



NSW LAW REFORM COMMISSION

# THE OMBUDSMAN'S REVIEW OF THE FREEDOM OF INFORMATION ACT 1989 (NSW)

March 2009

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## LETTER OF TRANSMISSION

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The Hon John Hatzistergos, MLC  
Attorney General  
Level 33 Governor Macquarie Tower  
1 Farrer Place  
SYDNEY 2000

10 March 2009

Dear Attorney

The NSW Law Reform Commission has developed a paper in response to the *Ombudsman's Review of the Freedom of Information Act 1989 (NSW)*.

As you know, the NSW Law Reform Commission is currently involved in a comprehensive review of privacy law in this State. As the Ombudsman's report raises issues relating to the interface between freedom of information and privacy legislation, we felt it necessary to state the Commission's preliminary views on this, and, in particular, to draw to the Government's attention our concern that some of the recommendations in the Ombudsman's report may weaken the protection of individual privacy in this State.

The NSW Privacy Commissioner, his Honour Judge Ken Taylor, AM RFD, has been consulted extensively during the development of the paper and has indicated his support and agreement for the direction taken.

The paper is attached for your consideration.

Yours sincerely

The Honourable James Wood AO QC  
*Chairperson*

## BACKGROUND

1 This paper is a response to the Ombudsman's self-initiated Special Report to Parliament, *Opening Up Government: Review of the Freedom of Information Act 1989* (NSW) (the "Barbour Report"). As its title suggests, the Report is a review of the current state of freedom of information law and practice in NSW. At the heart of the Report is a recommendation for new legislation, styled the *Open Government Information Act*, which would require government agencies to adopt a more proactive approach to the disclosure of information.<sup>1</sup> Simple machinery provisions would underpin and facilitate the approach,<sup>2</sup> and the oversight of the whole system would be entrusted to an independent guardian, the Information Commissioner, who would be "the public proponent for the objects and intentions of the new system".<sup>3</sup> Although the Report does not consider privacy directly, it acknowledges that the system it proposes necessarily impacts on the operation of the *Privacy and Personal Information Act 1998* (NSW) ("PPIPA") and the *Health Records and Information Privacy Act 2002* (NSW) ("HRIPA"),<sup>4</sup> as well as on the role of the Privacy Commissioner.<sup>5</sup>

### Relationship to the Commission's privacy reference

2 The NSW Law Reform Commission is currently involved in a comprehensive review of privacy law in this State. The then Attorney General, the Hon R J Debus, issued terms of reference for this review on 11 April 2006. The terms of reference envisaged that, in conducting our review, we would liaise with the Australian Law Reform Commission ("ALRC"), which was then reviewing the *Privacy Act 1988* (Cth). We reached an early agreement with the ALRC that our review of privacy law would initially focus on the desirability of introducing a statutory cause of action for invasion of privacy. We published a consultation paper on this subject in May 2007.<sup>6</sup> We expect our final report on this aspect of the reference to go to the Attorney General in March 2009.

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1. NSW Ombudsman, *Opening Up Government: Review of the Freedom of Information Act 1989*, Special Report to Parliament (2009) (the "Barbour Report"), ch 1-5.
  2. Barbour Report, ch 6-8.
  3. Barbour Report, ch 9, especially [9.1].
  4. Barbour Report, [2.4].
  5. Barbour Report, [9.4].
  6. NSW Law Reform Commission, *Invasion of Privacy* Consultation Paper 1 (2007).

Meanwhile, the ALRC, in its final report on privacy, has recommended that federal legislation should provide for a statutory cause of action for invasion of privacy, based largely on the model that we had recommended in our consultation paper.<sup>7</sup>

3 In June 2008, we published a further consultation paper ("Consultation Paper 3") concerned with evaluating the effectiveness of the key NSW statutes regulating privacy, principally PPIPA and HRIPA.<sup>8</sup> We also examined the relationship between PPIPA and other major NSW legislation that deals with privacy, including the *Freedom of Information Act 1989* (NSW) (the "FOI Act").<sup>9</sup> Because the federal government has announced a staged response to the recommendations in the ALRC's final report on privacy,<sup>10</sup> we have ourselves decided to report in stages on the issues raised in Consultation Paper 3.

4 The first stage of the federal government's response to the final report of the ALRC will focus on the ALRC's recommendations relating to the Unified Privacy Principles (UPPs), health and credit reporting regulations, and improving education about the impact of new technologies on privacy. In August 2008, the federal government envisaged that it would legislate (as necessary) on these matters within 12 to 18 months.<sup>11</sup> In the light of this, we decided that the most useful contribution we could make to the privacy debate in Australia was to follow Consultation Paper 3 with a report on the UPPs, taking into account the submissions that we had received on them. That report is nearing completion and we expect to deliver it to the Attorney General in May 2009.

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7. Australian Law Reform Commission, *For Your Information: Australian Privacy Law and Practice* Report 108 (2008) vol 3, ch 74.
  8. NSW Law Reform Commission, *Privacy Legislation in New South Wales* Consultation Paper (2008).
  9. NSW Law Reform Commission, *Privacy Legislation in New South Wales* Consultation Paper (2008), [8.8]-[8.17].
  10. Special Minister of State, Senator the Hon John Faulkner, and Attorney-General, Robert McClelland MP, *Report on Australian Privacy Law and Practice* Joint Media Release (11 August 2008) <[http://www.cabinetsecretary.gov.au/media/2008/mr\\_262008\\_joint.html](http://www.cabinetsecretary.gov.au/media/2008/mr_262008_joint.html)> (at 2 February 2009).
  11. Senator John Faulkner, *Speech to the Cyberspace Law and Policy Centre Symposium on "Meeting Privacy Challenges – the ALRC and NSWLRC Reviews"* (2 October 2008) <[http://www.cabinetsecretary.gov.au/speeches/2008/sp\\_20081002.html](http://www.cabinetsecretary.gov.au/speeches/2008/sp_20081002.html)> (at 2 February 2009).

5 That will mean that we still have to report on other aspects of privacy raised in Consultation Paper 3, such as the meaning of “personal information”; the exemptions from compliance with the legislation or particular privacy principles; the need (if any) for the separate treatment of information privacy in relation to health matters; and the relationship between the major instruments of privacy protection in this State. A major focus of this final report is, thus, the structural regulation of privacy in NSW, including its relationship to freedom of information legislation.

6 In our view, any sensible consideration of this issue must necessarily take into account the Commonwealth's legislative response to the ALRC's report on privacy and to its stated intention to reform freedom of information legislation.<sup>12</sup> Meanwhile, the Barbour Report, which follows a comprehensive review of Queensland's freedom of information laws,<sup>13</sup> has raised issues relating to the interface between freedom of information and privacy legislation on which it is necessary that we state our preliminary views in order to maintain the integrity of our on-going review of privacy, particularly to the extent to which we perceive that the Barbour Report threatens to weaken the protection of individual privacy in NSW.

7 We do so to draw the attention of the Government to our preliminary position on these issues and to provide a background for the next stage of our privacy review. To that end, we append to this paper tables of key relevant aspects of the law in comparable jurisdictions, to which we will be making reference in our further investigation of the law of privacy.

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12. See below.

