FUNDRAISING INSTITUTE AUSTRALIA

PUBLIC FUNDRAISING REGULATORY ASSOCIATION

Privacy Act Review

10 JANUARY 2022

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About FIA

Fundraising Institute Australia (FIA) is Australia's national peak body representing professional fundraising in Australia. It has over 1200 members who are charities, NFPs, suppliers of fundraising services and fundraising professionals.

Most major registered charities are FIA members, accounting for more than 80 per cent of the nearly $10.5[1] billion donated by Australians each year.

As the peak body for fundraising, FIA champions and facilitates best practice across the sector through our Code for ethical fundraising and through professional development and training.

We do this by:

- Setting best practice standards for professional fundraising;
- Administering a Code of ethical fundraising practice which is recognised and followed by both FIA members and most non-members engaged in the sector;
- Providing ongoing guidance to members on compliance with the Code and statutory regulation, including the APPs;
- Actively monitoring compliance with the Code by members and non-members;
- Providing professional development in best practice fundraising, including promoting awareness of the APPs; and
- Maintaining and making available a comprehensive set of resources to support professional fundraisers.

About the PFRA

The Public Fundraising Regulatory Association (PFRA) is the self-regulatory body for face to face fundraising in Australia. Face to face fundraising is one of a number of methods used by charities across Australia to generate funding. It provides significant funding that allows charities to provide vital services for local communities and to help solve some of the greatest global issues. Established in February 2015, the role of the PFRA is to make sure that the right balance is maintained between the duty of charities to ask for donations and the right of the public to experience high standards of behaviour from our members' fundraisers.

In this submission, FIA/PFRA highlights concerns in three broad areas:

1. Changes that will specifically and disproportionately affect charities:
    a. The proposal to eliminate APP 7 will mean an end to all fundraising that relies on implied consent. This will force charities to shift their fundraising efforts to more expensive channels such as free to air television where a single 30 second advertising spot in prime time can cost up to $40,000. Charities are already under attack for their expenditures on fundraising. If they are forced to give up direct marketing (one of the most cost-efficient means of acquiring new donors) their cost

[1] https://www.acnc.gov.au/tools/reports/australian-charities-report-2017

of fundraising will increase dramatically as will attacks from those opposed to fundraising spending on new donor acquisition. They will also be forced to turn to non-targeted communications such as flyers, unaddressed admail and random dialing of telephone numbers, which are likely to be less acceptable to the community.

2. Changes that are not supported by sufficient evidence:
    a. The proposed introduction of a right of 'erasure' would defeat efforts by charities to manage donor preferences by forcing them to remove personal information from their databases, including a person's expressed preferences regarding fundraising solicitations.
    b. The proposals concerning civil penalties for breach and a direct right of action are unnecessarily heavy-handed and will lead to costly and wasteful litigation, whereas most complaints can be (and are) effectively dealt with through EDR systems.
    c. Most of the proposed changes to the APPs appear to be designed to deal with privacy concerns arising from the conduct of social media platforms. FIA submits that these concerns should be addressed through the OP code currently being developed to cover these entities, not through changes to the Act.

3. Other matters that the Review should consider:
    a. We believe the Review should consider the unprecedented increase in State agency surveillance of Australians, particularly in regard to sensitive health information and location monitoring that has arisen since the onset of Covid-19. The potential erosion of privacy rights from surveillance technology is a far greater privacy threat than receiving an unrequested or unexpected appeal for a gift from a charity. The Review should make recommendations regarding the winding-back of these measures.
    b. Charitable fundraising is an activity carried out in the public interest and should be expressly acknowledged as such in the proposed change to the objects of the Act and granted exemption or exceptional status under any new amendments that would restrict use of personal data in other private sector jurisdictions.
    c. We recommend that the Review consider a "legitimate interest" concession modelled on GDPR whereby charities would be able to continue to contact prospective donors without express prior consent.
    d. Australia's APPs do not currently meet the 'adequacy' test of the European Commission, disadvantaging charities and the broader business community.

