



Office of the Information Commissioner
GPO Box 5218
Sydney
NSW 2001

Via e-mail: consultation@oaic.gov.au

3 November 2015

Dear Commissioner,

Re PCEHR (Information Commissioner Enforcement Powers) Guidelines 2015

The Australian Federation of AIDS Organisations (AFAO) is pleased to provide comments on the PCEHR (*Information Commissioner Enforcement Powers) Guidelines 2015* (PCEHR Enforcement Guidelines).

For consumers to participate in the system, they must have confidence that their privacy and confidentiality are appropriately protected. The fact that the draft Guidelines reflect the new powers provided to the Office of the Australian Information Commissioner (OAIC) as a result of the 2014 amendments to the Privacy Act, is encouraging in this regard.

AFAO is the national federation for the HIV community response. AFAO's members are the AIDS Councils in each state and territory; the National Association of People with HIV Australia (NAPWHA); the Australian Injecting & Illicit Drug Users League (AIVL); Anwernekenhe National HIV Alliance (ANA); and Scarlet Alliance, Australian Sex Workers Association. AFAO advocates for its member organisations, promotes medical and social research into HIV and its effects, develops policy on HIV issues, and provides HIV policy advice to the Commonwealth, state and territory governments.

➤ **Adequate funding to the OAIC**

The OAIC must be adequately funded to meet the inevitable increase in workload associated with the increase in its jurisdiction.

We are aware that when the Federal Privacy Commissioner was given jurisdiction over private sector organisations in 2001, there was no proportionate increase in funding. This led to unacceptably long delays, of over a year in many instances, in complaints

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investigation¹. The volume of complaints related to the PCEHR could be large, especially as many of those to first register and use a PCEHR are likely to be individuals who have complex health conditions, such as people living with HIV and co-morbidities who are frequent users of the health system. As well, teething-problems associated with any new enterprise are likely to generate complaints. The regulator must have sufficient resourcing to ensure timely investigation and resolution of complaints.

Ensuring adequate funding will also enable the OAIC to engage in the necessary education and promotion activities required to explain to both organisations and individuals the requirements for the safe handling of personal information, and the circumstances under which complaints may be brought.

➤ **Comments on specific provisions**

s.7.7

This subsection states that the “Information Commission will generally publish accepted enforceable undertakings”. We support this position of default publication, to ensure transparency of circumstances where breaches have occurred. However, AFAO recommends that the limited circumstances in which publication may not occur as implied by the word “generally” should be specified, rather than being left open. This would be addressed by revising the wording to something along the lines of:

“The Information Commissioner will publish accepted enforceable undertakings except where to do so may put at risk the safety, privacy or confidentiality of an individual”.

s.13.4

This subsection of the PCEHR Enforcement Guidelines lists the following as one of the criteria for the Information Commissioner to consider when determining whether to impose a civil penalty for a breach of privacy, the “guiding principle” being that:

“ ... the Information Commissioner is unlikely to seek a civil penalty order for minor or inadvertent contraventions, where the person responsible for the contravention has co-operated with the investigation and taken steps to avoid future contraventions”.

To ensure that a person responsible for a minor or inadvertent contravention has taken steps that are indeed adequate to avoid repetition of the same or a similar contravention (steps such as staff training, or revising procedural policies and guidelines), AFAO recommends replacing “taken steps” with “taken adequate steps”, so that it reads:

“ ... the Information Commissioner is unlikely to seek a civil penalty order for minor or inadvertent contraventions, where the person responsible for the contravention has co-operated with the investigation and taken adequate steps to avoid future contraventions”.

¹ Australian Government Office of the Privacy Commissioner (2005). *The Operation of the Privacy Act Annual Report*. Commonwealth Government of Australia, Canberra, 34.
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AFAO would be pleased to further discuss our views. Rob Lake can be contacted at rob.lake@afao.org.au or on (02) 9557 9399.

Yours sincerely,

A handwritten signature in black ink, appearing to read 'Rob Lake', written in a cursive style.

Rob Lake
Executive Director

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