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**Cyberspace Law and Policy Centre**  
A Centre for the Public Interest in Networked Transactions

## **Improving Privacy Legislation in New South Wales**

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

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## Improving Privacy Legislation in New South Wales

This is a submission in response to the New South Wales Law Reform Commission's Consultation Paper, *Privacy Legislation in New South Wales*, June 2008 (CP3). Our submissions follow the order of questions asked by the Commission.

### Introduction

#### *The iPP Project*

Research for this submission has been undertaken as part of a Discovery project funded by the Australian Research Council, 'Interpreting Privacy Principles'. Details of the project, and other publications resulting from it, are at <http://www.cyberlawcentre.org/ipp/>. The *iPP Project* is based at the Cyberspace Law & Policy Centre at UNSW Law Faculty. The principal objective of this research is to conduct over the course of the project (2006-09) a comprehensive Australian study of (i) the interpretation of information privacy principles (IPPs) and 'core concepts' in Australia's various privacy laws, particularly by Courts, Tribunals and privacy regulators; (ii) the extent of current statutory uniformity between jurisdictions and types of laws, and (iii) proposals for reforms to obtain better uniformity, certainty, and protection of privacy. Submissions to law reform bodies are one outcome of this research.

#### *Limited scope of this enquiry*

We are surprised that the Consultation Paper does not contain a general request for submissions on other aspects of the Act that are in need of reform. With one exception below we have not attempted to make such submissions, because we do not know whether they will be taken into account, but we consider that this is desirable because the Consultation Paper does not address some aspects of the Act that are in need of reform.

*Submission:* The Commission should call for submissions on any other aspects of the Act in need of review.

For example, the Paper does not touch on the issue of Part 6 of PPIPA – the Public Register provisions. In our view, they are both confused and unworkable – e.g. disclosing from a 'public register' is harder than for any other type of record, and doesn't even allow disclosure with consent.

*Submission:* Part 6 should be repealed. Disclosure from public registers should instead be governed by the normal disclosure principles, as overridden by specific legislation governing those registers e.g. electoral roll etc.

## Chapter 1 Introduction

### ***ALRC'S review of privacy law***

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

*Submission:* National consistency is clearly desirable, but this does not necessarily translate into uniformity. As the Commission acknowledges, the UPPs proposed by the ALRC are at a sufficiently high level of generality to “to accommodate the differences in practices and obligations across jurisdictions... (1.10)” In our view, pursuit of national consistency (and where appropriate uniformity) should not be at the expense of levels of privacy protection which NSW has already elected to provide. In other words there should be no 'levelling down' of substantive protection standards. We indicate elsewhere in this submission where we think this is a risk.

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

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

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

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

However, we do not endorse the removal of the residual 'general privacy ombudsman' jurisdiction that has existed since the 1970s by which the (then) Privacy Committee and subsequently the Privacy Commissioner had a jurisdiction to investigate and make recommendations in relation to any complaints concerning any types of privacy issues in the private sector. We make reference to the continued value of this wider jurisdiction in response to Issues 27 & 28. We note that there is no equivalent 'non-NPP' jurisdiction in the federal *Privacy Act 1988*, and none proposed by the ALRC, although the proposed privacy cause of action will of course overlap this.

## ***Information sharing***

### **Issue 1(a) What are the impediments to information sharing in New South Wales?**

#### **Issue 1(b) How should they be resolved?**

*Submission:* It is odd that this should be the first question posed in the paper. The terms of reference for the review charge it “... to inquire into and report on whether existing legislation in New South Wales provides “an effective framework for the protection of the privacy of an individual”. Even the 'matters to be considered' do not include any preference for information sharing. Elevating this question is entirely the wrong starting point for the review. Sharing of information may well have benefits, but equally may be entirely inappropriate. The privacy principles expressly create a presumption against sharing of personal information without consent, with specific exceptions to recognise competing public interests. This is the correct starting point.

The paper uses the example of 'safety, welfare and well-being of children’ to illustrate the benefits of information sharing. There are many other examples that could have been chosen, but we are not persuaded of the utility of inviting general submissions on this question, particularly when directed at such an emotive topic. In our view the appropriate way to ask about this issue is in the context of individual principles of definitions – i.e. 'does the operation of the xxx principle (or the definition of yyy) impede the attainment of any other important public interests and if so how?'. This is the approach taken by the Commission in Chapters 5, 6 & 7 and that is the appropriate context for a substantive response to this question.

## ***Criminal sanctions***

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

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

On the other hand, the threat of criminal penalties, if it were more widely known, could focus the minds of public servants on compliance in a way that the other sanctions might not. Repealing the offences under ss.62 and

63 would send the wrong message in an environment where illicit trade in personal information remains a known problem.

We submit that the Act should be amended to give both the Privacy Commissioner and the Tribunal an express duty to refer any suspected offences to the police and/or DPP.

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

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

*Submission:* We support this proposal

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

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

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

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

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

agencies<sup>2</sup> and private sector organisations in NSW.

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

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

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

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

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<sup>2</sup> We comment below on the unconscionable effect of the Regulations which have effectively exempted the Healthelink EHR trial from HPP 15.

## Chapter 5 – Scope of Privacy Protection

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

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

*Submission:* No, these exemptions (which are for publicly/generally available *publications*, not *information*)<sup>3</sup> are not appropriate and undermine the objectives of the laws. We strongly agree with the criticisms of these exemptions, summarised in CP3, and strongly disagree with the conclusion of the AGD's Statutory Review, and of the government's response, that no action need be taken unless and until there is evidence of 'unreasonable claims'. The ADT has already found such evidence, and the risk of continued 'abuse' of these broad exemptions, resulting in loss of privacy protection, is too great to justify retaining them. The broad exemptions also create confusion for public servants trying to interpret and apply the law - for example, the ADT has said that repackaging information taken from a publicly available publication, by way of variation, alteration or provision in a different context, “may mean that the same information is no longer being used or disclosed, in which case the repackaged information may lose the protection” of the s.4(3)(b) exemption (*NW v NSW Fire Brigades* [2005] NSWADT 73 at [30]).