1.1 Amend the objects in section 2A, to clarify the Act's scope and introduce the concept of public interest, as follows:
(a) to promote the protection of the privacy of individuals *with regard to their personal information*; and
to recognise that the protection of the privacy of individuals is balanced with the interests of entities in carrying out their functions or activities *undertaken in the public interest*.

FIA/PFRA believes the objects of the Privacy Act do not need to be changed. The objects adequately balance the needs of individuals with the needs of entities carrying out their legitimate activities. Further restricting activities such as fundraising by charities would impact their ability to connect with donors and prospective donors in the public interest.

Proposal 1.1(b) introduces the concept of the 'public interest' without defining what is meant by this term except to give examples "…including public health and safety, research, national security, freedom of expression, law enforcement and, regarding commercial entities, the economic wellbeing of the country." FIA/PFRA submits that charitable fundraising is in the public interest and should be so identified if a public interest test is to be introduced into the Act.

2.1 Change the word 'about' in the definition of personal information to 'relates to'.

FIA/PFRA opposes this wording change. We submit that the term 'relates to' is more precise and specific than the more general term 'about' and its meaning is now widely understood among APP entities. The use of different terminology in other more recent legislative instruments such as the Covidsafe app is a matter for those instruments and their drafting.

2.2 Include a non-exhaustive list of the types of information capable of being covered by the definition of personal information.

FIA/PFRA submits that this type of information is better left to OAIC-issued guidelines, rather than attempting to include a list in the Act. Types of information will, presumably, continue to be invented in the future and any attempt to list them will soon date the Act.

2.3 Define 'reasonably identifiable' to cover circumstances in which an individual could be identified, directly or indirectly. Include a list of factors to support this assessment.

FIA/PFRA submits that this is another matter best left to OAIC issued guidelines, rather than the Act.

2.4 Amend the definition of 'collection' to expressly cover information obtained from any source and by any means, including **inferred** or generated information.

FIA/PFRA does not support the proposed amendment to the definition of collection of personal information to include 'inferred' personal information. Such broadening of key terms in the Act risks making them meaningless in real world application.

Whether or not information is 'personal' is a question of fact, not inference. If additional guidance is needed to determine whether information is 'personal', this can be (and already is) provided via OAIC-issued guidelines developed in consultation with stakeholders, rather than by changing the Act.

As an illustration of how charities responsibly leverage inferred consent, we refer to the submission from the Wilderness Society (See appendix 2):

> Inferred and generated information on individuals allows Wilderness Society to engage with external suppliers who assist in identifying relevant, look-alike audiences to attract new supporters. With the recent pandemic restrictions, opportunities to attract new supporters are limited and not-for-profit organisations have had to diversify the way in which we reach out to new audiences. In 2020 TWS saw an increase of 500 new supporters through a 2 step digital acquisition program. Ensuring our marketing supplier partners can still leverage data smarts such as inferred and generated information, enables not-for-profits to market more intelligently, ensuring only relevant individuals are engaged.[2]

2.5 Require personal information to be anonymous before it is no longer protected by the Act.

[2] See Appendix 2 Submission to FIA from The Wilderness Society

FIA/PFRA does not support the expansion of the definition of personal information outlined in proposals 2.1-2.3 and therefore cannot support the change from 'de-identified' to 'anonymous'. The term 'de-identified' has been widely in use for over two decades and is well understood by fundraisers. The term 'anonymous' is used differently in the Act (i.e. the right to be dealt with anonymously) and has an entirely different meaning in practice.

2.6 Re-introduce the Privacy Amendment (Re-identification) Offence Bill 2016 with appropriate amendments.

FIA/PFRA recommends that the current Review of the Privacy Act be limited to aspects of that legislation and not extended to other bills, especially given the lack of all-party support for that particular bill.

3.1 Amend the Act to allow the IC to make an APP code on the direction or approval of the Attorney General

FIA/PFRA submits there is already a workable process for the development of APP Codes and the fact more have not been developed is due to a lack of resourcing rather than limits on the powers of the IC. FIA/PFRA is concerned that a power to unilaterally impose a code on a sector is disproportionate and amounts to regulatory over reach by government.