13. See FOI Independent Review Panel, *The Right to Information: Reviewing Queensland's Freedom of Information Act* Report (June 2008). See also Queensland, Department of Premier and Cabinet, *The Right to Information: A Response to the Review of Queensland's Freedom of Information Act* (August 2008).

## Current position in NSW

8 The FOI Act is the main piece of legislation in NSW facilitating public access to government documents. The objects of the Act are:

to extend, as far as possible, the rights of the public:

- (a) to obtain access to information held by the Government, and
- (b) to ensure that records held by the Government concerning the personal affairs of members of the public are not incomplete, incorrect, out of date or misleading.<sup>14</sup>

9 The legislation was enacted to give effect to the public's "right to know", and as a check on government corruption, at a time when records were largely paper-based.

10 The other aspect of information management is the protection of personal information about individuals held by government agencies. Information privacy is regulated under PPIPA, which governs the collection, use, storage and disclosure of personal information held by public sector agencies. Individuals also have access and amendment rights regarding their personal information.<sup>15</sup> HRIPA performs the same function in relation to health information.

11 Responsibility for monitoring privacy matters rests with the NSW Privacy Commissioner. The Privacy Commissioner is appointed by the Governor<sup>16</sup> and is independent of government. The Privacy Commissioner performs a broad range of functions to ensure promotion of, and compliance with, privacy laws, principles and codes of practice.

12 Contrastingly, there is no central agency responsible for co-ordinating FOI. Individual agencies are responsible for nominating FOI officers. These officers are the first point of contact for FOI enquiries or complaints. If the matter is not resolved, a complainant may seek external review by the Ombudsman under Part 5 Division 1 of the FOI Act, or by the Administrative Decisions Tribunal ("the ADT"). In addition to his functions under the FOI Act, the Ombudsman may use his powers under the *Ombudsman Act 1974* (NSW) to investigate complaints and report to

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14. *Freedom of Information Act 1989* (NSW) s 5.

15. PPIPA s 14, 15.

16. Under PPIPA s 34.



Parliament, or to recommend improvements to the way in which agencies deal with FOI complaints.

## Recent developments

13 As noted above, the federal government has made announcements concerning FOI and privacy. So far as FOI is concerned, a draft Bill, implementing much of the 1995 Report by the ALRC and the Administrative Review Council,<sup>17</sup> is anticipated in the first half of 2009.<sup>18</sup>

14 Also relevant is the recently released report into Queensland's freedom of information laws. The report by the FOI Independent Review Panel recommended an overhaul of the State's FOI law to move away from the traditional culture of secrecy towards more proactive disclosure of information.<sup>19</sup> The Queensland Government acted quickly to endorse the report, and has subsequently released the draft *Right to Information Bill 2009* (Qld) and the *Information Privacy Bill 2009* (Qld), which are open for public comment until 31 March 2009.

## THE OMBUDSMAN'S VIEWS

15 The NSW Ombudsman considers that the legislative structure for providing access to government-held information does not serve the public interest as well as it should. In the Barbour Report, he expresses the view that the FOI Act is outdated, overly complex and ineffective.<sup>20</sup>

16 The Act's lack of effectiveness is made worse by confusion over its interaction with other laws dealing with access to information, the lack of a central FOI coordinator, and the need to address the impact of technological developments. These problems are compounded by what the Ombudsman perceives to be a lack of political will to implement changes to the FOI scheme.

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17. ALRC and Administrative Review Council, *Open Government: a Review of the Federal Freedom of Information Act 1982*, Report 77 (1995).

18. Special Minister of State, Senator John Faulkner, *Freedom of Information Reform* Media Release (22 July, 2008) <[http://www.smos.gov.au/media/2008/mr\\_252008.html](http://www.smos.gov.au/media/2008/mr_252008.html)> (at 3 March 2009).

19. See FOI Independent Review Panel, *The Right to Information: Reviewing Queensland's Freedom of Information Act* (June 2008).

20. See Barbour Report, 1.

## Ombudsman's proposal for reform

17 The Ombudsman considers that a truly effective scheme providing for public access to government documents should comprise the following elements:

- Greater proactive disclosure of government information.
- New disclosure-focused legislation to replace the FOI Act.
- Rationalisation of legislation dealing with access to information.
- The appointment of an independent Information Commissioner to oversee access to government information.

These changes should be accompanied by a significant shift in attitude and expectations concerning access to information.

18 The Premier, the Hon Nathan Rees MP, has indicated his support for the Ombudsman's proposals, and has signalled his intention to introduce a new *Open Government Information Act* into NSW Parliament in the forthcoming session.<sup>21</sup>

## THE COMMISSION'S VIEWS

19 The Commission endorses the overall approach advocated in the Barbour Report. The current FOI regime is two decades old and in need of comprehensive review. We wish to make specific comment regarding the following recommendations in the report:

- The need for new FOI legislation that promotes disclosure of information.
- The establishment of an Information Commissioner.
- The location of the Information Commissioner within the office of the Ombudsman.
- Incorporating the Privacy Commissioner within the auspice of the Information Commissioner.

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21. Nathan Rees, "Premier Welcomes Ombudsman's Review of FOI Act" (5 February 2009), [http://www.premier.nsw.gov.au/Newsroom/Articles/2009/February/Premier\\_welcomes\\_FOI\\_review.html](http://www.premier.nsw.gov.au/Newsroom/Articles/2009/February/Premier_welcomes_FOI_review.html) (at 3 March 2009).

## Legislation promoting disclosure

20 We support the proposal for a change in emphasis towards a culture more focused on disclosure rather than secrecy. As noted in the Barbour Report, this is not only desirable but inevitable, given the ease with which information may now be accessed.<sup>22</sup> Ironically, this very proliferation of available information can make it harder for people to zero in on salient material relevant to their needs.

21 Accordingly, information needs to be provided in a meaningful, co-ordinated way. The Ombudsman's recommendations for greater proactive disclosure go a long way to achieving this. Greater access to information fosters openness and accountability, and should make recourse to FOI applications a last resort. To some extent, this shift in attitude is already happening. We note the two recent memoranda issued by the Premier requiring all ministerial media releases to be posted on relevant agency websites,<sup>23</sup> and requesting that Ministers identify information within their areas of administration that could be made publicly available without compromise to the public interest.<sup>24</sup>

22 The Barbour Report recommends that the proactive disclosure regime should be mandated by the new FOI legislation.<sup>25</sup> This occurs in other jurisdictions, such as New Zealand and the United Kingdom, where relevant legislation requires agencies to list the information that is publicly available and the manner in which it may be obtained. That information may include the functions, policies and procedures of the agency, the services it offers, policy documents about decision-making, corporate plans, and budget and financial information.<sup>26</sup> In New Zealand, public sector agencies routinely post Cabinet papers and decisions on their websites.<sup>27</sup> Proactive disclosure provisions are also contained in the

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22. See Barbour Report, 19.

23. Department of Premier and Cabinet, "Availability of Ministers' Media Releases on NSW Government Agency Websites", *Premier's Memorandum M2008-18* (15 October 2008).

24. Department of Premier and Cabinet, "Proactive Release of Information by Government Agencies", *Premier's Memorandum M2008-19* (23 October 2008).

