



NSW GOVERNMENT

**Response to the Report on the Statutory Review of the
*Privacy and Personal Information Protection Act 1998***

Introduction

The statutory review of the *Privacy and Personal Information Protection Act 1998* (the Privacy Act) was undertaken by the NSW Attorney General's Department. The review takes into account over 70 submissions from the public and interested stakeholders. The Report on the Review of the *Privacy and Personal Information Protection Act* concludes that the objectives of the Act remain valid, however makes 27 recommendations for potential reform.

The Government supports 11 of the Report's recommendations in principle, believes that 13 of the recommendations require further consideration, and is of the view that three of the recommendations are no longer necessary. A more detailed response to each of the 27 recommendations is set out below.

It is noted that the former NSW Attorney General, the Hon Bob Debus, and the Federal Attorney General, the Hon Philip Ruddock, have asked the NSW and Australian Law Reform Commissions to review privacy laws.

The Privacy NSW Annual Report 2005-06 states:

'The two references, drawn up in the way they have been, present a unique opportunity to rationalise privacy legislation throughout Australia.'

The Commonwealth reference requires the Australian Law Reform Commission to consult with relevant State and Territory bodies and to conduct widespread public consultation in compiling its reference.

The NSW Law Reform Commission will consider, in particular, the desirability of privacy protection principles being uniform across Australia and how the present *Privacy and Personal Information Protection Act 1998* interacts with other State legislation.

Both Commissions have been asked to work together to simplify privacy laws and to recommend a comprehensive privacy regime where there are clear distinctions between national and State responsibilities in privacy matters.

The Report on the Review of the *Privacy and Personal Information Protection Act 1998* has been forwarded to the NSW Law Reform Commission so that it can be considered as part of the NSW Law Reform Commission and the Australian Law Reform Commission inquiries.

Those reviews may potentially make proposals for substantial changes to the way privacy legislation operates throughout Australia. It would accordingly be premature for the Government to pursue any legal reforms unilaterally in NSW until both the NSW and the Australian Law Reform Commissions have reported.

The Government's responses to the 27 recommendations for potential reform contained in the Report therefore recognise that many of those recommendations will need to be considered further once the NSW Law Reform Commission and the Australian Law Reform Commission have reported.

Recommendation 1

The Annual Reports of the Privacy Commissioner should provide a clear picture of the number and type of privacy complaints it receives in each year. The figures should be enable direct comparison between years. The use of whole numbers, rather than percentages in the analysis of the Commissioner's workload should be preferred.

The Privacy Commissioner should be encouraged to use the information collected about the sources of the Commissioner's workload to inform the best allocation of resources. In particular, the relative importance of allocating resources to complaints handling compared with education and advice, should be actively considered.

Response:

The Government supports this recommendation and it has been implemented.

The Privacy Commissioner's Annual Reports now include numbers as well as percentages to give a clearer picture of the activities of the Commissioner's Office (PrivacyNSW).

As has been the experience of offices of Privacy Commissioners in Australia and overseas, the number of complaints about possible breaches of privacy tend to peak when the Privacy Commissioner and the Commissioner's office are first established, then tend to decline. Also in keeping with privacy offices elsewhere, requests for advice, for participation on intergovernmental committees and for appropriate public interest directions providing exemption from the legislation have substantially increased. This has meant that resources that may have initially been assigned to complaint handling have been reassigned to meet emerging requirements. PrivacyNSW plans to revise performance indicators to reflect these changing work patterns.

Recommendation 2

The Act should be restructured, using the *Health Records and Information Privacy Act 2002* as a model, so that the Information Protection Principles (IPPs) and exemptions are set out in a Schedule to the Act.

Response:

The Government supports this recommendation in principle.

The *Health Records and Information Privacy Act 2002* is generally regarded as a more modern and user-friendly approach to privacy legislation in NSW. The Health Privacy Principles are set out in a schedule to the Act, with the relevant exemptions immediately following each principle. The *Health Records and Information Privacy Act 2002* more closely mirrors Victorian, Northern Territory and Commonwealth privacy legislation.