To the extent that there are legitimate arguments for not applying some aspects of the principles to publicly or generally available information or publications, these should be made and assessed in the context of those specific principles. We strongly endorse the Privacy NSW submission to the statutory review “that the appropriate manner in which to deal with publicly available publications is therefore to create specific exemptions as necessary in relation to the IPPs dealing with collection, rather than the current exemption from the definition of ‘personal information’ itself.”(p.66).

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<sup>3</sup> The element of publication makes the exemption narrower than if it were just publicly available *information*. The Tribunal has said that in this context, “publications” are “legible records which are made available for others to read” (*PC v University of New South Wales* [2007] NSWADT 286 at [15]). The Appeal Panel has gone further, stating: “The term ‘publication’ connotes, we think, more than a mere document that can be uplifted from an administrative file and inspected or copied. It has a connotation of greater formality than that. We are inclined to the view that what was in the mind of the Parliament was material in a published form consistent with general, unfettered availability such as a brochure, pamphlet or report” (*WL v Randwick City Council* [2007] NSWADTAP 58 at [27]).

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

*Submission:* We assume this question should read “should the publicly available publication exemption apply only to IPP 2 and HPP 3?” We submit that many of the principles should apply, at least to some extent, to both “publicly available publications” and “generally available publications” There is a case for an exemption to apply to IPP 2 and HPP 3 (direct collection) and IPP 3 and HPP 4 (notice with respect to collection).

**Issue 7: (a) Is the meaning of “publicly available information” the same as “generally available information”? Is it appropriate that they have different meanings in the context of general information and health information?**

*Submission:* There is no justification for the current distinction between publicly or generally available *publications* (not *information*), and it should not be necessary if the extent of any exemption is considered on a case by case basis in relation to each principle.

**Issue 7: (b) If two different phrases are to remain, should the definitions of “publicly available information” and “generally available information” be clarified in the legislation?**

*Submission:* To the extent that an exemption can be justified for either type of information in the context of any particular principle, there should be a clear definition. As above, the reference should be to generally available *publications* (not *information*).

**Issue 8: (a) Should the exemptions in any or all of the following provisions remain or are they made unnecessary by 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 Schedule 1 to the *Freedom of Information Act 1989* (NSW):**

- s 4(3)(e) of the *Privacy and Personal Information Protection Act 1998* (NSW) and s 5(3)(h) of the *Health Records and Information Privacy Act 2002* (NSW);

- s 4(3)(i) of the *Privacy and Personal Information Protection Act 1998* (NSW) and s 5(3)(l) of the *Health Records and Information Privacy Act 2002* (NSW); and/or

–s 4(3)(ja) of the *Privacy and Personal Information Protection Act 1998* (NSW)?

*Submission:* The exemptions for 'protected disclosures' and 'restricted documents' and 'adoption information' do not need to be from all the IPPs and HRIPs, and consistent with the general approach we favour, the justification for any exemption should be considered in the context of

particular principles.

**Issue 8: (b) If any or all of the exemptions are to remain, should the information referred to in each provision be exempt from all the IPPs and HPPs or only some of them? Which, if any, IPPs and HPPs should apply to the information?**

*Submission:* We reserve our position on this question, which would require careful and detailed consideration of draft changes proposed by the Commission. However given the extent to which most privacy principles are already overridden by other legislation (e.g. because of s.25 of PPIPA), these exemptions do not appear necessary at all. There have been no cases involving any of these three exemptions.

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

*Submission:* There should be a presumption in favour of the wording in HRIPA, which was drafted with the benefit of hindsight and knowledge of some of the operational weaknesses of PPIPA. Thus there are sensible and balanced exemptions built into HRIPA in relation to investigations and research, while in PPIPA the equivalent exemptions are still subject to 'temporary' s.41 directions made by the Privacy Commissioner. The research exemption in HRIPA is also stronger in the sense it is more detailed, requiring various steps including ethics committee approval.*was*

**Issue 9: What is the rationale behind, and value of, the exception contained in s 4(3)(h) of the *Privacy and Personal Information Protection Act 1998* (NSW) and s 5(3)(k) of the *Health Records and Information Privacy Act 2002* (NSW) (information arising out of a complaint about conduct of police officers)?**

*Submission:* The exemption for 'information arising out of a complaint about conduct of police officers' does not need to be from all the IPPs and HRIPs, and consistent with the general approach we favour, the justification for any exemption should be considered in the context of particular principles.

This exemption is currently far too broad and open to abuse. For example in one case, the Tribunal found that information that was both “contained within” a Part 8A complaint (that is, the information about an event in the past which triggered the Part 8A investigation: that KO had been arrested for smoking) and “arose out of” the Part 8A complaint (the information that KO and KP had complained about police misconduct in relation to that arrest) was exempt. This meant that when police disclosed this information to KO’s employer, and KO lost his job as a result, he had no

grounds for a privacy complaint (*KO & KP v Commissioner of Police, NSW Police* [2005] NSWADT 18 at [42]). This outcome – the loss of his employment - is an appalling situation to arise for a young person as a result of smoking in a non-smoking area and then complaining about his police treatment as a result, if there is no avenue for complaint or redress.

An exemption relating to investigations in general, which gave exemptions from necessary principles (eg IPP 2 direct collection), should suffice, regardless of whether it is the investigation of a complaint about police or anyone else.

**Issue 10: Should a person who has made a complaint about police conduct be precluded from having access to their personal file in relation to the complaint process?**

*Submission:* In principle, individuals who have made a complaint about police conduct should be able to obtain access to personal information held about them in relation to the complaint, subject to the 'standard' range of exceptions – there is no justification for a special exemption for all such information.

