



# Anglican Church Diocese of Sydney

31 March 2023

Attorney-General's Department  
Submitted online

## Submission on the Attorney-General's Department Privacy Act Review Report 2022

### Who are we?

1. This submission is on behalf of Anglican Church Diocese of Sydney (the Diocese). The Diocese is one of twenty three dioceses that comprise the Anglican Church of Australia. The Diocese is an unincorporated voluntary association comprising 267 parishes, as well as various schools, organisations and other bodies.
2. The Parishes of the Diocese are unincorporated associations and small businesses for the purposes of the *Privacy Act 1988*.
3. This submission specifically addresses Section 6.3 of the *Attorney-General's Department Privacy Act Review Report 2022 (Review Report)* - 'Removing the small business exemption'.
4. We welcome the opportunity to make this submission and we give consent for this submission to be published. Our contact details are as follows.

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### The implications of removing the small business exemption

5. The proposal to remove the small business exemption will involve an enormous expansion in the number of entities that are subject to the *Privacy Act 1988 (Act)*.

6. The overwhelming majority of Australian businesses (92.6% or approximately 2.4 million businesses) have a turnover of less than \$2 million.<sup>1</sup> These businesses generate approximately half of Australia's GDP and employ 42% of the private sector workforce.<sup>2</sup>
7. The proportion of businesses subject to the small business exemption in the Act would likely be higher than 92.6% since the exemption applies up to \$3 million in turnover and the ABS data does not include businesses that have a current or projected turnover of less than \$75,000 per annum that are not registered for GST. However, not all small businesses would collect or hold personal information, and some would also be disqualified from reliance on the small business exemption. All considered, the ABS data is likely to be broadly representative of the number of entities that are currently not subject to the Act, but will be if the exemption is removed.
8. The small business exemption is an important measure to reduce the cost and compliance burden on businesses that have limited financial and human resources. Many are sole traders or unincorporated associations, have few staff and operate on small revenue margins. A significant number also operate in the charities and not-for-profits sector and meet their compliance costs from donor contributions.
9. The Review Report quotes an ALRC estimate that removing the small business exemption will result in a startup cost of \$292 and an annual ongoing cost of \$391 (adjusted for inflation) for each small business. While we are not aware of the analysis behind these numbers, they appear to be gross underestimates for at least the following reasons:
  - a. They do not account for the value of the small business owner's time and effort in the tasks listed in the Review Report.
  - b. They exclude the cost of handling requests for access and the cost of implementing industry-standard systems for ensuring the secure storage of personal information and keeping those systems up to date.
  - c. Many small businesses will have cyber insurance and the premiums for that insurance will increase (perhaps significantly so) once the small business is exposed to the risk of penalties under the Act.
  - d. They fail to account for the cost and disruption a small business will experience if it is the subject of a complaint to the Office of the Australian Information Commissioner (**OAIC**).
10. We acknowledge the arguments in favour of removing the small business exemption in the Review Report and the need to ensure the protection of personal information. We also acknowledge the Government's proposal to remove the exemption.

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<sup>1</sup> ABS Counts of Australian Business 8165.0, Table 17, Dec 2021

<sup>2</sup> ABS Australian Industry, Table 5, May 2022 and ASBFEO calculations, private sector industry.

11. We are not arguing in this submission for the small business exemption to be retained, and nor are we arguing that it should be removed. Our concern is to ensure that if it is removed, that the significance of this decision on small business is properly understood and that appropriate measures are included in the reform package.
12. We strongly support the Government's position that if the small business exemption is removed that it should only be once there is a high level of certainty that small businesses are in a position to comply with the Act.
13. We do have concerns about the impacts that the proposed changes will have on the 267 parishes of the Diocese, particularly on the volunteers who serve in our churches who bear a considerable load in regulatory compliance.
14. We make the following recommendations.

Recommendation A: There should be a scaled approach to the obligations and penalties in the Act to ensure they are proportionate to the size and resources of small businesses.

15. Removing the small business exemption is not an 'either-or' proposition. There are many instances of Commonwealth legislation applying to small businesses which makes special provision to ensure the compliance burden is appropriate to their circumstances. For example, the obligations may be principles-based and implementation dependent on the resources of the organisation,<sup>3</sup> or the time periods for undertaking certain actions may be longer.<sup>4</sup>
16. Furthermore, the current penalty regime in the Act does not take into account the size, turnover and resources of the organisation. There should be a tiered approach to maximum penalties. The current maximum penalties for a person other than a corporation range from about \$100K to \$450K and up to \$2.5 million for a serious or repeated interference with privacy. These are far too high and disproportionate for a small business. They can still have a deterrent effect at a much lower level that will not affect solvency.
17. The high potential penalties would also have a flow on effect to insurance related to privacy breaches. We recommend that the Attorney-General receive advice from the insurance industry on the likely impact of removing the small business exemption on the availability and cost of cyber and other privacy protection insurance for small businesses.

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<sup>3</sup> For example, the *Anti-Money Laundering and Counter-Terrorism Act 2006 (Cth)*.

<sup>4</sup> For example, the *Fair Work Act 2009 (Cth)* and the *Australian Charities and Not-for-Profits Commission Act 2012 (Cth)*.