The Government will, however, await the outcomes of the NSW Law Reform Commission and the Australian Law Reform Commission reports on this issue to help ensure the most well-informed position possible is taken.

Recommendation 3

The Privacy Commissioner should monitor, over a two year period, whether the lack of protection for collection of sensitive personal information causes significant concerns for citizens, and, if warranted, make further submissions to the Attorney General's Department at the conclusion of the monitoring period.

Response:

This recommendation is no longer necessary. The NSW Law Reform Commission and the Australian Law Reform Commission are conducting extensive public consultation as part of their reviews, in which any public concern regarding the collection of sensitive personal information can be ascertained.

Recommendation 4

Section 9 should be amended so that collection from a third party is permitted where it is unreasonable or impracticable to collect the information from the individual to whom the information relates.

Response:

The Government supports this recommendation in principle, however will consider it further once the NSW Law Reform Commission and the Australian Law Reform Commission have reported.

The Privacy Act does not currently permit collection of personal information from third parties without consent. This is an inflexible rule, which causes most agencies some difficulty in their day-to-day operations. The Privacy Commissioner advises that it is the single most important reason for applications to the Commissioner for exemptions under section 41 of the Act. The Government is of the view that implementing a recommendation such as this, if supported by the NSW Law Reform Commission and the Australian Law Reform Commission, may alleviate these problems.

Recommendation 5

The Act should be amended so that if collection from third parties occurs, the collector should be obliged to ensure that the person about whom the information relates is advised of its collection and that the information collected is relevant. If to do so would cause serious harm then the obligation should not apply.

Response:

The Government believes this recommendation requires further consideration. It will be considered further once the NSW Law Reform Commission and the Australian Law Reform Commission have reported. In further considering the recommendation, the Government will take into account the potential for an increased regulatory burden on public sector agencies, as well as the existing provisions used in the *Health Records and Information Privacy Act 2002*.

Recommendation 6

The Privacy Commissioner should monitor the security of information collected and stored electronically, and advise the Attorney General of any emerging practical problems with security that cannot be adequately accommodated by Information Protection Principle (IPP) 5.

Response:

This recommendation is no longer necessary. The privacy inquiries currently being conducted by the NSW Law Reform Commission and the Australian Law Reform Commission provide an opportunity for any emerging practical problems with security to be raised.

Recommendation 7

The circumstances under which personal information can be used and disclosed should be the same. The use and disclosure principles in the more recent privacy statutes should be used as a model for the reformulation of the Privacy Act principles, although the use and disclosure of sensitive personal information should continue to be treated more restrictively.

Response:

The Government supports this recommendation in principle.

It appears inefficient from an operational point of view for the rules about use and disclosure to be different, as well as out of step with other privacy laws. The Government is of the view that standardising the principles concerning use and disclosure, if consistent with conclusions of the NSW Law Reform Commission and the Australian Law Reform Commission reports, is likely to assist agencies to manage personal information held by them in a consistent manner.

Recommendation 8

That the Privacy Commissioner:

- Consider the privacy laws that exist in other jurisdictions, with a view to determining their adequacy for the purpose of regulating trans-border disclosures of personal information; and
- Advise the Attorney General (in accordance with a timetable agreed with the Attorney) in relation to the making of a suitable regulation (or Code, if the ability to make Codes is retained) to regulate trans-border disclosures of personal information.

Response:

This recommendation is no longer necessary. Trans-border disclosures of personal information is a matter to be dealt with as part of the NSW Law Reform Commission and Australian Law Reform Commission inquiries.

Recommendation 9

Consideration be given to incorporating Information Protection Principles (IPPs) regulating the use of unique identifiers and preserving the right to anonymity.

Response:

The Government believes this recommendation requires further consideration. It is noted that the *Health Records and Information Privacy Act* provides that an organisation may only assign identifiers to individuals if the assignment of identifiers is reasonably necessary to enable the organisation to carry out any of its functions efficiently, and also that anonymity may only be offered where this is lawful and practicable. Further consideration needs to be given, however, to whether this is necessarily transferable from the health sector to the general public sector environment. Further consideration also needs to be given to the potentially increased regulatory burden on public sector agencies. The Government will consider this recommendation further once the NSW Law Reform Commission and the Australian Law Reform Commission have reported.

