



**Australian  
Privacy  
Foundation**

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# Privacy Legislation in New South Wales

**Submission to the New South Wales Law  
Reform Commission  
in response to the Commission's June 2008  
Consultation Paper (CP3)**

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## **The Australian Privacy Foundation**

The Australian Privacy Foundation is the main non-governmental organisation dedicated to protecting the privacy rights of Australians. The Foundation aims to focus public attention on emerging issues which pose a threat to the freedom and privacy of Australians. Since 1987, the Foundation has led the defence of the right of individuals to control their personal information and to be free of excessive intrusions. The Foundation uses the Australian Privacy Charter as a benchmark against which laws, regulations and privacy invasive initiatives can be assessed. For further information about the Foundation and the Charter, see [www.privacy.org.au](http://www.privacy.org.au)

## **Submission**

Generally, we support the detailed submission by the Cyberspace Law and Policy Centre at UNSW (will be at <http://www.cyberlawcentre.org/ipp/>). We would however like to expressly confirm our position in relation to the following selected proposals and issues in CP3.

### ***Chapter 1 - Introduction***

Proposal 1: Reforms of New South Wales privacy law should aim to achieve national uniformity.

Submission: National consistency is clearly desirable, but this does not necessarily translate into uniformity. In our view, pursuit of national consistency (and where appropriate uniformity) should not be at the expense of levels of privacy protection which NSW has already elected to provide. In other words there should be no 'levelling down' of substantive protection standards.

Proposal 2: New South Wales should co-operate with the Commonwealth in the development of privacy principles that are capable of application in all New South Wales privacy legislation.

Submission: Co-operation is clearly desirable, and an agreed set of principles for national application a desirable goal. However we support the Commission's view that given the lengthy timetable likely for any agreement on national uniformity, there remains a need for a short-medium term review, and possible amendment, of the two principal NSW information privacy laws (PPIPA and HRIPA) (1.13).

Proposal 3: New South Wales legislation should only apply to the handling of personal information by public sector agencies.

Submission: We support this proposal provided there are no 'gaps' left in the coverage of the many hybrid (public-private) entities – see our comments below on the proposal concerning state owned enterprises.

### **Information sharing**

Issue1(a): What are the impediments to information sharing in New South Wales?

Issue1(b): How should they be resolved?

Submission: this question is entirely the wrong starting point for the review. Sharing of information may well have benefits, but equally may be entirely inappropriate. The privacy principles expressly create a presumption against sharing of personal information without consent, with specific exceptions to recognise competing public interests. In our view the appropriate way to ask about this issue is in the context of individual principles of definitions – i.e. 'does the operation of the xxx principle (or the definition of yyy) impede the attainment of any other important public interests and if so how?'. This is the approach taken by the Commission in Chapters 5, 6 & 7 and that is the appropriate context for a substantive response to this question.

### **Criminal sanctions**

Issue 2: To what extent are the criminal sanction provisions of the legislation considered in this paper adequate and satisfactory?

Submission: Criminal sanctions sit uncomfortably in information privacy legislation, which is more commonly enforced through complaint resolution, civil penalties and/or compliance notices. The Privacy Commissioner is not expressly given a prosecution role, and does not have the resources to perform such a role. Suspected offences have to be referred to the police or DPP, who appear not to see privacy breaches as a priority – like Commission, we are aware of only one prosecution under the Privacy Act, the outcome of which is pending.

On the other hand, the threat of criminal penalties, if it were more widely known, could focus the minds of public servants on compliance in a way that the other sanctions might not. Repealing the offences under ss.62 and 63 would send the wrong message in an environment where illicit trade in personal information remains a known problem. We submit that the Act be amended to give both the Privacy Commissioner and the Tribunal an express duty to refer any suspected offences to the police and/or DPP.

## ***Chapter 4 - a clear and consistent legislative structure***

Proposal 4: The Privacy and Personal Information Protection Act 1998 (NSW) should be restructured: to locate the IPPs and exemptions in a schedule to the Act; and to reduce the Act's level of detail and complexity to resemble more closely that of the Health Records and Information Privacy Act 2002 (NSW).

Submission: We support this proposal

Issue 3: Should the *Privacy and Personal Information Protection Act 1998* (NSW) contain an objects clause? If so, how should that clause be drafted?

