introduce a direct right of action into the Bill.

¹ Public Interest Advocacy Centre, Submission to the Review of the Privacy Act 1988 (November 2020) ('JEC Issues Paper Submission') <https://jec.org.au/publication/submission-re-review-of-the-privacy-act-1988/> ; Public Interest Advocacy Centre, Submission to Discussion Paper on the Review of the Privacy Act 1988 (December 2021) ('JEC Discussion Paper Submission') <https://jec.org.au/publication/submission-to-the-discussion-paper-on-the-review-of-the-privacy-act-1988/> ; Public Interest Advocacy Centre, Privacy Act Review Report Consultation Response (31 March 2023) ('JEC Review Report Submission') <https://jec.org.au/publication/submission-to-the-privacy-act-review-report-consultation/> ; Justice and Equity Centre, Submission to Inquiry into the Privacy and Other Legislation Amendment Bill 2024 (11 October 2024) ('JEC Inquiry into Bill Submission') <https://jec.org.au/publication/submission-to-the-senate-legal-anconstitutional-affairs-legislation-committee-inquiry-into-the-privacy-and-other-legislation-amendment-bill-2024>

² Justice and Equity Centre, Submission to Inquiry into the Privacy and Other Legislation Amendment Bill 2024 (11 October 2024) ('JEC Inquiry into Bill Submission') <https://jec.org.au/publication/submission-to-the-senate-legal-and-constitutional-affairs-legislation-committee-inquiry-into-the-privacy-and-other-legislation-amendment-bill-2024/>.

2. Fair and reasonable test

The JEC strongly supports the introduction of a fair and reasonable test for the collection, use and disclosure of personal information. As outlined in previous submissions,³ this change is necessary to ensure the burden of managing privacy risks is appropriately shared by APP entities in a digital age where the collection, use and disclosure of personal information is occurring at ever increasing rates. We are pleased to see that the proposed fair and reasonable test in the Bill largely aligns with proposal 12.1 of the Review Report. However, we are concerned the draft Bill does not adopt the Review Report's recommendation in proposal 12.2(c).

Proposal 12.2(c) of the Review Report recommended that, in determining whether a collection, use or disclosure is fair and reasonable, an APP entity must have regard to:

whether the collection, use or disclosure is reasonably necessary for the functions and activities of the organisation or is reasonably necessary or directly related for the functions and activities of the agency.

In contrast, the Bill proposes that an APP entity must have regard to:

whether the collection, use or disclosure of the information **relates to one or more** of the APP entity's functions or activities (*Australian Privacy Principle 3*, section 3.2(c)).

This revised wording weakens the fair and reasonable test to allow an APP entity to consider it fair and reasonable to collect, use or disclose personal information based only on whether it relates to a singular function or activity of the entity. This could allow an APP entity to collect, use or disclose personal information in a wide range of circumstances said to 'relate to' a function or activity of its business, despite the collection, use or disclosure not being necessary for that function or activity. For example, a real estate platform could argue that collecting and using extensive information about rental applicants, including bank transaction data, income and employment history, rental history, or data from platform use, relates to its tenant screening or property management functions. While some information may be necessary to assess an application or manage a tenancy, a broad 'relates to' test could permit intrusive profiling or ranking of applicants using information that is not reasonably necessary for those functions.

The JEC recommends the revised wording be replaced by original wording of Proposal 12.2(c) of the Review Report.

The JEC supports the mandatory consideration of the matters listed in *Australian Privacy Principle 3*, section 3.2, when an APP entity determines whether a collection, use or disclosure is 'fair and reasonable in the circumstances'. While we agree with the Consultation Paper's explanation that the 'factors would need to be considered as part of a holistic assessment in the circumstances', we are concerned that without clear guidance APP entities are likely to apply these principles inconsistently. OAIC guidance will be necessary and must make clear that each

³ JEC Discussion Paper Submission, 11-12; JEC Review Report Submission, 5-6; JEC Inquiry into Bill Submission, 4

of the factors must be considered. It should also provide practical examples for APP entities to assist with consistent application of the test.

In addition, we repeat our recommendation that vulnerability be included as one of the matters that an APP entity must consider. Vulnerability was recognised as relevant to the 'fair and reasonable' test in the Review Report (page 159), which said:

While the 'fair and reasonable test' would be assessed objectively, where an entity is aware that it is likely to be handling information of people experiencing vulnerability, or is engaging in activities which could have a significant effect on people experiencing certain vulnerabilities, those circumstances will be relevant to whether the entity's information handling objectively satisfies the fair and reasonable test. Any information the APP entity has, or ought to have, about the likely vulnerabilities of their users would be relevant in determining whether a collection, use or disclosure is fair and reasonable in the circumstances.

