Improving clarity and enhancing protection of privacy rights: Response to the NSW Law Reform Commission's *Consultation Paper 3: Privacy Legislation in NSW*

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Level 9, 299 Elizabeth Street, Sydney NSW 2000 • DX 643 Sydney
Phone: 61 2 8898 6500 • Fax: 61 2 8898 6555 • www.piac.asn.au

Introduction

The Public Interest Advocacy Centre

The Public Interest Advocacy Centre (**PIAC**) is an independent, non-profit law and policy organisation that seeks to promote a just and democratic society by making strategic interventions on public interest issues.

PIAC identifies public interest issues and, where possible and appropriate, works co-operatively with other organisations to advocate for individuals and groups affected. In making strategic interventions on public interest issues PIAC seeks to:

- expose unjust or unsafe practices, deficient laws or policies;
- promote accountable, transparent and responsive government;
- encourage, influence and inform public debate;
- promote the development of law—both statutory and common—that reflects the public interest; and
- develop community organisations to pursue the interests of the communities they represent.

Established in July 1982 as an initiative of the Law Foundation of New South Wales, with support from the NSW Legal Aid Commission, PIAC was the first, and remains the only broadly based public interest legal centre in Australia. Financial support for PIAC comes primarily from the NSW Public Purpose Fund and the Commonwealth and State Community Legal Services Program. PIAC also receives funding from the NSW Government Department of Water and Energy for its work on utilities, and from Allens Arthur Robinson for its Indigenous Justice Program. PIAC also generates income from project and case grants, seminars, consultancy fees, donations and recovery of costs in legal actions.

PIAC's Expertise in Privacy Law

PIAC has a long history of interest in, and concern about, the appropriate protection of privacy rights within both the public and private sectors. PIAC has been a strong advocate for the protection of the privacy rights of Australians, particularly the rights of individual Australians to control their personal information and to be free of excessive intrusions. PIAC's work as a consumer advocacy organisation, particularly in relation to health matters, has required PIAC to consider privacy issues because they are frequently a matter of concern to many people who contact the Centre.

In recent years, PIAC has provided legal advice and assistance to clients in a number of matters involving alleged breaches of the *Privacy and Personal Information Protection Act 1998* (NSW) (**the PPIP Act**) and the *Privacy Act 1988* (Cth) (**the Privacy Act**). In 2006, PIAC represented the respondent in *Director General, NSW Department of Education and Training v MT* [2006] NSWCA 270, a landmark case concerning the interpretation of several key provisions of the PPIP Act. In another matter, currently before the Office of the Privacy Commissioner (**OPC**) PIAC is representing a former Villawood detainee whose personal information was allegedly inappropriately disclosed to the media.

PIAC has played a leading role in privacy debates in Australia in recent years, contributing to a number of inquiries and reviews at the national and state level. Recent submissions by PIAC have addressed the privacy

implications of the proposed Health and Social Services Access Card[1], and the proposal by the Australian Bureau of Statistics to implement a longitudinal study in the population census (a proposal requiring capacity to data match over time).[2] In October 2007, PIAC made a submission to the first Consultation Paper in the current reference from the New South Wales Law Reform Commission (**NSW LRC**), *Consultation Paper 1 – Invasion of Privacy*.[3] In December 2007, PIAC made a submission in response to *DP72: Review of Australian Privacy Law*, as part of the reference on privacy being conducted by the Australian Law Reform Commission (**ALRC**).

PIAC Chief Executive Officer, Robin Banks, is a member of the Privacy Advisory Committee (**PAC**), which provides strategic advice to the Federal Privacy Commissioner on privacy issues and the protection of personal information.

The NSW Law Reform Commission Privacy Reference

PIAC commends the NSW LRC on its *Consultation Paper 3: Privacy Legislation in New South Wales* (**the Consultation Paper**), which provides an important analysis of the operation of privacy law in NSW.

PIAC welcomes the opportunity to provide this submission in response to most aspects of that discussion paper.

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1 Public Interest Advocacy Centre, *Health and Social Services Access Card: Submission to Access Card Consumer and Privacy Taskforce, Discussion Paper* (2006); Public Interest Advocacy Centre, *Access Card Proposal Still Fails Public Interest Test: Comment on the Exposure Drafts of the Access Card Legislation* (2007).

2 Public Interest Advocacy Centre, *Submission to the Australian Bureau of Statistics on Enhancing the Population Census: Developing a Longitudinal View* (2005).

3 Public Interest Advocacy Centre, *Matching Rights with Remedies: a statutory cause of action for invasion of privacy, Submission to the NSW Law Reform Commission on Consultation Paper 1 – Invasion of Privacy* (2007).

Chapter 1

Proposal 1: Reforms of NSW privacy laws should aim to achieve national uniformity

PIAC supports this proposal and urges the NSW Law Reform Commission to seek to achieve uniformity in respect of the key elements of privacy law, particularly:

- the privacy principles;
- extent of coverage of personal information;
- the process for dealing with allegations of breach of privacy, in terms of internal and external review processes, remedies, etc;
- the availability of damages for breaches of privacy.

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

As noted above in response to Proposal 1, PIAC supports the adoption of a single set of privacy principles that are capable of application in all NSW and Federal privacy legislation. Further, PIAC supports the proposal that the NSW Government co-operate with the Commonwealth in the development of privacy principles.

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

PIAC generally supports Proposal 3 as part of the goal of achieving national uniformity and removal of duplication and confusion about State and Commonwealth privacy laws.

However, PIAC believes that NSW should not repeal its current privacy legislation unless and until Commonwealth privacy legislation covers the whole field of privacy protection. The recent Australian Law Reform Commission (ALRC) report, *For Your Information: Australian Privacy Law and Practice* (***For Your Information***), recommends the amendment of the Commonwealth Privacy Act to remove the small business exemption from the Privacy Act.[4] PIAC strongly supports this proposal. PIAC submits that, in particular, those provisions of the PPIP Act that relate to the private sector not be repealed until the Privacy Act applies to all of the private sector, regardless of the size of the enterprise.

PIAC is also concerned about the resources available to the Commonwealth Privacy Commissioner to deal with complaints and enquiries currently dealt with under the PPIP Act. If the NSW privacy legislation covers only the public sector, PIAC is particularly concerned about the extra burden on the Commonwealth Privacy Commission in dealing with complaints about breaches of the privacy principles with regard to health information. PIAC recommends that consideration be given to use the existing state-based medical registration and health complaint processes to deal with such complaints.
PIAC submits there is a particular need to address the problem that if access to medical records is denied to a health consumer, the timeframes of the complaints processes for both NSW and Commonwealth jurisdictions are inappropriate for the timely resolution of such complaints. Consumers who wish to access their medical records usually do so for a purpose and that purpose is usually related to the immediate state of their health. The timeframe of an average privacy complaint—often several months—is not appropriate for someone who urgently seeks access to their records and is refused.

[4] Australian Law Reform Commission, *For Your Information: Australian Privacy Law and Practice*. *Report 108* (2008) 53.

A possible solution is to have complaints of breaches of privacy principles by registered health practitioners dealt with by the various health professional boards such as the Medical Board and the Health Care Complaints Commission (HCCC). The ALRC in *For Your Information* recommends that the Privacy Act be amended to enable the Privacy Commissioner to delegate all or any of his or her powers in relation to complaint handling to a state or territory authority.[5] In respect of health privacy matters in NSW that would mean referral to the HCCC.

In its submission to the Australian Law Reform Commission (ALRC) *Review of Australian Privacy Laws*[6], PIAC supported this proposition.[7] PIAC however stated that:

> Consideration needs to be given to ensure that there are consistent approaches to complaint handling, including timing and resources across all jurisdictions. It would be unfortunate if delegation to achieve the benefit of local complaint resolution resulted in differential standards of response and assistance between different states and territories.[8]

This remains PIAC's position.

PIAC suggests that another way to achieve the same end would be to make breach of privacy law matters for disciplinary proceedings under the various medical registration legislation. In all of the NSW legislation establishing the various registration boards there is a definition of 'unsatisfactory professional conduct'. For example, section 36 of the *Medical Practice Act 1992* (NSW) sets out various transgressions by medical practitioners that could lead to a finding of 'unsatisfactory professional conduct'. These include breaches of various statutory provisions, including offences under various Commonwealth and State legislation and failure to comply with medical practice regulations. Failure to comply with obligations under the privacy principles could and should be added to this list. This would emphasise the importance of adherence of privacy principles, as serious breaches could lead to disciplinary proceedings against a health professional.

For situations were there are less serious breaches of professional standards of conduct, the *Health Care Complaints Act 1993* (NSW) makes provision for complaints to be resolved outside the investigation process. Resort to dealing with complaints in this manner should lead to a faster resolution of less complex disputes regarding access to health records.

PIAC notes that a proposal to establish a national registry for all health practitioners has been through the Council of Australian Governments (**COAG**) and the Commonwealth is currently consulting with stakeholders and the public on the structure of future national regimes for health registration, complaints and disciplinary proceedings. PIAC submits that a requirement to comply with privacy principles should be part of any future national code of mandatory conduct applying to all health professionals.

Issue 1: Impediments to information sharing and their resolution

The potential for privacy laws to create unnecessary and inappropriate barriers to information sharing is very real and is a potential that has already been realised in many contexts. PIAC, through its work with homeless

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5 Ibid, chapter 49.

6 Australian Law Reform Commission, *Review of Australian Privacy Laws* DP 72 (2007).

7 Anne Mainsbridge with Robin Banks, *Resurrecting the Rights to Privacy: Response to Australian Law Reform Commission Discussion Paper 72: Review of Australian Privacy Law* (2007) 91.

8 Ibid, 91.

people and agencies that support homeless people, is concerned that agencies may inadvertently breach privacy laws when they are seeking to co-ordinate service delivery and ensure some of the most vulnerable in the community don't fall through the cracks. While mechanisms may exist that permit services to share information under approved protocols, these mechanisms are not well understood nor are there sufficient supports available to poorly resourced community organisations to effectively develop and implement such protocols.

