



Law Council
OF AUSTRALIA

Business Law Section

Mr Timothy Pilgrim
Australian Privacy Commissioner
Office of the Australian Information Commissioner
GPO Box 5218
Sydney NSW 2001
Via email: consultation@oaic.gov.au

12 April 2013

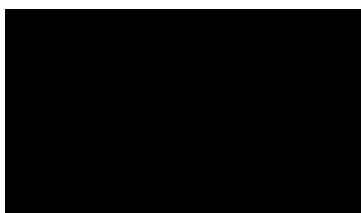
Dear Commissioner,

The Privacy Committee of the Business Law Section of the Law Council of Australia (the Committee) welcomes the opportunity to respond to the Office of the Australian Information Commissioner (OAIC) request for comment on a consultation draft of the [Guidelines for developing codes – issued under Part IIIB of the Privacy Act 1988](#) (Draft Guideline).

As stakeholders are aware, the [Privacy Amendment \(Enhancing Privacy Protection\) Act 2012](#) (Privacy Amendment Act) makes a number of changes to the [Privacy Act 1988](#) (the Privacy Act) and come into effect on 12 March 2014. The changes include the introduction of a new Part IIIB in relation to privacy codes. Part IIIB, which replaces the current Part IIIA, changes the process for the development of privacy codes.

Please see attached a table summarising the Committee's comments for the proposed process. Should you have any questions or wish to discuss this matter please contact Olga Ganopolsky the Committee Chair on (02) 9278 7837.

Yours sincerely,



Enc.

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Key Terms in Guidelines	Comments
Part 1 – Introduction The Privacy Act and codes	The Committee welcomes the additional clarity and transparency that will be achieved
Part 2 – Deciding and planning to develop a code Related publications	It would be beneficial if the draft Guideline would be expanded to illustrate what the OAIC will consider as appropriate reasons or resources and what factors will be taken into account in determining criteria such as adequacy of resources and needs in any given circumstances
Part 3 – Request by the Commissioner to develop a code	It would be useful to add further clarity as to what will be considered an independent function when addressing these requirements
Part 4 – Developing codes	What will be the avenue for reviewing the appropriateness of the request and assessing the criteria as to in what circumstances such a request can be made. This goes to independence and transparency. It would be useful to provide a clear statement of what would be considered as independent in these circumstances
Part 5 – Handling and reporting of privacy complaints	In dealing with reporting and monitoring of complaints it would be important to address separation of powers. This is particularly pertinent in the legal regime with substantial legal penalties and existing regulatory enforcement mechanisms.
Other issues Statement of a clear policy objective Dealing with objections Onus of proof	<p>Because codes by necessity need to work under the Act and are of themselves subject to the Act, it would be useful to make it clear that codes are not additional explanations to the Act. A code is designed to give meaning to some particular operational matter or be industry specific. Typically, codes would by necessity deal with a number of data flow objectives that may raise specific policy or legal issues. It would be good to have maximum certainty as to the needs or “mischief” that the proposed code seeks to address.</p> <p>What are the ways that objections can be made in the code making process?</p> <p>No provisions of the code should have the effect of reversing the onus of proof under the Act.</p>