Submission: We support the inclusion of an objects clause and generally support the adoption of the wording of the Victorian IPA in sections 1 & 5, but we have reservations about elevating the 'free flow of information' to the status of an objective on a par with the explicitly privacy protective objectives (s.5(a) IPA 2000 (Vic)). We acknowledge the desirability of recognising a public interest in information flows, but prefer the way this is done in the Privacy Act 1988 (Cth) by making it a matter to which the Commissioner shall have regard in the performance of their functions (s.29). This clearly distinguishes the primary focus and objectives of the legislation – privacy protection – from other important but secondary considerations

Proposal 5: The Health Records and Information Privacy Act 2002 (NSW) should be amended so that the handling of health information by private sector organisations is regulated under the Privacy Act 1988 (Cth).

Submission: We support this proposal in general, but it is important that HPP 15, requiring opt-in consent for electronic health records, is not lost – this is a principal difference between HRIPA and PPIPA, arising from the recommendations of the 'Panacea or Placebo?' report in 2000<sup>1</sup>. If an equivalent is not provided in the Commonwealth law, then NSW should keep HPP 15 in some form as a requirement for both public sector agencies<sup>2</sup> and private sector organisations in NSW.

Issue 4: If health information held by the private sector were to be regulated by the *Privacy Act 1988* (Cth), should New South Wales continue to have two separate information privacy statutes?

Submission: No – there is no need for NSW to have a separate health information privacy law, provided PPIPA is amended to include the anonymity, unique identifiers and transborder principles (which are addressed below), as well as the HPP 15 requirement for shared EHRs to be 'opt-in'.

Issue 5: What reasons would there be for the continued existence of the *Health Records and Information Privacy Act 2002* (NSW) if it only regulated public sector agencies?

Submission: None – the handling of health information by public sector agencies should be regulated by or under the general NSW information privacy statute, but with the specific additional requirements for health information contained in the current HRIPA.

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1 See <http://www.health.nsw.gov.au/policy/gap/privacy/eprivacy.pdf>

2 We comment below on the unconscionable effect of the Regulations which have effectively exempted the Healthlink EHR trial from HPP 15.

## **Chapter 5 – Scope of Privacy Protection**

### **Issues arising out of the exceptions to “personal information”**

Issue 6(a): Should “publicly available information” under the *Privacy and Personal Information Protection Act 1998* (NSW) and “generally available information” under the *Health Records and Information Privacy Act 2002* (NSW) be exempted altogether from the definition of “personal information” in those Acts?

Submission: No, these exemptions (which are for publicly/generally available *publications* (not *information*) are not appropriate and undermine the objectives of the laws. We strongly agree with the criticisms of these exemptions, summarised in CP3, and strongly disagree with the conclusion of the AGD's Statutory Review, and of the government's response, that no action need be taken unless and until there is evidence of 'unreasonable claims'.

We strongly endorse the Privacy NSW submission to the statutory review “that the appropriate manner in which to deal with publicly available publications is therefore to create specific exemptions as necessary in relation to the IPPs dealing with collection, rather than the current exemption from the definition of ‘personal information’ itself.”(p.66).

Issue 6(b): Should IPP 2 and HPP 2 alone apply to “publicly available information” and “generally available information”, but not other IPPs and HPPs?

Submission: We submit that many of the principles should apply, at least to some extent, to both “publicly available publications” and “generally available publications”

Issue 8(c): If the Privacy and Personal Information Protection Act 1998 (NSW) and the Health Records and Information Privacy Act 2002 (NSW) are merged into one Act, how should the exemptions be worded if they are retained?

Submission: There should be a presumption in favour of the wording in HRIPA, was drafted with the benefit of hindsight and knowledge of some of the operational weaknesses of PPIPA.

Issue 12: Should some IPPs and HPPs but not others apply to information about an individual arising out of a complaint made under Part 8A of the *Police Act 1990* (NSW)? If so, which ones should apply?

Submission: In principle, personal information relating to a complaint about police conduct should be subject to all relevant IPPs and HPPs, subject to the whatever 'standard' exceptions apply – there is no justification for a special exemption for all such information from all of the principles.

Issue 13(a): Should the NSW Ombudsman be included among those agencies listed in s 27 of the *Privacy and Personal Information Protection Act 1998* (NSW) and s 17 of the *Health Records and Information Privacy Act 2002* (NSW) as being exempt from compliance with the IPPs?