Another aspect of this issue is the use of personal information for social research undertaken in the course of public interest work. PIAC, along with many other community organisations, undertakes social research that often includes the collection of personal information for use in analysis of legal and other social justice or human rights problems. While universities undertaking human research have access to appropriate ethics clearance processes, these are not available to either community organisations, nor to government agencies that hold data and may seek to engage consultants to analyse that data. Mechanisms are needed to ensure effective and efficient review of research proposals to ensure that privacy is protected while social and other forms of research are enabled.

PIAC recommends that consideration be given to enhancing the capacity of the Privacy Commissioner's office to enable:

- improved communication of mechanisms available to develop information-sharing protocols;
- the provision of support to community organisations to develop appropriate, privacy compliant information sharing protocols;
- timely review and authorisation of research being undertaken outside universities.

One further aspect of the potential for privacy laws to have adverse impacts is where there is a requirement that documents containing personal information be destroyed. As PIAC noted in its responses to the ALRC, its work in the area of Stolen Wages highlights the importance of records being retained. The issue in short is that between 1900 and 1969 monies were withheld from Aboriginal people in NSW and were supposed to be paid into trust funds held by the NSW Government. Aboriginal people were also supposed to be paid 'pocket money' by employers. Many Aboriginal people were not paid pocket money and money was either not paid into trust, the trust monies were improperly paid out or they have remained in trust to this day. PIAC has been active in seeking repayment of all of the monies owed to Aboriginal people affected by this requirement. Since the establishment of the Aboriginal Trust Fund Repayment Scheme in 2005, PIAC has been assisting claimants in respect of their claims for repayment. Both prior to and since the establishment of the Scheme it has been clear that there was a serious failure of record keeping that is now precluding claimants from being successful in their claims. These failures occurred both within government agencies and non-government organisations with whom Aboriginal children were placed. The destruction of records either deliberately or inadvertently means that more than 60% of claimants are unsuccessful as the scheme requires evidence of the trust monies.

It is vital that privacy laws requiring destruction of personal information not result in future legal claims failing for lack of evidence. While Government generally has requirements to retain records under state archive laws, this is not necessarily true of other entities. PIAC urges that the NSW Law Reform Commission consider what mechanisms may be suitable to ensure that personal information records are not destroyed where such destruction may result in loss of important documents either for future research or future legal purposes.

Issue 2: Adequacy of criminal sanctions provisions

Given that the criminal sanctions provisions of the PPIP Act and the *Health Records and Information Privacy Act 2002* (NSW) (**HRIP Act**) have been used only once, PIAC does not consider the provisions to be adequate or satisfactory. PIAC considers there are several reasons for this under utilisation including that the standard required ('corruption') is too high and that the relevant body (Privacy NSW) does not have the capacity or tools to properly investigate possible breaches.

PIAC is aware of only one case in which the criminal sanction provisions of the PPIP Act have been used. The outcome of that case is not yet known. PIAC is aware of one other court case in which the criminal provisions of the PPIP Act were considered by the court, but which did not result in any criminal proceedings. His Honour Chief Justice Speigleman in *Director General, Department of Education and Training v MT* [2006] NSWCA 270 justified his finding that the Department of Education and Training was not responsible for an unauthorised use of MT's personal information by an employee teacher by noting that subsection 62(1) of the PPIP Act allowed for prosecution of employees who disclose or use personal information for a purpose outside of the scope of their official functions.[9] That a prosecution of the individual teacher did not occur suggests there may be issues with the accessibility and effectiveness of these provisions.

The criminal sanctions provisions of the PPIP Act and the HRIP Act both require 'corrupt' conduct. Unhelpfully, what constitutes 'corrupt conduct' is not defined in either act. It is defined in sections 8 and 9 of the *Independent Commission Against Corruption Act 1988* (NSW) (**ICAC Act**). The key notion in that definition is the misuse of public office and commonly it will involve the dishonest or partial use of power or position that results in one person being advantaged over another. PIAC considers that the lack of prosecutions may be due to this standard being too high.

PIAC also considers that a lack of investigative power is contributing to the under-utilisation of the criminal sanction provisions. Unlike the Independent Commission Against Corruption (**ICAC**), Privacy NSW does not have surveillance capacity, or the power to issue or seek search warrants, listening devices, or telephone interception and according to Privacy NSW, attempts to seek the co-operation of other agencies with the powers and resources to conduct investigations and/or prosecutions of the offences in Part 8 of the Act (such as NSW Police, the Police Integrity Commission, the ICAC and the Director of Public Prosecutions) have not to date been fruitful.[10]

Two matters recently referred by Privacy NSW to ICAC for investigation as possible breaches of the ICAC Act and/or Part 8 of the PPIP Act by public sector officials demonstrate problems with investigation and prosecution of breaches of privacy and with the definition of corruption.

The first matter involved the improper access and use of university student records. A student received an e-mail from a previous work colleague asking her to meet him socially and referring to her change of name. The student alleged that she had never given her former colleague her contact details or informed him of her change of name and alleged this information must have been obtained by accessing her student records.

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9 *Director General, Department of Education and Training v MT* [2006] NSWCA 270 [41 – 43].

10 *Submission by Privacy NSW on the Review of the* Privacy and Personal Information Protection Act 1998 (2004) 21.

ICAC determined not to take any action in respect of the matter, as the agency concerned had investigated and had found that the disclosure was not 'motivated by improper or corrupt conduct'. This suggests that 'corrupt' is too high a standard.

The second matter involved disclosure of a job applicant's contact details, career history and performance at interview by a member of the selection to a member of the public.

Section 4(3)(j) of the PPIP Act excludes 'information or an opinion about an individual's suitability for appointment or employment as a public sector official' from the definition of 'personal information'.

This conduct may have amounted to a breach of section 62 of the PPIP Act, however, that provision only applied to in this context to councillors or employees of the council, not member of the selection committee drawn from community representatives. Further, section 62 only applies to 'personal information'.

This matter was referred to ICAC by the council following its internal review of a complaint. ICAC declined to deal with the matter on the basis that the matter was already with Privacy NSW. However Privacy NSW's only role was to oversee the internal review process as it had no formal complaint to invoke its investigative functions.[11]

Chapter 4

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).***

PIAC agrees that the Information Privacy Principles (**IPPs**) and exemptions should be located in a schedule to the PPIP Act. The current location of the IPPs in the body of the Act is confusing, as is the fact that they are not numbered. The location of the exemption provisions is haphazard and confusing. Some are expressly included in the PPIP Act[12], some are contained in regulations[13], some in codes of practice made by the Attorney General[14], others in public interest directions made by the Privacy Commissioner.[15] Where they are found in the Act, the IPPs are not located in one place, but are dispersed throughout the legislation. Relocating all the exemptions to a Schedule would make the Act more user-friendly and transparent.

Locating the IPPs and exemptions in a Schedule would make the PPIP Act more transparent and would also bring it into line with other information privacy laws, such as the HRIP Act, the *Information Privacy Act 2000* (Vic) and the *Privacy Act 1988* (Cth). It would also accord with the ALRC proposal to consolidate the two sets of

[11] Privacy NSW, *Annual Report 2002-03* (2003) 33-35.

[12] See, for example, *Privacy and Personal Information Protection Act 1998* (NSW) s 3: State Owned Corporations; s 4: what is not personal information; s 4A: health information; s 6: courts, tribunals, Royal Commissions; s 20: freedom of information law; ss 23-28: law enforcement, investigative agencies, non-compliance lawfully authorised, non-compliance would benefit individual concerned, ICAC, etc; and exceptions to each IPP specified in ss 8 – 19.

[13] See, for example, the *Privacy and Personal Information Protection Regulation 2005* (NSW).

[14] Made under *Privacy and Personal Information Protection Act 1998* (NSW) part 3, Division 1

[15] Made under *Privacy and Personal Information Protection Act 1998* (NSW) s 41.

privacy principles in the *Privacy Act 1988* (Cth) into a single set of Unified Privacy Principles (**UPPs**) and to clarify and group together the exemptions in a separate part of that Act.

However, PIAC is very concerned about the number of exemptions that currently exist, and breadth of these exemptions. PIAC notes the NSW LRC's comment that 'the number of exemptions and exceptions is such that, even when presented in tabular form, they run for several pages'.[16] Before the exemptions are set out in a Schedule to the Act, they should be subjected to a comprehensive reappraisal and review. Only those exemptions that can be justified on policy grounds should be retained, and they should be limited to the extent necessary.

PIAC agrees that the PPIP Act should be restructured along the lines of the HRIP Act and that its level of detail and complexity should be reduced. In its current form, the PPIP Act lacks coherence and is overly complex and confusing. Many of PIAC's clients have complained that they have been unable to understand their rights from a reading of the PPIP Act and have therefore been put in the position of being forced to seek legal advice and representation. This is inappropriate in a jurisdiction that encourages self-representation.

HRIP Act is clearer and more accessible than the PPIP Act. It also more closely mirrors Victorian, Northern Territory and Commonwealth privacy legislation.

Issue 3: An object clause and its drafting

PIAC supports the NSW LRC's preliminary view that the PPIP Act should contain an objects clause. Inclusion of an objects clause that clearly sets out the aims and principles of the PPIP Act would assist in the interpretation of the legislation in cases of uncertainty or ambiguity.[17] The inclusion of an objects clause is also consistent with other privacy laws including the HRIP Act and privacy legislation in other states and territories.

PIAC notes that the NSW LRC has referred to section 5 of the *Information Privacy Act 2000* (Vic) as the best example of a statement of objects clause in comparable privacy legislation.

PIAC believes that section 5(a) of the *Information Privacy Act 2000* (Vic) should not be included in any proposed objects clause for the PPIP Act. The starting point for the development of an objects clause for the PPIP Act should be the recognition that the right to privacy is a fundamental human right that has been recognised as such in key international instruments including the *Universal Declaration of Human Rights*[18] and the *International Covenant on Civil and Political Rights*.[19] While PIAC recognises that privacy is not an absolute right and that it must be balanced against other rights (such as freedom of expression and national security), PIAC is concerned that section 5(a) reduces the status of privacy to a 'public interest' that can be traded off against other public interests.

