6 June 2014

Cyber and Identity Security Policy Branch
Address: 3–5 National Circuit
BARTON ACT 2600

By email: identity.security@ag.gov.au

Dear Sir/Madam

National Identity Proofing Guidelines

Thank you for the opportunity to comment on the National Identity Proofing Guidelines ('the Guidelines). Given the tight time frames for making submissions to this consultation, the Law Council of Australia did not have the opportunity to consult with each of its Constituent Bodies, Sections or Committees. However, it is most grateful for the views of its National Human Rights Committee which has considered the *National Identity Proofing Guidelines: Discussion Paper* dated May 2014 (the Discussion Paper) and provided the following comments.

The missing questions – privacy and the Guidelines

The National Human Rights Committee is concerned that the Discussion Paper and the Guidelines provide little attention to privacy issues. Any mention of privacy appears to be directed at the security of information collected by agencies in accordance with the Guidelines; the Guidelines fail to recognise the privacy issues associated with the process of proofing identity in the first place. This is surprising, given that identity assessment and proofing is one of the most fundamental privacy issues. If privacy is about 'controlling who knows what about you'[1], then clearly the most fundamental privacy issue is controlling who knows who you *are*.

The National Human Rights Committee considers that a privacy analysis of the issue of identity proofing must be at the centre of the development of the Guidelines. This will ensure that the least privacy intrusive option is identified and implemented, while achieving the objectives of reducing security and fraud risks.

A privacy analysis need not be an onerous task. The Privacy Commissioner's tool for assessment and implementing new law enforcement and national security powers[2] would be an appropriate tool for such an analysis. It is necessary to consider and identify the size, scope and likely longevity of the problem the Guidelines seek to address, as well as the

[1] David Watts, Acting Privacy Commissioner, Victoria quoted in 'Google Glass: Australian entrepreneurs move to capitalise on new wearable technology', ABC (Freya Michie), 1 June 2014, http://www.abc.net.au/news/2014-06-01/google-glass-australian-entrepreneurs-move-to-capitalise/5488742

[2] Australian Privacy Commissioner, Privacy fact sheet 3: 4A framework – A tool for assessing and implementing new law enforcement and national security powers (July 2011)

GPO Box 1989, Canberra
ACT 2601, DX 5719 Canberra
19 Torrens St Braddon ACT 2612

Telephone **+61 2 6246 3788**
Facsimile +61 2 6248 0639

Law Council of Australia Limited
ABN 85 005 260 622
www.lawcouncil.asn.au

range of possible solutions, including less privacy invasive alternatives. Such a framework would assist in refining the Guidelines to articulate better when the different levels of assurance would be implemented.

The National Human Rights Committee also notes that the Guidelines will not relieve agencies of their obligations under the *Privacy Act 1988*. The Guidelines should assist agencies to comply with their obligations by using the language of the Privacy Act and directing agencies to consider issues such as:

- Is it *reasonably necessary* to collect the personal information in question?
- Is collection *directly related* to one of the agency's functions?

Use of primary evidence

The Guidelines require the provision of primary evidence at Levels 2 to 4, which require medium to very high levels of assurance. The only levels at which primary evidence is not required is Level 0 (no assurance required) and Level 1 (low assurance required). Primary evidence is limited to a passport, Australian driver licence, Australian government issued proof of age card, Australian secondary student identity document (for minors only) or an immiCard. Each of these documents is a photographic identity document.

The National Human Rights Committee is unable to assess whether the Guidelines will involve greater use of photographic ID compared to the current '100 point check' process. This is in part because it is unclear to which situations the various levels of assurance will apply. For example, the Guidelines fail to provide any examples of when each level of assurance will apply. In addition, the guidance provided in Table 1 is open to interpretation and dispute; reasonable minds will differ on whether 'little or no' or 'some' confidence in the claimed identity is required.

Given that privacy is fact and context specific, the National Human Rights Committee considers that it is impossible to assess privacy effects, and whether those effects are the warranted in the circumstances, in the abstract. The Committee also anticipates that agencies responsible for implementing these Guidelines will similarly find it difficult. For these reasons, the National Human Rights Committee recommends that the Guidelines be amended to assist agencies to assess when different levels will apply by providing more real-life examples.

Consideration should also be given to whether the need for 'some confidence' in a claimed identity necessarily requires the production of photographic ID. Careful consideration is necessary to allay concerns such as the potential for the Guidelines to establish the circumstances for passports, drivers licences and proof of age cards to become de facto 'Australia Cards'.

Use of pseudonymous identities

The Guidelines provide no guidance as to when legitimate pseudonymous identities will be permitted. From the National Human Rights Committee's reading of the Guidelines, the objectives and aims of Level 2 level of assurance could be met by an established

pseudonymous identity. However, the requirement for primary evidence (a photographic ID) rules out the option of pseudonymous identities for Level 2.

Under Australian Privacy Principle 2, individuals must have the option of using a pseudonym when dealing with an APP entity, unless an Australian law or court or tribunal order requires identification or it is impracticable for the APP entity to deal with an individual using a pseudonym. The National Human Rights Committee submits that it is for the APP entity to establish that a pseudonym is not authorised or is impracticable. The Guidelines do not do so.

Paragraph 2.1.3 of the Guidelines states that this right is 'not absolute' and that having pseudonym will not be possible 'where processes require documentary evidence of a person's identity'. The National Human Rights Committee considers that this reverses the proper consideration of this issue. It suggests that the question should be whether having a pseudonym is impracticable or identity is required; whether documentary evidence is required should then follow from this answer.

The Committee further suggests that use of real-life examples to explain when Levels 1 or 2 will apply would assist in articulating why pseudonyms are permissible at Level 1 but not Level 2.

Community connection interview

The National Human Rights Committee observes that the proposed community connection interview will involve the collection of a great deal of personal information and could easily become a limited version of a security assessment. For this reason, the Committee emphasises the need for a privacy analysis to be applied to the interview to ensure that collection of this information is reasonably necessary or directly related to an agency's functions.

The National Human Rights Committee also notes that the community connection interview would affect most persons who do not have an 'official', government-verified identity, who may be expected to be more vulnerable than other persons, including. homeless persons, young persons, and those with disabilities.

I trust that these comments will be of assistance to the Department. Should you require any further information or wish to discuss these comments further, please contact Sarah Moulds, Acting Co –Director Criminal Law and Human Rights Division, on 08 7225 8011 or sarah.moulds@lawcouncil.asn.au.

Yours faithfully

MARTYN HAGAN
SECRETARY-GENERAL