Recommendation 10

The Privacy Act should provide for both substitute and implied consent to agencies handling a person's personal information in appropriate circumstances.

Response:

The Government supports this recommendation in principle, however will consider it further once the NSW Law Reform Commission and the Australian Law Reform Commission have reported.

Additionally, the Privacy Commissioner has subsequently published the *Best Practice Guide – Privacy and People with decision-making disabilities*. The guide aims to assist agencies to apply the Privacy Act in a manner that protects and promotes the privacy of people with decision-making disabilities to the greatest possible extent. It was prepared in consultation with public sector agencies, people with disabilities and their support persons and advocates, non-government organisations and health and legal professionals. It applies to situations where a person has a decision-making disability that affects their capacity to give or refuse consent to, or understand, the manner in which their personal information is handled by NSW public sector agencies.

Recommendation 11

The application of the Act to individual statutory office holders, entities that exist within a larger government agency and quasi-governmental bodies should be clarified by making a regulation that identifies or excludes public sector agencies to which the Act applies.

Response:

This recommendation will be considered further once the NSW Law Reform Commission and the Australian Law Reform Commission have reported.

Recommendation 12

All NSW State Owned Corporations (SOCs) should be subject to privacy regulation, so that either: the NSW Privacy Act should apply to SOCs that are not covered by the Federal Privacy Act or their prescription under the Federal Act should be facilitated.

Response:

The Government supports in principle the application of the Commonwealth *Privacy Act* to State Owned Corporations (SOCs). The Government is of the view that there is a good argument for SOCs to operate under the Commonwealth regime given they are expected to operate on a commercial basis. Upon completion of the NSW Law Reform Commission and the Australian Law Reform Commission reports (and subject to the outcome of those reviews), the Government will consider writing to the Commonwealth requesting that it prescribe all NSW SOCs as organisations for the purpose of the Commonwealth *Privacy Act*.

Recommendation 13

The Act should provide a structure for binding non-government organisations that are contracted by public sector agencies to provide services that require the management of personal information to conform to the terms of the Privacy Act, unless a privacy law equivalent to the NSW Privacy Act otherwise binds them. A regulation nominating equivalent privacy laws should be made.

Response:

An increasing number of government services are being provided by non-government organisations (NGOs). The Government is aware that this raises concerns about whether the personal information of a client who is referred to an NGO is adequately protected. The recommendation that the NSW Privacy Act provide a structure for binding NGOs to comply with the Act requires further consideration once the NSW Law Reform Commission and the Australian Law Reform Commission have reported. In further considering the recommendation, the Government will take into account its potential impact on the limited resources of NGOs.

It is frequently the case already, however, that public sector agencies contracting with NGOs will require the NGO to comply with the Information Protection Principles (IPPs) and the NSW Privacy Act as a term of the contract. In this way, the personal information handled by NGOs is protected.

Recommendation 14

The application of Information Protection Principles (IPPs) 12, 13, 14, 15 and 16 should be limited to personal information in a material form.

Response:

The Government believes that this recommendation requires further consideration. It will be considered further once the NSW Law Reform Commission and the Australian Law Reform Commission have reported. If adopted, it would enshrine in legislation the NSW Court of Appeal's decision in *Vice-Chancellor Macquarie University –v- FM* (2005) NSWCA 192 that 'information held in the mind of an employee' cannot constitute personal information.

Recommendation 15

The provisions of the section 41 Direction about research (suitably updated) should be incorporated into the Act. Otherwise, a regulation with this effect should be made.

Response:

The Government believes that this recommendation requires further consideration. It will be considered further once the NSW Law Reform Commission and the Australian Law Reform Commission have reported.