25. See Barbour Report, recommendations 2-6.

26. See attached table of comparative legislation.

27. See NZ Privacy Commissioner, *The Official Information Act and Privacy: New Zealand's Story*, speech presented at the FOI Live 2005 Conference, London, 2005, 8.

draft *Right to Information Bill 2009* (Qld). Clause 19 of the Bill states that an agency must have a publication scheme setting out the classes of information available and the terms on which the agency will make the information available.

23 While these examples could serve as a useful model for NSW, we sound a note of caution against the precipitous introduction of new FOI legislation ahead of the release of the draft Commonwealth legislation foreshadowed for the first half of 2009. Action by the federal government arising out of the ALRC's report on privacy is also likely to impact upon access to information.<sup>28</sup> Taking the Commonwealth provisions into consideration will help to avoid problems experienced in the past caused by a lack of uniformity.

### An Information Commissioner

24 At the centre of the reforms proposed by the Ombudsman is the creation of an Information Commissioner. The Barbour Report states that the Information Commissioner would be independent of government, and would provide oversight and accountability for the new system.<sup>29</sup> The Information Commissioner would ensure that agencies have systems in place to deal appropriately with proactive disclosure of information, and with applications and complaints. The Commissioner would also provide training and conduct systemic reviews of information-handling practices. In addition, the Information Commissioner would perform the external review role currently undertaken by the Ombudsman.

25 We consider the establishment of a central independent agency overseeing FOI to be a much-needed reform. It is fair to say that many of the criticisms of the current FOI regime stem from the lack of an independent advocate for the public's right to access government-held information. It would provide a co-ordination point for FOI matters, and reflect the importance of the public's right to have access to government information. As the ALRC expressed in 1995, an FOI Commissioner would provide "the critical mass required to ensure a public profile for FOI".<sup>30</sup> Also, the new regime of proactive disclosure is likely to carry a

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28. The significance of the relationship between the protection of personal information and the right to have access to information is discussed below.

29. Barbour Report, 8.

30. ALRC Report 77, [6.4].

considerable workload, and would justify the creation of a dedicated FOI or Information Commissioner.

26 While the need for an Information Commissioner is clear, how that office should be structured in terms of its functions, powers and location requires deeper examination. This issue is further addressed below.

### Location within the Ombudsman's office

27 Recommendation 84 of the Barbour Report proposes that the Information Commissioner be located within the Office of the Ombudsman. There appear to be two main reasons for this. First, the Ombudsman already exercises certain functions in relation to FOI and the Information Commissioner would be able to draw on this experience. Secondly, removing the need to establish a separate office would save on resources.

28 We are opposed to this recommendation.

29 So far as the first rationale is concerned, while the Ombudsman currently exercises functions relating to FOI, and is one avenue for external review, the functions and powers of the Ombudsman have a focus different from those of the proposed Information Commissioner. The Ombudsman exercises monitoring functions akin to the Auditor-General. As such, he should maintain an independent distance from decision-makers in order to scrutinise government policy across the board and highlight defects. He should not be involved directly in administering legislation (other than the Ombudsman's own), or developing policy himself. On the other hand, an Information Commissioner should be a pro-disclosure advocate, with responsibility for administering FOI legislation and developing policy within that framework. To put it another way, the Ombudsman's focus is on identifying and rectifying maladministration, while the Information Commissioner's role, in conjunction with the Privacy Commissioner,<sup>31</sup> should be to promote best practice in information handling.

30 The Ombudsman has significant experience in auditing government practices and recommending improvements to public administration, and, as the Report points out, has "established systems

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31. The relationship between the Privacy Commissioner and the proposed Information Commissioner is discussed below.

for liaison and information sharing with key government agencies and other watchdogs".<sup>32</sup> However, this very experience could represent a conflict of interest for both offices. For the Information Commissioner, being located within the Ombudsman's office could create the impression that the Commissioner is under the Ombudsman's control. For the Ombudsman, incorporating the Information Commissioner within his office could compromise the perception of him as an independent scrutineer.

31 It would also impact upon the functions of the Ombudsman with regard to the Information Commissioner. Ideally, the Ombudsman should be able to monitor and review the way in which the Information Commissioner exercises his or her functions. Yet, the Ombudsman's capacity to conduct arms-length scrutiny of the Information Commissioner's decision-making powers would be hampered if they were part of the same office. Accordingly, we hold the view that locating the Information Commissioner's office within that of the Ombudsman would be a fetter on the independence and effective functioning of both agencies.

32 Furthermore, the question of the powers and functions that should be exercised by the Information Commissioner has been debated, but not satisfactorily resolved. The Barbour Report recommends that the Information Commissioner should have investigative, but not determinative functions, with determinations continuing to be made by the ADT.<sup>33</sup> This accords with the current powers of the Ombudsman, who may make recommendations, but not determinations, and so the Ombudsman would appear to be an appropriate host agency.

33 However, the type of powers and functions that should be exercised by the Information Commissioner requires much greater consideration, particularly when viewed in the broader context. During the 2007 election campaign, the current federal government (then in Opposition) foreshadowed the establishment of an FOI Commissioner with determinative powers to replace the Administrative Appeals Tribunal in the FOI review process.<sup>34</sup> This situation occurs in other

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32. See [9.2], 98.

33. Barbour Report, recommendation 78, ch 8.

34. K Rudd, J Ludwig, *Government Information: Restoring Trust and Integrity, Election 2007*, 7 <[http://www.alp.org.au/download/now/071026\\_government\\_inform-](http://www.alp.org.au/download/now/071026_government_inform-)

jurisdictions.<sup>35</sup> In Consultation Paper 3, we raised the issue of whether the NSW Privacy Commissioner should be able to make final determinations.<sup>36</sup>

34 Ideally, every endeavour should be made to achieve structural harmony between State and Commonwealth agencies responsible for the oversight of public access to information, and between those agencies themselves. All of these factors need to be considered before deciding on the powers of the Information Commissioner. Logically, it should only be once the powers have been determined that any decision should be made as to whether the Commissioner's office would fit seamlessly into another agency.

35 With regard to the second rationale underlying Recommendation 84, we note the resource implications involved in setting up a separate office. While these are obviously important considerations, particularly in the current financial climate, we do not believe that the question of resources should be the ultimate driver in a matter as significant as the one at hand. Consideration could, perhaps, be given to resource sharing between agencies. For example, the office of the Information Commissioner could be located in the same premises as the Ombudsman or the Privacy Commissioner, and share corporate support services. This would not only produce resource benefits, but would also be advantageous given the relationship between privacy and freedom of information. These ideas have previously been mooted at the federal level.<sup>37</sup>

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ation\_policy.pdf>. The Government has subsequently announced its intention to establish an FOI Commissioner as part of its broader reform of FOI law, but the structure of the Commissioner's Office, and the specific functions and powers that would attach, remain to be seen: Special Minister of State, Senator John Faulkner, *Freedom of Information Reform* Media Release (22 July 2008) <[http://www.smos.gov.au/media/2008/mr\\_252008.html](http://www.smos.gov.au/media/2008/mr_252008.html)> (at 3 March 2009).

35. For example, Queensland, the Northern Territory, New Zealand and the United Kingdom have FOI review bodies capable of making determinations: see attached table.