**Issue 11: Should the police officer who is the subject of a complaint be able to access the information relating to the complaint?**

*Submission:* In principle, individual police officers who are the subject of a complaint about police conduct should be able to obtain access to personal information held about them in relation to the complaint, subject to the 'standard' range of exceptions – there is no justification for a special exemption for all such information.

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

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

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

*Submission:* No – there is no justification for the NSW Ombudsman to be exempt from all of the IPPs and HPPs. Some principles such as data quality and data security are clearly applicable even in the context of investigations. While there may be a case for selective exceptions to some

other principles, this needs to be justified. However any exemptions should be relevant to complaint-handling and investigative functions (properly defined), not all functions of some organisations like the Ombudsman and other bodies listed at s.27 of PPIPA. Regulators such as the Ombudsman should be subject to the same requirements as other public sector agencies in relation to their non-investigative functions, such as the employment of staff.

Furthermore, regulators such as the Ombudsman often have an immunity from liability built into their own statutes (e.g. s.35A of the Ombudsman Act) which already makes bringing privacy complaints against regulators extremely difficult – see *The Ombudsman v Koopman* (2003) 58 NSWLR 182, and *The Ombudsman v Laughton* [2005] NSWCA 339.

**Issue 13: (b) Even if the answer to this is “yes”, should the information referred to in s 4(3)(c), (d), (f) and (h) of the Privacy and Personal Information Protection Act 1998 (NSW) and s 5(3)(f), (g), (i) and (k) of the Health Records and Information Privacy Act 2002 (NSW) continue to be exempt from the definition of “personal information”?**

*Submission:* No - these exemptions do not need to be from all the IPPs and HRIPs, and consistent with the general approach we favour, the justification for any exemption should be considered in the context of particular principles.

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

*Submission:* No – there is no justification for information about an individual’s suitability for appointment or employment as a public sector official to be specifically exempt from the definition of “personal information”. Principles such as data quality and security can and should apply. There may be a case for selective exemption from some of the other principles, but these must be justified and should be encompassed wherever possible by generic exemptions e.g. from the access principle for information covered by FOI Act exemptions.

The concept of free and frank referee discussions or medical assessments in the context of recruitment / promotion / discipline / involuntary retirement could be dealt with by way of specific exemptions to the access, amendment and disclosure principles. However any such exemption to the Disclosure principle should not distinguish between suitability for public or private sector employment, so that the same rule applies regardless of to whom a public sector employer is providing a reference.

**Issue 15: Should the exemption from the definition of “personal information” of information about an individual’s suitability for appointment or employment as a public sector official be restricted to information about a prospective employee, or also apply to information about an agency’s current employee?**

*Submission:* This is unlikely to be justified if a more sensible approach is taken to selective rather than 'blanket' exemptions – see our response to Issue 14.

**Issue 16: Do s 4(3)(j) of the *Privacy and Personal Information Protection Act 1998* (NSW) and s 5(3)(m) of the *Health Records and Information Privacy Act 2002* (NSW) need amending to clarify their meaning and Parliament’s intention?**

*Submission:* These 'blanket' exemptions should be removed – see our response to Issue 14.

**Issue 17: Should s 4(3)(j) of the *Privacy and Personal Information Protection Act 1998* (NSW) and s 5(3)(m) of the *Health Records and Information Privacy Act 2002* (NSW) be reworded to provide that they apply only to information that directly relates to suitability for recruitment, promotion, discipline and involuntary retirement?**

*Submission:* These 'blanket' exemptions should be removed – see our response to Issue 14.

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

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

**Issue 18: (b) Should this depend on whether an individual’s identity is apparent or can reasonably be identified from the visual image?**

*Submission:* Yes. As the ALRC has concluded, the overall interaction of definitions of “personal information” and “record “ should ensure that privacy law applies to photographs and visual images (ALRC Report 108, paragraph 6.141)

**Issue 18: (c) If the definition of “personal information” should include visual images, should this be clarified in the legislation?**

*Submission:* Yes, it needs to be clear that personal information can include visual images which can be reasonably attributable to an identified individual, even if we would not normally say that the individual is identifiable from the visual image.

**Issue 18: (d) Should some of the IPPs, but not others, apply to visual images that contain personal information? If so, which ones should apply?**

*Submission:* In principle, all the IPPs (and HPPs) should apply to all personal information including any visual images that meet the definition. There may be a case for selective exemption from some of the other principles, but these must be justified and should be encompassed wherever possible by generic exemptions.

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

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

**Issue 19: (b) If so, should this be by an amendment to the legislation or should it be left to judicial construction or the publication of a Privacy Guideline?**

*Submission:* Clarification of the definition should be in the legislation.

Another issue related to the definition of personal information is whether information has to be recorded. While this issue is not canvassed by the Commission in Chapter 5 of CP3, it does arise in the context of the data quality principle, addressed in Chapter 6.

*Submission:* See our submission on Issue 34

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

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

*Submission:* The definition of 'public sector agency' needs to encompass the widest possible range of public bodies. The NSW government should liaise with the Commonwealth government to ensure that between the Privacy Act 1988 (Cth) and PPIPA, all public bodies are covered by a privacy law (see our other responses on the desirability of national consistency). In particular, State-owned corporations should be covered by the definition of public sector agency.

**Issue 21: Should s 4(1) of the *Health Records and Information Privacy Act 2002* (NSW) be amended to define a “public sector agency” as “a body established or appointed for a public purpose by or under a NSW Act or an affiliated health organisation” or, alternatively, “any public authority constituted by or under a NSW Act or an affiliated health organisation”?**

*Submission:* The definition of 'public sector agency' needs to encompass the widest possible range of public bodies, and affiliated health organisations. The NSW government should liaise with the Commonwealth government to ensure that between the Privacy Act 1988 (Cth) and PPIPA, all public bodies and affiliated health organisations are covered by a privacy law (see our other responses on the desirability of national consistency).