3.2 Amend the Act to allow the IC to issue a temporary APP code on the direction or approval of the Attorney-General if it is urgently required and where it is in the public interest to do so.

FIA/PFRA does not agree that there is a need for the IC to have 'urgent' powers to impose a code. Such a code, issued in haste without proper consultation with the affected stakeholders, would likeky fail to serve its public interest objectives and do more harm than good. If urgent action is needed to constrain the activities of a rogue entity, there are already powers and interventions available to the IC under the Act in its current form.

3.3 Amend Part VIA of the Act to allow Emergency Declarations to be more targeted…

FIA/PFRA opposes this proposal on the same grounds as 3.2. The DP proposes to put aside the privacy protections of the Act in the event of 'emergencies', however it is arguable that protection under the law, including privacy law, is even more imperative in such circumstances. This proposal seems to be at odds with the objective of the Review to enhance privacy protections for the community.

3.4 Amend the Act to permit organisations to disclose personal information to state and territory authorities when an Emergency Declaration is in force.

FIA/PFRA suggests that any decision to suspend the privacy rights of citizens under the Act should be made on a case by case basis, not triggered arbitrarily by the State. A process should be developed whereby such decisions could be made without undue delay, but having regard to proper process. Otherwise the privacy protections in the Act become almost meaningless.

8.1 Introduce an express requirement in APP 5 that privacy notices must be clear, current and understandable.

APP5 already requires notice to be given "at or before" the time of information collection. This satisfies the need for 'currency'. It also sets out in detail the requirement to disclose the circumstances in which information is being collected, including the purpose of collection. The term

'understandable' is vague, subjective and not helpful in interpreting APP5. FIA/PFRA suggests there is no need for further amplifying APP5 in the manner proposed by the DP. If further explanation is needed, it should be the subject of OAIC-issued guidance.

8.2 APP 5 notices limited to the following matters under APP 5.2:

- the identity and contact details of the entity collecting the personal information
- the types of personal information collected
- the purpose(s) for which the entity is collecting and may use or disclose the personal information
- the types of third parties to whom the entity may disclose the personal information
- if the collection occurred via a third party, the entity from which the personal information was received and the circumstances of that collection
- the fact that the individual may complain or lodge a privacy request (access, correction, objection or erasure), and

the location of the entity's privacy policy which sets out further information.

FIA/PFRA supports limiting the extent of matters subject to privacy notices, in line with Proposal 8.2 from the DP.

8.3 Standardised privacy notices could be considered in the development of an APP code, such as the OP code, including standardised layouts, wording and icons. Consumer comprehension testing would be beneficial to ensure the effectiveness of the standardised notices.

FIA/PFRA supports the development and adoption of standarised privacy notices in the interest of simplifying compliance by entities while promoting better understanding by the community.

'More' and 'better' privacy regulation are not the same thing. FIA/PFRA believes the current Review should go further in exploring ways to simplify compliance with the Act. Indeed, this should be one of the objectives of the Review.

8.4 Strengthen the requirement for when an APP 5 collection notice is required – that is, require notification at or before the time of collection, or if that is not practicable, as soon as possible after collection, unless:

- the individual has already been made aware of the APP 5 matters; or
- notification would be impossible or would involve disproportionate effort.

FIA/PFRA does not agree that the proposed strengthening of APP5 collection notices is necessary. APP5 already requires notification 'at or before' the time of collection.

9.1 – consent to be defined…as being voluntary, informed, current, specific, and an unambiguous indication through clear action.

FIA/PFRA opposes the proposed changes to consent and notes that they are linked to the proposal to remove APP 7 from the Act. FIA/PFRA is opposed to the removal of APP 7 and any other change that undermines the well established and broadly accepted convention whereby consent can be implied from the actions of the individual, pursuant to proper notice.