As there is a clear public interest in permitting access to personal information for the purposes of research, the Privacy Commissioner has made, and the Attorney General has approved, a section 41 direction allowing researchers to collect and use personal information that would otherwise be protected by the Act. In addition, the *Privacy and Personal Information Regulation 2005* now exempts from the definition of personal information, information about an individual that is contained in a document kept in a library, art gallery or museum for the purposes of reference, study or exhibition, is held in a major cultural institution or a library. A similar exemption exists in the *Health Records and Information Privacy Act 2002*.

Recommendation 16

The Act should be amended to clarify that while unsolicited information is not subject to the collection principles, the other Information Protection Principles (IPPs) do apply.

Response:

The Government believes that this recommendation requires further consideration. As part of this, the meaning of 'unsolicited' needs further review. For example, information could be treated as unsolicited only where it is provided gratuitously and is not relevant to the function of the agency. Arguably, if a person voluntarily provides information to an agency that is unsolicited within this meaning, it is difficult to see why an agency should be subject to the same restrictions as for solicited material. The Government will consider this recommendation further once the NSW Law Reform Commission and the Australian Law Reform Commission have reported.

Recommendation 17

The definition of sensitive personal information in the Act should include a person's criminal record.

Response:

The Government believes that this recommendation requires further consideration. It will be considered further once the NSW Law Reform Commission and the Australian Law Reform Commission have reported. The Government notes, however, that the privacy laws in Victoria, the Northern Territory and the Commonwealth include criminal records in the definition of 'sensitive personal information.'

Recommendation 18

A single set of rules (which take into account the existing regimes in the Freedom Of Information, Privacy and Local Government Acts) for managing access to, and alteration of information, including personal information, held by the public sector should be developed and legislated.

Response:

The Government supports the harmonisation of the provisions relating to access requests. The harmonisation of conflicting or inconsistent provisions is to be considered by the NSW Law Reform Commission and the Australian Law Reform Commission.

Recommendation 19

- The exemptions for law enforcement and investigative functions in sections 23 and 24 should be simplified and applied in a similar manner to the like exemptions in the Health Privacy Act.
- Investigations concerning disciplinary proceedings and professional misconduct and the like should be specifically included in the exemptions.
- The section 41 directions relating to investigations and information sharing should likewise be incorporated into the exemptions in the Act. The exemptions should allow for a flow of information to and from an investigating agency and specifically permit the sharing of information by agencies for the purpose of briefing counsel and consulting other experts.

Response:

The Government supports this recommendation in principle, however will consider it further once the NSW Law Reform Commission and the Australian Law Reform Commission have reported. The review report revealed that public sector agencies are confused by the distinctions between the exemptions available to them in the course of investigations and law enforcement activities. This lack of clarity often means that agencies are unclear about whether they can share otherwise protected personal information. The *Health Records and Information Privacy Act 2002* appears to deal with these exemptions in a more uniform way.

Recommendation 20

The Privacy Act should be amended so that it is clear that it cannot affect the provisions of agencies own operational statutes which apply to regulate personal information held by the agency.

Response:

The Government believes that this recommendation requires further consideration. It will be considered further once the NSW Law Reform Commission and the Australian Law Reform Commission have reported. The Crown Solicitor has advised that the availability of an exemption under the Act provides a 'lawful excuse' to disclose under another law. This has facilitated, for example, the productive and important sharing of information among human service agencies.

Recommendation 21

Exemptions in existing codes and directions should be including in the Act or in Regulations. Future variations to the application of the Act should be by way of regulation only. Provision for consultation with the Privacy Commissioner prior to the making of a regulation should be made.

Response:

The Government believes that this recommendation requires further consideration, as it will potentially reduce the flexibility of the Act and its ability to respond quickly to emerging and unforeseen projects and developments. It will be considered further once the NSW Law Reform Commission and the Australian Law Reform Commission have reported.

Recommendation 22

The Privacy Commissioner should be encouraged to continue to develop effective partnerships with the community and the public sector in developing strategies to better protect the privacy of individuals and adopt best practice strategies (based on the IPPs) for the protection of personal information.