An express reference to the right to privacy as a fundamental human right is also consistent with the recent recommendations of the ALRC.[20]

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16 NSW Law Reform Commission, *Consultation Paper 3: Privacy Legislation in New South Wales* (2008) 56-57.

17 *Interpretation Act 1987* (NSW) s 33.

18 *Universal Declaration of Human Rights*, GA Res 217A(III), UN Doc A/Res/810 (1948), Art 12.

19 *International Covenant on Civil and Political Rights*, 16 December 1966 [1980] ATS 23, (entered into force generally on 23 March 1976), Art 17.

20 Australian Law Reform Commission, *Report 108: For Your Information: Australian Privacy Law and Practice*, vol 1, 5.121.

PIAC submits that an appropriate objects clause in the PPIP Act should read:

(a) To promote the protection of individual privacy as a fundamental human right;
(b) To recognise that the right to privacy is not absolute and to provide a framework within which to balance the right to privacy against other human rights and freedoms.
(c) To promote awareness of responsible personal information handling practices in the public sector;
(d) To promote the responsible and transparent handling of personal information in the public sector.

This proposal more accurately reflects the objects and purpose of the legislation as articulated in the second reading speech in the NSW Parliament:

> The purpose of the bill is to promote the protection of privacy and the rights of the individual by the recognition, dissemination and enforcement of data protection principles consistent with international best practice standards.[21]

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).

PIAC agrees with this proposal. PIAC goes further and proposes that the Privacy Act should regulate all heath information privacy in NSW, whether held by private and public sector entities.

The original intention of the HRIP Act was to respond to the development of electronic health records. The Second Reading speech for the HRIP Act refers to the Ministerial Advisory Committee on Privacy and Health Information. The Minister says:

> The Committee concluded that that a strong regulatory regime was essential to protect health information and address privacy concerns about privacy risks associated with electronic records. As such, it recommended the introduction of a Health Records and Privacy Act in New South Wales.[22]

Since 2002, there have been ongoing consultations, both at a State and Commonwealth level, about the introduction of a form of electronic health records for individual consumers. Such electronic records would include information collected from the public sector and the private sector. Although private sector records health records and public sector records now (for the most part) remain separate for the individual health consumer, the models proposed for electronic health records envisage a central electronic record of the consumer's health information with both private and public sector health records collected and held. This will represent a significant change to how health information is collected, held and secured.

If national uniformity is an important goal, and if the Commonwealth can constitutionally cover the field in the area of health privacy (or other co-operative mechanisms are put in place for the States to cede their powers to the Commonwealth) then the Privacy Act should regulate health information privacy in NSW, both private and public. There is no reason why the current freedom of information officers within public health providers could

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[21] New South Wales, *Parliamentary Debates*, Legislative Council, 17 September 1998, 7598-99 (the Hon John W Shaw, NSW Attorney General).

[22] New South Wales, *Parliamentary Debates,* Legislative Council, 11 June 2002, 2958 (The Hon Michael Egan, Leader of the Government).

not facilitate access to health information and ensure adherence to privacy principles to health information under the UPPs and national health privacy guidelines.

In the response to Proposal 3 above, PIAC suggests that there is a role for health complaints bodies to deal with complaints about health privacy, particularly in the area of disputes regarding access to records. There is no reason why, with appropriate funding and a consistent approach, state-based health complaints bodies could not deal with complaints about breaches of national health privacy principles and guidelines. PIAC notes that COAG and the State and Federal Health Ministers are now consulting on the proposal to have a national system of registration of health professionals and related health complaints in place by 2110. Again, dealing with breaches of health privacy by health professionals through either the disciplinary system or through the resolution of less serious complaints could be achieved as part of a national system.

The proposed system of registration of health professionals only forms part of the increasing role of the Commonwealth in the health arena. The Commonwealth already has a major role through Medicare, the Pharmaceutical Benefits Scheme and the funding and regulation of Aged Care. Many non-government organisations and as well as representatives of Governments, both State and Federal, have canvassed at some time the possibility of the Commonwealth taking over the total health care of aged citizens and the total funding and operation of public hospitals. Any of these proposals, if implemented, would make it harder to justify separate NSW privacy legislation to regulate its public health sector only. This would particularly be the case if an electronic health record existed containing information that was collected from both the State and Commonwealth public sectors as well as the private sector.

A consumer's electronic health record might also contain health records collected in several states and/or territories, which is a further argument for a unified national model in this area.

Issue 4: Retention of two separate information privacy statutes

PIAC proposes that the Privacy Act should regulate all heath information privacy in NSW, private and public. If the Privacy Act were to apply to the NSW public sector health organisations, there would not be any necessity for two information privacy statutes in NSW. For further on this, see above in response to Proposal 5.

Issue 5: Rationale for retention of *Health Records and Information Privacy Act 2002* (NSW)

PIAC proposes that the Privacy Act should regulate all heath information privacy in NSW, private and public. In this case, there would not be a need for a separate NSW statute dealing with health information privacy. For further on this, see above in response to Proposal 5.

Chapter 5

Issue 6: Exemption for 'publicly available information' and 'generally available information' from the definition of 'personal information'

Issue 7: The meanings of 'publicly available information' and 'generally available information'

PIAC does not support the exclusion of 'publicly available information 'or 'generally available information' from the definition of 'personal information' in NSW privacy legislation. PIAC would support legislative reform that qualifies when information, particularly sensitive and health information, found in the public domain should not be subject to all or selected privacy principles.

More and more information that would otherwise be considered 'private' is now found on the Internet. This requires a rethink of what was previously characterised as 'publicly available information' or 'generally available information'.

In the past it was easier to draw the line between information in the public domain, ie, mainly found in print and electronic media and personal information. Individuals had recourse to the law (defamation) or the media sources themselves (correction and reply) to balance incorrect personal information that made its way into the public arena without the subject's consent. In 2008, it cannot be said that individuals are always totally aware of information about them that can be retrieved from cyberspace. It is possible that personal information downloaded from the Internet that is either inaccurate or sensitive or both could be collected and stored without protection if the exclusion of publicly available information from the definition of personal information remains.

Information placed in the public domain without the consent of the subject of the information does not necessary breach privacy principles, in that the IPPs only apply to public sector agencies and the Health Privacy Principles (**HPPs**) only apply to organisations as defined. Yet the Internet allows third parties to widely disseminate personal information about an individual, accurate or misleading, without the individual's consent. PIAC believes this information should be subject to the privacy principles where the information is collected by a public agency or private entity and is 'sensitive' or 'health information' as defined.

PIAC recommends that the phrases 'publicly available information' and 'generally available information' be no longer be used in the legislation and in the principles.

A narrower exception should be included in the principles that with regard to sensitive and health information found in a publicly available publication (including information held publicly in libraries and museums) or form of media is exempt from any privacy principle only if, on the face of the publication, the person clearly consents to the information being in the public domain.

Further, PIAC submits that all personal information that has been unlawfully (including through a breach of privacy principles or a breach of confidentiality) obtained and found in a public source should also remain under the protection of privacy legislation. For personal information found in a publicly available publication or

form of media as above, could be subject to a general exemption, unless there is suspicion or knowledge that it has been unlawfully placed in the public domain.

These changes should at least partially protect individuals from the collection of information that is inaccurate, misleading and/or unlawfully obtained and allow for correction of such information and particularly protect individuals from having sensitive or health information collected without their knowledge or consent that may also inaccurate and out of date. At the same time it should allow agencies and private entities to collect information that is in the public domain, clearly with the consent of the subject individual.

Issue 8(a) and (b): Retention of exemptions in paragraphs 4(3)(e), (i) and (ja) of the PPIP Act, and paragraphs 5(3)(h) and (l) of the HRIP Act

PIAC favours selective exceptions rather than blanket exemptions. So, for example in relation to 'protected disclosures' while PIAC acknowledges that it may not be possible to obtain an official's consent to collection of their personal information while they are being investigated for corrupt conduct, there is no reason why other IPPs including IPP 1 (collection for lawful purposes), IPP 5 (retention and security) and IPP 9 (checking accuracy before use) should not apply to these types of information.

PIAC submits that these exceptions should be removed from section 4 of the PPIP Act and inserted in Part 2, Division 3 of the PPIP Act.

Issue 9: The exemption for information arising out of a complaint about conduct of police officers

The police have extensive and exceptional powers with regard to ordinary members of the public that are not possessed by other state agencies. Most police officers exercise these powers responsibly, but in some cases these powers are misused. In order to maintain public confidence in the police system there must be an effective, transparent and accessible system for scrutinising police conduct.

In PIAC's experience, most complainants are reluctant to make complaints about police conduct. Most complainants are in a less powerful position than the police and some fear reprisals or victimisation for making a complaint. It is essential that complaints be treated as confidential to ensure confidence in the complaints system.

In those circumstances, PIAC agrees that some IPPs and HPPs should not apply to information arising out of a complaint about police officers' conduct. For example, it would be incoherent to suggest that IPP 2 (collection of personal information directly from the individual) and IPP 3 (consent of the individual required before personal information can be used or disclosed) should apply to personal information about a police officer who is the subject of a complaint.

On the other hand, PIAC submits that some IPPs and HPPs should still apply to information arising out a complaint about conduct of police officer and consideration should be given to removing this exception from section 4 and including it in specific exceptions set out in Part 2 of the PPIP Act.

Issue 10: Access to personal files in respect of a complaint about police conduct

PIAC believes that it is important that complainants are informed of the outcome of an investigation and suggests that at the end of an investigation into a complaint the complainant should be provided with a written report about the investigation process and findings.

Issue 11: Access to complaint information for a police officer who is the subject of a complaint

PIAC does not support this proposal. Police have exceptional powers with regard to ordinary members of the public and that are not possessed by other state agencies. Furthermore, the police force has access to more extensive personal information about individuals that any other public sector agency. In those circumstances, there is a significant risk that if a police officer that is the subject of a complaint were able to access the complaint information this could lead to abuses of the system for example the officer be able to contact, harass or intimidate the complainant.