Submission: No – there is no justification for the NSW Ombudsman to be exempt from all of the IPPs and HPPs.

Issue 14: Should the legislation continue to exempt from the definition of “personal information” information about an individual’s suitability for appointment or employment as a public sector official?

Submission: No – there is no justification for information about an individual’s suitability for appointment or employment as a public sector official to be specifically exempt from the definition of “personal information”.

Issue 18(a): Should information contained in photographs or video images come within the definition of “personal information”?

Submission: Yes, information contained in photographs or video images should remain within the definition of “personal information”.

Issue 19(a): Should the meaning of the phrase “or can reasonably be ascertained from the information or opinion” in s 4(1) of the *Privacy and Personal Information Protection Act 1998* (NSW) and s 5(1) of the *Health Records and Information Privacy Act 2002* (NSW) be clarified?

Submission: No – instead the phrase “or can reasonably be ascertained from the information or opinion” in both PPIPA and HRIPA should be amended to ensure that identity can also be ascertained from a combination of the information in the record in question and other information reasonably available to the agency or organisation; i.e the concept of 'constructive identification' needs to be clarified.

### **Definition of “public sector agency” - PPIPA s 3(1); HRIPA s 4(1)**

Issues 20&21: Should s 3(1)(b) of the *Privacy and Personal Information Protection Act 1998* (NSW) and s 4(1) of the *Health Records and Information Privacy Act* be amended to define a “public sector agency” as “a body established or appointed for a public purpose by or under a NSW Act ” or, alternatively, “any public authority constituted by or under a NSW Act”?

Submission: The definition of 'public sector agency' needs to encompass the widest possible range of public bodies. and affiliated health organisations.

### **Unsolicited information – PPIPA s 4(5); HRIPA s 10**

Issue 22: Should the meaning of “unsolicited” in s 4(5) of the *Privacy and Personal Information Protection Act 1998* (NSW) and s 10 of the *Health Records and Information Privacy Act 2002* (NSW) be clarified?

Submission: Our strong preference is for the abolition of the distinction between solicited and unsolicited, which we submit is an unnecessary complication in the Acts. The obligations of the IPPs and HPPs should apply to all personal information, however obtained, to the maximum extent practicable in the circumstances. This should apply to information obtained by surveillance and generated by transactions, as well as to information provided by another party, whether solicited or not.

## **Law enforcement and investigative agencies – PPIPA s 23, 24 and 27; HRIPA s 27**

Issue 24: Should the meaning of, and distinction between, “administrative” and “educative” functions in s 27 of the *Privacy and Personal Information Protection Act 1998* (NSW) and s 17 of the *Health Records and Information Privacy Act 2002* (NSW) be more clearly defined?

Submission: This exemption is entirely miscast. If it is necessary at all (which we doubt), it should at least be drafted as an exemption for legitimate, core investigative functions. We submit that far fewer operational functions of any agency need to be wholly exempt. Victorian Police, for example, do not have the same blanket exemption as NSW Police do under s.27 of PPIPA. Furthermore, it is difficult to see why any agency should not be subject to the data security and data quality principles in respect of operational information. The data quality principle should absolutely be applied to the creation and maintenance of criminal records, given the repercussions to innocent individuals of an incorrect criminal record.

## **State owned corporations**

Proposal 6: All State owned corporations should be covered by privacy legislation.

Submission: We strongly support this proposal

## **Government contractors**

Proposal 7: The *Privacy and Personal Information Protection Act 1998* (NSW) should be amended to provide that where a public sector agency contracts with a non-government organisation to provide services for government, the nongovernment organisation should be contractually obliged to abide by the IPPs and any applicable code of practice in the same way as if the public sector agency itself were providing the services.

Submission: We strongly support this proposal. However we also support retaining the current system of liability under s.4(4)(b) of PPIPA, in which the appropriate respondent to a privacy complaint remains the public sector agency which contracted out the services in the first place.

## **SHOULD OTHER ASPECTS OF PRIVACY BE EXPRESSLY PROTECTED IN PPIPA?**

Issue 27: Should the *Privacy and Personal Information Protection Act 1998* (NSW) contain express provisions for the general regulation of bodily privacy?