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

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

*Submission:* We believe this distinction should not be maintained. We submit that, as proposed by the ALRC, unsolicited information should be covered as personal information once the agency chooses to retain the information. However, if the distinction is maintained, it should be made clear that information is 'solicited' if an agency has a system in place to record it, even if it does not actively request information in a particular case. If it is genuinely 'unsolicited' and to be exempt from some or all of the principles, then a condition of that is that agencies should securely dispose of the information as soon as practicable after receipt. If there is any justification for retaining unsolicited information, then the IPP and HPP obligations should apply to the maximum practicable extent.

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

**Issue 23: If information is “unsolicited”, what IPPs or HPPs, if any, should apply to that information? Should all of the provisions of the *Privacy and Personal Information Protection Act 1998* (NSW) and the *Health Records and Information Privacy Act 2002* (NSW) apply to unsolicited information, except the collection IPPs and HPPs?**

*Submission:* If this distinction is maintained, then the only principle that may need to be varied is the collection principle, where it may not be

practicable to comply with all the obligations. However, agencies should be required to comply with those obligations to the maximum practicable extent – e.g. by including the matters required under the notification principles (IPP 3 and HPP 3) in any public material that encourages persons to provide personal information.

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

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

*Submission:* If this concept is retained, then certainly the meaning of 'administrative and educative functions' needs to be more clearly defined in the legislation, so as to ensure that agencies cannot simply avoid categorising functions as 'administrative and educative' in order to avoid the application of the privacy laws.

However this exemption is entirely miscast. If it is necessary at all (which we doubt, see further below), it should at least be drafted as an exemption for legitimate, core investigative functions. Instead, by providing a blanket exemption and then ‘pulling’ administrative and educative functions back in under the scope of the IPPs and HPPs, the effect of this exemption is to render many police activities unaccountable in terms of privacy protection, even where a police officer acts unlawfully, as the Tribunal acknowledged in the case of *HW v Commissioner of Police, NSW Police and Anor* [2003] NSWADT 214.

Therefore the underlying and more important question is what 'operational' functions need to be exempt from some or all of the Principles?

We submit that far fewer operational functions of any agency need to be wholly exempt. Victorian Police, for example, do not have the same blanket exemption as NSW Police do under s.27 of PPIPA. Furthermore, it is difficult to see why any agency should not be subject to the data security and data quality principles in respect of operational information. The data quality principle should absolutely be applied to the creation and maintenance of criminal records, given the repercussions to innocent individuals of an incorrect criminal record.

We also note that the ALRC has concluded that many of the current exemptions in the Privacy Act 1988 (Cth) be either removed or reviewed, on the basis that exemptions need to be fully justified in relation to specific principles rather than simply asserted by reference to some general public interest in non-compliance.

**Issue 25: Should the legislation explicitly provide that if a function is dual, the administrative function must be separately categorised?**

*Submission:* See our response to Issue 24.

**Issue 26: Is the opportunity to complain to the Privacy Commissioner and challenge the categorisation of a function sufficient?**

*Submission:* See our response to Issue 24. Clarification of this important distinction should not be left to the Privacy Commissioner or to complaints – agencies will only be deterred from a self serving interpretation of 'operational' functions by clear guidance in the legislation itself.

### ***State owned corporations***

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

*Submission:* We strongly support this proposal

### ***Government contractors***

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

*Submission:* We strongly support this proposal. However we also support retaining the current system of liability under s.4(4)(b) of PPIPA, in which the appropriate respondent to a privacy complaint remains the public sector agency which contracted out the services in the first place. A contract with a third party service provider will not give the person affected any remedy against the third party. We submit that the agency should remain liable for the breach, as this will encourage it to make the appropriate contractual arrangements so that it can recover from the third party in the event of a breach of the Act. The third party, as a private sector organisation should also be liable for the breach under the *Privacy Act 1988*.

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

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

**privacy?**

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

We also note that a statutory tort or 'private right of action', would also assist in the protection of bodily privacy. We support the creation of such a right of action (see our submission to the NSWLRC Consultation Paper 1 and the recommendation of the ALRC in its Report 108) – see also our submission on Issue 29.

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

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

**A GENERAL CAUSE OF ACTION FOR INVASION OF PRIVACY?****Issue 28: Should the *Privacy and Personal Information Protection Act 1998* (NSW) contain express provision for breaches of territorial privacy?**

*Submission:* It is not appropriate, in our view, for PPIPA to expressly deal with the issue of territorial privacy except to the extent that records of personal information are involved. We do however favour the retention of the general 'privacy related matters' jurisdiction for the Commissioner

which does allow for investigation and conciliation of complaints about invasions of territorial privacy not involving personal information.

We note that a statutory tort or 'private right of action', would also assist in the protection of territorial privacy. We support the creation of such a right of action (see our submission to the NSWLRC Consultation Paper 1 and the recommendation of the ALRC in its Report 108) – see also our submission on Issue 29

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

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

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

## Chapter 6 - The Privacy Principles

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

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

*Submission:* We favour additional controls on the collection of 'sensitive' personal information, to be defined consistently with Commonwealth law. However, we do not believe that a requirement to collect sensitive information only where 'strictly necessary' would in practice offer any significant extra protection. Agencies will typically be able to make a case for all their intended collection and an objective assessment of 'strictly necessary' would be impossible in most cases.