Issue 12: Application of IPPs and HPPs to police complaints

See 9 above.

Issue 13: Exemption of the NSW Ombudsman from compliance with the IPPs

PIAC does not believe there is a sound justification for the Ombudsman to be exempt from compliance with all the IPPs and HPPs, which would be the case if the Ombudsman were to be included among the agencies listed in section 27 of the PPIP Act and section 17 of the HRIP Act. While it may be important that the investigative and complaint-handling functions of the Ombudsman are not subjected to undue scrutiny pursuant to privacy legislation, there is no reason for principles such as data quality and data security not to apply. In any event, PIAC notes that the Ombudsman is already subject to a number of other exemptions in the legislation.[23] In addition, section 35A of the *Ombudsman Act 1974* (NSW) would make it very difficult in practice to bring an action against the Ombudsman for breach of privacy.

PIAC does not believe there is a sound justification for the continued exemption from the definition of 'personal information' of the categories of information referred to in paragraphs 4 (3)(c), (d), (f) and (h) of the PPIP Act and paragraph 5(3)(f), (g)(i) and (k) of the HRIP Act. This effectively takes these categories of information outside the scope of the legislation completely and cannot be justified on policy grounds. A better approach may be to provide exemptions from specific IPPs for the various categories of information.

Issue 14: Continuation of exemption for information on suitability for appointment as a public sector official

This exemption is extremely broad, and is open to abuse. The purpose of the exception, is to allow 'free and frank discussion' during the recruitment process.[24] However, there is scope for the exemption to be applied to other aspects of employment, including promotion, conditions of employment, transfer and training, discipline and termination. It has been said that 'an agency could conceivably mount an argument for almost every piece

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23 For example, the exemptions relating to investigative agencies in s 24 of the PPIP Act.

24 See, for example, NSW Attorney General's Department, *Review of Privacy and Personal Information Protection Act 1999* (2007) [9.22].

of information, as well as an opinion, that it collects or receives pertaining to one of its employees'. Even in circumstances where a decision to except information is successfully challenged, in the meantime the employee will have suffered inconvenience and/or harm to reputation and career.

The exemption should be reviewed in the light of the ALRC findings on the employee records exemption. The exemption should be clearly restricted to a recruitment and promotion context. Consideration should also be given to whether a wholesale exemption from the IPPs and HPPs is appropriate, or whether it would be better to have exemptions from specific principles. For example, there appears to be no reason why principles such as data quality and security should not apply.

Issue 15: Limiting the exemption for information suitability for appointment as a public sector official

See the response above to Issue 14.

Issue 16 & 17: Clarification of paragraphs 4(3)(j) of the PPIP Act and 5(3)(m) of the HRIP Act

PIAC recognises that the issue of how to deal with employee records under privacy legislation is complex. PIAC believes that employee records should be, prima facie, subject to the privacy principles and personal information held in employee records should no longer be an exemption to the definition of personal information under the PPIP Act.

PIAC agrees with the ALRC when it recommends that the *Privacy Act 1988* (Cth) should be amended to remove the employee records exemption by repealing section 7B(3) of that Act.[25]

PIAC further supports the ALRC recommendation that the Office of the Federal Privacy Commissioner should develop and publish guidance on the application of the model privacy principles to employee records, including when it is and is not appropriate to disclose employee concerns or complaints by third parties about an employee.

PIAC would encourage the timely development of these guidelines and if, as recommended the draft UPPs are adopted nationally, then the principles set out in the national guidelines should apply to NSW Government employees who are subject to continuing NSW privacy legislation. PIAC would expect that such guidelines would only be developed after broad community consultation, involving trade unions, employer groups and the community sector.

PIAC submits that if the Commonwealth and all states and territories do not adopt the proposed UPPs and/or if the Commonwealth Government fails to develop guidelines for personal information held in employee records as above, the NSW Privacy Commissioner should draft guidelines along the same lines.

PIAC submits that sensitive information and medical information held in employee records should be subject to the same restrictions and protections as other personal information in these categories.

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[25] Australian Law Reform Commission, *Review of Australian Privacy Law* (2007) Chapter 36.

Issue 18: Photographs and visual images as 'personal information' and the application of IPPs

PIAC believes that section 4 of the PPIP Act should be amended to make it clearer that photographs or visual images of individuals that can be reasonably attributed to an individual should come within the definition of 'personal information'.[26]

Issue 22 & 23: Application of principles and provisions to and clarification of unsolicited information

PIAC submits that the distinction between solicited and unsolicited adds unnecessary complexity to the current law and should not been maintained. PIAC recommends that all of the IPPs and the HPPs should apply to all personal information, however obtained, to the maximum extent practicable in the circumstances.

Issue 24: Meaning and distinction between 'administrative' and 'educative' functions

PIAC supports the view that these terms should be more clearly defined in the legislation. The distinction between administrative, educative and 'core' functions appears to be the important distinction for the purpose of this inquiry. The legislation should make it clear that the way an agency categorises a function is not determinative.

PIAC questions whether there is a need for the ICAC, the NSW Police, the Police Integrity Commission and the NSW Crime Commission to be exempt from the privacy principles in respect of all their non-administrative and non-educative functions. If this exemption is justified, it should be restricted to the legitimate, core investigative functions of these entities. Considerations should also be given to whether a wholesale exemption from all the IPPs is necessary, or whether it would be more appropriate to have exemptions from specific principles.

Issue 25: Separate categorisation of the administrative function

See the response above to Issue 24. However, it is not clear how this question arises from the concerns identified by the NSW LRC in its related discussion. Where something is appropriately categorised as both administrative and 'core', then certainly to the extent possible they ought to be separated to maximise the application of the PPIP Act and HRIP Act.

Issue 26: Sufficiency of the right to complain and challenge the categorisation of a function

See the response above to Issue 24.

While an opportunity to complain to the Privacy Commissioner about the categorisation of a function may be useful it will only be sufficient if it operates as an effective appeal mechanism. However, it is more important that there be clear guidance given in the legislation.

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[26] See, for example, *SW v Forests, New South* Wales [2006] NSWADT 74 in which the Administrative Decisions Tribunal accepted that a photograph of an individual was 'personal information' and *Re Pasla and Australian Postal Corporation* (1990) 20 ALD 407 in relation to the *Privacy Act 1988* (Cth).

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

PIAC fully supports this proposal and considers that privacy legislation should be amended as a matter of urgency, whether or not other amendments are made.

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 non-government 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.

PIAC strongly supports this proposal.

However, in relation to the current system of liability set out in paragraph 4(4)(b) of the PPIP Act, in which the appropriate respondent to a privacy complaint remains the principal agency, PIAC is concerned about two issues. Firstly, individuals affected by a breach of privacy should have the right to make a complaint against the agency with which they are dealing. Second, a principal agency that receives a complaint in relation to a breach of privacy by a contracting agent should not be able to raise a privity of contract argument to avoid liability for the privacy breach.

PIAC considers it imperative that individuals affected by a breach of privacy by a contracting agent must have the right to bring legal action against either the principal agent or the contracting agent by operation of the PPIP Act. While a right to bring legal action expressly provided for in the contract is important, it is not an accessible mechanism for dealing with privacy breaches.

Issue 27 & 28: Provisions for the general regulation of bodily privacy and territorial privacy

PIAC notes that the 'general privacy matters' jurisdiction of the Privacy Commissioner allows for investigations and conciliations about complaints about invasions of bodily privacy not involving records of personal information. While there are obvious limitations on the Commissioner's power, PIAC supports the retention of this jurisdiction in the PPIP Act, at least until such time as a statutory cause of action for breach of privacy is enacted. (See the response below to Issue 29.)

PIAC is concerned that a person who alleges a breach in respect of bodily privacy currently has to look beyond express privacy law to find what protections exist. It is logical for all regulation in respect of privacy, be it bodily information or territorial is in a single statute dealing with privacy. If the issues raised are complex, then it may be appropriate to keep them in a separate part of the PPIP Act, or for there to be a mechanism to use the PPIP Act to deal with breaches of bodily or territorial privacy as regulated in other statutes.

PIAC submits that the 'general privacy matters' jurisdiction in the PPIP Act should be extended and strengthened to encompass hearing, determination and remedy.

Issue 29: Relationship between the PPIP Act and a statutory cause of action for invasion of privacy

PIAC strongly supports a general cause of action for invasion of privacy. PIAC has already made a detailed submission about this matter to the NSW LRC.[27]

In PIAC's view, the most appropriate statute through which to establish the statutory cause of action is the *Privacy Act 1988* (Cth). If states and territories enact their own, separate legislation dealing with invasions of privacy, there is a danger that levels of protection will be uneven across Australia. Moreover the cause of action should apply broadly, to all individuals and bodies, whether public or private. It is therefore inappropriate that it be contained in the PPIP Act, which applies only to the public sector.

PIAC notes that the ALRC has recommended the enactment of uniform privacy legislation by the states and territories. Until this happens, the NSW public sector should be subject to the proposed statutory cause of action for invasion of privacy in the *Privacy Act*.

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[27] Anne Mainsbridge, *Matching Rights with Remedies: a statutory cause of action for invasion of privacy, Submission to the NSW Law Reform Commission on Consultation Paper 1 – Invasion of Privacy* (2007).

Chapter 6

Issue 30: Restricting the collection of sensitive information

PIAC generally supports the proposal that the principles should preclude collection of 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 unless the collection is strictly necessary.

PIAC notes, however, that some of this information—particularly in relation to ethnic or racial origin—may be collected as demographic data to enable agencies to ensure that their services are being appropriately accessed or that their employment practices are not excluding people on the basis of a personal characteristic. It is important that such collection is understood to be an important aspect of ensuring equal opportunity in employment and receipt of services. It may be hard for an agency to argue that this collection is 'strictly necessary', but from an equality perspective, it is certainly an important measure of whether or not services and opportunities are available to communities of particular need.

Issue 31: Permitting collection of sensitive information to prevent a serious and imminent threat to life or health

Section 19 of the PPIP Act requires a 'serious and imminent' threat to life or health before sensitive information can be disclosed to third parties. PIAC submits that the word 'imminent' should be retained in the legislation.