Recommendation 1 – Strengthen fair and reasonable test

- (a) Replace the proposed wording in APP 3.2(c), which asks whether collection, use or disclosure 'relates to' an APP entity's functions or activities, with the original wording of Proposal 12.2(c) of the Privacy Act Review Report 2023, requiring that collection, use or disclosure be reasonably necessary for, or directly related to, those functions or activities.*
- (b) Explicitly include in the list of matters which must be considered in APP 3.2 whether the person or people about whom the APP entity is collecting, using or disclosing information are experiencing vulnerability which could impact on the sensitivity of the information or the risk of harm.*

3. Permitted general situations

The JEC is concerned that the proposed expansion of permitted general situation 2 (amending section 16A of the Act) may weaken important safeguards. The amendment would replace the concept of 'misconduct of a serious nature' with the broader concept of 'wrongdoing of a serious nature' so that an APP entity can avoid the need for consent, or for collection, use or disclosure to be fair and reasonable, if the entity is taking action to address the suspected 'wrongdoing'. It expressly provides that the exception may apply to conduct by persons external to the entity, including conduct that does not involve any duty owed to the entity. As this includes suspected future wrongdoing, the Consultation Paper contemplates that the exception may support proactive monitoring and risk detection activities where an entity suspects fraud or other serious wrongdoing (page 19).

We recognise this broader formulation may assist entities to identify and respond to serious harms. However, the amendment may also create a more expansive basis for the collection, use and disclosure of personal information without consent, including sensitive information, and without the 'fair and reasonable' limitation otherwise applied by the revised APP 3. In practice, there is a risk that entities may seek to rely on the exception to justify increasingly intrusive monitoring, profiling and surveillance practices, including the use of biometric technologies or facial recognition systems for speculative wrongdoing detection.

The JEC recommends that the draft Bill be amended, or accompanying OAIC guidance developed, to make clear that: (a) the exception is confined to reasonably suspected serious wrongdoing supported by objective evidence; (b) any collection, use or disclosure must be necessary and proportionate to the suspected wrongdoing; and (c) the exception does not justify indiscriminate or continuous surveillance of people. These safeguards would better balance the important objective of preventing serious harm with the protection of individual privacy rights.

Recommendation 2 – Clarify Permitted General Situation 2

Amend the proposed permitted general situation for suspected serious wrongdoing, or develop accompanying OAIC guidance, to clarify that the exception is confined to reasonably suspected serious wrongdoing supported by objective evidence, and that any collection, use or disclosure must be necessary and proportionate.

4. Modernised definitions

The JEC welcomes the draft Bill's introduction of modernised definitions into the Privacy Act, including:

4.1 Definitions of 'personal information' and 'collect'

As outlined in previous submissions,⁴ the JEC supports the implementation of the modernised definitions proposed by the Review Report (proposals 4.1, 4.2 and 4.3). The JEC supports the proposed definitions of 'personal information' and 'collect' set out in the Bill, which implement the Review Report's recommendations.

4.2 Definition of 'consent'

The JEC supports the modernised definition of consent to specify that it is '*voluntary, informed, current, specific and unambiguous*' (Schedule 1, section 6AAB). As we have previously recommended,⁵ we suggest that the element of '*unambiguous*' be expressed as '*unambiguous indication through clear action*' to make clear the need for affirmative action to indicate consent.

Alongside introducing the modernised definitions, we continue to recommend that the meaning of each element of the definition of consent be made clear, preferably in the legislation. The Consultation Paper elaborates on the meaning of each element – we suggest essential aspects of these explanations, including examples where appropriate, be included directly in the legislation. We also suggest clarifying further what is meant by 'unambiguous' – the Consultation Paper says this '*means an individual's choice must be clear. Seeking consent through preselected settings or pre-ticked boxes would likely not be sufficient*' (page 9). The use of 'would

⁴ JEC Issues Paper Submission, 5-6; JEC Discussion Paper Submission, 7-8; JEC Review Report Submission, 3; JEC Inquiry into Bill Submission, 4-5.

⁵ JEC Issues Paper Submission, 7-8; JEC Discussion Paper Submission, 9-10; JEC Review Report Submission, 4; JEC Inquiry into Bill Submission, 5.

*likely not be sufficient*⁴ invites uncertainty as to what would be sufficient and if preselected settings could be used.

The JEC recommends that clear definitions of the elements be provided in the legislation or guidelines which include clear examples of what would and would not satisfy the elements.

Recommendation 3 – Further clarify definition of ‘consent’

- (a) Express the proposed definition of consent as requiring a voluntary, informed, current, specific and unambiguous indication through clear action.*
- (b) Include clear definitions of each element of consent in the legislation, or otherwise in OAIC guidance, with examples of practices that would and would not satisfy those elements, including clear confirmation that preselected settings or pre-ticked boxes are insufficient.*

5. Strengthened complaints process

The Consultation Paper seeks feedback on a number of proposed reforms to strengthen the OAIC's complaint-handling, investigation and representative complaint powers. However, these proposals do not appear to be reflected in the Exposure Draft Bill. As a result, we are not able to comment directly on the practical operation and drafting of the proposed measures, and recommend exposure draft provisions be released for these measures before the consultation process concludes.