We note that the ALRC has concluded in Report 108 that no additional conditions are required for collection of sensitive personal information. We disagree and submit that collection of sensitive information should only be allowed with *express* consent; where collection is required or *specifically* authorised by or under law, where necessary for the establishment, exercise or defence of a legal or equitable claim or where collection is necessary to prevent a serious and imminent threat to the life or health of the any person (see also Issue 31). It may also be appropriate to allow collection of health information without consent in some health care or research situations – we comment separately on these in our submission on ALRC Report 108.

**Issue 31: Should collection of sensitive information be allowed if necessary to prevent a serious and imminent threat to the life or health of the individual concerned or another person?**

*Submission:* See our submission on Issue 30

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

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

*Submission:* We support this proposal. We believe that IPP 2 currently

imposes an unrealistic requirement, regularly ignored by agencies, thereby bringing the IPPs into disrepute. We note the recommendation by Privacy NSW, in its submission on the Review of PPIPA, for an exemption “where the collection of the person’s personal information is reasonably relevant and reasonably necessary for the purpose of the agency providing services, diagnosis, treatment or care to the client” (p.45). This does not in our view accommodate the full range of circumstances in which third party collection may be reasonable. We prefer the solution in Proposal 8 which we note is also recommended by the ALRC in Report 108 (proposed UPP 2.3).

**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 it is “unreasonable or impractical to do so”.**

*Submission:* We support this proposal in part – see our submission on Proposal 8. However in relation to HPP 3 and the collection of personal information about a child from their parent or guardian, we prefer the approach taken in ss.7-8 of HRIPA on the broader issue of capacity (not just the capacity of children), and suggest that this approach also be adopted for all privacy principles in PPIPA. This is a more privacy protective and balanced approach, as it allows an informed 15 or 16 year old to make decisions and communicate on their own behalf, but also allows information about a child (under 18) to be collected from their parent or guardian where the child lacks capacity to provide the information directly.

**Issue 32: Should the *Privacy and Personal Information Protection Act 1998* (NSW) be amended by introducing a provision equivalent to s 7 of the *Health Records and Information Privacy Act 2002* (NSW) that an individual is incapable of doing an act authorised, permitted or required by the *Health Records and Information Privacy Act 2002* (NSW) if that individual is incapable, by reason of age, injury, illness or physical or mental impairment, of understanding the nature of the act or communicating his or her intentions with respect to the act?**

*Submission:* Yes. We support a provision in PPIPA equivalent to s7 of HRIPA. An equivalent to s.8 of HRIPA should also be included.

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

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

*Submission:* Yes, the same obligations should apply – see our response to Issue 33.

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

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

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

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

*Submission:* We support this proposal. If personal information is defined so as to only cover information once recorded, then the collection obligations should apply, to the maximum extent, at the point of recording.

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

*Submission:* Yes, IPP 9 & HPP 9 should apply to conclusions and opinions about an individual if they are recorded. However, this should be clear from the definition of personal information, and no amendment of IPP9 and HPP 9 is therefore required.

However, there is a separate but related issue, not expressly identified by the Commission in CP3. This is whether the interpretation of 'personal information' by the Court of Appeal (*Vice-Chancellor Macquarie University v FM* [2005] NSWCA 192 at [25], [28], [40]) so as to exclude information in the minds of employees, but never recorded, is appropriate or whether it undermines the protection offered by the Act. The Court's interpretation seems at odds with the intention of Parliament in expressly

including 'whether or not recorded in a material form' in the definition of 'personal information (PPIPA s4).

The Commission simply acknowledges the Court of Appeal's decision. While it is the law in New South Wales, there should be some consideration of whether it is good policy, and whether the Act should be changed. It can be argued that the Principles should apply to unrecorded information, otherwise the intent of the Act can too readily be avoided by public servants simply communicating information about individuals orally without ever making a record.

On the other hand, there will be practical difficulties in demonstrating and assessing compliance with some of the Principles if information is not in a record, as some of the principles are not appropriate to apply to information held only in the mind of a person (for example, the correction and security principles). Furthermore, NSW law would be inconsistent with that of the Commonwealth and all other Australian jurisdictions if it did not have the requirement that information must first be included in a record before the Principles have effect.

As matters now stand, the main protections in relation to information which does not enter a record must come from the law of breach of confidence. In some instances this could in theory provide a remedy against disclosures, but one which is more difficult for most plaintiffs to pursue, compared with complaining to an agency and then (if necessary) to the ADT. Rather than applying the Principles generally to information only held in the mind of a public servant, it might be better to provide that the Use and Disclosure Principles apply whether or not the information has entered a record. At the least, the Commission should consider the issue further.

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

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

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

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

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

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

**Issue 35: Does the effect of s 15(1) and (2) of the Privacy and Personal Information Protection Act 1998 (NSW) need clarification? If so, how should one or both sections be amended to reconcile their operation?**

*Submission:* Yes, this needs clarification. We favour the amendment to s15(2) suggested by the Commission.

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

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

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

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

The current dichotomy has led to too many examples of conduct falling between the gaps. For example in one recent case, the Tribunal found that information that was transferred from one part of a large agency to another (from a District Office of the Department of Education to a school) was done so without valid reason, and in circumstances that could found an action for breach of confidence. Yet the Tribunal found there was no ‘disclosure’ (because the information was transferred within the one agency), nor any ‘use’ by the recipient school (*ZR v NSW Department of Education and Training* [2008] NSWADT 199).

### **IDENTIFICATION OF THE PURPOSE FOR COLLECTION – IPPs 10 AND 11; HPPs 10 AND 11**

**Issue 37: Is the correct interpretation of IPPs 10 and 11 and HPPs 10 and 11 that the relevant purpose is the one for which the agency/organisation collected it? If so, should the provisions be amended to clarify this?**

*Submission:* This is an important issue which was overlooked by the ALRC in its review, with the result that the proposed UPP5 contains the same 'flaw' as IPPs 10 & 11 of PPIPA and HPPs 10 & 11 of HRIPA. We favour amending the principles to make it clear that the relevant purpose is one for which the agency/organisation collected the information (noting that there may be more than one primary purpose of collection).