36. NSWLRC, *Privacy Legislation in New South Wales*, Consultation Paper 3 (2008), [7.46]-[7.50].

37. See ALRC/ARC Report 77, [6.30].

## Privacy Commissioner should remain separate and independent

36 Recommendation 86 states that consideration should be given to making the Information Commissioner responsible for the oversight of privacy as well as FOI. The Ombudsman notes that he has not considered privacy directly.<sup>38</sup> We are strongly opposed to this recommendation. Just as independence is crucial for the effective working of the freedom of information scheme, the same applies to privacy. Privacy is a finely-balanced concept that requires careful monitoring and independent oversight.

37 Incorporating the Office of the Privacy Commissioner within that of the proposed Information Commissioner, as recommended in the Barbour Report, would not only affect the independence of an office that has existed for a decade, but would represent a downgrading in the perceived importance of privacy as a concept.

38 These arguments are not new. In 2003, the *Privacy and Personal Information Protection Amendment Bill* proposed to merge the Privacy Commissioner's office with that of the Ombudsman. The Bill failed to pass through the Legislative Council due to objections over the incompatibility of the functions of the Privacy Commissioner and the Ombudsman, and the fact that privacy would be left without an independent champion.<sup>39</sup>

39 We note that an Information Commissioner is the overseeing agency for privacy matters in other jurisdictions. For example, the United Kingdom has a single Information Commissioner with responsibility for freedom of information and data protection. Further, the draft *Information Privacy Bill* in Queensland provides for the establishment of a Privacy Commissioner to operate under the direction of the Information Commissioner.<sup>40</sup> Whatever the merits of this approach, the position in Queensland is not directly relevant to NSW, since there has never before been a Privacy Commissioner.

40 We would argue strongly for the Information Commissioner and the Privacy Commissioner to operate as two independent sentinels, with

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38. See Ombudsman's Report, [2.4], 31.

39. See NSW, *Parliamentary Debates*, Legislative Assembly, 29 October 2003, 4400 (Andrew Tink).

40. *Information Privacy Bill 2009* (Qld) cl 131, 133, 135.



commensurate powers and responsibilities, guarding the public's information rights from different, but complementary, perspectives. Provided the independence of both offices is supported by clear statutory provisions, we would not oppose a model involving some form of common oversight of privacy and FOI. A similar model was endorsed by the current federal government as part of its election commitment. The proposal was to establish an independent FOI Commissioner, preserve the existing role of the Privacy Commissioner, and create an over-arching office to be known as an Information Commissioner, with responsibility for overseeing all aspects of data protection and information management.<sup>41</sup> The advantages and disadvantages of such an approach could be examined as part of the further research suggested below.

### Broader relationship between FOI and privacy

41 Consideration of the location of the Privacy Commissioner's office raises the broader concern of the relationship between FOI and privacy. We agree with standardising the definition of personal information across both PPIPA and the FOI Act, and with rationalising the access and amendment provisions depending on whether access is sought to personal or non-personal information.<sup>42</sup> However, this is only a starting point.

42 There needs to be far greater examination of the privacy/FOI interface, taking into account all of the challenges brought about by technological advancements. The relationship between privacy and FOI needs to be articulated clearly in both pieces of legislation. Precedents for this can be found in New Zealand, and in the draft Queensland legislation. In striving to achieve the goal of more open government, we need to ensure that privacy is not compromised as a result, and *vice versa*.

43 We are of the view that the structural issues concerning the Information Commissioner and the Privacy Commissioner would be resolved in the process of this further consideration.

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41. K Rudd, J Ludwig, *Government Information: Restoring Trust and Integrity*, Election 2007, 6.

42. Barbour Report, recommendation 10. This may be a more complex issue than foreshadowed in the Report, however, with likely complications arising from mixed access applications, etc.

## Conclusion

44 The time is ripe for an intensive look at the FOI Act to ensure its relevance to modern information management practices. This should involve going back to first principles, and examining how the goal of open and accountable government can best be achieved, while not compromising the privacy of personal information. It should not merely be an exercise of making piecemeal amendments to the Act's machinery provisions, but should build on national and international momentum regarding open and accountable practices.

45 The Barbour Report serves as a good springboard for further research. It raises important issues concerning public access to government-held information, but leaves many questions unanswered. In particular, the precise nature of the functions and powers of the proposed Information Commissioner, and how this would sit with the current functions of the Ombudsman, needs much greater investigation. Also, the relationship between FOI and privacy, and the agencies that oversee each of these concepts, is crucial and needs deeper examination. By its own admission, the Ombudsman has only peripherally considered privacy during the course of his inquiry.

46 This Commission has looked at some aspects of FOI, but only in the context of its impact on privacy legislation. We would welcome the opportunity to conduct further timely research into this important area of law.

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# Appendices

- Appendix A: Freedom of Information
- Appendix B: Privacy

## Freedom of Information

	<b>NSW</b>	<b>Commonwealth</b>	<b>Queensland</b>	<b>New Zealand</b>	<b>United Kingdom</b>	<b>Canada</b>
<b>Legislation</b>	<i>Freedom of Information Act 1989</i>	<i>Freedom of Information Act 1982</i>	<i>Freedom of Information Act 1992</i>	<i>Official Information Act 1982</i> See also Local Government Official Information and Meetings Act 1987	<i>Freedom of Information Act 2000</i>	<i>Access to Information Act, R.S.C.</i>
<b>Purpose of legislation</b>	<p>To require information concerning documents held by the Government to be made available to the public</p> <p>To enable a member of the public to obtain access to documents held by the Government</p> <p>To enable a member of the public to ensure that records held by the Government concerning his or her personal affairs are not incomplete, incorrect, out of date or misleading</p>	To extend as far as possible the right of the Australian Community to access information in the possession of the Government of the Commonwealth (s 3).	<p>To extend the right of the community to have access to information held by the Queensland government</p> <p>To strike a balance between openness and competing interests such as the need to avoid prejudice to an essential public interest or to someone's private or business affairs (s 4).</p>	<p>To increase the availability of official information to the people of New Zealand to enable their more effective participation in the making and administration of laws and policies, and to promote the accountability of Ministers and officials.</p> <p>To provide for proper access by each person to official information relating to that person.</p> <p>To protect official information to the extent consistent with the public interest and the preservation of personal privacy (OIA s 4).</p>	To make provision for the disclosure of information held by public authorities or by persons providing services for them (s. 1).	To extend the right of access to information in records under the control of a government institution in accordance with the principles that government information should be available to the public, that necessary exceptions to the right of access should be limited and specific and that decisions on the disclosure of government information should be reviewed independently of government. (s 2)
<b>Scope of legislation</b>	<p>Applies to information held by most State government agencies and local authorities (s 6).</p> <p>Does not apply to judicial functions of courts and tribunals.</p> <p>Gives persons a right to access an agency's documents.</p> <p>Agency has 21 days to determine an application for access.</p>	Creates a right, subject to the Act, to access all documents held by agencies, including the applicant's personal information (s. 11). Part IV prescribes the documents that are exempt from this general right of access.	Creates a legally enforceable right of access to all documents, including those relating to personal affairs, held by Queensland government agencies or Ministers, (s 21) unless documents are exempt (see Part 3, Div 2).	<p>Applies to information (other than personal information about an applicant) held by Ministers and government agencies. Includes Cabinet documents.</p> <p>Presumption in favour of access unless reason to withhold - eg national security, or if disclosure outweighed by competing public interest or personal privacy concerns (OIA s 5-9).</p> <p>Ministers/agencies have 20 days to respond to request for access.</p> <p>Proactive disclosure provisions (OIA Part 3).</p>	Creates a general right of access to information held by public authorities (s 1). Part II covers the kinds of information that are exempt. One such exemption is "personal information" (s 40).	Creates a legally enforceable right for all Canadian citizens and permanent residents to access any record under the control of a government institution, (s 4(1)) unless documents are exempt (see s 13-18.1).
<b>Responsible agency</b>	<b>Ombudsman</b> Independent statutory office established under Ombudsman Act 1974 (NSW) s 6. Appointed by Governor for 7 year term; can be re-appointed.	There are two Commonwealth agencies with the power to conduct external review of FOI decisions, the Ombudsman and the Administrative Appeals Tribunal (AAT). The Ombudsman is an independent statutory office established under the Ombudsman Act 1976. The Ombudsman is appointed by the Governor General (s 21)	<b>Information Commissioner</b> Independent statutory office established under s 101A. Appointed by Governor for maximum 3 year term.	<b>Ombudsman</b> Independent statutory office established under Ombudsmen Act 1975 s 3. Appointed by Governor-General, on recommendation of House of Representatives, for a 5 year term (s 5).	<b>Information Commissioner</b> Independent statutory office holder appointed by the Queen for a term of up to 5 years (s 6(1) of the Data Protection Act 1998) .	<b>Information Commissioner</b> Independent statutory office established under s 54. Appointed by Governor in Council for a 7 year term. Can be re-appointed for a further term not exceeding 7 years