To illustrate the impact of this proposed measure, we cite the following extract from a submission to FIA from one of its member charities:

> Any move away from inferred consent would very seriously impact our postal direct marketing, telemarketing and some of our digital marketing. It would require a programme of actively obtaining consent from all of our supporters & donors where we currently rely on inferred consent. We could potentially lose 50% of our donors leading to a potential loss of revenue of $6 million. A good example of the impact of a consent model is in the UK when the RNLI moved to a consent platform in 2017. (The UK Information Commissioner was strongly recommending consent for DM at the time). They lost over half of their supporters:

https://www.civilsociety.co.uk/news/more-than-500-000-supporters-opt-in-to-rnli-communcations.html

In 2019, the RNLI had to reverse this decision due to the fall in the charity's income. Instead they used the GDPR lawful basis of "legitimate interest".

https://www.civilsociety.co.uk/news/rnli-reverses-opt-in-marketing-policy-after-income-fall.html

If the regulator is to move forward with the proposed consent model, then we strongly recommend that an alternative lawful purpose is introduced, such as the "legitimate interest" purpose on the GDPR in order to minimise the impact. Introducing the new term 'current' also creates difficulties. From the point of view of a charitable fundraiser, 'current' could be taken to mean the current fundraising cycle, which could be up to 12 months. [3]

FIA/PFRA recommends that the Review consider a "legitimate interest" concession modelled on GDPR whereby charities would be able to continue to contact prospective donors without express prior consent.

10. Additional protections for collection, use and disclosure of personal information

The additional protections for collection, use and disclosure of personal information appear to flow from the proposed removal of APP 7. As previously stated, FIA/PFRA is opposed to the removal of APP 7 and contends that changes to APP 3 and APP 6 would not be necessary if APP 7 were retained in its existing form.

It is unclear from the DP how the proposed changes would enhance privacy. The proposed introduction of the highly subjective and vague terms 'proportionality', 'reasonable expectation', 'reasonably necessary', 'sensitivity' and extent of 'transparency' will only create greater risk and uncertainty for APP entities. Any amendments to the Act should aim to create greater clarity and certainty for all, not add to confusion, uncertainty and risk.

10.4 Define a 'primary purpose' as the purpose for the original collection, as notified to the individual. Define a 'secondary purpose' as a purpose that is directly related to, and reasonably necessary to support the primary purpose.

FIA/PFRA opposes this proposed change to 'secondary purpose'. If it is implemented in combination with the removal of APP 7 the effect would be to make it impossible to approach new prospective donors without their prior knowledge and express consent.

11. Restricted and prohibited acts and practices

FIA/PFRA submits that there should be an Option 3: Retain the status quo. The DP does not make the case for introducing further restrictions. The proposed Option 1 is totally unacceptable to the charitable fundraising sector and would do enormous damage to registered charities and not-for-profits. Option 2, while still unacceptable, would be less damaging to the sector but create unnecessary consent fatigue at the donor level.

12.1 Introduce pro-privacy defaults on a sectoral or other specified basis.

FIA/PFRA submits that there should be an Option 3: Retain the status quo. The DP does not make the case for introducing pro-privacy default settings. Option 1 would be too restrictive, as it would likely mean multiple, granular opt-ins at every data collection point and fundraisers would further lose the ability to infer any consent. Option 2, while still an unnecessary imposition on charities, at least would enable fair, reasonable and transparent data collection without undue burden on the data subject.

13.1 Amend the Act to require consent to be provided by a parent or guardian where a child is under the age of 16.

[3] The charity wished to remain anonymous

FIA/PFRA supports in principle the provision of greater privacy protection for children under 16. We favour Option 1 from the DP.

14.1 An individual may object or withdraw their consent at any time to the collection, use or disclosure of their personal information.

FIA/PFRA considers it unnecessary to introduce a new right to object. Individuals already have a right under law to withdraw their consent at any time.

15. Right to erasure of personal information

FIA/PFRA submits that the existing provisions around de-identification and destruction of personal information in the Act remain fit for purpose. There is no need to introduce a new right to erasure and doing so would actually create significant problems for fundraisers in respect of their ability to manage donor preferences. Erasing personal information from databases defeats the efforts to maintain accurate and up to date information on donor preferences.