However care should be taken to ensure that these principles are not undermined by the reference to 'collection'; a more neutral term should be used such as 'obtained'. Personal information may have been created by the agency without going through a process that could be described as 'collection', or it may have been received by the agency in an unsolicited fashion, which under the current provisions means it was not 'collected' by the agency. Another view, with which we disagree but which was accepted by the Tribunal, is that information collected in breach of IPP 1, i.e. unlawfully, is not therefore 'collected' by the agency, and thus IPP 10 does not apply (*SW v Forests NSW* [2006] NSWADT 74).

In the case of genuinely 'unsolicited' information (see our submission on Issue 22 above), the relevant purpose should be determined with reference to the reason for retaining the information. This should solely be for the purpose of complying with the State Records Act for the minimum period before the record can be destroyed, and in that sense there should be considered no relevant primary purpose under which the information can legitimately be used or disclosed.

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

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

*Submission:* There is undesirable uncertainty over which of the principles apply to unsolicited personal information. We favour the solution recommended by the ALRC – see our response to Issue 39.

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

*Submission:* Yes, the NSW laws should include a principle identical to the ALRC proposed UPP 2.4 (note change in numbering since DP72), such that unsolicited personal information becomes subject to the maximum extent to all relevant principles, once a decision has been made to retain it.

## ***DISCLOSURE TO THIRD PARTIES – IPP 11***

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

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

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

## ***SPECIAL RESTRICTIONS ON DISCLOSURE – IPP 12***

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

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

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

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

**Issue 43: Should s 19(1) of the *Privacy and Personal Information Protection Act 1998* (NSW) be taken out of s 19 and placed within s 18?**

*Submission:* Yes, as a matter of principle, additional requirements and exceptions should be contained within the relevant principles to improve transparency and understanding, and this is one such example.

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

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

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

### ***REGULATING UNIQUE IDENTIFIERS***

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

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

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

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

## Chapter 7 - Other Operational Issues

### EXEMPTIONS

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

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

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

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

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

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

*Submission:* It is important to get the wording (and therefore the effect) of this necessary exemption right. In our submission to the ALRC review we argued for the wording to be 'required or specifically authorised by or under law'. The ALRC concluded on balance that the qualifier 'specifically' should not be included, but we think this leaves the exemption much too broad. The example of a response to a sub-poena considered in *HW v Commissioner of Police, New South Wales Police Service* is not in our view a good test of the limits of the exemption – it would in our view be covered by 'required by law'. The objective should be to place appropriate limits on the scope of the 'authorised' part of the exemption. We maintain our strong support for the wording : 'required or specifically authorised by or under law'.

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

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

...

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

*Submission:* We do not support any amendment which would recognise general common law duties (e.g. a duty of care). The separate 'serious and imminent threat ...' exception, together with considered statutory duties such as those under the *Occupational Health and Safety Act*, are a sufficient response to this duty.

Where an 'authorised or required by law' exception is justified, it should be included in the applicable principles rather than in a separate section, to improve transparency and understanding. We do not believe that such an exception is necessary for *all* of the principles currently listed in s25 or that the two part construction of the exemption in s25 is necessary – it reflects an over-defensive approach to compliance with the principles. A single 'where required or specifically authorised by or under law' exemption, in appropriate principles, should suffice.

***Application of s 25(b) to a preliminary inquiry by the Ombudsman***

**Issue 47: Should public sector agencies be exempted from compliance with s 18 of the *Privacy and Personal Information Protection Act 1998* (NSW) if the information is disclosed to an investigative agency in order that it may exercise its complaints-handling or investigative functions?**

*Submission:* It is appropriate for there to be an exemption from the principle of non-disclosure for disclosures to an investigative agency in pursuance of its complaints-handling functions. This is necessary because it will not always be practicable to obtain consent from third parties involved in disputes, and would be consistent with the ALRC's recommendation for an exemption in relation to ADR processes (UPP 5.1(h)). However we would nonetheless encourage an approach in which requests made by way of 'preliminary inquiry' or the like must be put in writing to the agency concerned, to improve accountability for such disclosures in relation to both the Ombudsman and the disclosing agency.

Disclosure to an investigative agency in pursuance of functions other than complaints-handling or ADR should not need any additional exemption and should have to rely on meeting the terms of other relevant exemptions such as 'required ... by law' or consent.

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

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

**Issue 49: Should the precise scope of a privacy code of practice be clarified?**

*Submission:* The permitted effect of a privacy code of practice under PPIPA should be clarified. In CP3, the Commission does not expressly canvass views about the status of Codes, which can only weaken (s30(2)) and not strengthen (s29(7)(b)) the principles. We address this further below.

A discretion to disclose under PPIPA and HRIPA – whether under the disclosure principle, an exemption to that principle, or under a s.41 Direction or a privacy code of practice - should not be accepted as creating an exception to any secrecy provisions in an agency's own statute. To do so gives the Attorney General and/or Privacy Commissioner more power than Parliament intended when considering the agency's own statute.

The Commission does not address some other important issues relating to privacy codes of practice. The current provisions in Part 3, Division 1 of PPIPA do not contain any positive criteria for the Commissioner's decision to make or approve a code - only two 'negative' ones (in s29(7)), and contain no public consultation requirements.

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

If the Code provisions remain, we submit that there should be a public interest test for the Commissioner to apply in making or approving a code – similar to that applying to s41 Directions (s41(3)). There should also be a requirement, unfortunately absent from s41, for the Commissioner to undertake public consultation and take submissions into account. The Privacy Act 1988 (Cth) has some good features in this respect which could provide a suitable model.