## Freedom of Information (Cont'd)

	NSW	Commonwealth	Queensland	New Zealand	United Kingdom	Canada
<b>Functions of Agency</b>	<p>Investigate complaint about the relation to a determination made by an agency (s 52)</p>	<p><b>Ombudsman</b></p> <p>The Ombudsman has a general power (subject to exceptions) to investigate the administrative action of a Department or a prescribed authority (s 5, <i>Ombudsman Act 1976</i>).</p> <p>Under the <i>Freedom of Information Act 1982</i>, the Ombudsman can conduct external review of actions taken by agencies in relation to FOI requests (s 57).</p> <p><b>AAT</b></p> <p>The AAT conducts merits review of administrative action. It must be granted jurisdiction to do so by 'an enactment' (s 25, <i>Administrative Appeals Tribunal Act 1975</i>).</p> <p>The <i>Freedom of Information Act 1982</i> provides that the AAT may conduct review of FOI decisions, but only after the internal review process has been exhausted (s 55).</p>	<p>Conduct external review.</p> <p>Investigate and review decisions of agencies and Ministers concerning disclosure of documents.</p> <p>Provide information and assistance to the public and government agencies on the review process (s 101C).</p>	<p>Conduct external review.</p> <p>Investigate and review decisions of agencies and Ministers concerning disclosure of documents: the manner in which the documents are disclosed</p> <ul style="list-style-type: none"> <li>the time taken to disclose</li> <li>any charges or conditions imposed (OIA s 28, 35).</li> </ul>	<p>The functions of the Information Commissioner under the <i>Freedom of Information Act 2000</i> are to:</p> <ul style="list-style-type: none"> <li>Investigate complaints regarding compliance with the Act (s 50).</li> <li>Provide advice to the Secretary of State regarding the issuing of codes of conduct under the Act (s 45).</li> <li>Promote good FOI practice among public authorities (s 47(1)).</li> <li>Disseminate information about the operation of the Act, good practice and any other matters within the scope of his function (s 47(2)).</li> <li>Make recommendations to agencies as to how they can ensure good practice in relation to FOI (s 48(1)).</li> <li>Report to Parliament in relation to the exercise of his functions (s 49).</li> <li>Approve model publication schemes relating to the publication of information by public authorities (s 20).</li> </ul>	<p>Receive and investigate complaints relating to requesting or obtaining access to records (s 30(1)).</p> <p>Initiate complaints (s 30(3)).</p> <p>Make recommendations to the government institution including recommending disclosure of a record (s 37(1)).</p> <p>Submit an annual report to Parliament (s 38)</p>
<b>Powers of the Agency</b>	<p>Exercise of powers under the Ombudsman Act, eg, the power to:</p> <ul style="list-style-type: none"> <li>accept preliminary inquiries into, investigate and conciliate complaints about the conduct of a public authority (s 12 13A);</li> <li>require a public authority to provide a statement of information; produce any document or other thing; provide a copy of any document. (s 18)</li> <li>make or hold inquiries exercising the same powers, authorities, protections and immunities as a Royal Commissioner (s 19)</li> <li>enter and inspect a public authority's premises and inspect any document or thing on the premises (s 20).</li> </ul> <p>No power to make binding determinations.</p>	<p><b>Ombudsman</b></p> <p>The powers given to the Ombudsman by the Ombudsman Act 1976 include but are not limited to:</p> <ul style="list-style-type: none"> <li>The discretion not to investigate certain complaints (s 6).</li> <li>The making of preliminary inquiries upon receipt of a complaint to determine whether the Ombudsman is authorised to investigate, or should use his or her discretion not to investigate it (s 7A).</li> <li>Obtaining information and documents (s 9).</li> <li>Referring specified questions regarding the action of a Department or authority to the AAT (s 10A).</li> <li>Examining witnesses (s 13).</li> <li>Entering premises (s 14).</li> <li>Making a report, including recommendations, in relation to his or her findings (ss 15 &amp; 16).</li> </ul>	<p>Exercise of powers under Ombudsmen Act, eg, the power to:</p> <ul style="list-style-type: none"> <li>hear or obtain any information, or make any inquiries he/she thinks fit (s 18(3)).</li> <li>compel attendance of witness or production of any document (s 19).</li> <li>report an opinion of an adverse finding to a Department/agency and request appropriate action (s 22(3)).</li> <li>report to the Prime Minister and to Parliament on the lack of appropriate action by a Department or agency (s 22(4)).</li> <li>enter premises of agency to conduct investigation (s 27)</li> </ul>	<p>Exercise of powers under Ombudsmen Act, eg, the power to:</p> <ul style="list-style-type: none"> <li>hear or obtain any information, or make any inquiries he/she thinks fit (s 18(3)).</li> <li>compel attendance of witness or production of any document (s 19).</li> <li>report an opinion of an adverse finding to a Department/agency and request appropriate action (s 22(3)).</li> <li>report to the Prime Minister and to Parliament on the lack of appropriate action by a Department or agency (s 22(4)).</li> <li>enter premises of agency to conduct investigation (s 27)</li> </ul>	<p>The <i>Freedom of Information Act 2000</i> gives the Information Commissioner the power to:</p> <ul style="list-style-type: none"> <li>Investigate complaints regarding compliance with the Act (s 50).</li> <li>Enter and search premises as well as inspect and seize documents (Schedule 3).</li> <li>Collect any necessary information from public agencies (s 51).</li> <li>Notify High Court of non-compliance with enforcement notices (s 54).</li> <li>Where satisfied that a public authority has failed to comply with the requirements of the Act, issue an enforcement notice directing the authority to take steps necessary to ensure compliance (s 52).</li> </ul>	<p>Generally, the Information Commissioner has all the powers of a deputy head of a Department (s 55(1)).</p> <p>In relation to investigating a complaint, the Information Commissioner has the same powers as a superior court of record to:</p> <ul style="list-style-type: none"> <li>compel the appearance of persons at an investigation.</li> <li>hear evidence on oath.</li> <li>compel the production of documents and things (s 36(1)(a))</li> <li>receive evidence and other information, whether or not admissible in a court of law (s 36(1)(c)).</li> <li>enter premises occupied by any government institution (s 36(1)(d)) and while on the premises: converse in private with persons, carry out inquiries (s 36(1)(e)), and examine or obtain copies of records (s 36(1)(f)).</li> </ul>