The impracticality of a right of erasure is illustrated by the following extract from a submission to FIA by member charity The Wilderness Socitiey:

> The difficulty we would face as a not-for-profit organisation would be the loss of control we currently have in ensuring that an individual's data is removed as requested from specific communications or listed as DNC. Under the current act an individual can opt out in various ways and this is marked and updated in our database, which is then used against all future comms to ensure exclusions are upheld as per the individual's request. If an erasure was implemented we foresee many instances where an individual's data may be acquired again from another source and a not-for-profit having no way to verify whether that individual has previously opted out of communications or marked as DNC. Providing historical receipts to past supporters would be impossible if a right to erasure was applied. These are often requested for tax reasons. Currently we have over eighty thousand records of individuals that we run as exclusions for marketing communications. Direct mail sees an average 10-15% of records excluded and 30% across telemarketing to uphold individual privacy preferences. The right of erasure should apply to certain aspects of individual data across sectors, however exclusions must apply when the benefit of retaining an individual's data contributes to ensuring their ongoing privacy and request for communications is upheld. There must be variations to digital content data held vs basic identification details.[4]

16. Direct marketing, targeted advertising and profiling

The proposals in section 16 of the DP appear aimed at curbing the tracking activity of social media giants. FIA/PFRA argues that such measures should be targeted in a code aimed at those entities rather than being applied to the wider community where they will have an unnecessarily harmful effect.

16.4 Repeal APP 7 in light of existing protections in the Act and other proposals for reform.

FIA/PFRA strongly opposes the proposal to repeal APP 7 and submits that many of the new proposals for reform to other APPs would not be necessary if APP 7 (with its existing restrictions on collection/handling/use of personal information for DM purposes) were retained.

If accepted, this change would mean an end to all fundraising that relies on implied consent. This would force charities to shift their fundraising efforts to more expensive channels such as free to air television where a single 30 second advertising spot in prime time can cost up to $40,000.

Charities are already under attack for their expenditures on fundraising. If they are forced to give up direct marketing (one of the most cost-efficient means of acquiring new donors) their cost of fundraising will increase dramatically as will attacks from those opposed to fundraising spending for new donor acquisition. They will also be forced to turn to non-targeted communications such as

[4] See Appendix 2 The Wilderness Society submission to FIA

flyers, unaddressed admail and random dialing of telephone numbers, which are likely to be less acceptable to the community.

The calculation below is an industry estimate of the volume of direct mail needed to recruit new donors. Note: this is based on new donor acquisition appeals, not mailings to existing donors.

2 million pieces of direct mail
1.5% response rate
= 30,000 new donors @ $50 avg gift
= $1,500,000 in upfront donation revenue
= $15,000,000 in lifetime donation revenue

Removal of APP 7 will potentially stop this impact and force charities to use different techniques (as described above) or forego revenue from donors.

The DP does not make the case for repeal of APP 7. The DP cites only two submissions to the previous round of consultation (one from a small consultancy and one from the OAIC itself) to justify removal of a core principle of private sector privacy law that has been in place and working effectively for over 20 years. The DP and the OAIC do not provide evidence that APP7 is failing or is no longer fit for purpose.

17.1 Require privacy policies to include information on whether personal information will be used in automated decision-making which has a legal, or similarly significant effect on people's rights.

FIA/PFRA supports the inclusion of information in privacy policies regarding automated decision-making, noting that this is not a normal practice of fundraisers or their suppliers to engage in automated decision-making.

18.2 Introduce the following additional ground on which an APP organisation may refuse a request for access to personal information:

- the information requested relates to external dispute resolution services involving the individual, where giving access would prejudice the dispute resolution process.

FIA/PFRA supports this proposed change to grounds on which an organisation may refuse access to information.

18.3 Clarify the existing access request process in APP 12

FIA/PFRA supports these proposed changes to the access to information process.

19. Security and destruction of personal information

FIA/PFRA supports these proposed changes to the security and destruction of personal information requirements.

20.1 Introduce further organisational accountability requirements into the Act, targeting measures to where there is the greatest privacy risk:

- Amend APP 6 to expressly require APP entities to determine, at or before using or disclosing personal information for a secondary purpose, each of the secondary purposes for which the information is to be used or disclosed and to record those purposes.