PIAC notes that 'imminent' is not included in the equivalent section of the draft Commonwealth UPPs. PIAC submitted to the ALRC and maintains that 'imminent' strengthens the requirement and limits opportunity for abuse. PIAC accepts there are possibly situations where sensitive information must be immediately released and required in a short timeframe where that information is required urgently by a third party to save a life or to dramatically improve the health of an individual.

If disclosure to third parties is sanctioned if the threat is only 'serious' and no reference is made to the imminence of the threat, then this could potentially provide a disincentive for the holder of the information to attempt to communicate with the subject individual or have to exercise other remedies such as recourse to the Guardianship Tribunal. A 'serious', but not 'imminent', threat should still allow time to explore other options other than disclosure without the consent of the subject of the information.

Issue 31 refers, however, to the 'collection' rather than the disclosure of sensitive information. If disclosure is allowed, then should the party receiving it be permitted to collect it in the same circumstances, ie, of imminent and serious danger to the individual?

In this narrow sense, one flows from the other and collection in this narrow sense should not be seen as a diversion from privacy principles. Section 10 of the PPIP Act sets requirements for collection of information and allows those requirements to be met 'as soon as practicable' after collection. This would allow the section 10 requirements to take place after an emergency disclosure as mandated by section 19 of the PPIP Act.

'Collection' is not defined in NSW privacy legislation. The *Macquarie Dictionary* defines 'collect' as to 'gather together; assemble' but also refers to a broader meaning that is to both 'gather' and to 'accumulate'[28], ie, 'make a collection of'. In the Privacy Guidelines, the term 'hold' is also used. One of the *Macquarie Dictionary* definitions of hold is to 'reserve; retain; set aside'.[29] Information is collected, and then held under the Privacy Guidelines. It follows that 'collection' in privacy legislation refers only to the gathering of information not the reserving or accumulation of information.

PIAC submits that a legislative change would and should not be necessary to allow an agency to collect information in an emergency situation as prescribed in section 19 of the PPIP Act. PIAC submits that the holder of sensitive information should be the agency responsible for the disclosure of that information to third parties, not the agency that seeks the information and the current NSW legislation reflects this principle.

The practical difficulty that arises, is not that section 19 of the PPIP Act does not allow sensitive information to be collected, but that once information is gathered/collected, then it is, from that point in time, then 'held' by the relevant agency where difference privacy principles apply. If the information is allowed to be collected without the consent and participation of the subject of the information, then there is no prohibition in the privacy guidelines to that information to be continued to be held, subject to the privacy principles about holding, storage, security, etc. Although there is a general obligation to ensure that held information is accurate and up to date, there is no obligation in the Privacy Principles to, after collection, advise an individual that the agency holds the information and/or that they can check it for accuracy. The assumption is that the information was collected from the individual to whom the information relates or that the individual has authorised someone else to supply the information.

The appropriate course of action for an agency or health provider should be that, if sensitive information is disclosed in the course of an emergency situation where an imminent and serious threat to the life or health of the subject individual necessitated that disclosure, then after that emergency situation passes, the privacy principles should apply as if the information was about to be collected in accordance with section 10 of the PPIP Act. In practical terms that would mean, the individual should be advised of the disclosure and the reasons for the disclosure, and then agreement should be sought as to whether the individual agrees to the agency/ health provider continuing to hold the sensitive information, after checking its accuracy and allowing for amendment. If this agreement is not obtained, then the information should then be removed from all records held by the agency/ health provider. This process should occur at the first opportunity the subject individual has the capacity to agree or otherwise to the continuing holding of the information.

PIAC submits that this would not require a change to existing legislation or the existing NSW privacy principles for the reasons set out above. The process as described in the previous paragraph should more appropriately form part of guidelines, in particular any future Health Privacy Guidelines, issued by either the State and/or the Commonwealth Privacy Commissions (depending on which body or bodies are eventually responsible for which area the private sector / public sector/ health sector privacy divide).

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

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28 A Delbridge and J R L Berbard, *The Macquarie Dictionary* (3rd ed, 1997) 432.

29 Ibid, 1018.

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".

PIAC is concerned with the general permissiveness of the words 'unreasonable or impractical'. PIAC believes that the general principle that information can only be collected from the subject individual should be maintained with only limited exceptions.

PIAC notes the draft UPP expresses the concept in another way:

> 2.3 If it is reasonable and practicable to do so, an agency or organisation must collect personal information about an individual only from that individual.' Expressed this way, the test becomes more objective and less subjective.

PIAC submits that privacy legislation and principles should be amended to reflect the language of Australia's anti-discrimination law and introduce the less permissive and more objective concept of 'unjustifiable hardship'. IPP 2 and HPP 3 would then contain the exemption that information must be collected from the individual unless it would impose 'unjustifiable hardship' on the collector.

Proposal 9: If two separate Acts continue to operate:

- ***HPP 3 should be amended to allow an individual to authorise collection of his or her personal information by an organisation from someone else and to allow collection of information about an individual under 16 years from a parent or guardian; and***
- ***IPP 2 should be amended by introducing a further exemption, namely that information must be collected from the individual unless is it "unreasonable or impractical to do so".***

PIAC has no objection to HPP 3 being amended to allow an individual to authorise collection of his or her personal information from a third party. PIAC also has no objection to HPP 3 being amended to allow collection about a person under 16 from a parent or guardian. However, PIAC notes that collecting only from a parent or guardian may result in inaccurate or incomplete information being collected. It is clear that there is personal information held by individuals under the age of 16 that they will not have disclosed to their parent or guardian.

PIAC does not support the proposed amendment to IPP 2. PIAC submits that an exception containing the phrase 'unreasonable or impractical' is too vague and permissive (see comments in response to Proposal 8 above).

Issue 32: Impact of limits on capacity

The ALRC in its *Review of Australian Privacy Law* has comprehensively considered the issue of adults with a temporary or permanent capacity.[30] The ALRC proposes that the *Privacy Act 1988* (Cth) be amended to incorporate provisions that the concept and role of authorised representatives in decision making.[31] This is basically the model replicated in section 7 of the HRIP Act. PIAC broadly supports Proposals 61-1 and 61-2 in the ALRC report.[32]

30 Australian Law Reform Commission, *Review of Australian Privacy Law* (2007) 1825-1845.

31 Ibid 1831.

32 Ibid 1836.

The ALRC recommends the adoption of the wording of the *Health Records Act 2001* (Vic), rather than the NSW legislation. PIAC submits that any state legislation in this area should be based on a uniform Commonwealth model. Relationships such as guardianship can extend privacy issues beyond state borders and currently different states have different legislative models for guardianship, powers of attorney and substituted decision making generally.

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

PIAC supports this proposal. The privacy principles about collection of personal information should apply regardless of whether the information is collected directly or indirectly. PIAC agreed with the NSW LRC's reasoning on this point.

Issue 33: Achieving consistency between IPP 3 and HPP 4 or UPP 3.2

PIAC believes that HPP 4 provides a more comprehensive code in relation to notification in the privacy principles. PIAC believes the phrase 'as reasonable in the circumstances' found in both UPP 3 and HPP 4 is unnecessarily permissive The codification of the exceptions set out in HPP 4, PIAC submits, makes this phrase unnecessary.

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.

PIAC supports this proposal. While this would allow agency employees to avoid the operation of IPPs 3 and 4 by communicating their observations orally, rather than recording them it appears impractical and extreme to require IPP 3 and 4 to apply in respect of non-documented personal information. PIAC notes that the definition of 'personal information' in section 4 of the PPIP Act contemplates non-documented information:

> … information or an opinion (including information or an opinion forming part of a database and whether or not recorded in material form) about an individual whose identity is apparent or can reasonably be ascertained from the information or opinion [emphasis added].

However, it is difficult to imagine how to effectively apply these IPPs to non-recorded information.

Issue 34: Application of IPP 9 and HPP 9 to conclusions, opinions, observations, or conversations

PIAC believes that while there are some legal and administrative difficulties that arise from regulating documents containing opinion rather than factual information only, total exclusion of opinion from the privacy principles is both unnecessary and contrary to the public interest.

PIAC maintains that the public interest reasons for both IPP 9 and HPP 9 are the same for both facts and opinion, ie, to ensure that information is not used by the holder of the information until the subject of the information has a chance to correct any errors and provide any additional information they decide might correct or modify the information held.

PIAC does not accept that these public interest considerations are in any way diminished by the fact that the information is provided orally and is recorded in a file note. There are cogent reasons why all personal information, including what the PPIP Act describes as opinion, should be subject to IPP 9 and HPP 9.

Although the PPIP Act speaks of information or an opinion as if they are entirely separate concepts, the reality is that most information held about someone is a mix of objective facts and subjective opinion. Statements of opinion, particularly in documents likely to be subject to privacy legislation, often set out certain facts that led to formation of the opinion. This can apply in even the shortest conversation found recorded in a file note, eg, 'X has schizophrenia because she says she hears voices'. From the point of view of the subject of the information, quite often the facts and the opinions are both contestable.

PIAC submits that if factual information is contained in a document that also includes opinion then the same public interest applies in requiring verification of these 'facts' as applies if the document does not contain opinion. Most health information contains both objective facts and subjective opinion. The line between these two categories is often not so easily drawn. Something as seemingly objective as blood tests can be subject to false negatives and false positives.

IPP 9 and HPP 9 impose a similar obligation; in that the holder must take reasonable steps to ensure that the information is 'relevant, accurate, up to date, complete and not misleading'. It is hard to argue that all opinion is always relevant, up to date and complete. PIAC believes that individuals should have a right to be aware of opinion evidence about them that may have been superseded by other opinions, that has not been based on accurate or contemporise facts, or is not complete. This is particularly relevant to health information.

