



14 April 2023

Attorney-General's Department

Submitted online at <https://consultations.ag.gov.au/integrity/privacy-act-review-report/consultation/>

1. The Australian Charities and Not-for-profits Commission (**ACNC**) welcomes the opportunity to make a submission to inform the Government response to the Privacy Act Review Report (**Report**).

#### About the ACNC and the charity sector

2. The ACNC is the national regulator of charities established by the *Australian Charities and Not-for-profits Commission Act 2012* (Cth) (**ACNC Act**). The objects of the ACNC Act are to:
  - a. maintain, protect and enhance public trust and confidence in the Australian not-for-profit sector; and
  - b. support and sustain a robust, vibrant, independent and innovative Australian not-for-profit sector; and
  - c. promote the reduction of unnecessary regulatory obligations on the Australian not-for-profit sector.
3. In 2010, the Productivity Commission estimated that Australia has approximately 600,000 not-for-profits in total, including charities.<sup>1</sup> The ACNC regulates approximately 60,000 registered charities but does not oversee not-for-profits that are not charities. Our comments therefore relate to charities specifically, although may be taken to apply to the broader not-for-profit sector.
4. The ACNC acknowledges the importance of promoting information privacy and sees sound records management as part of good governance. We also acknowledge that the public is becoming increasingly concerned about the vulnerability of the large amounts of personal information held digitally by government, private sector and community sector organisations, following several high-profile data breaches. If the public is confident that charities are handling personal information correctly, it will enhance trust and confidence in the Australian not-for-profit sector.

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<sup>1</sup> Productivity Commission, 'Contribution of the Not-for-profit Sector' (2010) 57.



5. If implemented, we consider some of the Report's recommendations will have significant impacts on registered charities. We suggest these impacts need to be considered when determining how to strike the optimum balance between enhancing privacy protection and ensuring that charities (and other not-for-profits) are not subject to unnecessary regulatory obligations.
6. We want to highlight the importance of ensuring that organisations operating in this sector are provided with appropriate support to enable them to comply with any additional obligations imposed by changes to the *Privacy Act 1988* (Cth) (**Privacy Act**). This support will be vital to ensure minimal disruption to the important work they perform in the community.

### Impact of the Report's recommendations on registered charities

#### *Removal of the small business exemption*

7. Registered charities vary significantly in size, purpose and areas of operation.<sup>2</sup> There is corresponding diversity in the volume and type of personal information that charities hold, with some holding considerable information as part of their service delivery operation.
8. Some charities are already Australian Privacy Principle (**APP**) entities as defined in the Privacy Act. However, it is likely that the majority of registered charities are exempt from the requirements of the Privacy Act because they satisfy the criteria of the small business exemption.<sup>3</sup> In the 2020 reporting year, 65.9% of charities reported revenue of less than \$1 million.<sup>4</sup> It can reasonably be assumed that the majority of these charities would be small business operators for the purposes of the Privacy Act.
9. Additionally, registered charities are highly reliant on part-time, casual and volunteer labour. In the 2020 reporting year, 51% of charities operated without any paid staff.<sup>5</sup> On average, charities with paid staff which reported annual revenue of less than \$1 million employed 37.6% of their staff on a part-time basis and 35.5% of their staff on a casual basis.<sup>6</sup>
10. Therefore, proposal 6.1 to remove the small business exemption will be a significant change for registered charities.

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<sup>2</sup> Australian Charities and Not-for-profits Commission, '[Australian Charities Report](#)' (8 ed, 2022) 6-10; 51.

<sup>3</sup> *Privacy Act 1988* (Cth) s 6D. Note that, the ACNC does not require charities to report their annual turnover, instead collecting data on annual revenue, as defined by the Australian Accounting Standards Board (AASB). However, as the AASB definition of 'revenue' is broadly analogous to the definition of 'turnover' in the *Privacy Act 1988* (Cth), we consider the ACNC revenue data can be used as an indicative proxy.

<sup>4</sup> Australian Charities and Not-for-profits Commission, '[Australian Charities Report](#)' (8 ed, 2022) 6-7.

<sup>5</sup> Australian Charities and Not-for-profits Commission, '[Australian Charities Report](#)' (8 ed, 2022) 11.

<sup>6</sup> Australian Charities and Not-for-profits Commission, '[Australian Charities Report](#)' (8 ed, 2022) 12.