## **THE MEANING OF “PERSON” IN s 37 AND 38 OF PPIPA**

**Issue 50:** Should the word “person” in s 37 and 38 of the *Privacy and Personal Information Protection Act 1998* (NSW) be read as meaning a “natural person”? If so, should this be clarified in the legislation?

**Issue 51:** Should both s 37 and 38(4) of the *Privacy and Personal Information Protection Act 1998* (NSW) apply to a “person or public sector agency”?

*Submission:* We submit that the objective of these sections would be undermined by a narrow interpretation, or definition, of 'person'. The Commissioner should be able to obtain relevant information from any natural or legal person, subject to the 'defences' provided by s.38(4).

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

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

*Submission:* Subject to our general views about s41, we submit that in principle, the Commissioner should be able to amend Directions, but s41 is deficient in not requiring any public consultation, either for an original Direction or for subsequent amendments. When making and amending Directions the Commissioner should be required to undertake public consultation and take submissions into account in deciding the balance of public interests under s41(3). Part VI of the *Privacy Act 1988* (Cth) has some good features in this respect which could provide a suitable model.

**Issue 52: (a)** Should the intended application of s 41 of the *Privacy and Personal Information Protection Act 1998* (NSW) and s 62 of the *Health Records and Information Privacy Act 2002* (NSW) be clarified?

**Issue 52: (b)** Should the sections make clear that the Privacy Commissioner may make a written direction applying to a class of agency/organisation?

**Issue 52: (c)** Alternatively, should the sections make clear that the Privacy Commissioner may not make a written direction applying to a class of agency/organisation?

*Submission:* As we have already indicated, s41 has been 'stretched' to accommodate semi-permanent variations to the IPPs and compliance requirements, which the legislation envisaged being made through Codes. In our view, experience suggests that neither mechanism is adequate as a way of providing long term variations, which should be made by legislative amendments, or at least by Regulation, thereby providing for more effective Parliamentary scrutiny.

We submit that any residual s41 Direction power be made expressly 'temporary', with a limit on the power to renew, which has been over-used. The section should however provide for Directions to apply to a class of agencies – it is impracticable and unnecessary for the Commissioner to have to list named agencies, given the frequency of name changes.

## **COMPLAINTS UNDER s 45 OF PPIPA**

### ***Complaints on behalf of the individual***

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

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

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

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

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

*Submission:* Parliament clearly intended that complaints can be brought both for breaches of the IPPs (conduct to which Part 5 applies) and for other 'privacy related matters' (see Commissioner's function (s36(2)(k)), a

continuation of the ‘non-IPP’ powers to investigate and recommend held by the previous Privacy Committee. It would be helpful for the legislation to clarify the relationship between these 'grounds' for complaint and the terms 'interference with privacy' and 'violation of privacy' in s45. See our response to Issue 27 – In our view the Commissioner's powers to investigate and recommend in 'privacy related matters' should continue.

### ***Relationship between s 45 and s 36(2)(k) of PPIPA***

**Issue 56: (a) Does the interaction between, and operation of, s 45 and 36(2)(k) of the *Privacy and Personal Information Protection Act 1998* (NSW) need to be clarified?**

**Issue 56: (b) Should these sections be regarded as together regulating the Privacy Commissioner’s functions and powers with respect to complaints or as two independent sources of the Privacy Commissioner’s powers?**

*Submission:* See our response to Issues 54 & 55.

### ***Application of s 51 of PPIPA to withdrawn complaints***

**Issue 57: Does s 51 of the *Privacy and Personal Information Protection Act 1998* (NSW) require clarification with respect to the Privacy Commissioner’s power to conduct an inquiry or investigation into any general issue raised by a withdrawn complaint?**

*Submission:* The ability of the Commissioner to conduct an inquiry into 'any general issue raised in connection with a complaint' should not be artificially limited by the Crown Solicitor's interpretation of s51. The public interest underlying this provision should not depend on whether a complaint is withdrawn or not. There are many reasons why a person may withdraw a complaint which have no bearing on whether there was a prima facie privacy issue that should still be pursued. The section should be amended to make it clear that the Commissioner's power is not limited in respect of withdrawn complaints.

### ***Report to Parliament under s 65 of PPIPA***

**Issue 58: (a) Is it correct to conclude that the Privacy Commissioner has the power to make a “special report” under s 65 of the *Privacy and Personal Information Protection Act 1998* (NSW) in relation to a complaint made under s 45, in addition to the power to make a report under s 50 of that Act?**

**Issue 58: (b) Should the legislation be amended to clarify the Privacy Commissioner’s powers under s 65 and s 50 of the *Privacy and Personal Information Protection Act 1998* (NSW) to make a report relating to a complaint made under s 45?**

*Submission:* Whatever the correct interpretation of the current provisions, the legislation should confirm that the Commissioner may make a report to Parliament under s65 that relates to one or more complaints made under s45, in addition to any s50 report, which will not be directed primarily at Parliament. There is no obvious public interest in limiting the s65 power.

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

### ***Nature of the jurisdiction***

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

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

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

### ***Absence of a limitation period for review by the ADT***

**Proposal 18: The *Privacy and Personal Information Protection 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.**

*Submission:* We support this proposal for a 60 day limitation period for application for review by the ADT . However this proposal should be clarified to also apply to matters proceeding from an internal review, not just from a s.45 complaint to the Privacy Commissioner.

**Issue 60: Should s 53(3) of the *Privacy and Personal Information Protection Act 1998* (NSW) be amended to include a provision allowing a person to request internal review of conduct outside the six-month limitation period?**

*Submission:* Yes – there should be provision for out-of-time requests for an internal review as suggested by the ADT.

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

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

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

*Submission:* We support this proposal.

### ***Role of the Privacy Commissioner***

**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.**

*Submission:* We support this proposal.