Response:

The Government supports this recommendation and it has been implemented. PrivacyNSW has adopted a number of strategies to develop effective partnerships with the community and public sector. For example PrivacyNSW staff participate in the Privacy & Freedom of Information Officers' meetings at which they provide regular updates to the privacy officers of public sector agencies and instrumentalities. Representatives from PrivacyNSW frequently address seminars and public meetings involving the private and public sectors, as well as make submissions to inquiries and comments on legislative proposals.

PrivacyNSW representatives participate on standing committees ranging from the Steering Committee on DNA Laboratories to the Premier's Supervising Committee on the Statewide Anti Social Behaviour Pilot Project. PrivacyNSW also participated in the IPART review of red tape, and has been asked to chair or sit on a Committee to implement the report's findings.

PrivacyNSW is taking part in Privacy Awareness Week (26 August to 1 September 2007), a joint public awareness campaign with other privacy agencies in Australia and New Zealand and Hong Kong. The feature of this project is an international competition for secondary students dealing with their impressions of privacy. The project is being conducted under the umbrella of APPA - the Asian Pacific Privacy Authorities - of which PrivacyNSW is a member.

Recommendation 23

Section 52 should be clarified to apply to conduct that is non-compliant with an Information Protection Principle (IPP) or the public register provisions.

Response:

Conduct is reviewable if it is alleged to be in contravention of the IPPs, a privacy code of practice, or the public register provisions. The Government notes the Privacy Commissioner's view that the reference to codes of practice is confusing in this

context as their operative parts only ever derogate from the rules set out in the IPPs. This recommendation will be considered further once the NSW Law Reform Commission and the Australian Law Reform Commission have reported.

Recommendation 24

Agencies should be able to out-source their internal review obligations to appropriately qualified agents. To be qualified as an agent, the person must be either a lawyer of seven years standing or a person endorsed by Privacy Commissioner as an expert in privacy law and practice.

Response:

The Government believes that internal reviews are best addressed by an agency's own management structures. It is arguable, however, that for smaller agencies where it is difficult to find an appropriate person within the agency to conduct the review, an ability to outsource internal review work would be useful. The Government believes that this recommendation requires further consideration. It will be considered further once the NSW Law Reform Commission and the Australian Law Reform Commission have reported.

Recommendation 25

The Act should:

- set out the scope of the Privacy Commissioner's role in the Administrative Decisions Tribunal as determined in consultation with the Commissioner and the President of the Tribunal, but primarily to assist in matters of statutory interpretation and privacy practice in NSW; and
- clarify that the Commissioner may appear in privacy matters before the Tribunal's Appeal Panel.

Response:

The Government supports this recommendation in principle, however will consider it further once the NSW Law Reform Commission and the Australian Law Reform Commission have reported. Legislative guidance as to the scope of the Privacy Commissioner's role may alleviate the Commissioner's concern that some agencies may think that his role in the Tribunal is to advocate on behalf of applicants, and accordingly be reluctant to seek assistance from his office.

The Government has also asked the Privacy Commissioner to prepare a fact sheet setting out his role in the Administrative Decisions Tribunal in order to clarify the situation for public sector agencies and other parties.

Recommendation 26

Applicants should be allowed 60 days from the date of completion of an internal review to file an application for external review in the Administrative Decisions Tribunal.

Response:

The Government supports this recommendation in principle, however will consider it further once the NSW Law Reform Commission and the Australian Law Reform Commission have reported. Currently there is no time limit for applying for external

review. The Government is of the view that this lack of closure in relation to privacy complaints is an unreasonable burden on agencies and should be rectified.

Recommendation 27

The Act should make clear that privacy matters are heard in the Administrative Decision Tribunal's review jurisdiction.

Response:

The Government notes that there is uncertainty at present as to whether the Tribunal's jurisdiction is a 'review' one or an 'original' one. The Tribunal has held, but has expressed some doubt, that it is a review jurisdiction. The Government believes that this recommendation requires further consideration. It will be considered further once the NSW Law Reform Commission and the Australian Law Reform Commission have reported