FIA/PFRA opposes this proposed change to APP6 on the grounds that requiring organisations to keep records of each disclosure of information for a secondary purpose constitutes excessive red tape for organisations without enhancing the privacy of individuals. FIA/PFRA submits that measures such as this appear to be designed to interrupt, discourage and frustrate normal exchanges of data between organisations and their suppliers (in our case, charities and their fundraising service providers).

FIA/PFRA submits that if APP 7 were left intact, this proposed change to APP 6 would become unnecessary.

22. Overseas data flows

The DP misses the opportunity to address the fact that Australian privacy law currently fails the European Commission's test for 'adequacy' meaning Australian businesses are barred from engaging in many cross-border data exchanges that are available to countries such as New Zealand. In FIA/PFRA's view, this should have been one of the objectives of the Review.

The absence of adequacy recognition makes it difficult for Australian charities to engage with donors based in the EC.

22.2 Standard Contractual Clauses for transferring personal information overseas be made available to APP entities to facilitate overseas disclosures of personal information.

FIA/PFRA supports the development of standard contract clauses for transferring information overseas (developed in consultation with the private sector and without the additional requirements proposed in 22.4).

22.3 Remove the informed consent exception in APP 8.2(b).

FIA/PFRA does not support the removal of the informed consent exception, noting there are times when an organisation may need to assure itself that it has the informed consent of a donor before transferring information.

22.4 Strengthen the transparency requirements in relation to potential overseas disclosures to include the countries that personal information may be disclosed to, as well as the specific personal information that may be disclosed overseas in entity's up-to-date APP privacy policy required to be kept under APP 1.3.

FIA/PFRA does not agree that the transparency requirements in the Act need strengthening. The proposed changes would add to the red tape burden on charities and their suppliers.

22.5 Introduce a definition of 'disclosure' that is consistent with the current definition in the APP Guidelines.

FIA/PFRA argues that the definition of disclosure in the Guidelines should be brought into line with the current definition in the Act and not the reverse.

22.6 Amend the Act to clarify what circumstances are relevant to determining what 'reasonable steps' are for the purpose of APP 8.1.

FIA/PFRA submits that if further clarification of 'reasonable steps' is needed, it should be left to Guidelines.

24.1 Create tiers of civil penalty provisions to give the OAIC more options so they can better target regulatory responses

FIA/PFRA opposes the introduction of civil penalties as proposed in the DP. Such a move would have a chilling effect on the wider economy, not only charitable fundraising. It would significantly increase risk for charities and their suppliers and encourage litigiousness in the wider community. FIA/PFRA would rather see greater emphasis placed in the Act on dispute resolution systems and that these be properly funded.

24.4 Amend the Act to provide the IC the power to undertake public inquiries and reviews into specified matters.

FIA/PFRA does not support the proposed increase in the powers of the IC to undertake inquiries. The powers of the IC were increased in the last major review of the Act in 2012 and remain adequate for enforcement purposes.

24.5 Amend paragraph 52(1)(b)(ii) and 52(1A)(c) to require an APP entity to identify, mitigate and redress actual or reasonably foreseeable loss.

FIA/PFRA does not support the proposed requirement for mitigation and redress for the same reasons we oppose the introduction of civil penalties (see response to 24.1).

24.6 Give the Federal Court the power to make any order it sees fit after a section 13G civil penalty provision has been established.

FIA/PFRA does not support the proposed reference to the Federal Court (see response to 24.1).

24.7 Introduce an industry funding model similar to ASIC's

FIA/PFRA does not agree that organisations facing investigation/prosecution by the OAIC should be required to fund both their own defence and their prosecution by the regulator. The prospect of accessing such a new revenue stream is likely to encourage the regulator to pursue prosecutions it might otherwise deem unsustainable.

24.9 Alternative regulatory models

FIA/PFRA supports Option 1, the expansion of EDR.

25. A direct right of action

FIA/PFRA opposes the introduction of a direct right of action. This idea has been repeatedly considered and rejected by policy makers over the past two decades. The DP does not present any new evidence to justify such action, which would promote endless litigation in the courts at great expense to the community.