

31 January 2022

Privacy Act Review – Discussion Paper

Attorney General’s Department

4 National Circuit

BARTON ACT 2600

(submitted by email: privacyactreview@ag.gov.au , extension granted)

Privacy Act Review – Discussion Paper

Justice Connect welcomes the opportunity to respond to the Privacy Act Review – Discussion Paper.

About Justice Connect

In the face of huge unmet legal need, Justice Connect designs and delivers high-impact interventions to increase access to legal support and achieve social justice. We help those who would otherwise miss out on assistance, focusing on people disproportionately impacted by the law and the organisations that make our communities thrive.

We have been serving the community for more than 25 years. We are a registered charity, operating nationally.

Our expertise – our Not-for-profit Law program

This submission draws on the experience of our specialist Not-for-profit Law program which provides free and low-cost legal assistance to not-for-profit community organisations and social enterprises, many of whom are registered charities.

We handle more than 1,600 enquiries annually from a diverse range of groups, primarily small to medium and mostly volunteer run. We have received over 75 privacy-specific enquiries over the past two years. Our privacy page, which includes further links to dedicated resources, has received over 6,000 unique views in the past two years and our Privacy Guide has been downloaded several times per day over that same period. We regularly deliver training on this issue and have many free resources (see: www.nfplaw.org.au/privacy).

The focus of our legal advice service (delivered by in-house lawyers and via pro bono referrals) is on small volunteer-run charities that would not otherwise be able to access this help. Many of these organisations are in regional, rural or remote communities.

Our submission

The structure of our submission is as follows:

1. overarching comments

2. small business exemption (proposal 4)
3. children and vulnerable persons (proposal 13)
4. enforcement (proposal 24)
5. interactions with other schemes (proposal 28).

Our submission focuses on the impact of the proposals in the Discussion Paper on small to medium sized not-for-profit organisations.

1. Overarching comments

From experience over more than 12 years, we know the vast majority of not-for-profits want to do the right thing. Our experience is echoed in the Australian Charities and Not-for-profits Commission (**ACNC**) Regulatory Approach Statement:

“The ACNC understands that most people involved in charities are honest, act in good faith and try to do the right thing. If mistakes are made, they are usually honest mistakes, or due to a lack of knowledge, expertise or capacity.”¹

Charities and other not-for-profits want to adopt good privacy practices, but most have scant resources to navigate regulatory complexity such as exists with the current privacy law regime. Our submission focuses on how to encourage compliance with ethical privacy collection and use practices, while providing practical and targeted support for the not-for-profit sector. The aim is to prevent their resources being unnecessarily diverted from providing services to the community.

2. Small business exemption (Proposal 4)

Our response

We strongly support comprehensive, accessible, and targeted resources being provided to educate and encourage small to medium businesses to adopt better privacy practices. But in doing so we **want to emphasize the different nature of the not-for-profit sector.**

As explained below, many not-for-profit organisations come within the current ‘small business’ exemption and this needs to be considered in the regulatory approach adopted for compliance and enforcement. For example, resources need to speak to not-for-profits, using their language as they do not readily relate to the concepts of ‘business’ and ‘customers’. Instead, they relate to being for-purpose (mission-driven) organisations with clients (or service users), funders, members and volunteers (and other non-business stakeholders such as carers).

¹ Para 30, ACNC Regulatory Approach Statement <https://www.acnc.gov.au/raise-concern/regulating-charities/acnc-regulatory-approach-statement> (accessed 28 January 2022)

If the small business exemption is removed or narrowed, then the need for resources and support for small to medium sized not-for-profits will be crucial.

Any removal or narrowing of the exemption should be timed to allow these resources to be created and accessed, and with a generous timeframe for these organisations to transition to compliance. These resources need to be easy to understand, easy to find and free. Multiple formats need to be provided (text, video, easy English) and supported with training and access to a dedicated hot line such as that run by the Australian Taxation Office (ATO).²

We are experienced in creating practical, plain language resources to improve legal literacy and organisational compliance. We have worked with regulators in the past and have award-winning experience in translating 'business', legal and regulatory requirements for the not-for-sector. We are willing to assist or consult on resource development in this area, if needed.

An active and targeted promotion and awareness-campaign would also be needed. Directors and volunteers in many not-for-profits will not be readily aware of the nature and extent of new obligations; such awareness-raising will reduce the risk of unintentional non-compliance.