## Freedom of Information (Cont'd)

	NSW	Commonwealth	Queensland	New Zealand	United Kingdom	Canada
<b>Functions of Agency (Cont'd)</b>		<p><b>AAT</b> Under the <i>Administrative Appeals Tribunal Act 1975</i> the AAT has the power to:</p> <ul style="list-style-type: none"> <li>Direct that parties to a complaint take part in alternative dispute resolution (s 34).</li> <li>Compel a decision-maker to give reasons, produce documents and provide additional statements (s 37 &amp; 38).</li> <li>Summon a person to appear before it and take evidence under oath (s 40(1) &amp; 40(1A)).</li> <li>Remit the decision to the decision-maker for further consideration (s 42D).</li> <li>Make a decision following its review (s 43).</li> </ul>				
<b>Offences</b>	<p>Following offences under <i>Ombudsman Act</i> apply:</p> <p>Wilfully obstruct, hinder or resist Ombudsman without lawful excuse.</p> <p>Refuse or wilfully fail to comply with any lawful requirement of the Ombudsman without lawful excuse.</p> <p>Wilfully make any false statement to or mislead, or attempt to mislead, the Ombudsman.</p> <p>Falsely represent that he or she is the Ombudsman, Deputy Ombudsman, or Assistant Ombudsman, or appointed as acting in those positions.</p> <p>10 penalty units max.</p> <p>Using, causing, inflicting or procuring any violence, punishment, damage, loss or disadvantage to any person for or on account of his or her making a complaint to, or assisting, the Ombudsman.</p> <p>Dismissing, or prejudicing, an employee on account of the employee assisting the Ombudsman (s 37).</p> <p>200 penalty units or imprisonment for 5 years, or both.</p>	<p><b>Ombudsman</b></p> <p>Refuse or fail to attend before the Ombudsman, be sworn or make an affirmation, furnish information or answer a question or produce a document. Penalty: fine of \$1000 or imprisonment for 3 months (s 36).</p> <p><b>AAT</b></p> <p>Fail to attend as required by summons (s 61(1)(a) &amp; (b)).</p> <p>Fail to provide a book, document or thing as required by summons (s 61(3)(a) &amp; (b)).</p> <p>Refuse to be sworn or answer questions (s 62).</p> <p>Give false or misleading evidence (s 62A).</p> <p>Engage in conduct that constitutes contempt of the Tribunal (s 63).</p> <p>The penalty for each of these offences is 30 penalty units or 6 months imprisonment, or both.</p>	<p>Providing false or misleading information (s 86A).</p> <p>Knowingly mislead or deceive in order to gain access to the personal affairs of another person (s 106).</p> <p>Failure to produce information or attend without reasonable excuse, if compelled (s 94).</p> <p>Maximum penalty: 100 penalty points</p>	<p>None under OIA.</p> <p>Following offences under <i>Ombudsmen Act</i> apply:</p> <ul style="list-style-type: none"> <li>wilfully obstruct, hinder or resist Ombudsman without lawful excuse</li> <li>refusal to comply without lawful excuse</li> <li>making a false statement, misleading, or attempting to mislead, Ombudsman or other person in the course of Ombudsman's duty</li> <li>falsely representing the holding of authority under <i>Ombudsmen Act</i> (s 30).</li> </ul>	<p>Obstructing the Privacy Commissioner in the performance of his or her duties and functions (s 68).</p> <p>Maximum penalty: \$1000</p>	<p>Obstructing the Information Commissioner in the performance of his or her duties and functions (s 67(1)).</p> <p>Maximum penalty: fine up to one \$1000.</p> <p>Obstructing right of access by: destroying, mutilating, falsifying, altering or concealing a record (s 67.1(1)).</p> <p>Penalty: imprisonment up to two years or fine up to \$10,000, or both, for an indictable offence; or imprisonment up to six months or fine up to \$5000, or both, for a summary offence.</p>

## Freedom of Information (Cont'd)

	NSW	Commonwealth	Queensland	New Zealand	United Kingdom	Canada
Outcomes		<p><b>Ombudsman</b></p> <p>If the Ombudsman finds that a Department or prescribed authority has engaged in an incorrect use of power, the Ombudsman can issue a report to that agency detailing his or her findings and making recommendations as to how the agency can redress any wrong that has been done (s 15).</p> <p>If the agency does not take action in response to this report, the Ombudsman can report to the Prime Minister and to Parliament (ss 16 &amp; 17).</p> <p><b>AAT</b></p> <p>Following its review of a decision, the AAT can:</p> <ul style="list-style-type: none"> <li>· Affirm the decision.</li> <li>· Vary the decision.</li> <li>· Set the decision aside (s 43).</li> </ul>	<p>Following an external review, the Information Commissioner may affirm, vary or set aside the original decision (s 89).</p> <p>The Information Commissioner cannot make binding determinations.</p>	<p>If the Ombudsman considers that a decision of an agency or Minister is incorrect or unreasonable, he/she shall report this opinion to the agency or Minister, together with reasons. The Ombudsman may make any recommendation he/she thinks fit (OIA s 30(1)).</p> <p>Such a recommendation imposes a public duty on the agency/Minister concerned. They must comply with the recommendation within 20 days, unless the Governor-General by Order in Council directs otherwise (OIA s 32).</p>	<p>Under section 52, the Information Commissioner can serve “enforcement notices” on a public authority when satisfied that the agency has failed to comply with the Act. The notices must detail what steps the authority is required to take in order to ensure compliance with the Act.</p>	<p>Following an investigation, the Information Commissioner may: make any appropriate recommendations, including that access to a record be given; and request a report from the government institution into compliance with those recommendations, or reasons for non-compliance (s 37).</p> <p>The Information Commissioner cannot make binding determinations.</p>
Right of appeal	<p>Questions regarding the Ombudsman’s jurisdiction may be taken to the Supreme Court (<i>Ombudsman Act</i> s 35B).</p> <p>No other right of appeal.</p>	<p><b>Ombudsman</b></p> <p>There is no statutory right of appeal from decisions of the Ombudsman.</p> <p><b>AAT</b></p> <p>It is possible to appeal a decision of the AAT to the Federal Court on a question of law or standing (see Part IV of the <i>Administrative Appeals Tribunal Act 1975</i>).</p>	<p>Judicial review by Supreme Court.</p>	<p>Ombudsman’s decision is final.</p> <p>If the Governor-General makes an order under s 32 overturning the Ombudsman’s recommendation, the applicant may seek review by the High Court that the Order in Council was ultra vires or wrong in law (OIA s 32B).</p>	<p>Part V of the Act provides either party with a right to appeal to the Information Tribunal following the service of a notice by the Commissioner (s 57).</p> <p>The Tribunal is able to review findings of fact (s 58(2)).</p> <p>Decisions of the Tribunal can be appealed on points of law to the High Court of Justice or its equivalent in Scotland and Northern Ireland (s 59).</p>	<p>Judicial review by Federal Court (s 41)</p>