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

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

*Submission:* No – In our view, the Tribunal Determination model has, on balance, worked far better than the Commissioner Determination model in the Commonwealth Act. We disagree with the Commission's categorisation of the Commonwealth model as 'Tribunal Determination' as at present there is no means by which a complainant can 'reach' the AAT or the Federal Court or Magistrates Court for a merits review, as there is no right of appeal against the Commissioner's s52 Determinations. The only exception is in relation to the quantum of compensation where the Commissioner has made an initial s52 Determination. There is only one instance of such an appeal.

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

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

Ideally, we would prefer a hybrid model which provides for a choice of agency internal review (as now) or Commissioner investigation and (possibly) Determination (unless successful conciliation agreed by both parties) with a right of appeal (merits review) from both the agency decision (as now) and the Commissioner's Determination (or where the Commissioner refers the matter to the ADT), to a low cost Tribunal jurisdiction such as the ADT. Such an approach would combine the best features of the current NSW system with either the role of the Commissioner under the Victorian or New Zealand Acts (no determination by the Commissioner), or the Commonwealth Act (determinations by Commissioner). Either approach would improve the NSW approach, but the most important thing is not to remove the current NSW approach.

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

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

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

**Issue 62:** Should the disclosure, access and correction provisions of the *Privacy and Personal Information Protection Act 1998* (NSW) and the *Freedom of Information Act 1989* (NSW) be rationalised?

*Submission:* The access and correction provisions are already effectively rationalised, as the exemptions in PPIPA to the access and correction principles match (indeed are contained in) the FOI Act.

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

*Submission:* No. The FOI Act is too bureaucratic and imposes fees for access which are not appropriate when people only wish to access personal information about themselves. If anything, first party access requests should be exclusively covered by PPIPA, not the FOI Act.

**Issue 64:** Should the complaints-handling and review procedures of the *Privacy and Personal Information Protection Act 1998* (NSW) and the *Freedom of Information Act 1989* (NSW) that are not specifically related to the particular provisions of each Act be made consistent?

*Submission:* This would seem to be a sensible reform.

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

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

**Issue 66: (a) Should the following amendments, as suggested by the NSW Ombudsman, be made?**

- repeal s 20(5) of the Privacy and Personal Information Protection Act 1998 (NSW);
- amend s 13, 14 and 15 and/or s 20 of the Privacy and Personal Information Protection Act 1998 (NSW) to provide that the IPPs contained in those sections do not apply to agencies to which the Freedom of Information Act 1989 (NSW) applies and that, in relation to those agencies, those principles are implemented through the relevant provisions of the Freedom of Information Act 1989 (NSW);
- amend the Freedom of Information Act 1989 (NSW) to clarify that agencies can adopt informal methods of releasing personal information to the applicant.

*Submission:* s.20(5) should not be repealed without clarification of the application of the procedural provisions of the FOI Act to requests for access under s.13 of PPIPA. Some FOI provisions; e.g. the requirement to submit an application in writing and pay a set fee, and time limits but with reasons to 'stop the clock' etc, undermine the purpose of having a more straightforward access rule for first-party access only.

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

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

**Issue 67: What alternative amendments to the *Privacy and Personal Information Protection Act 1998* (NSW), the *Freedom of Information Act 1989* (NSW) and the *Local Government Act 1993* (NSW) would address the current problems arising from the application of three different regulatory schemes?**

*Submission:* One solution is to repeal s.12(6)-(8) of the Local Government Act. Section 12 of the Local Government Act was originally introduced to address what were seen as the short-comings of the FOI Act, namely the ability for agencies to use the FOI Act's bureaucratic procedures and fee-charging abilities to frustrate members of the public with legitimate demands to see council information. Section 12(1) does this job well.

However in the drafting of s.12 it was recognised that not every document should be made publicly available, and therefore some de facto privacy protection was built into that regime, in s.12(6)'s public interest test.

The later privacy statutes have since comprehensively provided a guide to council on when information should or should not be disclosed, effectively codifying where the 'public interest' lies. Section 12(6)-(8) of the Local Government Act could therefore now be repealed.

This would leave councils with a fairly sensible hierarchy under which to navigate access requests:

- (i) if the document requested is listed in s.12(1) of the Local Government Act, it must be provided
- (ii) if the document is not listed in s.12(1) of the Local Government Act, and it contains personal information, then the Disclosure principle/s in PPIPA (and HRIPA if retained) are the guiding provisions, or
- (iii) if the document is not listed in s.12(1) of the Local Government Act, and it does *not* personal information, then application can be made under the FOI Act.

Deficiencies in the FOI Act should be addressed by way of amendment to that Act.

## **THE RELATIONSHIP BETWEEN PPIPA AND THE STATE RECORDS ACT**

**Issue 68: (a) Should a provision be inserted into s 12 of the *Privacy and Personal Information Protection Act 1998* (NSW), identical to that inserted into s 15(4) of that Act, providing that s 12, and any provision of a privacy code of practice that relates to the requirements set out in that section, apply to public sector agencies despite s 21 of the *State Records Act 1998* (NSW)?**

*Submission:* No. The provisions are intended to work in harmony. IPP 5 is not intended to override the State Records Act.

**Issue 68: (b) Alternatively, should s 12 be clarified as taking effect subject to the prohibition in s 21 of the *State Records Act 1998* (NSW)?**

*Submission:* The Privacy Commissioner has advised public sector agencies to look to the retention periods established under the State Records Act 1998 (NSW), but also to “consider matters such as legal or administrative accountability when deciding whether to dispose of personal information” (Privacy NSW, *A Guide to the Information Protection Principles*, 1999, p.16.)

The Disposal principle (IPP 5 or s.12 of PPIPA) should be clarified to state that the time at which personal information should be considered no longer necessary (and thus disposed of securely) should be calculated with reference to the State Records Act. That is, the Disposal principle should in effect say ‘do not keep records longer than required under the State Records Act’.