In terms of developing resources and getting the message out to the sector, we recommend the Office of the Australian Information Commissioner (OAIC) work closely with the ACNC and the ATO as the key regulatory channels for the sector. It is also important to work with sub-sector peak bodies (such as the Councils of Social Services, disability, sport, arts and homelessness peaks) and sector-run support services.

Recommendation 1:

We recommend that the small business exemption only be removed or narrowed if comprehensive, accessible, targeted and free resources and training are provided to educate and encourage small to medium not-for-profits to adopt better privacy practices. In particular, we recommend that:

- a not-for-profit specific telephone and online enquiry service be established, like the service currently provided by the ATO
- OAIC work closely with the ACNC, ATO, peak sector bodies and sector-run support services to develop and promote resources and training
- resources be available before the start of any change to the exemption to allow sufficient time for not-for-profits to become aware of and meet new compliance obligations.

² <https://www.ato.gov.au/Non-profit/Getting-started/In-detail/Getting-help/>: 'NFP administrators can phone our dedicated Not-for-profit Premium Advice Service on 1300 130 248 between 8.00am and 6.00pm'

Our reasoning

Narrowing or removing the small business exemption will significantly impact the not-for-profit sector. In its latest report,³ the ACNC states 65% of registered charities had annual revenue under \$250,000 and a further 16% had revenue between \$250,000 and \$1 million. Many of these organisations come within the current small business exemption. When this is broadened beyond registered charities to other not-for-profit groups (for example, community sporting clubs, cultural groups), the number is much greater.⁴

Not-for-profits have limited resources to enable them to comply with increased regulatory burden. As the ACNC data shows, at least half of all charities operate without paid staff, with volunteers not typically volunteering to assist with regulatory ‘paperwork’. Not-for-profits need support to make it easier for them to comply with privacy regulation. The more money and staff time (paid and unpaid) spent on compliance, the less time to spend on achieving their purposes.

The existing OAIC resources seem to be primarily directed to a different audience. For example, every organisation covered by the Privacy Act must prepare a privacy policy. If a small not-for-profit seeks help to prepare its policy from the OAIC website, it will find the Guide to developing an APP Privacy Policy⁵ (18 pages) which is intended to be read with the Australian Privacy Principles guidelines⁶ (213 pages), and the principles themselves (24 pages). Small not-for-profits may struggle to quickly and easily find the help they need within these comprehensive resources.

Below we respond to some of the specific questions asked in this section of the Discussion Paper.

What support for small business would assist with adopting the standards in the Act?

Practical and targeted resources would support small business, particularly small to medium not-for-profits. We have discussed this above, but by way of some examples:

- short, practical guides in plain language and easy English (to support those whose first language is not English) about each principle with case examples relevant to small to medium not-for-profits (e.g. What does ‘good practice’ look like for a small not-for-profit? What are the common errors and traps? Top privacy tips when working with volunteers)
- template or relevant example privacy policies and notices
- a dedicated not-for-profit hotline (like that provided by the ATO, referred to above)
- short, recorded webinars on common topics for small to medium organisations including not-for-profits
- guidance as to organisations who can provide direction and advice

³ ACNC Australian Charities Report (7 Ed) <https://www.acnc.gov.au/tools/topic-guides/australian-charities-report> accessed 29 January 2022

⁴ Registered charities represent only a small percentage of the overall Australian not-for-profit sector <https://www.ato.gov.au/general/aboriginal-and-torres-strait-islander-people/not-for-profit-organisations/types-of-nfp-organisations/>

⁵ OAIC Guide to Developing an AAP policy <https://www.oaic.gov.au/privacy/guidance-and-advice/guide-to-developing-an-app-privacy-policy/>

⁶ OAIC APP guidelines <https://www.oaic.gov.au/privacy/australian-privacy-principles-guidelines>

- interactive decision-making tools e.g. our Justice Connect web app DGR tool which helps charities navigate complex tax laws.⁷

In addition to new resources, consideration should be given to making existing resources of the OAIC more accessible for small organisations.

How can small businesses be encouraged to adopt best practice information collection and handling?

Encouragement can be given to small to medium not-for-profits by giving them a way to check their level of compliance without fear of repercussions, e.g. an anonymous free online compliance check.