## Privacy

	NSW	Commonwealth	Queensland	New Zealand	United Kingdom	Canada
<b>Legislation</b>	<i>Privacy and Personal Information Protection Act 1998</i>	<i>Privacy Act 1988</i>	None An administrative scheme has existed since 2001. The effect of this is that any legislation that deals with the same matters will take precedence.	<i>Privacy Act 1993</i>	<i>Data Protection Act 1998</i>	<i>Privacy Act, R.S.C. 1985, c. P-21</i>
<b>Purpose of legislation</b>	To provide for the protection of personal information and privacy of individuals generally. To provide for the appointment of a Privacy Commissioner.	To protect the privacy of individuals	To provide a means of protecting personal information held by Qld government agencies. To be as consistent as possible with Commonwealth provisions.	To promote and protect individual privacy in general. In particular: · to establish principles with respect to the collection, use, and disclosure, by public and private sector agencies, of information relating to individuals · to facilitate access by individuals to his/her personal information held by public and private sector agencies · to provide for the appointment of a Privacy Commissioner.	To regulate the processing of information relating to individuals, including the obtaining, holding, use or disclosure of such information.	To extend the laws that protect the privacy of an individual's personal information held by a government institution and that provide a right of access to that information. (s 2)
<b>Scope of legislation</b>	Binds public sector agencies to comply with Information Protection Principles ("IPPs"). Gives individuals a right to make a privacy related complaint to the Privacy Commissioner.	Covers personal information held by Government agencies and some, but not all, private organisations.	Two sets of Information Standards exist - IS42 and IS42A. IS42 - to protect the privacy of personal information held by Queensland public sector agencies. Based on the 11 IPPs contained in the Privacy Act 1988 (Cth). IS42A - to protect the privacy of personal, sensitive and health information held by Queensland Health. Based on the 10 NPPs contained in the <i>Privacy Act 1988</i> (Cth).	Covers all personal information held by public and private sector organisations.	Covers all personal data held by both public and private organisations, subject to the exemptions listed in Part IV.	Applies to personal information collected by a government institution that relates directly to an operating program or activity of the institution. (s 4)
<b>Responsible agency</b>	<b>Privacy Commissioner</b> Independent statutory office established under s 34. Appointed by Governor.	<b>Privacy Commissioner</b> Independent statutory officer appointed by the Governor General (s 19) for a period not exceeding 7 years (although eligible for reappointment) (s 20).	<b>Various</b> No central agency	<b>Privacy Commissioner</b> Independent statutory office appointed under s 12	<b>Information Commissioner</b> Independent statutory officer appointed by the Queen for a maximum term of 5 years (s 6(2)), who reports directly to Parliament (s 52).	<b>Privacy Commissioner</b> Independent statutory office established under s 53. Appointed by Governor in Council for a 7 year term; can be re-appointed for a further term not exceeding 7 years



## Privacy (Cont'd)

	NSW	Commonwealth	Queensland	New Zealand	United Kingdom	Canada
<p><b>Functions of the agency</b></p>	<p>Make any appropriate and relevant inquiries and investigations (s 48(1)).</p> <p>Make written report as to findings or recommendations (s 50(1)).</p>	<p>The Privacy Commissioner has an extensive list of functions, outlined in s 27, which include:</p> <ul style="list-style-type: none"> <li>· Investigating breaches of the Information Privacy Principles (IPPs) (s 27(1)(a)) or National Privacy Principles (NPPs) (s 27(1)(ab)).</li> <li>· Approving privacy codes, variations of privacy codes, as well as revoking privacy codes (s 27(1)(aa)).</li> <li>· Performing the functions of an adjudicator under an approved privacy code where named in that code as an independent adjudicator to whom complaints can be made (s 27(1)(ac)).</li> <li>· Reviewing the operation of an approved privacy code (s 27(1)(ad)).</li> <li>· Reviewing decisions of other named adjudicators under approved privacy codes (s 27(1)(ae)).</li> <li>· Providing policy advice regarding the effects of proposed legislation and technological change on the privacy of individuals (ss 27(1)(b) &amp; (c)).</li> <li>· Promoting the IPPs and NPPs (s 27(1)(d)).</li> </ul>	<p>Individual Departments are responsible for resolving complaints about privacy breaches. Each Department/agency must:</p> <ul style="list-style-type: none"> <li>· nominate a Privacy Contact Officer</li> <li>· develop and publish plans to implement the IPPs</li> <li>· review and update plans annually</li> <li>· establish a complaints mechanism for dealing with privacy disputes.</li> </ul> <p>Department of Health is responsible for IS42A.</p> <p>Department of Justice and Attorney General provides guidance and support to government agencies and the public.</p>	<p>Extensive list of functions in s 13. Includes the following:</p> <ul style="list-style-type: none"> <li>· Investigate complaints concerning privacy breaches</li> <li>· Conduct information audits of an agency if requested by that agency.</li> <li>· Issue Codes of Practice.</li> <li>· Undertake educational programs, make public statement, etc, on privacy-related matters.</li> <li>· Maintain and publish a directory of personal information.</li> <li>· Monitor data matching programs between government agencies.</li> <li>· Monitor the impact of technology on personal privacy.</li> <li>· Consult and cooperate with other bodies and individuals concerned with individual privacy.</li> <li>· Provide advice to government on privacy matters.</li> <li>· Examine any proposed legislation, or any existing law, policy or procedure to assess its impact on personal privacy.</li> </ul>	<p>The functions of the Information Commissioner include but are not limited to:</p> <ul style="list-style-type: none"> <li>· Maintaining a register of data controllers (s 19).</li> <li>· Ensuring that the data protection principles are enforced (s 40).</li> <li>· Promoting good practice and the observance of the Act by data controllers (s 51(1)).</li> <li>· Disseminating information regarding the Act, to the public (s 51(2)).</li> <li>· Preparing and disseminating codes of practice following consultation with stakeholders (s 51 (3)).</li> <li>· Assisting in the fulfilment of the international privacy-related obligations of the United Kingdom (s 54 &amp; 54A).</li> </ul>	<p>Receive and investigate complaints relating to collection, use or disclosure of, or access to, personal information (s 29(1)).</p> <p>Initiate complaints (s 30(3)).</p> <p>Make recommendations to the government (s 35(1)).</p>

