



**Australian  
Privacy  
Foundation**

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*(Please note that hard copy postal correspondence to APF may take some time due to re-direction – our preferred mode of communication is by email, which should be answered without undue delay.)*

January 2009

Judge Ken Taylor  
Privacy Commissioner of NSW  
Locked Bag 5111  
Parramatta NSW 2124

cc: The Hon. John Hatzistergos, Attorney General of NSW  
Attorney-General's Department  
Professor Michael Tilbury, Law Reform Commission of NSW  
Ms Karen Curtis, Australian Privacy Commissioner  
Ms Helen Versey, Victorian Privacy Commissioner  
Ms Zoe Marcham, NT Information Commissioner

Dear Commissioner Taylor,

**Interpretation of the Information Privacy Principles – ADT Case  
*GQ v NSW Department of Education and Training (No 2) [2008] NSWADT 319*<sup>1</sup>**

I am writing on behalf of the APF. We were disturbed to read the decision of the Administrative Decisions Tribunal (ADT) in the above case, and in particular that the Tribunal accepted a submission from your office arguing that s18 (Information Privacy Principle or IPP 11) does not apply to disclosures outside NSW, which would only be governed by s19(2) (IPP 12) if and when that principle took effect – this awaits the making of a Code by your office under s19(4).

We note that your submission is at odds both with the submission by the then Commissioner to the statutory review of the *Privacy and Personal Information Protection Act 1998* (PPIPA)

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<sup>1</sup> <http://www.austlii.edu.au/au/cases/nsw/NSWADT/2008/319.html> or  
<http://www.lawlink.nsw.gov.au/adtjudgments/2008nswadt.nsf/1410fb8ca7f756c5ca25684e0041e60e/2a048e0de4302ce6ca25750e007c0367?OpenDocument>

in 2004,<sup>2</sup> and with the acknowledgement of this by the Attorney-General's Department in its report of the Review, made public in 2007.

“6.61 The Privacy Commissioner takes the view that effect of this is that generally speaking the ordinary rules about disclosure apply to trans-border disclosures.”<sup>3</sup>

By accepting your recent submission, the Tribunal has now set the precedent that disclosure by a NSW agency to a person outside NSW is in effect unregulated by PPIPA. This is not only an obvious gap in the scheme of protection, but also creates an opportunity for NSW agencies to deliberately avoid the controls in IPP 11 (s18) by 'laundering' information through other jurisdictions.

The effect of your submission and of the resulting Tribunal decision is a bizarre and perverse outcome for which we can see no justification, and we are extremely surprised and disappointed that as the Commissioner charged with promoting the objectives of PPIPA, you made such a submission.

Neither the *Explanatory Note*<sup>4</sup> accompanying the 1998 *Bill*, nor the Minister's Second Reading speech (Legislative Council 17, item 44, September 1998)<sup>5</sup> explain the intended effect and interaction of the IPPs 11 and 12, but in the absence of any public interest purpose or express intention supporting such an anomalous interpretation, we fail to see why they should be regarded as inconsistent or repugnant.

On the contrary, cross border transfer provisions in the privacy laws of other jurisdictions, including the *Privacy Act 1988 (Cth)* and the *Information Privacy Act 2000 (Vic)* clearly operate as an additional constraint on disclosure, over and above the application of the more general use and disclosure principles (NPP 9 and IPP 9 respectively, relative to NPP 2 and IPP 2 in those Acts).<sup>6</sup> We note that the ALRC recommends that its proposed UPP 11 expressly includes a note to this effect.<sup>7</sup>

Your submission to the ADT also argued that the legislation is not intended to have 'extra-territorial effect'. This argument ignores the view that the effect of IPP 12 (were it to actually be in force) is only intended to regulate the conduct by the agency within NSW, at the time and place where they made the disclosure; no claim is made to restrict the conduct of the recipient person or body outside NSW.