Issue 28: Should the *Privacy and Personal Information Protection Act 1998* (NSW) contain express provision for breaches of territorial privacy?

Submission: It is not appropriate, in our view, for PPIPA to expressly deal with the issue of bodily and territorial privacy except to the extent that records of personal information are involved. (the definition of 'personal information' already includes DNA and other biometrics). We do however favour the retention of the general 'privacy related matters' jurisdiction for the Commissioner which does allow for investigation and conciliation of complaints about invasions of bodily and territorial privacy not involving personal information.

We also note that a statutory tort or 'private right of action', would also assist in the protection of bodily and territorial privacy. We support the creation of such a right of action (see our

submission to the NSWLRC Consultation Paper 1 and the recommendation of the ALRC in its Report 108) – see also our submission on Issue 29.

### *Privacy of Communications:*

Submission: CP3 briefly discusses the issue of privacy of communications and notes that the Telecommunications (Interception and Access) Act 1979 (Cth) and the Telecommunications Act 1997 'cover the field'. The Commission concludes "For that reason, it is difficult to see how PPIPA/HRIPA could include provisions that regulate the privacy of telecommunications" (paragraph 5.99)

Submission: We respectfully disagree and submit that the Commission needs to look at the relationship between PPIPA and privacy of communications at least in respect of the use of recording or surveillance devices that do not fall within the scope of the federal legislation. It is clear that there is a residual jurisdiction, already covered, albeit imperfectly, by the 'listening device' provisions of the Surveillance Devices Act 2007. Given the Commission's consideration of these matters in Report 108 (2005) we are surprised that they have not been re-visited in the current inquiry. We submit that they should be, to ensure that any recommendations for changes to PPIPA take account of the Surveillance Devices Act and that between the two Acts the areas of communications privacy not covered by federal jurisdiction are adequately protected.

Issue 29: If a statutory cause of action for invasion of privacy is to be enacted, what should be its relationship to the *Privacy and Personal Information Protection Act 1998* (NSW)?

Submission: We agree with the Commission that a statutory cause of action for invasion of privacy would be complementary to PPIPA and HRIPA - "and HRIPA can be viewed as offering preventative, or "front-end", protection, while a statutory cause of action can be viewed as offering curative, or "back-end", protection" (paragraph 5.106). It would also apply more broadly - "to all individuals and bodies whether public or private" (5.107).

We note that the ALRC has now recommended a statutory cause of action, and are broadly supportive of the detail of that proposal (Report 108, Recommendations 74.1-74.7). We submit that the NSW LRC should recommend a statutory cause of action for invasion of privacy consistent with any Commonwealth action in this area.

## **Chapter 6 – The Privacy Principles**

### **COLLECTION FOR LAWFUL PURPOSES – IPP 1; HPP 1**

Issue 30: Should IPP 1 be amended to include a provision that a public sector agency must not collect personal information relating to an individual's ethnic or racial origin, political opinions, religious or philosophical beliefs, trade union membership, sexual activities or criminal record (defined as "sensitive information") unless the collection is strictly necessary?

Submission: We favour additional controls on the collection of 'sensitive' personal information, to be defined consistently with Commonwealth law.

**COLLECTION DIRECTLY FROM THE INDIVIDUAL – IPP 2; HPP 3**

Proposal 8: If the Privacy and Personal Information Protection Act 1998 (NSW) and the Health Records and Information Privacy Act 2002 (NSW) are merged, the provision governing collection of personal information directly from an individual should contain the two exceptions currently provided for in IPP 2 together with a third exception currently provided for in HPP 3, namely that information must be collected from the individual unless it is “unreasonable or impractical to do so”.

Submission: We support this proposal. We believe that IPP 2 currently imposes an unrealistic requirement, regularly ignored by agencies, thereby bringing the IPPs into disrepute.

**FURTHER COLLECTION REQUIREMENTS – IPP 3 AND IPP 4; HPP 4**

Proposal 10: IPPs 3 and 4 should be amended to stipulate that the requirements imposed by those sections apply whether the information is collected directly from the individual to whom the information relates or indirectly from someone else.

Issue 33: Should IPP 3 be amended to adopt the wording of HPP 4 or UPP 3.2, or some combination of the two?

Submission: The same obligations should apply. We favour the approach taken by the ALRC in its proposed UPP3, which is to apply the same notification/awareness obligations to the collecting agency, whether the collection is direct or indirect.