As discussed above, to broaden the reach and knowledge of OAIC in relation to the not-for-profit sector, we recommend OAIC work closely with the ACNC and ATO and sector peak bodies.

Recommendation 2:

We recommend OAIC establish a Not-for-profit Sector Advisory Group and draw on the expertise from within the ACNC and ATO including the ATO's Not-for-profit Stewardship Group.

Would proposal 23.2 to introduce a voluntary domestic privacy certification scheme be useful to small businesses that wish to differentiate themselves based on their privacy practices?

We acknowledge the benefits of a certification scheme but consider the additional cost of certification is likely to be prohibitive for many small to medium not-for-profits. We support a scheme that is simple and low or no cost for not-for-profits.

3. Children and vulnerable individuals (Proposal 13)

Our response

Recommendation 3:

We recommend adding an exemption to proposal 13.1 to amend the Privacy Act to require consent be provided by a parent or guardian if the child is under 16. The exemption would dispense with the requirement to obtain parental or guardian's consent where to do so is not fair and reasonable, or not in the best interests of the child.

Our reasoning

We are concerned the proposed requirement for parental or guardian consent for children will hinder a not-for-profit's ability to provide services to vulnerable children. For example, if a child is escaping family violence, seeking parental consent may put the child at risk of harm. If the child is seeking urgent care, the organisation may not be able to obtain timely parental consent. APP 12.3

⁷ Justice Connect's Not-for-profit Law Deductible Recipient (DGR) Tool <https://www.nfplaw.org.au/DGR>

does not adequately cover these situations. This aligns with our recent submission on the Online Privacy Bill Exposure Draft.⁸

4. Enforcement (Proposal 24)

4.1 Civil penalties and OAIC powers

Our response

We make no comment on the detail of the proposed new penalty scheme or the proposed enhanced assessment and investigation powers, but urge the OAIC **continue** its regulatory approach of working with organisations to encourage compliance. As discussed above, we recommend the OAIC **increase** its focus on education, guidance and advice to support organisations to adopt better privacy practices and help them **prevent** breaches of their obligations, particularly for not-for-profits. This focus on prevention by education and support is the regulatory approach of the ACNC.⁹

The OAIC should take into account whether an organisation is a not-for-profit or a charity when considering what action to take, particularly if they are small and/or volunteer run.

Recommendation 4:

We recommend the regulatory approach of the OAIC, particularly for not-for-profits, focuses on prevention through education and support, and account be taken of whether an organisation is a not-for-profit, particularly those that are small or volunteer run.

Our reasoning

A focus on penalties and enforcement may discourage many small to medium not-for-profits from opting into the Privacy Act. If the small business exemption is removed or narrowed, many of these organisations will need support to comply with the Act to avoid unintentional breaches.

4.2 Funding the OAIC

Our response

Recommendation 5:

We recommend not-for-profits, including registered charities, be exempt from levies suggested in proposal 24.7.

⁸ Submission to the Privacy Legislation Amendment (Enhancing Online Privacy and other Measures) Bill 2021, Justice Connect [13 December 2021] <https://www.nfplaw.org.au/submission-privacy-legislation-amendment-enhancing-online-privacy-and-other-measures-bill-2021>

⁹ ACNC Regulatory Approach Statement <https://www.acnc.gov.au/raise-concern/regulating-charities/acnc-regulatory-approach-statement> (accessed 28 January 2022)

Our reasoning

Not-for-profits contribute significantly to the community. Given their work, and their size and resources, a levy would impose an unreasonable burden. There are precedents for this: registered charities are exempt from ASIC's supervisory cost recovery levy; and the UK Information Commission charges a lower flat fee for charities.

5. Interactions with other schemes (Proposal 28)

Our response

Recommendation 6:

We recommend the adoption of proposal 28.3.

We support the goal of greater harmonisation of the Privacy Act with other privacy schemes and legislation including state and territory privacy laws.

Our reasoning

Small to medium not-for-profits have limited resources to comply with one privacy scheme, let alone several. Many charities and other not-for-profits are supported by funding from more than one level of government. These funding contracts typically pass on obligations under the relevant privacy law to the recipient and, therefore, will mean the recipient has to comply with the privacy laws across multiple states and the Commonwealth. This involves navigating considerable complexity.

We would be happy to discuss or expand on any of our comments. We agree to this submission being made public (with signatures redacted).

Yours sincerely,



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