11. Based on our experience of leading regulatory change in the charity sector, these organisations would need tailored support and an appropriate transition period to be able to implement compliance with obligations under the Privacy Act.
12. We consider information sessions, plain language written guidance, digital modules and self-assessment tools would be of assistance to charities. Given the proposed changes will have such a significant impact on the sector, we recommend guidance be tailored to charities specifically. Generally, these organisations do not define or regard themselves as ‘small businesses’ and can be confused by guidance provided in language that is business-focused.
13. Assistance to obtain independent privacy advice may be beneficial to some charities. This would be particularly useful for the nearly one-third of registered charities that are ‘extra small’, with less than \$50,000 in annual revenue.<sup>7</sup>
14. A transitional period for charities to develop their compliance with any new privacy obligations will be required, to reflect the challenges that these organisations will face in developing the capacity to comply with new regulatory obligations. In determining an appropriate duration for the transitional period, the cumulative impact of regulatory obligations upon these organisations should be taken into account, particularly any changes to other regulatory obligations that are being implemented concurrently. We are available to provide further information on this point should you wish to better understand the regulatory environment for charities.

We note that some sections of the public have a perception that charities should expend their resources (or at least donated funds) exclusively on direct provision of services, and are critical of charities which are perceived to be ‘wasting’ resources on administration expenses.<sup>8</sup> If more resources are needed for additional administration to ensure compliance with (significant) new requirements such as the Privacy Act, this may add to this ongoing issue and its related impact on charitable fundraising.

#### *Direct marketing*

15. Our data confirms that some registered charities fundraise from the public, with 12.6% of charities reporting that they have obligations to report to a state or territory fundraising regulator.<sup>9</sup>
16. Without suggesting that this provides a reason for exempting direct marketing by charities, we draw your attention to an example from the United Kingdom demonstrates

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<sup>7</sup> Australian Charities and Not-for-Profits Commission, ‘[Australian Charities Report](#)’ (8 ed, 2022) 7.

<sup>8</sup> See, for example, Social Ventures Australia and the Centre for Social Impact, ‘[Paying What It Takes: Funding Indirect Costs to Create Long-term Impact](#)’ (2022) 37. Also, in response to concerns raised with the ACNC, we have published guidance on ‘Charities and Administration Costs’

<https://www.acnc.gov.au/for-public/understanding-charities/charities-and-administration-costs>

<sup>9</sup> Australian Charities and Not-for-Profits Commission, ‘[Australian Charities Report](#)’ (8 ed, 2022) 46.



the potential impact of a requirement for a charity to proactively engage with individuals whose data it holds to check whether they wish to opt out of future communication.

In 2015, the Royal National Lifeboat Institution (RNLI) committed to only contacting people who had opted in to receiving its communications seeking financial support.<sup>10</sup> After implementing this commitment in 2017, RNLI's database of supporters fell from two million people to just 500,000 and its financial resources fell by £28.5 million in 2018.<sup>11</sup> This led RNLI to again change its approach to handling supporter data in 2019, to a 'legitimate interest' approach, which did not require supporters to positively opt in to receiving communications.<sup>12</sup>

### *Right to erasure*

17. If a right to erasure of personal information is introduced in accordance with proposal 18.3, charities which hold personal information for the purpose of fundraising may inadvertently contact people who have previously requested to opt out of direct marketing (as the charity would no longer know that this particular person wished to opt out).
18. Contacting a person about a right of erasure in these circumstances could be addressed by recognising that there is a competing public interest in charities holding and using personal information for fundraising purposes, given that charities are, by virtue of their charity status, required to pursue purposes that are for the public benefit. This competing public interest could trigger the exception contemplated by proposal 18.6.

### **Summary**

19. The Report includes several proposals which would increase the regulatory burden on registered charities. As the national regulator for charities, the ACNC has an object of reducing unnecessary regulatory burden on the Australian not-for-profit sector. Therefore, the ACNC suggests that the unique needs and interests of charities should be given due consideration when determining how to implement any proposals in the Report that would result in the imposition of additional regulatory obligations upon them. If the proposals come into law, the ACNC stresses the importance of ensuring that tailored support and appropriate transition periods are provided to enable this vital sector of the Australian economy to adjust to its new obligations.

### **Publication of this submission**

20. The ACNC consents to the publication of this submission.

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<sup>10</sup> Alice Sharman, '[RNLI Switches to Opt-in Communications in Move It Says Will Lose It Millions](#)', *Civil Society* (21 October 2015).

<sup>11</sup> Priya Kantaria, '[RNLI Reverses 'Opt-in' Marketing Policy to Stem Income Fall](#)', *Civil Society* (1 October 2019).

<sup>12</sup> Priya Kantaria, '[RNLI Reverses 'Opt-in' Marketing Policy to Stem Income Fall](#)', *Civil Society* (1 October 2019).



**Next steps**

21. If you have queries about this submission, please contact Joanna Austin at [Joanna.Austin@acnc.gov.au](mailto:Joanna.Austin@acnc.gov.au).

A handwritten signature in black ink, appearing to read "Sue Woodward". The signature is fluid and cursive, with a long horizontal stroke at the end.

**Sue Woodward AM**  
Commissioner  
Australian Charities and Not-for-profits Commission