**APPLICATION OF IPPs TO RECORDS OF OBSERVATIONS OR CONVERSATIONS**

Proposal 11: IPPs 3 and 4 should be amended to clarify that the word “collects” means, in relation to information derived from observations of, or conversations with, an individual, the point at which information is recorded.

Submission: We support this proposal.

Issue 34: Should IPP 9 and HPP 9 apply to personal information that consists of conclusions drawn, or opinions expressed, based on observations of, or conversations with, an individual, providing a record is made of those conclusions or opinions? If so, do these provisions require amendment to clarify this?

Submission: Yes, IPP 9 & HPP 9 should apply to conclusions and opinions about an individual if they are recorded. We submit also that the definition, and therefore the Principles, should apply to unrecorded information. Otherwise the intent of the Act can too readily be avoided by public servants simply communicating information about individuals orally without ever making a record.

**RETENTION AND SECURITY OF INFORMATION – IPP 5; HPP 5**

Proposal 12: IPP 5 and HPP 5 should be amended to include a requirement for the secure collection of personal information.

Submission: We support this proposal, which would fill an obvious 'gap' in the coverage of the security principle.

### **ACCESS TO, AND ALTERATION OF, INFORMATION – IPP 7 AND IPP 8; HPP 8**

Proposal 13: The meaning and effect of s 20(5) of the Privacy and Personal Information Protection Act 1998 (NSW) and s 22(3) of the Health Records and Information Privacy Act 2002 (NSW), and their application to the IPPs and HPPs respectively, should be clarified.

Submission: We support this proposal – the relationship between the access and correction rights in PPIPA and HRIPA and the related provisions of the FOIA needs to be clarified. It would be preferable for individuals to have the benefit of less formal access and correction processes, while retaining the safeguard of formal appeal processes if required.

### **THE DICHOTOMY BETWEEN “USE” AND “DISCLOSURE” – IPPs 9, 10, 11 AND 12; HPPs 9, 10, 11 AND 12**

Issue 36(a): Should “use” and “disclosure” be treated as one concept such as “processing”, or as a combined phrase such as in the proposed UPP 5, with the one set of privacy standards and exemptions applying?

Issue 36(b): Alternatively, should the same privacy standards, and exemptions from those standards, contained in the HPPs apply equally to “use” and “disclosure” of information?

Submission: We favour the same standards applying to both use and disclosure of personal information, so that it becomes irrelevant for compliance purposes as to whether a particular action constitutes one or the other. The simplest way of achieving this is with a single 'use and disclosure' principle, along the lines suggested by the ALRC (UPP 5).

### **APPLICATION OF IPPs 10 AND 11 AND HPPs 10 AND 11 TO UNSOLICITED INFORMATION**

Issue 38: Do IPPs 10 and 11 and HPPs 10 and 11 apply to unsolicited information? If not, should they apply?

Issue 39: Should the privacy principles include a principle in terms identical, or equivalent, to the proposed UPP 2.5?

Submission: Yes, the NSW laws should include a principle identical to the ALRC proposed UPP 2.4, such that unsolicited personal information becomes subject to the maximum extent to all relevant principles, once a decision has been made to retain it.

## DISCLOSURE TO THIRD PARTIES – IPP 11

Issue 40(a): Should s 18(1)(b) of the *Privacy and Personal Information Protection Act 1998* (NSW) be amended to include the phrase “and the agency disclosing the information has no reason to believe that the individual concerned would object to the disclosure”?

Issue 40(b): Alternatively, should s 18(1)(b) be amended to delete the reference to s 10 and to provide instead that the individual must be made aware at the time the information is collected that information of that kind is usually disclosed to a third party?

Submission: There should not be an exception to the use and disclosure principle based solely on awareness, even if the awareness is required to exist at or before collection. Awareness alone gives individuals no control – involuntary uses and disclosures without consent are more appropriately authorised by other exceptions such as 'required by law' or 'serious and imminent harm'. We favour the exception proposed by the ALRC (UPP 5(a)) which includes a positive and objective test 'the individual would reasonably expect', rather than the negative and subjective 'the agency has no reason to believe the individual would object'.

## SPECIAL RESTRICTIONS ON DISCLOSURE – IPP 12

Issue 41: Should disclosure of an individual’s criminal history and record be restricted under s 19 of the *Privacy and Personal Information Protection Act 1998* (NSW)?

