FINANCIAL PLANNING
ASSOCIATION *of* AUSTRALIA

REVIEW OF THE PRIVACY ACT 1988

Comments on discussion paper
27 November 2020

Introduction

Thank you for the opportunity to contribute to the Australian Government's review of the *Privacy Act 1988*. The Privacy Act framework is very important to financial planners and the Office of the Australian Information Commissioner is one of eight separate Government regulators and agencies that have an interest in overseeing the financial planning profession.

The Financial Planning Association of Australia (FPA) broadly supports the application of the Privacy Act framework to the financial planning profession. Australians have an expectation when engaging a financial planner that their personal information will be protected, and strong privacy protections benefit financial planners by building public trust in the profession.

The financial planning profession is based on a deep and direct relationship with clients who are seeking guidance on their financial affairs. Financial planners work to understand their clients through extensive fact-finding interviews, in which clients disclose a wide range of personal information. This personal information will usually include the client's financial position, employment, family ties, health issues, current living arrangements and goals for the future, among other things. A financial planner will then take this personal information and develop financial advice for the client which may recommend an investment strategy, savings plan, management of cash-flow and strategy for achieving the client's financial goals.

Financial advice has traditionally included a recommendation relating to one or more financial products which suit the client's needs. However, the recommendation of a product is not always central to the work of a financial planner. Though the *Corporations Act 2001* links financial advice to the provision of a financial product, it should be seen as a much broader service.

Recent developments in technology are relevant to any discussion of privacy in financial planning. Some financial planners have adopted methods of providing financial advice using software and/or online platforms, which is often referred to as robo-advice. While robo-advice may change the manner in which a financial planner engages with their clients, it does not materially change the role of the financial planner, the planner's obligations to their clients or the nature of the personal information they receive and hold from their clients.

The introduction of the Consumer Data Right is also of great significance to financial planners. The CDR promises to streamline the collection of personal information from clients and make the provision of financial advice more efficient and easier to tailor to the client's specific needs. However, the CDR will likely not change the underlying nature of the personal information collected by a financial planner or the purpose for which it is held.

Financial planners have extensive legal and professional obligations to maintain records in relation to their clients and the advice they have provided. These requirements are usually applied in conjunction with the Privacy Act framework to protect the interests of the client.

We have provided some answers to specific questions in the discussion paper which may assist the Government in conducting its review. We would be happy to expand on these responses if needed.

Comments on specific questions

Question 9
Are there businesses or acts and practices that should or should not be covered by the small business exemption?

By its nature, financial planning involves a practitioner collecting and holding a wide range of personal information relating to a client, including financial information and health information.

Financial planning businesses are largely subject to the Privacy Act framework. Even where a financial planning business has an annual turnover of less than $3 million (which would include most small and medium sized practices), they are generally 'reporting entities' under section 6 of the *Anti-Money Laundering and Counter-Terrorism Financing Act 2006*.

In considering whether the small business exemption remains appropriate, the Government may wish to consider the definition of 'reporting entity' under section 6 the *Anti-Money Laundering and Counter-Terrorism Financing Act 2006*. Of the 54 items in that definition, most relate to the act of providing or arranging a financial product. A business that does not hold an Australian Financial Service licence and/or does not arrange a financial product will not be caught by this definition.

There are a range of financial services businesses that may fall outside this definition, including financial planners who provide only strategic advice (which does not involve a financial product recommendation), and financial or money coaches.

The FPA considers it is appropriate for all businesses that collect personal information in order to provide a professional service - whether this is financial advice, strategic advice or financial coaching - to be subject to the Privacy Act framework. Most Australians would expect the disclosure of such personal information to their financial planner or other professional would be covered by privacy safeguards, regardless of whether the service they receive includes the recommendation of a financial product or is authorised by an Australian Financial Services licence. The recommendation of a financial product should not be the determining factor in whether the Privacy Act framework applies.

Question 20
Does notice help people to understand and manage their personal information?

Disclosure is a common tool in the financial services sector and is used to protect consumer interests with regard to financial advice and financial products. As a method of protecting the interests of consumers, disclosure assumes that consumers will engage with the disclosures they are provided, that they will read and understand disclosure documents and that they will make informed decisions about how to proceed.