A health consumer should have the right to seek and provide alternative opinions if an authority or health provider hold certain opinion evidence concerning them about which they disagree. This general right has been recognised in discussions leading to the National Charter of Healthcare Rights although it is not specifically included in the final Charter.[33]

Proposal 12: IPP 5 and HPP5 should be amended to include a requirement for the secure collection of personal information

PIAC supports this proposal on that basis that all personal information held by an agency or an organisation should be held securely.

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.

While PIAC supports clarification of these provisions it prefers the approach set out in response to Issues 62 and 63 below, which would remove the need for subsection 20(5).

Issue 35: Clarifying the effect of subsections 15(1) and (2) of the PPIP Act

PIAC agrees that clarification of the effect of subsections 15(1) and (2) of the PPIP Act is necessary. As currently worded, these sections appear to contradict each other. Subsection 15(1) provides that an agency 'must' amend personal information if requested, whereas subsection 15(2), which provides for certain steps to be

[33] Australian Commission on the Safety and Quality of Health Care. *Australian Charter of Healthcare Rights* <http://www.safetyandquality.gov.au> at 17 October 2008.

taken if an agency is not prepared to make amendments, clearly contemplates that an agency may choose *not* to make the requested amendments.

PIAC supports the NSW LRC's proposed amendment to subsection 15(2) of the PPIP Act.

Issue 36: Streamlining the 'use' and 'disclosure' principles

PIAC supports the consolidation of the 'use' and 'disclosure' principles into a single privacy principle such as UPP 5. PIAC has previously expressed concern about the confusion that arises about whether an action is a 'use' or a 'disclosure'.[34] PIAC is concerned that this confusion can, and has, lead to particular conduct falling through the gaps: see *ZR v NSW Department of Education and Training* [2008] NSWADT 199.

Issue 37: Clarifying the 'purpose' of collection

PIAC supports amendment of IPPs 10 and 11 to ensure clarity. However, use of the 'collection' does not include situations where personal information is created by the agency or organisation without the agency or organisation going through a process of 'collection'. Similarly, the information may be unsolicited information received by the agency or organisation. PIAC submits that IPPs 10 and 11 should not be restricted to dealing with the purpose for which information has been collected, but should also apply to the purpose for which a record of personal information was created or the purpose for which the information was retained.

Issue 38: Application of IPPs 10 and 11 and HPPs 10 and 11 to unsolicited information

Refer to the response above to Issues 22 and 23.

Issue 39: Inclusion of a privacy principle in terms identical, or equivalent to the proposed UPP 2.5

PIAC notes that proposed UPP 2.5 has now been re-named UPP 2.4 in the ALRC's final report. PIAC supports the inclusion of in the privacy principles of a principle in terms identical to the proposed UPP 2.4. Unsolicited information is can be extremely sensitive (for example, allegations of child abuse, or domestic violence) and where an agency decides to retain this information, it should be subject to adequate privacy protection, in terms of access, correction, security, use and disclosure.

At present, the PPIP Act does not provide this protection. Subsection 4(5) of the PPIP Act provides that personal information is not 'collected' if receipt of the information by the agency is unsolicited. This means that the collection principles—IPPs 1 to 4—do not apply to unsolicited information. The application of the remaining IPPs to unsolicited information is uncertain.[35]

In PIAC's view, UPP 2.4 provides appropriate protection for unsolicited information and should be incorporated into the PPIP Act.

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[34] Mainsbridge with Banks, above n7.

[35] See, *KD v Registrar, New South Wales Medical Board* [2004] NSWADT 5; *OA v NSW Department of Housing* [2005] NSWADT 233; *AW v Vice Chancellor, University of Newcastle* [2008] NSWADT.

Issue 40: Disclosure to third parties

PIAC supports the amendment of paragraph 18(1)(b) of the PPIP Act 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 41: Restrictions on disclosure of an individual's criminal history and record

PIAC believes that an individual's criminal history and record should be included in restricted information set out in subsection 19(1) of the PPIP Act. This is consistent with the approach taken in other jurisdictions.[36]

Issue 42: Clarification of the meaning of the words 'sexual activities'

PIAC believes that the term 'sexual activities' are uncertain and unclear. PIAC submits that subsection 19(1) of the PPIP Act should be amended by replacing the phrase 'sexual activities' with the phrase 'sexual orientation'. The term 'sexual orientation' reflects modern usage[37], and is consistent with language used in recent federal legislation[38], and with state and territory human rights and anti-discrimination legislation.[39]

Issue 43: Consolidating restrictions on disclosure

PIAC submits that the current separation of subsection 19(1) from section 18 of the PPIP Act is confusing and may result in the stricter requirements for disclosure of sensitive information being overlooked. PIAC also notes that the remaining provisions of section 19 deal with the separate issue of trans-border information disclosure. Logically, it makes sense for subsection 19(1) to be incorporated into section 18, which relates to limits on disclosure of personal information.

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.

PIAC is concerned that none of the current provisions, nor proposed UPP 11 provide an appropriate level of privacy protection for information subject to cross-border data flow. They are all far too permissive and leave the individual with little or no protection against or remedy for breach. The principle in respect of cross-border data flow ought to be that the consumer's privacy interests remain fully protected under the domestic law applying to the entity holding and handling the information. The consumer should not be required to understand the nature of the data flow nor be required to consent to data transfer. Rather, they should be able

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36 *Privacy Act 1988* (Cth) s 6; *Information Privacy Act 2000* (Vic) sch 1; *Information Act 2002* (NT) s 4; *Personal Information Protection Act 2004* (Tas) s 3.

37 In recent years, the use of the term 'sexual orientation' has been preferred by media style guides to the term 'sexual preference' as the latter carries the contested implication that sexuality is a matter of choice. See, for example, Gay and Lesbian Alliance against Defamation, *Media Reference Guide*, <http://www.glaad.org/media/guide/style.php> at 21 December 2007.

38 *Private Health Insurance Act 2007* (Cth) s 55.5.

39 *Equal Opportunity Act 1995* (Vic) s 6; *Charter of Human Rights and Responsibilities Act 2006* (Vic) s 3; *Equal Opportunity Act 1984* (WA) s 35O; *Anti-Discrimination Act 1998* (Tas) s 16; *Human Rights Act 2004* (ACT) s 8.

to feel certain that their personal information is protected under local law from any breach of the privacy principles and should have a local, accessible remedy for breach against the principal to whom their personal information was provided at first instance.

PIAC notes that the proposed UPP 11 has been the subject of extensive and appropriate criticism for being far too permissive and not ensuring an effective and accessible remedy for a person who is the victim of a breach of their privacy.

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.

PIAC is concerned about the increasing number of identifiers being developed by government agencies as they strive to deliver services in a 'joined-up government' manner. PIAC strongly supports the inclusion of a privacy principle regulating the use and disclosure of identifiers in whatever form NSW privacy legislation ultimately takes.

PIAC notes that the PPIP Act is currently the only privacy statute in Australia that does not include a provision regulating the use of identifiers. This is unacceptable given the potential of identifiers to increase threats to privacy by facilitating unauthorised linkages of information about an individual within and across organisations, particularly in an electronic environment.

PIAC supports a separate privacy principle relating to Identifiers along the lines of proposed UPP 10 in the ALRC Report. Accommodation of identifiers within other privacy principles such as collection, use and disclosure would be unnecessarily complex and would fail to give adequate recognition to the serious privacy risks associated with the misuse of identifiers. Proposed UPP 10 in the ALRC Report provides an appropriate model.

Issue 44: The privacy principle regulating the use and disclosure of identifiers

See the comments above in relation to Proposal 15. PIAC submits that the proposed UPP 10 is the preferable model because it focuses on ensuring 'single use' of identifiers, contains fewer exemptions, and has stricter limits on use and disclosure.

Chapter 7: Other operational issues

Issue 45: Exemptions relating to complaint handling or investigative processes

PIAC favours the use of selective rather than general exemptions and would not support this proposed amendment to section 24 of the PPIP Act. To the extent that it is considered necessary to avoid the dichotomy identified by the NSW LRC, PIAC submits that the current approach of the Privacy Commissioner in making a Direction under section 41 on the use of information for investigative purposes has the advantage that it is regularly reviewed.

Issue 46: Interpretation and clarification of subsection 25(a) of the PPIP Act

See proposal 16 below.

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 sections 9, 10, 13, 14, 15, 17, 18 or 19 if:
… 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.'

PIAC does not support this proposal. The addition of the words 'or any other law' in the subsection would allow an exemption from most of the IPPs where non-compliance is permitted (or necessarily implied or reasonably contemplated) under the common law. This is an extremely vague and uncertain test, and would arguably allow an agency to evade its privacy responsibilities for such reasons as a 'common law duty to disclose'.

The words 'otherwise permitted (or is necessarily implied or reasonably contemplated)' are extremely broad, and have contributed to the progressive watering down of the PPIP Act over the years. In PIAC's submission, a much better test is that used in section 47 of the *Disability Discrimination Act 1992* (Cth), which provides that an act will not be unlawful where it is done in 'direct compliance' with an industrial instrument or a prescribed law. This approach provides clarity and certainty as it is much easier for an entity with obligations under the legislation to determine whether or not it has directly conflicting obligations under a relevant industrial instrument or a law that has been prescribed under regulations than to ascertain whether there might be, by implication, a conflicting obligation somewhere in the law in Australia.

Issue 47: Exemption from section 18 where disclosure to an investigative agency for complaints-handling or investigative functions

PIAC recognises the legitimate exercise of investigative agencies that obtain information from individuals and other agencies through statutory powers. PIAC also has, in the area of health policy, highlighted the need for promotion of increased patient safety and the role that open disclosure by health providers plays in improving patient safety. However, PIAC believes that neither investigative agencies, or other agencies holding personal information that are required to release this information for the purpose of an investigation, are hampered by the existing legislative arrangements.

Investigative agencies are set out in the definition in the PPIP Act and additional agencies can be added by regulation. Issue 47 is concerned with the disclosure of personal information held by an agency to an

investigative agency for the purposes of an investigation. Under section 18 of the PPIP Act there are four exemptions to the principle that personal information held by one agency should not be disclosed to another agency. Section 24 of the PPIP Act sets out the exemptions with regard to investigative agencies investigation functions. Section 25 of the PPIP Act says that a public sector agency is not required to comply with section 18 if the agency is lawfully authorised or required not to comply with the principle concerned. PIAC submits that section 25 is sufficient to cover the concerns raised regarding investigative agencies.