Submission: Yes, criminal history should be included in the definition of 'sensitive information'. Criminal history should be defined to include more than just 'criminal record' - the use of the latter term in the Privacy Act 1988 (Cth) is too narrow as it can be interpreted to exclude information about arrests, charges etc that do not result in formal criminal records.

Issue 42: Should the meaning of the words “sexual activities” in s 19(1) of the *Privacy and Personal Information Protection Act 1998* (NSW) be clarified?

Submission: We favour the wording 'sexual orientation and practices' recommended by the ALRC in Report 108.

## Section 19(2) of PPIPA – disclosure outside NSW

Proposal 14: Section 19(2) of the Privacy and Personal Information Protection Act 1998 (NSW) should be redrafted in line with HPP 9 and the proposed UPP 11. Alternatively, if the Privacy and Personal Information Protection Act 1998 (NSW) and the Health Records and Information Privacy Act 2002 (NSW) are to become one Act, HPP 9, redrafted to incorporate elements of the proposed UPP 11, is to be preferred over s 19(2) to regulate transborder data flows and transfer of information to Commonwealth agencies.

Submission: The NSW laws should contain cross-border data flow controls consistent with those in the Commonwealth Act. However, we have serious reservations about the adequacy of the ALRC's proposed UPP 11 (see our response to ALRC Report 108). Until an adequate Commonwealth principle is in place, we submit that PPIPA should be amended to include an equivalent principle to HPP 14 (not 9) which, while not ideal, is superior to both the existing NPP 9 and the proposed UPP 11.

## **REGULATING UNIQUE IDENTIFIERS**

Proposal 15: If the Privacy and Personal Information Protection Act 1998 (NSW) and the Health Records and Information Privacy Act 2002 (NSW) are to become one Act, a privacy principle regulating the use and disclosure of identifiers should be contained in the new Act. If the two Acts are to remain separate, the Privacy and Personal Information Protection Act 1998 (NSW) should be amended by the addition of a further IPP regulating the use and disclosure of identifiers.

Submission: We support this proposal – the NSW privacy laws should include a principle regulating the use of identifiers, consistent with the Commonwealth Act.

Issue 44: Should the privacy principle regulating the use and disclosure of identifiers be in the same terms as HPP 12 or the proposed UPP 10, or some combination of the two?

Submission: HPP 12 has too many exceptions which undermine its effect. The ALRC's proposed UPP 10 is a sound basis for an 'identifier' principle but in our view it should apply to government agencies as well as private sector organisations. It is a suitable model for application to NSW government agencies, with appropriate variation in wording.

## ***Chapter 7 - Other Operational Issues***

### **EXEMPTIONS**

#### **Section 24 of PPIPA – exemptions relating to investigative agencies**

Issue 45: Should s 24 of the *Privacy and Personal Information Protection Act 1998* (NSW) be amended to exempt an agency from compliance with IPPs 2, 3, 10 and 11 when the agency is disclosing personal information to an investigative agency for the purpose of that investigative agency carrying out its complaint handling or investigative functions?

Submission: There is no justification for the wholesale exemption either of investigative agencies themselves or of 'disclosures to investigative agencies' from all the provisions of these four principles. Limited exemptions may be appropriate; e.g. from the notification requirement of IPP3 where it would prejudice an investigation, but any such exemption should be narrow and contained within the applicable principle.

## Section 25 of PPIPA – exemptions where non-compliance is otherwise permitted

Issue 46(a): Is the correct interpretation of s 25(a) of the *Privacy and Personal Information Protection Act 1998* (NSW) that it applies to cases where a statutory provision expressly refers to the relevant IPP and provides that an agency is authorised or required not to comply with it, or is a wider interpretation correct, such as adopted by the Administrative Decisions Tribunal in *HW v Commissioner of Police, New South Wales Police Service*?

Issue 46(b): Should s 25(a) of the Privacy and Personal Information Protection Act 1998 (NSW) be amended to clarify its application?

Proposal 16: Section 25(b) of the Privacy and Personal Information Protection Act 1998 (NSW) should be amended to read as follows:

**“A public sector agency is not required to comply with section 9, 10, 13, 14, 15, 17, 18 or 19 if:**

...

