

20 September 2013

Australian Information Commissioner
Office of the Australian Information Commissioner (OAIC)
GPO Box 5218
Sydney NSW 2001.

By email: consultation@oaic.gov.au

Dear Commissioner

Submission on Draft Australian Privacy Principle (APP) Guidelines

Thank you for the opportunity to comment on the OAIC Draft APP Guidelines (**the Draft Guidelines**).

We note that the Draft Guidelines relate to the *Privacy Act 1988* (Cth) as amended by the *Privacy Amendment (Enhancing Privacy Protection) Act 2012* (Cth) (which we will refer to as the Privacy Act).

We would like to make some brief comments on one very limited aspect of the Draft Guidelines: how they refer to and deal with the application of the *Privacy Act* to not-for-profit organisations.

About PilchConnect and PILCH

PilchConnect is a specialist legal service for not-for-profit community organisations in Victoria and NSW. We provide free and low cost legal information, training, phone advice and casework services to community organisations. We focus our legal services on community organisations that are working in the public interest. PilchConnect is a program of the Public Interest Law Clearing House (**PILCH**).

Please refer to [Attachment A](#) for more information about our organisation.

Not-for-profit organisations in Australia

It is estimated that there are over 600,000 not-for profit organisations in Australia¹ – made up of unincorporated groups, trusts, incorporated associations, co-operatives, and companies (primarily companies limited by guarantee but also indigenous corporations).

The sector ranges from very small, volunteer-involving, member organisations (eg. with less than \$500 annual budgets) to national, employer organisations with multi-million dollar budgets for service delivery.

Not-for-profit organisations operate across a variety of fields including social and community services, health, education and childcare, sport and recreation, the arts and culture, housing and community development, overseas aid, and the environment.

While it is essential to the legal nature of not-for-profit organisations that they cannot operate as a business (ie. they cannot distribute profits to owners or shareholders for private gain), many have fee for service and/or various trading operations.

Not-for-profit organisations and the Federal privacy legislation

In our experience there are varying, but generally low, levels of knowledge across the not-for-profit sector about the application of Federal privacy legislation. We think that this partly stems from the terminology used in the *Privacy Act*.

As noted in the Draft Guidelines (paras. B.2 and B.3), the *Privacy Act* will apply to ‘an APP entity’, which is defined to be an ‘agency’ or ‘organisation’. An ‘organisation’ is then defined in section 6C of the Act to include an individual, body corporate, partnership, other unincorporated association, or trust. Some exceptions from this general definition of ‘organisation’ are then set out (eg. for ‘small business operators’).

The term ‘organisation’ is one that the not-for-profit sector is familiar with, and the way it is defined in s 6C of the Act includes many of the common legal structures within the not-for-profit sector such as body corporates (including incorporated associations, cooperatives, companies limited by guarantee, and indigenous corporations) unincorporated associations and trusts.

However the ‘small business operator’ exception set out at the end of section 6C is much less clear and much more problematic for the sector.

The terminology of ‘small business’ and ‘operator of a small business’ is most commonly used to describe for-profit commercial activities and operations. Many not-for-profit community organisations are unlikely to identify that their organisation might fit into an exception described as for those ‘operating a small business’.

Draft Guideline B.5 explains that:

In general, a small business operator is a business with an annual turnover of \$3,000,000 or less for a financial year, unless an exception applies (s 6C). The exceptions include businesses that provide a health service and hold health

¹ Productivity Commission, *Contribution of the Not-for-profit Sector* (2010)

information other than in an employee record and businesses that disclose personal information for a benefit, service or advantage, or provide a benefit, service or advantage to collect personal information (s 6D).

It would be helpful if Draft Guideline B.5 could be clarified to assist people involved in not-for-profit organisations to determine how and whether their organisation might fall within the 'small business' exception, as this is not apparent from the legislation.

Alternatively, if this kind of extension to the Draft Guidelines is considered too wordy, it would be valuable if the OAIC could publish a fact sheet that is dedicated to the not-for-profit sector. While there are currently factsheets for NFP subsectors like [education and child-care bodies](#) and [sporting bodies](#), given the size and diversity of the sector, we believe a general fact sheet about the application of the *Privacy Act* to not-for-profit organisations would be well-received. The factsheet could include examples, so that not-for-profit organisations could work out when the small business exemption may apply to their circumstances.

We note that a definition of 'non-profit organisation' has been inserted into section 6(1) of the new *Privacy Act* and a reference to non-profit organisation is included in APP3. This has been addressed in Chapter 3 (paras. 3.57 to 3.60) of the Draft Guidance. Again, it would be valuable if, in addition this Draft Guidance, this explanation could be included in a separate fact sheet about the application of the *Privacy Act* for not-for-profit organisations (as per above).

We would be happy to discuss these matters with you, and further assist the Office of the Australian Information Commissioner in the development of further guidance material specific to the not-for-profit sector.

Kind regards

A handwritten signature in black ink, appearing to read 'N.MacDonald', with a large, sweeping flourish underneath.

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Attachment A:

About PILCH

The Public Interest Law Clearing House (Vic) Inc (**PILCH**) is an independent NFP with a vision of a world that is fair and just; where rights are respected and advanced, laws are fairer, and systems are more accessible and accountable. PILCH improves access to justice through the provision of pro bono legal services to people experiencing disadvantage and the community organisations that support them. We also address injustice through law reform, policy work and legal education.

Since its establishment in 1994, PILCH has developed a reputation for innovation and excellence in responding to unmet legal need in Victoria. Each year we provide free legal help to thousands of people experiencing disadvantage and Victorian non-profit community organisations.

On 1 July 2013 PILCH Victoria merged with PILCH NSW to create PILCH Justice Connect, which will provide pro bono legal services in both Victoria and NSW.

About PilchConnect

Of particular relevance to this submission is PilchConnect. This unique service was established by PILCH in response to an identified unmet legal need of Victorian community organisations for tailored, practical, free/low cost legal help.

By 'helping the helpers', PilchConnect seeks to maximise the limited resources of NFPs for pursuing their mission – to support vulnerable people and build more socially inclusive communities.

PilchConnect currently assists NFPs in the following ways:

- a legal information webportal with plain language resources and practical tools for Victorian community organisations, based around the 'lifecycle' of a group (see www.pilch.org.au/legal_info);
- a telephone legal advice service for discrete issues staffed by PilchConnect lawyers with NFP legal expertise;
- brokering of pro bono legal referrals for 'public interest' NFPs for assistance from PILCH member law firms;
- training and education for NFPs on common legal issues; and
- law reform and campaign work drawing on our inquiry and service data to inform policy submissions.

More information about PilchConnect is available at our website at www.pilchconnect.org.au.