In relation to the proposals outlined in the Consultation Paper, the JEC welcomes the proposal to include measures to enhance the regulatory powers and efficiency of the OAIC as a privacy regulator. We support the introduction of a requirement for APP entities to provide accessible complaint mechanisms, minimum timeframes for responses and written decisions with outcome and review options provided.

However, we do not support the proposal to require people to complain to the APP entity directly as a mandatory step before complaining to the OAIC. There may be circumstances in which the APP entity's complaint mechanism is not appropriate, or there may be good reasons for a person to complain directly to the OAIC. This may arise, for example, in circumstances where:

- the applicant requires an urgent resolution for a breach to occur before the minimum timeframe for the APP entity to respond expires;
- the applicant is concerned about retaliatory conduct if they complain directly to the APP entity; or
- the APP entity's complaint mechanism is not accessible to the applicant due to their personal circumstances (for example due to their disability, their lack of access to the internet or issues with literacy comprehension).

We support measures to ensure complaints mechanisms are accessible to all potential complainants, including both those provided by APP entities and the OAIC. Any specific requirements for making a complaint, such as a particular form as contemplated by the

Consultation Paper, must be designed to ensure accessibility – in consultation with people who may be affected.

We also recommend the addition of a compliance framework to hold APP entities accountable for their obligations to implement accessible complaint mechanisms. We suggest this framework provide an avenue for affected persons to complain to the OAIC about an APP entity's complaints mechanism and for the OAIC to take enforcement action against APP entities for failure to comply.

Recommendation 4 – Complaints process

- (a) Maintain complaint options that include allowing a person to complain directly to the OAIC without having to complain directly to an APP entity before doing so.*
- (b) Introduce a compliance framework to hold APP entities accountable for providing accessible complaints mechanisms, including an avenue for affected persons to complain to the OAIC and for the OAIC to take enforcement action for non-compliance.*

6. Regulation of emerging technologies including facial recognition technology

The JEC agrees that community concerns about risks associated with emerging technologies require closer attention. While the Consultation Paper gives specific attention to 'wearable' technologies like smart glasses, there are broader concerns about rapidly developing and proliferating technologies, particularly facial recognition.

We acknowledge the *Privacy Act*, as updated by the proposed Bill, will cover 'biometric information' and 'biometric templates' and treats those as sensitive information. While the draft Bill strengthens protections for biometric information, it continues to regulate facial recognition technology through the general framework for personal information handling. This approach does not adequately address a number of risks that arise from the deployment of facial recognition technology itself, including mass surveillance, discriminatory and inaccurate identification, limitations on anonymity in public spaces, and the chilling effect that pervasive identification may have on participation in social, political and community activities. These harms may arise even where biometric information is collected, stored and disclosed in a manner that complies with the *Privacy Act*.

The JEC refers to the work of the University of Technology Sydney's Human Technology Institute (HTI), highlighting the risks and gaps in regulation of facial recognition technology, and supports the introduction of specific regulation dedicated to addressing facial recognition technology as proposed by HTI.⁶

⁶ Human Technology Institute, 'Facial recognition technology: Towards a model Law; (September 2022) <https://www.uts.edu.au/research/centres/human-technology-institute/projects/facial-recognition-technology-towards-model-law>

Recommendation 5 – additional regulation for facial recognition technology

Introduce specific regulation for facial recognition technology, beyond general privacy protections for biometric information.

7. Additional reform required for direct right of action

The prospective changes to the complaints process are a step towards reforming the framework to ensure outcomes for individuals affected by breaches of the Privacy Act. However, we repeat our previous submissions supporting the introduction of a direct right of action for individuals to pursue breaches of the Privacy Act.⁷

Despite the Previous Bill introducing new civil penalty provisions and a statutory tort for serious and intentional invasions of privacy, the legislative framework still lacks a direct right of action for individuals to remedy instances of misuse of personal information. The process for individuals seeking to enforce their rights under the Privacy Act remains clumsy and provides limited recourse.

The JEC continues to strongly support the introduction of a direct right of action that is available to any individual or group whose privacy has been interfered with by an APP entity. The JEC endorses an approach modelled on the Consumer Data Right where applicants have a choice as to whether they apply directly to the courts or seek conciliation through the OAIC.

Recommendation 7 – Direct right of action

Introduce a direct right of action into the Privacy Act 1988 (Cth), available to individuals and groups whose privacy has been interfered with by an APP entity, with applicants able to choose whether to proceed directly to court or seek conciliation through the OAIC.

⁷ JEC Issues Paper Submission, 8-11; JEC Discussion Paper Submission, 14-19; JEC Review Report Submission, 7; JEC Inquiry into Bill Submission, 5.