This is not always the case and there is ample evidence of the shortcomings of disclosure as a consumer protection measure in the financial services sector, recently highlighted in ASIC Report 632. These shortcomings do not mean disclosure is not a useful tool in protecting consumer interests, but they do highlight areas of concern in which particular attention must be paid. For example, disclosures must be as simple as possible but have regard to the underlying complexity of the subject matter. Disclosures must compete for consumers' attention and must be delivered in a manner that reflects the consumer's needs and situation. In this context, the ASIC report concludes that disclosure shouldn't be the default method of protecting consumer interests.

The issues about disclosure discussed in ASIC Report 632 could assist this review in understanding the benefits and challenges of relying on consumer notification of privacy issues.

Question 25
Would a standardised framework of notice, such as standard words or icons, be effective in assisting consumers to understand how entities are using their personal information?

Yes. A standardised framework would have two benefits. Firstly, it would ensure that disclosures are made in plain language that is focused on consumer understanding rather than addressing compliance risks for the organisation. Secondly, a standardised framework would promote a broader understanding of privacy issues in the community and provide a common language that will improve the effectiveness of the disclosure system as a whole.

Adults learn information in a variety of ways including auditory, visual, kinesthic, and auditory digital. For this reason, we are supportive of information being provided in standard words and icons, but information should also be encouraged to be provided in recordings and video as well.

Question 30
What requirements should be considered to manage 'consent fatigue' of individuals?

Privacy is only one of the issues that defines the relationship between a financial planner and their clients. Clients are also provided with lengthy documents such as fee disclosure statements and ongoing agreements for service and are expected to provide their consent to their ongoing relationship with the financial planner.

Financial planners are required to obtain free, informed and prior consent from their clients before they act for them. The requirements of the Privacy Act framework are only a small part of the disclosures and consents that a financial planner is required to make.

In order to make the process as easy and consumer-friendly as possible, consents under the Privacy Act framework should be flexible enough to integrate with other documentation and consents to ensure the client has a consolidated view of the documents and consents that

define their relationship with their financial planner. Flexibility should include the form of disclosure and consent (noting the benefits of standardised language etc above) and the timing by which these are needed.

Question 38
Should entities be required to refresh an individual's consent on a regular basis? If so, how would this best be achieved?

It would be appropriate for a client to renew their consent where there has been a material change in the personal information being collected or held by their financial planner. A mandated refresh of consent based on a particular time period is unnecessary and would simply add to the compliance burden currently faced by financial planners, without much benefit to consumers in return.

Where a refresh of consent is required, arrangements should be flexible enough to allow the consent to be integrated into other interactions clients have with their financial planner, such as renewal of annual agreements and the provision of fee disclosure statements.

Question 39
Should entities be required to expressly provide individuals with the option of withdrawing consent?

The ability to withhold or withdraw consent is implicit in a request for a client to provide consent. A specific option of withdrawing consent would appear to be unnecessary in a relationship in which there is effective disclosure and renewal of consent at appropriate intervals. In saying this, there are times when other laws, such as the *Corporations Act 2001*, require financial advice records to be maintained for a 7-year period regardless of whether a client has withdrawn consent for the financial planner to hold that personal information.

Question 46
Should a 'right to erasure' be introduced into the Act? If so, what should be the key features of such a right? What would be the financial impact on entities?

The FPA does not have a view on a broader "right to erasure", but notes the legal obligations on financial planners to maintain appropriate client records, both to properly service their clients and also to respond to any complaints that may arise in future years. Any "right to erasure" must continue to allow financial planners to maintain their client records with being required to delete personal information that is central to those records.

Question 56

How should any direct right of action under the Act be framed so as to give individuals greater control over their personal information and provide additional incentive for APP entities to comply with their obligations while balancing the need to appropriately direct court resources?

The framing of a direct right of action should focus on achieving acceptable resolution of complaints at a minimum burden for consumers and for the organisations subject to the complaints. Requirements for internal and external dispute resolution (IDR/EDR) prior to bringing a case in court are common means of reducing the cost and time taken to resolve complaints.

In the financial services sector the Australian Financial Complaints Authority (AFCA) provides a mandatory and enforceable EDR scheme that is able to address most complaints without the cost of litigation. However, AFCA does not have the specialist skill to mediate complaints about privacy matters. The Office of the Australian Information Commissioner is well placed to undertake this role and should be funded by the Government appropriately.