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3 April 2012

Hon Ruth Dyson, Chair  
Government Administration Committee  
Parliament Buildings  
PO Box 18041  
**WELLINGTON 6160**

Dear Ruth Dyson

**Electronic Identity Verification Bill**

**Introduction**

1. As foreshadowed in my letter of 6 March 2012, the Legislation Advisory Committee (LAC) seeks permission to make a late submission on the Electronic Identity Verification Bill.
2. The LAC was established to provide advice to the Government on good legislative practice, legislative proposals, and public law issues. The LAC has produced and updates the *Legislation Advisory Committee Guidelines: Guidelines on the Process and Content of Legislation* (LAC Guidelines) as appropriate benchmarks for legislation. The LAC Guidelines have been adopted by Cabinet.
3. The terms of reference for the LAC include:
  - a. To scrutinise and make submissions to the appropriate body on aspects of Bills introduced into Parliament that affect public law or raise public law issues:
  - b. To help improve the quality of law-making by attempting to ensure that legislation gives clear effect to government policy, ensuring that legislative

proposals confirm with the LAC Guidelines, and discouraging the promotion of unnecessary legislation.

4. The LAC wishes to draw the Committee's attention to certain aspects of the *Electronic Identity Verification Bill* on which consideration should be given to amendments, to better ensure that this Bill meets the provisions of the LAC Guidelines. These are as follows.

#### **Clause 4 – Principles**

5. Clause 4 sets out the principles on which the Act is based. The LAC is concerned that these principles are not adequately reflected in the subsequent provisions in the Bill. The first principle is that an individual has a complete discretion to decide whether to apply for an electronic identity credential to be issued to him or her and whether to use it at all if it has been issued. However, there is no corresponding provision in the body of the Bill specifically reflecting this. Although there is an absence of a requirement for a person to obtain an electronic identity credential, this is not the same thing. The LAC considers there should be a clause in the Bill stating that a person who does not wish to apply for or use an electronic identity credential cannot be required to do so, and that there must continue to be an alternative means of communicating with an agency if that is a principle on which the Bill is based.
6. The principles also include an individual's "right" to view the usage history of his or her electronic identity credential, however, clause 4(3) states that the preceding subclauses "do not confer on any person any legal right that is enforceable". It is therefore misleading to use the term "right" in the list of principles.
7. Clause 4(2) provides that certain persons "must, in making decisions, performing functions or duties, or exercising powers under this Act, take into account the principles specified in subclause (1) that are applicable (if any), so far as is practicable in the circumstances." This last sentence is so wide as to render the provision virtually meaningless, and could be deleted, given that the principles just have to be taken into account, rather than fully complied with in all circumstances.

#### **Clauses 56-59- Offences**

8. Clauses 56-59 create a number of new offences that appear to have high penalties relative to other existing offences, which may not be justifiable. For example, the penalty for conviction of offences under clause 57, which relate to improper access to and use of core identity information, and improper use of an electronic identity credential, is imprisonment for a term not exceeding 10 years, and/or to a fine not exceeding \$250,000. In comparison, sections 256-7 of the Crimes Act 1964 provide

that the penalty for forgery, or for using a forged document, is imprisonment for a term not exceeding 10 years.

### **Interface with Privacy Act 1993**

9. Clause 55 of the Bill preserves the application of the Privacy Act, except for principle 11 (clause 55(2), and there is a modification to one of the information matching rules to allow the retention of matching information for auditing and other purposes of the Bill (clause 36).
10. Clause 55(2) provides that "information privacy principle 11 of the Privacy Act 1993 does not apply to personal information held in accordance with the provisions of this Act". This raises the following issues:
  - a. In lieu of privacy principle 11, there needs to be a clear statement in the Bill that identity information shall not be disclosed except in accordance with its provisions. There are relevant prohibitions in the criminal offences (clauses 56-59), however a clause specifying that there can be no disclosure would provide a clear avenue for complaints to be made about inappropriate disclosure through the Privacy Commissioner's complaints jurisdiction. It would also usefully attach to any persons carrying out administrative and technical functions who have authorised access to identity information (see clause 21(1)(e)). Further, consideration could be given to including non-disclosure as one of the principles in clause 4(1) of the Bill.
  - b. The exclusion of Privacy Act principle 11 broadly refers to "personal information held in accordance with the provisions of this Act". "Personal information" (a term defined in the Privacy Act but not in the Bill) could usefully be replaced with a list of the relevant identity information, such as the content of the electronic identity credential, including associated information and usage history. That is the type of personal information for which special provision is made in the Bill. Any other personal information (such as employment information for example) could then continue to be governed by principle 11.
  - c. In addition, it would be useful for the reference to principle 11 to pinpoint section 6 of the Privacy Act.
11. Clause 55(3) ties the provisions of the Bill to the Privacy Act complaints jurisdiction. This raises the following issues.
  - a. Given the sensitivity of identity information and the need to keep such information secure and to ensure trust in the Service from consumers, there may be a case for breach of a relevant provision of the Bill to be a presumptive privacy breach, i.e. "an interference with privacy" without the need to show "harm" as per section 66(1)(b) of the Privacy Act.
  - b. The cross referencing to clauses 17 and 18 and 21 in relation to contraventions is not altogether clear. For example, clause 17 is a permissive clause as to how an individual may use the electronic identity

credential, and clause 18 specifies the parameters around the use of the Service by participating agencies. The intention may be that any use of the credential that falls outside these sections is a contravention and therefore a breach of a privacy principle. It might be clearer to omit the cross referencing and refer generally to provisions of the Bill that impose a prohibition or restriction, or regulate the manner in which personal information is handled.

- c. Clause 55(3)(a) and (b) should include the "use" of information as well as its availability.
- d. As mentioned above, "personal information" is not a term that is defined in the Bill.

The LAC does not wish to be heard on its submission.

Yours faithfully

Sir Grant Hammond  
Chairman, Legislation Advisory Committee