Both elements of your submission to the ADT in the GQ case also ignore the precedent effect of Health Privacy Principle 14 in the *Health Records and Information Privacy Act 2002*

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2 Submission page 57 (see [http://www.lawlink.nsw.gov.au/lawlink/privacynsw/ll\\_pnsw.nsf/vwFiles/sub\\_ppipareview.pdf/\\$file/sub\\_ppipareview.pdf#target=%27\\_blank%27](http://www.lawlink.nsw.gov.au/lawlink/privacynsw/ll_pnsw.nsf/vwFiles/sub_ppipareview.pdf/$file/sub_ppipareview.pdf#target=%27_blank%27))

3 See [http://www.lawlink.nsw.gov.au/lawlink/legislation\\_policy/ll\\_lpd.nsf/vwFiles/Privacy\\_Statutory\\_Review\\_as\\_tabled.pdf/\\$file/Privacy\\_Statutory\\_Review\\_as\\_tabled.pdf](http://www.lawlink.nsw.gov.au/lawlink/legislation_policy/ll_lpd.nsf/vwFiles/Privacy_Statutory_Review_as_tabled.pdf/$file/Privacy_Statutory_Review_as_tabled.pdf)

4 <http://www.parliament.nsw.gov.au/prod/parlment/nswbills.nsf/0/B0E062049C34F7484A2566830004AB88?Open&shownotes>

5 <http://www.parliament.nsw.gov.au/prod/parlment/hansart.nsf/V3Key/LC19980917044>

6 [http://www.austlii.edu.au/au/legis/cth/consol\\_act/pa1988108/sch3.html](http://www.austlii.edu.au/au/legis/cth/consol_act/pa1988108/sch3.html) and

[http://www.austlii.edu.au/au/legis/vic/consol\\_act/ipa2000231/sch1.html](http://www.austlii.edu.au/au/legis/vic/consol_act/ipa2000231/sch1.html)

7 <http://www.austlii.edu.au/au/other/alrc/publications/reports/108/31.html> at para 31.242

(HRIPA).<sup>8</sup> This principle, which also addresses cross border data transfers, unambiguously applies to all 'transfers' in addition to the disclosure principle HPP 11<sup>9</sup>.

We note that the NSW Law Reform Commission, in the context of its current inquiry into privacy legislation in NSW, appears to have accepted your view of the interaction of IPPs 11 and 12, and the consequential lack of regulation of cross border transfers<sup>10</sup>, although there is no discussion of the merits of this view. We understand that you expressed this view in discussions with the LRC and that the Crown Solicitor concurred (these submissions are not public).

We seek an urgent explanation of your position in relation to this issue, and your advice as to your intentions with regard to making a Code under s19(4), so as to bring IPP 12 into effect, and subsequent Determinations under s19(3).

We note that s19(4) *instructs* the Commissioner to prepare a Code – it is not a discretion. Successive Commissioners have failed to act on this instruction, depriving the intended beneficiaries of the Act of its protection. This was always unsatisfactory, but in the context of IPP 11 not applying it is completely unacceptable, creating a major gap in the privacy protection afforded by PPIPA.

However, given that any Code prepared by you under s19 would have to be made by the Attorney-General, it may be preferable to move directly to a legislative amendment, perhaps replacing IPP 12(2)-(5) with a version of HPP 14.

We are therefore also drawing our concerns to the attention of the Attorney General and his Department and the Law Reform Commission.

We are also copying this letter to the other three Privacy/Information Commissioners for their information, as cross border transfers are clearly an issue of mutual interest to them, and to all citizens of and visitors to NSW.

Yours sincerely

David Vaile  
Vice Chair, APF  
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<sup>8</sup> [http://www.austlii.edu.au/au/legis/nsw/consol\\_act/hraipa2002370/](http://www.austlii.edu.au/au/legis/nsw/consol_act/hraipa2002370/) or <http://www.legislation.nsw.gov.au/scanview/inforce/s/1/?TITLE=%22Health%20Records%20and%20Information%20Privacy%20Act%202002%20No%2071%22&nohits=y>

<sup>9</sup> Health Privacy Principles in Schedule 1 of *HRIPA*

<sup>10</sup> NSWLRC *Consultation Paper 3 (2008) - Privacy legislation in New South Wales*, paragraph 6.62, [http://www.lawlink.nsw.gov.au/lawlink/lrc/ll\\_lrc.nsf/pages/LRC\\_cp3chp6#H12](http://www.lawlink.nsw.gov.au/lawlink/lrc/ll_lrc.nsf/pages/LRC_cp3chp6#H12)