The NSW Ombudsman does appear to have particular concerns regarding pre-investigation inquiries but this seems to be more a concern about the *Ombudsman Act 1974* (NSW) than about privacy legislation. If the *Ombudsman Act 1974* (NSW) specifically authorised the Ombudsman to require the release of personal information for provisional inquiries, then the Ombudsman could collect the information under section 24 of the PPIP Act and the agency holding the information could disclose under section 25 of the PPIP Act.

A recent legislative amendment whereby the NSW Parliament has given an agency powers to demand information prior to an investigation is found in section 21A of the *Health Care Complaints Act 1993* (NSW). That section has given the Health Care Complaints Commission the same powers in requiring the production of information prior to assessment of a complaint as it has in investigating a complaint.

PIAC believes that information released should be subject to all privacy principles once the investigative body holds the information. PIAC also believes that investigative bodies should, if possible given the nature of the investigation, obtain the consent of the subject of the information to its release before using coercive powers to obtain information. If the information is in the form of investigation reports or official responses to the original complaint, then the subject of the information should have a prima facie right of access to this information. This must always be balanced by the public interest in the investigation itself and the benefit of open disclosure by health providers where agencies are encouraged to disclose all the information they hold relative to a complaint made or concerns or questions raised.

PIAC notes that it sometimes argued that if provider responses to complaints are available to all parties, not just the investigator, this has a tendency to discourage open disclosure.

To clarify these issues, PIAC proposes that the Privacy Commissioner issue guidelines in relation to the operation of the privacy principles and information released for the purposes of investigation.

Issue 48: Clarification of the interaction of subsections 29(2) and 30(1) of the PPIP Act

PIAC agrees that currently subsections 29(2) and 30(1) of the PPIP Act are ambiguous and need to be clarified. PIAC considers that the term ‘modify’ should replace the term ‘regulate’ in subsection 29(2) as it is the more restrictive term.

Issue 49: Clarification of the precise scope of a privacy code of practice

PIAC agrees that the precise scope of a privacy code of practice should be clarified. However, while PIAC accepts that there are circumstances in which an agency may need to modify the privacy principles such as where privacy has to be balanced against other public interests, PIAC considers that Privacy NSW ought to have a test or, at the very least, guidelines as to what will be considered by it to constitute the public interest. PIAC also considers that in deciding whether to approve a Code of Practice, Privacy NSW should undertake public consultation and call for and consider submissions.

Proposal 17: Section 41 of the* Privacy and Personal Information Protection Act 1998 *(NSW) should be amended to give the Privacy Commissioner the power to amend an earlier direction.

PIAC supports this proposal. A legislative amendment along these lines would essentially overcome an oversight in the original drafting of the legislation. It is almost inconceivable that Parliament intended to give the Commissioner power to exempt an authority or organisation from the privacy principles and not to have the power to later amend or rescind this process.

Issue 53: Clarification of scope of application of subsection 45(1) of the PPIP Act

Section 45(1) should **not** be limited to individuals whose privacy has been violated or to third parties acting on behalf of those individuals. It should also allow third parties which have a role as systemic advocates on issues to bring complaints in appropriate but limited circumstances.

In many cases, the individual whose privacy has been affected may be the last to find out, or may be reluctant to bring a complaint themselves because of financial disadvantage, or fear of reprisals. In these circumstances, there should be provision for complaints to be brought by others who become aware of the breach of privacy. Widespread or systemic breaches of privacy (such as data security breaches) are often more effectively and appropriately dealt with through representative complaints.[40]

Unfortunately, there is currently no express provision in the PPIP Act for the bringing of representative complaints. It is therefore vital that subsection 45 (1) be clearly worded so as not to restrict the rights of third parties to make complaints.

Issue 57: Application of the Commissioner's section 51 powers in respect of withdrawn complaints

Section 51 of the PPIP Act should be amended to make it clear that the Privacy Commissioner has the power to conduct an inquiry or investigation into any general issues raised by a withdrawn complaint. This section provides an important vehicle for the Privacy Commissioner to examine systemic breaches of privacy, and should not be unduly restricted. A complainant may decide to withdraw an otherwise meritorious complaint for any number of reasons, including ill health, relocation, financial disadvantage or inability to obtain legal representation. In these circumstances, it should still be possible for the Privacy Commissioner to inquire further into any systemic issues raised by the complaint.

Issue 58: Clarification of powers under sections 50 and 65 of the PPIP Act

PIAC submits that section 65 of the PPIP Act would allow the Privacy Commissioner to make a 'special report' in relation to a complaint made under section 45. Subsection 65(1) simply requires that the special report be on 'any matter in connection with the discharge of [the Privacy Commissioner's] functions'. The Privacy Commissioner's functions include 'to receive, investigate and conciliate complaints about privacy related matters (including conduct to which Part 5 applies)' (PPIP Act, paragraph 36(2)(k)). Subsection 45(1) allows the Commissioner to deal with complaints about the alleged violation of, or interference with, the privacy of an individual.

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40 For example, complaints about tenancy blacklists brought under the *Privacy Act 1988* (Cth).

PIAC notes that the Crown Solicitor has expressed a different view[41], and it may therefore be useful for the legislation to be amended to more clearly spell out the extent of the Privacy Commissioner's powers under section 65.

The power to make special reports to Parliament is a vitally important means of ensuring government accountability and of drawing public attention to matters that raise serious and/or systemic privacy issues.[42] It is therefore essential that this power not be read down, or weakened in any way.

Issue 59: Clarification of the jurisdiction of the ADT

Section 55 of the PPIP Act should be amended to clarify whether an application to the ADT is heard it its original or review jurisdiction. Although the ADT has previously held that it hears privacy matters in its review jurisdiction[43], the issue is not completely clear, and there are some factors that would seem to suggest the jurisdiction is original.[44] Legislative clarification is necessary in order to prevent matters being delayed by protracted legal argument about the issue.

In PIAC's view, the jurisdiction should be specified as being 'review' rather than original.

The legislation should also make it clear that the type of review is a merits review of conduct, rather than review of a decision.

Proposal 18: The* Privacy and Personal Information Privacy Act 1998 *(NSW) should be amended to include a limitation period for application for review by the Administrative Decisions Tribunal of an internal review. This should provide that an application to the Administrative Decisions Tribunal for external review of a complaint must be made within 60 days after the applicant:
(a) is notified that the Privacy Commissioner refuses to investigate the conduct complained of; or
(b) receives a report of the results of the Privacy Commissioner's investigation.

PIAC agrees that there should be a limitation period for application for review by the ADT. However, this should apply not only where there has been a complaint to the Privacy Commissioner under section 45 of the PPIP Act, but also where an internal review has been carried out by an agency.

PIAC also agrees with the proposed limitation period of 60 days, provided the ADT also has discretion to extend this period in appropriate circumstances (for example, where the complainant has been unable to file in time because of health problems, or because he or she has had difficulty in obtaining legal representation). PIAC notes that the Federal Court and the Federal Magistrates Court have discretion to extend time limits for the filing of applications in discrimination matters[45], and PIAC submits there is no apparent reason why the same should not also apply in privacy matters.

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41 NSW Law Reform Commission, above n16, 139.

42 See, for example, Privacy NSW, *Special Report to NSW Parliament under section 65 of the Privacy & Personal Information Protection Act 1998 (NSW): Complaint by Student A and his father against Mr John Aquilina MP, Mr Walt Secord and Mr Patrick Low,* Special Report No 2 (2002).

43 *Fitzpatrick* v *Chief Executive Officer, Ambulance Service of New South Wales* [2003] NSWADT 132.

44 For example, the remedies available under section 55(2) of the PPIP Act include damages and injunctions, which are not typically available in merits review proceedings.

45 For example, where a complaint is terminated by the President of the Australian Human Rights Commission, subsection 46PO(2) of the *Human Rights and Equal Opportunity Commission Act 1986* (Cth) provides that an application must be made

The term 'is notified' in Proposal 18(a) should be replaced by the words 'receives notification' as this provides greater clarity about the commencement of the limitation period and is also consistent with the wording used in Proposal 18(b). In the case of an internal review, the 60-day limitation period should commence when the applicant receives the findings of the agency's review.

Time limits for internal reviews

It is disappointing that the Consultation Paper does not also address the issue of time limits for the carrying out of internal reviews by agencies. PIAC's concerns about this issue were set out at some length in its submission to the Attorney General's Review of the PPIP Act in 2004. For a number of PIAC's clients, the internal review process has been a frustrating experience, characterised by substantial delays by the relevant agency. For example, in one matter a total of ten months elapsed between the receipt by the public sector agency of the complaint and the finalisation of the review. For many applicants, the review process can be a stressful time, particularly if they are employed by the relevant agency, or dependant on the agency for provision of services. Unlike complainants under the *Anti-Discrimination Act 1977* (NSW) and other state and federal discrimination laws, they have no protection against victimisation. It is therefore important that reviews be carried out as expeditiously as possible.

Subsection 53(6) of the PPIP Act gives an applicant the right to apply to the Tribunal if the internal review is not completed within 60 days. However, in PIAC's experience, most applicants are reluctant to take this course, as it invariably involves legal representation and associated costs. In practice, therefore, they are effectively at the mercy of agencies that delay the review process, either deliberately or through incompetence.

PIAC recommends that agencies that fail to complete an internal review within 60 days should be subject to penalties under the PPIP Act.

PIAC acknowledges that many agencies (particularly small agencies) may face difficulty in conducting internal reviews, particularly where resources are constrained or where the officer carrying out the review lacks relevant experience and expertise. PIAC recommends that in these circumstances, agencies should be able to refer out the review function to suitably qualified and independent bodies such as auditors or specialist consultants with expertise in privacy law.