Recommendation B: OAIC and Australian Cyber Security Centre (ACSC) should be required to provide resources, training and other facilities for small businesses that are sufficient to enable compliance with the Act.

18. We understand this is the Government's intent so we will not make submissions on this point, except to say that consideration should be given to setting out a simplified code or set of procedures which small business can follow to be compliant with the Act. Principles-based legislation is advantageous because of the flexibility it accords, however it can give rise to uncertainty about what is required to comply with the obligations. Small businesses have limited resources - it is important they have certainty about the measures they are required to implement to meet their obligations so they can ensure those resources are deployed efficiently.
19. Under the *Fair Work Act 2009* if a small business follows the 'Small Business Fair Dismissal Code' published by the Fair Work Ombudsman when undertaking a dismissal, the dismissal is deemed to comply with unfair dismissal laws. We would support the use of a similar form of code for compliance with aspects of the Australian Privacy Principles, such as in relation to privacy policies, collection notices and the storage/security of personal information.

Recommendation C: The Government should increase funding to OAIC and ACSC to enable them to provide the above resources and training for small businesses, and to efficiently handle a significant expected increase in enquiries from the new entities covered by the Act.

20. As noted above, removing the small business exemption will lead to an extraordinary increase in the number of entities that are subject to the Act. Furthermore, small businesses have fewer resources to implement compliance measures through their own staff or by engaging consultants and are likely to fall back on OAIC for assistance. OAIC and ACSC need to be properly resourced to provide the necessary assistance if small businesses are to be in a position to comply with the Act, as intended by the Government.

Recommendation D: There should be a long transition period from any date that the Government decides to remove the exemption.

21. While small businesses will need assistance from OAIC and ACSC, they will also need time to implement the necessary measures. While a large business may have privacy experts on staff or the capacity to engage consultants, for small businesses most of the work will be undertaken by the business owner as time permits or - in the case of a small community organisation - by volunteers outside of their work hours. This means that more time is needed to ensure small businesses can be in a position to comply.

Recommendation E: Volunteers should not be prosecuted for breach of a privacy obligation by an unincorporated association.

22. The number of Australians engaging in volunteering is in decline.<sup>5</sup> The participation rate declined from 36.2% in 2010 to 28.8% in 2019, and again in 2020. The total number of hours contributed by volunteers has also decreased by 20% in the period 2014 to 2019.<sup>6</sup> An increasing concern about exposure to personal risk is one reason for the decline, though there are multiple factors.
23. As a matter of principle, a person who willingly gives their time for the common good and without financial gain should not be subject to the risk of a penalty for breach of a compliance obligation by the organisation of which they are a volunteer.
24. Many small businesses in the charitable sector are unincorporated associations that do not operate behind a 'corporate veil'. They have few (and sometimes no) paid staff, and compliance is often undertaken by volunteers. The Act regards breaches by an unincorporated association as having been committed by each member of the association's committee of management (however described).<sup>7</sup> The maximum penalties applicable under the Act are very significant (especially after the increases legislated in 2022). Community organisations are already reporting that it has become more difficult to recruit new volunteers following the COVID-19 pandemic.<sup>8</sup> The risk of personal liability for a privacy breach by their organisations, among other rising compliance risks, is likely to have a further chilling effect on volunteerism.
25. To counter this, there should be statutory protection for volunteers in the Act which is modelled on the protection which applies under work, health and safety laws. This provides that a volunteer does not commit an offence for breach of a work, health and safety duty as a Person Conducting a Business or Undertaking (PCBU) or as an Officer of the PCBU.<sup>9</sup>
26. There is already an exemption for volunteers of registered political parties in the Act,<sup>10</sup> so the principle of not exposing certain volunteers to penalties for breach of the Act is already established. Protecting only volunteers of political parties has the appearance of 'special pleading' - all volunteers should be protected in the same way.

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<sup>5</sup> Volunteering Australia, Key Volunteering Statistics (February 2022). P.23

<https://www.volunteeringaustralia.org/wp-content/uploads/VA-Key-Volunteering-Statistics-2022-Update.pdf>

<sup>6</sup> Ibid

<sup>7</sup> Section 98B(1).

<sup>8</sup> Volunteering Australia, Key Volunteering Statistics (February 2022). P.26

<sup>9</sup> See section 34 of the *Work Health and Safety Act 2011 (NSW)* and the Model Work Health and Safety Bill published by Safe Work Australia. <https://www.safeworkaustralia.gov.au/doc/model-work-health-and-safety-act>

<sup>10</sup> Section 7C(4).

Recommendation F: OAIC should prioritise education in response to privacy breaches by small businesses – prosecution should be a last resort

27. OAIC should amend its *Privacy regulatory action policy* to include the size and resources of the entity as ‘factors to be taken into account’. Presently because few businesses with a turnover of less than \$3 million are subject to the Act, the resourcing of the entity does not feature in OAIC’s factors for consideration. Increasingly OAIC is going to be receiving complaints related to small retail businesses, tradespeople and charities staffed by volunteers, among others. These will require a different compliance approach that focuses on education.

We thank the Attorney-General’s Department for the opportunity to make this submission.

**The Right Reverend Dr Michael Stead**  
Anglican Church Diocese of Sydney