**(b) non-compliance is otherwise permitted (or is necessarily implied or reasonably contemplated) under an Act (including the State Records Act 1998) or any other law.”**

Submission: We do not support any amendment which would recognise general common law duties (e.g. a duty of care). The separate 'serious and imminent threat ...' exception, together with considered statutory duties such as those under the Occupational Health and Safety Act, are a sufficient response to this duty. Where an 'authorised or required by law' exception is justified, it should be included in the applicable principles rather than in a separate section, to improve transparency and understanding. We do not believe that such an exception is necessary for *all* of the principles currently listed in s25 or that the two part construction of the exemption in s25 is necessary – it reflects an over-defensive approach to compliance with the principles. A single 'where required or specifically authorised by or under law' exemption, in appropriate principles, should suffice.

## PRIVACY CODES OF PRACTICE - PPIPA PART 3; HRIPA PART 5

Issue 48: Should the interaction of s 29(2) of the *Privacy and Personal Information Protection Act 1998* (NSW) with s 30(1) of that Act be clarified?

Submission: have serious reservations about the value of Codes. The complex process of Code development and approval appears to have deterred agencies from applying, and they and the Commissioner have preferred to use s41 Directions instead, which are even less transparent and accountable. Any significant and lasting variation from the IPPs in our view only be made by Parliament, and we therefore submit that the Code provisions in Act be repealed.

If the Code provisions remain, we submit that there should be a public interest test for the Commissioner to apply in making or approving a code – similar to that applying to s41 Directions (s41(3)). There should also be a requirement, unfortunately absent from s41, for the Commissioner to undertake public consultation and take submissions into account.

**PUBLIC INTEREST DIRECTIONS - PPIPA s 41 ; HRIPA s 62**

Proposal 17: Section 41 of the Privacy and Personal Information Protection Act 1998 (NSW) and s 62 of the Health Records and Information Privacy Act 2002 (NSW) should be amended to give the Privacy Commissioner the power to amend an earlier direction. (Also Issue 52).

Submission: Section 41 has been 'stretched' to accommodate semi-permanent variations to the IPPs and compliance requirements, which the legislation envisaged being made through Codes. In our view, experience suggests that neither mechanism is adequate as a way of providing long term variations, which should be made by legislative amendments, or at least by Regulation, thereby providing for more effective Parliamentary scrutiny. submit that any residual s41 Direction power be made expressly 'temporary', with a limit on the power to renew, which has been over-used. The section should however provide for Directions to apply to a class of agencies. making and amending Directions the Commissioner should be required to undertake public consultation and take submissions into account in deciding the balance of public interests under s41(3).

**Complaints on behalf of the individual**

Issue 53: Should s 45(1) of the *Privacy and Personal Information Protection Act 1998* (NSW) be amended to clarify that its application is limited to an individual whose privacy has been violated, or a person acting on behalf of the individual?

Submission: No – if any clarification is required it should confirm that complaints may be made by third parties. In the absence of a separate 'representative complaints' provision such as is provided in the Privacy Act 1988 (Cth), it is essential that this section does not restrict the ability of third parties to make complaints. The nature of many privacy breaches is such that the particular individuals affected may not even be aware of the breach, and so the scheme relies on 'whistleblowers' to bring a complaint. There may also be good reasons why individuals directly affected by privacy breaches are not in a position to complain – for instance they will often be in a 'power imbalance' with the agency and unwilling to risk further adverse action. Low income and disadvantaged individuals will also rarely be able or willing to lodge and pursue complaints. While providing for complaints by a person acting on behalf is desirable, there also needs to be provision for third parties to bring 'public interest' complaints; e.g. in the event of major data security breaches.

**Criteria to be applied by the Privacy Commissioner**

Issue 54: Should the meaning of "violation of" and "interference with" an individual's privacy in s 45(1) of the *Privacy and Personal Information Protection Act 1998* (NSW) be clarified?

Issue 55: Should the legislation provide guidelines as to what can be taken into account in determining whether there has been a "violation of, or interference with, the privacy of an individual"?

Submission: See our response to Issue 27. Parliament clearly intended that complaints can be brought both for breaches of the IPPs (conduct to which Part 5 applies) and for other 'privacy related matters' (see Commissioner's function (s36(2)(k)). It would be helpful for the legislation to clarify the relationship between these 'grounds' for complaint and the terms 'interference with

privacy' and 'violation of privacy' in s45.

