



21 October 2009

Ms Deborah Sharp
Acting Executive Director
New South Wales Law Reform Commission
DX 1227 Sydney

Dear Ms Sharp

Access to Personal Information

I refer to your letter dated 10 September 2009 indicating that the New South Wales Law Reform Commission (NSW LRC) has received extended terms of reference from the NSW Government to specifically consider how the *Privacy and Personal Information Protection Act 1998* (NSW) (the PPIP Act) and the *Government Information (Public Access) Act 2009* (NSW) (the GIPA Act) should be administered. In order to comment on the GIPA Act, PIAC also proposes to make a number of comments in relation to the *Government Information (Information Commissioner) Act 2009* (NSW) (GIIC Act).

Thank you for the opportunity to provide a supplementary submission to deal with the issue of the relationship between the Privacy Commissioner and the Office of the Information Commissioner.

Administration of the GIPA (and GIIC) Act

In relation to the question of how the GIPA Act should be administered, PIAC has a number of suggestions about maximising the effectiveness of the Office of the Information Commissioner.

Firstly, in addition to the Information Commissioner being able to seek expert assistance, PIAC submits that the GIIC Act should be amended to expressly build consultation mechanisms into the work of the Information Commissioner. In particular, PIAC contends that consideration should be given to the creation of a properly resourced Information Advisory Committee, similar to the Privacy Advisory Committee established under Part VII of the *Privacy Act 1988* (Cth), to provide regular advice and assistance to the Information Commissioner. PIAC also submits that the GIIC Act should be amended to specifically require the Information Commissioner to engage in regular broad consultation with community sectors about guidelines, reforms and policies. Consultation with these groups about proposed guidelines would be another way of ensuring the relevance of any guidance produced by the Information Commissioner.

Second, while it is useful to provide for a complaints mechanism in the GIPA Act, PIAC strongly advocates that time frames be built into the complaints procedure to ensure that these reviews provide a satisfactory alternative to litigation for applicants. There are a number of different ways of achieving this outcome. PIAC's preference is for specific time periods to be expressly provided for in the legislation. For example, the Independent Review Panel has suggested that the Queensland freedom of information legislation should specify that there are 20 working days for an initial investigation, and a further 60 working days for the Commissioner to investigate a complaint and reach a decision.¹

¹ FOI Independent Review Panel, *The Right to Information – Reviewing Queensland's FOI Act* (2008) 250-53.

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Third, PIAC contends that Divisions 2 and 3 of the GII Act should be amended to set out relevant factors for the Information Commissioner to consider in deciding whether to investigate or discontinue an investigation under the legislation.² In particular, PIAC contends that the GII Act should expressly provide that in deciding to discontinue an investigation under the legislation, the Information Commissioner 'shall have regard to the public interest'.³

Finally, PIAC contends that all reports made about the compliance of agencies with the open government information legislation should be made publicly available as well as provided to the Minister and the relevant agency. This would increase the accountability and transparency of the open government information regime, as it would allow for public scrutiny of agencies' compliance with the legislation. Alternatively, the Information Commissioner should be given the power to table reports about an agency's compliance with the legislation in the Houses of Parliament if he or she provides the report to an agency and the agency fails to take the appropriate consequential actions recommended in the report within a reasonable period of time.⁴

Administration of the PPIP Act

PIAC submits the PPIP Act should also be amended to introduce statutory time frames into the investigation and conciliation of complaints by the Privacy Commissioner. This will ensure the timely and efficient resolution of complaints.

Unlike the Administrative Appeals Tribunal, which has established case-management procedures that ensure cases are dealt with in a timely manner, there are no such safeguards in relation to complaints to the Privacy Commissioner. In PIAC's experience, the lack of statutory timeframes that apply to privacy complaints is extremely problematic and undermines the advantages of this review mechanism.

Interrelationship between the Privacy Commissioner and the Information Commissioner

PIAC takes the view that the Office of the Information Commissioner should not only administer the GIPA Act, but should also be responsible for the overarching information policy of government and opening up government information to the public. In this context, PIAC submits that consideration should be given to adopting the recommendation of the Queensland FOI Independent Review Panel that within the office of the Information Commissioner there should be two deputies, one responsible for privacy legislation and the other for freedom of information legislation, ie, the GIPA Act.⁵ The advantage of this proposal is that it would ensure that the Office of the Information Commissioner is uniquely placed to consider questions about how to balance privacy issues against the public interest in maximising the disclosure of government information to the public.

This proposal is also consistent with the proposal of the Commonwealth Government to amend the *Freedom of Information Act 1982* (Cth) by creating an Office of the Information Commissioner, comprising an Information Commissioner, a Freedom of Information Commissioner and a Privacy Commissioner.⁶

On the other hand, PIAC submits that the same outcome would not be achieved by subsuming the Privacy Commissioner within the office of the Information Commissioner; it is essential that there

² See, for example, *Ombudsman Act 1974* (NSW) s 13.

³ *Ibid*, s 13(4A).

⁴ *Ibid*, s 27.

⁵ FOI Independent Review Panel, above n1, 273-274.

⁶ *Information Commissioner Bill 2009*, available at <http://www.dpmc.gov.au/consultation/foi_reform/docs/information_commissioner_bill_2009_exposure_draft.pdf> on 7 October 2009. The Commonwealth Government has indicated that it intends to introduce the Bill into the Commonwealth Parliament later this year.

remain a separate champion, in the form of a Deputy Commissioner - Privacy, who can advocate to the Information Commissioner on privacy issues. PIAC considers that the benefit of having a separate Deputy Commissioner – Government Information (Public Access) and Deputy Commissioner – Privacy within the one office is to allow for each to act as advocates for the privacy and freedom of information regimes.

Further, to reflect the scope of the role and retain within the senior position a focus on privacy, PIAC submits that the proposed title of the position be changed from 'Information Commissioner' to 'Information and Privacy Commissioner'.

If you have any questions about the issues discussed in this submission, please contact Ms Lizzie Simpson on 02 8898 6504 or by e-mail to esimpson@piac.asn.au.

Yours sincerely



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