## Privacy (Cont'd)

	NSW	Commonwealth	Queensland	New Zealand	United Kingdom	Canada
<b>Powers of the agency</b>	<p>Promote adoption of, and monitor compliance with, IPPs.</p> <p>Prepare and publish, and promote adoption of, guidelines relating to protection of personal information and other privacy matters.</p> <p>Initiate and recommend making of privacy codes of practice.</p> <p>Provide assistance to public sector agencies in adopting and complying with IPPs and privacy codes of practice, and in preparing and implementing privacy management plans.</p> <p>Conduct research, and collect and collate information, about protection of personal information and privacy of individuals.</p> <p>Provide advice on protection of personal information and privacy of individuals.</p> <p>Make public statements about privacy of individuals generally.</p> <p>Conduct education programs, and disseminate information, promoting protection of privacy of individuals.</p> <p>Prepare and publish reports and recommendations about the need for, or the desirability of, legislative, administrative or other action in the interest of privacy.</p> <p>Receive, investigate and conciliate complaints about privacy related matters.</p> <p>Conduct inquiries and investigations into privacy related matters as appropriate (s 36).</p> <p>No power to make binding determinations.</p>	<p>The Privacy Commissioner has the power to:</p> <ul style="list-style-type: none"> <li>Decide not to investigate claims in certain circumstances (s 41).</li> <li>Inform agencies, or where appropriate the Minister, that an officer of an agency has been guilty of a breach of duty or misconduct (s 43(9)).</li> <li>Obtain information and documents (s 44).</li> <li>Examine witnesses (s 45).</li> <li>Compel parties to attend conferences presided over by the Commissioner (s 46).</li> <li>Authorise staff to enter premises and inspect relevant documents (s 68).</li> <li>Refer complaints to the Ombudsman (s 50).</li> <li>Make a determination either dismissing the complaint or finding it substantiated. If it is the latter, make a declaration in relation to the appropriate remedy (s 52).</li> <li>Initiate proceedings in the Federal Magistrates Court or Federal Court for an order to enforce a determination (s 55A, 62).</li> <li>Make “public interest” determinations allowing agencies and organisations to employ certain practices that may normally constitute breaches of IPPs and NPPs, because such practices are in the public interest (s 72).</li> <li>Apply to the Federal Magistrates Court or the Federal Court for an injunction to prevent a person from breaching the Act either by action or inaction (s 98).</li> </ul>	<p>No formal powers</p>	<ul style="list-style-type: none"> <li>May require agencies to produce information for certain purposes (s 22).</li> <li>May hear or obtain any information for the purpose of conducting an inquiry (s 90, s 91(4)).</li> <li>May summon witnesses and examine under oath (s 91).</li> <li>May decide not to investigate a complaint, or refer it to more appropriate agency (s 71-72B).</li> <li>May negotiate a settlement (s 74, 77).</li> <li>Call parties to a compulsory conference, by summons if necessary (s 76).</li> <li>May refer matter to Human Rights Review Tribunal (s 77(2)).</li> <li>Make final and binding decisions regarding fees charged in relation to information privacy requests (s 78).</li> <li>Refer breach of duty or misconduct of public official to appropriate agency (s 80).</li> </ul>	<p>The Information Commissioner has the power to:</p> <ul style="list-style-type: none"> <li>Serve enforcement notices on organisations that have contravened any of the data protection principles, detailing what the organisation must do in order to comply with the Act (s 40(1)).</li> <li>Cancel or vary enforcement notices (s 41).</li> <li>When requested, assess whether the processing of an individual's personal data has contravened the Act (s 42).</li> <li>Serve information notices to organisations requesting that they provide information required to investigate compliance with data protection principles (s 43).</li> <li>Enter and search premises as well as inspect, examine, operate or test any equipment found there which is used, or intended to be used, for the processing of personal data, and inspect or seize any documents or other material found there that may be evidence (Schedule 9).</li> </ul>	<p>Generally, the PC has all the powers of a deputy head of a Department (s 54(1)).</p> <p>In relation to investigating a complaint, the PC has the same powers as a superior court of record to compel:</p> <ul style="list-style-type: none"> <li>appearance of persons at an investigation;</li> <li>giving of evidence on oath; and</li> <li>production of documents and things (s 34(1)(a)) and the power to:</li> <li>administer oaths (s 34(1)(b));</li> <li>receive evidence and other information, whether or not admissible in a court of law (s 34(1)(c));</li> <li>enter premises occupied by any government institution (s 34(1)(d)) and while on the premises: converse in private with persons; carry out inquiries (s 34(1)(e)); and examine or obtain copies of records (s 34(1)(f))</li> </ul>
	<b>Offences</b>	<p>Willfully obstruct, hinder or resist PC in the exercise of functions.</p> <p>Fail to comply with any lawful requirement of PC.</p> <p>Make false statement to, or mislead, PC.</p> <p>Falsefully represent that he or she is the Privacy Commissioner, or a PC staff member (s 68).</p> <p>10 penalty units maximum.</p>	<p>Refuse or fail to either attend before the Commissioner or to swear an oath or make an affirmation (penalty: \$2000 or 12 months imprisonment or both)(s 65).</p> <p>Refuse or fail to give information, answer a question or produce a document or record (penalty (individual): \$2000 or 12 months imprisonment or both (body corporate): \$10,000)(s 66).</p>	<p>Obstruct, hinder or resist the PC in the exercise of his/her duty without reasonable excuse.</p> <p>Refuse or fail to comply with a requirement of the PC without reasonable excuse.</p> <p>Deliberately make misleading or false statement.</p> <p>Falsely represent having authority under the Act (s 127).</p> <p>Maximum penalty \$2000.</p>	<p>Obstruct, hinder or resist the PC in the exercise of his or her duties and functions (s 68).</p> <p>Maximum penalty \$1000.</p>	<p>Fail to comply with an enforcement, information or special information notice (s 47).</p>

## Privacy (Cont'd)

	NSW	Commonwealth	Queensland	New Zealand	United Kingdom	Canada
<p><b>Right of appeal</b></p>	<p>Appeal from internal review under s 53 to Administrative Decisions Tribunal (s 55).</p> <p>No right of appeal following a finding of the PC in relation to a complaint under s 45.</p>	<p>There is no general right of appeal in relation to decisions made by the Privacy Commissioner.</p> <p>The Federal Court may be able to review some decisions under the <i>Administrative Appeals (Judicial Review) Act 1977</i>, or s 39B of the <i>Judiciary Act 1903</i>.</p>	<p>The Privacy Contact Officer is the first point of contact for complainants. That Officer processes the complaint as per the relevant Department's complaints handling mechanism.</p> <p>If a person is unhappy with the outcome, he or she may seek an internal review by the Department/ agency.</p>	<p>Applicant may appeal to the Human Rights Review Tribunal. If appeal allowed, the Tribunal reconsiders the matter and may:</p> <ul style="list-style-type: none"> <li>· declare the actions of the defendant to be a breach of privacy;</li> <li>· make an order restraining the defendant from repeating the action;</li> <li>· award damages;</li> <li>· order the defendant to rectify the breach; or</li> <li>· make any other order (s 85).</li> </ul>	<p>There is a right to apply to the Information Tribunal for merits review of any notice served, cancelled or varied by the Commissioner (s 48).</p> <p>Decisions of the Tribunal can be appealed on points of law to the High Court of Justice or its equivalent in Scotland and Northern Ireland (s 49).</p>	<p>Judicial review by Federal Court (s 41)</p>