## **REVIEW OF CONDUCT BY THE ADT - PPIPA PART 5; HRIPA s 21**

### **Nature of the jurisdiction**

Issue 59: (a) Should s 55 of the *Privacy and Personal Information Protection Act 1998* (NSW) be amended to clarify whether an application to the Administrative Decisions Tribunal is heard in its original or review jurisdiction?

Issue 59: (b) Should the jurisdiction be specified as being “review”?

Submission: However it is achieved, the Act should clarify that the ADT's role in relation to review of conduct that has been the subject of internal review under Part 5 is one of 'merits review'; i.e. an administrative review approach even where the conduct does not involve a 'decision'. It is important that the ADT's PPIPA and HRIPA jurisdictions should maximise access and minimise cost to complainants, and minimise formality and delay.

### **The ADT's powers on review**

Proposal 19: Section 55(2) of the *Privacy and Personal Information Protection Act 1998* (NSW) should be amended to provide that the Administrative Decisions Tribunal may make any one or more of the orders listed in subsections (a) - (g) on finding that the public sector agency's conduct the subject of the review was conduct that:

- contravened an IPP that applied to the agency;
- contravened a privacy code of practice that applied to the agency; or
- amounted to disclosure by the agency of private information kept in a public register.

Submission: We support this proposal.

### **Commissioner Determination model vs Tribunal Determination model**

Issue 61: Should Part 5 of the *Privacy and Personal Information Protection Act 1998* (NSW) be amended to give final determination of a complaint to the Privacy Commissioner rather than the Administrative Decisions Tribunal?

Submission: No – the Tribunal Determination model has, on balance, worked far better than the Commissioner Determination model in the Commonwealth Act.

The danger of having the Privacy Commissioner as the final arbiter or even as a ‘gatekeeper’ (as is the case with respect to privacy complaints against private sector organisations under HRIPA) is that the under-resourcing of the Privacy Commissioner’s office can directly impact on complainants’ access to justice.

Furthermore, the Privacy Commissioner already has competing roles with respect to education, advice and research; placing the Privacy Commissioner in a judicial role would create too great a conflict with respect to those other roles, and the more proactive work would likely suffer as a result.

Ideally, we would prefer a hybrid model which provides for a choice of agency internal review (as now) or Commissioner investigation and Determination (unless successful conciliation agreed by both parties) a right of appeal (merits review) from both the agency decision (as now) and the Commissioner's Determination, to a low cost Tribunal jurisdiction.

## ***Chapter 8 – The Relationship between PPIPA and other legislation***

### **THE RELATIONSHIP BETWEEN PPIPA AND THE FOI ACT**

#### **Disclosure, access and correction provisions**

Issue 63: Should the Freedom of Information Act 1989 (NSW) be the means by which the *Privacy and Personal Information Protection Act 1998* (NSW) access rights are obtained?

Submission: . The FOI Act is too bureaucratic and imposes fees for access which are not appropriate when people only wish to access personal information about themselves. If anything, first party access requests should be exclusively covered by PPIPA, not the FOI Act. We understand that a difficulty in the relationship between PPIPA, the FOIA and the State Records Act as they applied to correction of personal information were solved by amendment of PPIPA in 2004 which inserted section 15(4).

Issue 65: Should the administration of FOI and privacy legislation be amalgamated in one body?

Submission: A combined FOI and Privacy Regulator is acceptable in principle provided it is structured to give equal weight to both functions, and adequate resources. Combined 'Information Commissioners' operate effectively in the UK, Canada and in the Northern Territory. It would be a mistake to simply give privacy functions to an existing Ombudsman without significant other reforms to ensure that privacy enforcement was not reduced to the limited and weak 'recommendatory' role of Ombudsmen to date. The prospect of significant FOI reform offers an opportunity to create a powerful and effective Information Commissioner with both FOI and Privacy responsibilities.

Issue 66: (b) Is there a better alternative to this solution?

Submission: We submit that a better reform would be to take first-party access (i.e. by an individual to information about themselves) out of the FOI Act and leave it to PPIPA. The FOI Act could then cope better with other types of applications.

*Please note that postal correspondence takes some time due to re-direction – our preferred mode of communication is by email, which should be answered without undue delay.*