Issue 60: Amendment to allow 'out-of-time' internal review request

Although paragraph 53(3)(d) of the PPIP Act currently gives an agency discretion about whether or not it will accept out-of-time applications for internal review, the ADT has held that this discretion is not reviewable.[46] This potentially disadvantages applicants who might seek to first resolve a matter informally. Moreover, the complexity of the PPIP Act means that while a person may be aware of particular conduct by an agency, they may not also be aware—at least initially—that such conduct is potentially in breach of the IPPs and may therefore delay seeking a review. There is a need for a more flexible approach to the six-month time limit in subsection 53(3).

Proposal 19: Subsection 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***

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to the Federal Court or the Federal Magistrates' Court within 28 days after the date of the issue of a notice under subsection 46PH(2) 'or within such further time as the court concerned allows'.

46 *Y v DET* [2001] NSW ADT 149.

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.***

PIAC does not support this proposal. It is true that, as currently worded, subsection 55(2) of the PPIP Act does not require the ADT to make a finding that the conduct has breached the provisions of the PPIP Act before granting one of the listed remedies. However, this allows the ADT a certain degree of flexibility in the granting of remedies.

To require the ADT to first find that an agency's conduct has contravened an IPP or a privacy code of practice before it is able to grant a remedy is likely to limit this flexibility and to even render some of the remedies inoperable. For example, paragraph 55(2)(c) allows the Tribunal to make an order requiring an agency to perform an IPP or privacy code of practice. It is difficult to see how this remedy could be granted if it is first necessary to find that there has already been a breach of an IPP or privacy code of practice. Proposal 19 would also appear to rule out injunctive relief[47], and orders requiring a public sector agency not to disclose personal information contained in a public register.[48]

Proposal 20: Section 56 of the **Privacy and Personal Information Protection Act 1998** ***(NSW) should be amended to include a provision that the Privacy Commissioner has a right to appear and be heard in any proceedings before the Appeal Panel of the Administrative Decisions Tribunal.***

PIAC supports this proposal in respect of any proceedings under the PPIP Act. While the legislation provides a clear right for the Privacy Commissioner to appear and be heard in any proceedings before the ADT, it is currently unclear whether the Commissioner also has this right in relation to proceedings before the Appeals Panel of the ADT. Given the potential for the Commissioner to provide assistance to the Appeals Panel in matters relating to the scope and operation of the legislation, section 56 should be amended to make it clear that this right exists.

There should also be clear provisions in the Act to ensure that the Privacy Commissioner is notified when proceedings are lodged with the Appeals Panel, and that he/she is able to access the relevant documents in relation to the proceedings though the registry of the ADT.

The right of the Privacy Commissioner to appear in jurisdictions beyond the ADT (for example, the NSW Court of Appeal) should also be clarified in section 55.

PIAC notes, however, that any right to appear and be heard before the Appeals Panel or any subsequent jurisdiction will only be a hollow right, unless the Privacy Commissioner is adequately resourced to actually carry out this function effectively. In recent years, the Privacy Commissioner has been unable to appear in a

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[47] See, for example, section 55(2)(b), which allows the ADT to make an order requiring the public sector agency to refrain from any conduct of action in contravention of an IPP or privacy code of practice. though query whether it is possible to seek injunctions under PPIP Act: *Wykanak v Dept Local Govt* [2002] NSWADT 208.

[48] See, for example, section 55(2)(c), which allows the ADT to make an order requiring the performance of an IPP or a privacy code of practice. It is difficult to see how the ADT could make this order if it was first required to find that there had been conduct by the agency in breach of an IPP or privacy code of practice.

number of landmark privacy cases due to lack of funding.[49] This has been described by the NSW Court of Appeal as 'unfortunate'[50] and has the potential to have an adverse impact on the future development of privacy law in New South Wales. PIAC therefore urges the NSW Government to ensure that adequate funding is provided to the Privacy Commissioner to enable him/her to intervene in any matters that raise issues concerning statutory interpretation of the PPIP Act.

Issue 61: Amendment to empower Privacy Commissioner to make final determination of a complaint

PIAC submits that final determinations should continue to be made by the ADT. In PIAC's experience, many cases under the PPIP Act raise complex issues of statutory interpretation and it is more appropriate that these be decided by the ADT as this is more likely to result in a solid body of jurisprudence about the interpretation of the provisions of the Act. PIAC notes the almost complete absence of a comparable body of jurisprudence under the *Privacy Act 1988* (Cth) where the Federal Court and the Federal Magistrates Court have not been able to consider cases under that Act due to the lack of determinations issued under section 52 of that Act by the Privacy Commissioner.[51]

PIAC acknowledges the expertise of the Privacy Commissioner and the potential that a 'Commissioner Determination Model' has for offering a quicker and cheaper system for resolving privacy complaints. However, such a model is too dependant for its success on significant levels of government funding. If the Privacy Commissioner is not adequately funded—as has been the case now, over many years—access to justice is likely to suffer.

Chapter 8

Issue 62: Rationalising the disclosure, access and correction provisions of privacy and freedom of information laws

The overlap between the access and corrections provisions in the PPIP Act and *Freedom of Information Act 1989* (NSW) has been the source of much confusion and delay and PIAC agrees that the provisions should be rationalised.

PIAC has approach the issue of rationalisation by considering the different purposes of the PPIP Act and freedom of information legislation. The PPIP Act is concerned with protecting individual's right to privacy, including having their personal information protected by government, while the FOI Act is intended to ensure government accountability by allowing citizens to access government information.

Thus, PIAC submits that the right to access and correct one's personal information should be dealt with under the PPIP Act and the corresponding provisions of the *Freedom of Information Act 1998* (NSW) and *Local Government Act 1993* (NSW) should be repealed.

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[49] In *Macquarie University v FM* [2005] NSWCA 192, the NSW Court of Appeal noted that the Privacy Commissioner did not appear due to 'financial constraints'.

[50] Ibid. The Court also noted that it 'would have been assisted by further submissions'.

[51] *Privacy Act 1988* (Cth) s 55A allows proceedings to be commenced in the Federal Court or Federal Magistrates' Court to enforce a determination under section 52 of the Act.

Issue 63: Access rights through freedom of information laws

PIAC does not support the option of providing access rights in relation to personal information through freedom of information laws. The rights to access and amend one's personal information are fundamentally privacy rights that are more appropriately dealt with under privacy than under freedom of information legislation.

PIAC submits that the right to access and correct one's personal information should be dealt with under the PPIP Act and the corresponding provisions of the *Freedom of Information Act 1998* (NSW) (**the FOI Act**) should be repealed so that they this Act is limited to dealing with all other information held by government. Section 5 and subsection 20(5) of the PPIP Act should be repealed and consideration should be given to which exemptions currently found in the FOI Act should be retained in relation to personal information. Those exemptions should then be inserted into the PPIP Act.

To simplify the process of accessing information, PIAC submits that an applicant should not have to identify whether they are making a request under the PPIP Act or the FOI Act. Instead an applicant would complete a generic 'Information Request' form, setting out the information they request access to. Each public sector agency should have an 'information officer' who is required to acknowledge receipt of all information requests within 14 days. An acknowledgement of an information request should confirm that the request has been received, which Act it will be dealt with under (based on whether it is a request for the individual's own personal information or any other information held by the government), explain the relevant timeframes for processing the request. If the request is to be dealt with under the FOI Act, the information officer should explain that the request will not be processed until the application fee is received. If the request is mixed, then the applicant would still be required to pay the FOI application fee, but the different parts of the request would be dealt with as though 2 separate requests had been made under the FOI Act and the PPIP Act. This procedure would simplify the process for individuals making it easier for them to access public information.

Subsections 12(6)-(8) of the *Local Government Act 1993* (NSW) should also be repealed so that all requests for access to a person's personal information held by a local authority will also be dealt with under the PPIP Act.

Issue 64: Achieving consistency in complaints-handling and review procedures in privacy and freedom of information laws

See issue 62 & 63 above. If the PPIP Act and the FOI Act were rationalised, then this issue would not arise.

However, PIAC suggests that the PPIP Act be amended to specify time limits that agencies must adhere to in carrying out internal reviews. Many of PIAC's clients find the internal review process to be lengthy and frustrating, with agencies sometimes taking up to 12 months to carry out a review.

Issue 65: Amalgamation of the administration of freedom of information and privacy legislation

PIAC suggests that consideration should be given to adopting the recommendation of the Solomon report that the Information Commissioner should administer both the FOI Act and the PPIP Act to ensure that tensions between these Acts are managed. However, if this approach is adopted, PIAC suggests that within the office of

the Information Commissioner there should be two deputies, one responsible for privacy legislation and the other for the freedom of information legislation.[52]

Issue 66: Freedom of information, privacy and local government

See Issue 63 above.

Issue 67: Removing the complexity of three regimes: FOI, Privacy and LGA

See Issue 63 above.

Issue 68: State Records and Privacy

There are significant risks to privacy where agencies retain personal information for lengthy periods of time and PIAC believes that agencies should be required to destroy personal information when this information is no longer necessary.

However, in certain circumstances there is a strong public interest in agencies having to preserve personal information, at least for a specific period of time so that individuals are able to assert legitimate legal rights. Much of PIAC's work in the Stolen Wages project would not have been possible if personal information of claimants had been destroyed by government agencies. PIAC also acts for a number of clients who are seeking to recover damages for false imprisonment in the criminal justice system. In gathering evidence to substantiate these claims it is often necessary for PIAC to access records from government agencies that have had dealings with PIAC's clients.

PIAC is also concerned that section 12 of the PPIP Act may impact on the capacity to effectively carry out social and medical research.

In light of section 25 of the PPIP Act, PIAC believes that section 12 is already subject to section 21 of the *State Records Act 1998* (NSW) and no amendment to this effect is necessary. However, PIAC submits that section 12 should be amended by the insertion of the provision imposing a requirement that prior to the destruction the person to whom the information is held should be offered the opportunity to obtain a full copy of the information.

PIAC also suggest that some consideration be given to preventing the destruction of information about deceased persons for a specified period of time.

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52 FOI Independent Review Panel, *The Right to Information - Reviewing Queensland's FOI Act* (2008) 273-274.