



NSW Law Reform Commission
GPO Box 5199
SYDNEY NSW 2001

By email: nsw_lrc@agd.nsw.gov.au

18 JUN 2014

Dear NSW Law Reform Commission,

Re: Consultation Paper 16: Dispute Resolution: Frameworks in New South Wales

I write to you in regard to the NSW Law Reform Commission's (LRC) release of *Consultation Paper 16: Dispute Resolution: Frameworks in New South Wales*.

Alternative dispute resolution (ADR) is a valuable and effective strategy to manage and resolve disputes by using the different ADR techniques and processes. In the context of privacy, the complaint handling processes under the NSW privacy regime, that is the *Privacy and Personal Information Protection Act 1998* (PPIP Act) and *Health Records and Information Privacy Act 2002* (HRIP Act), provides for ADR mechanisms to address privacy complaints made by individuals under the PPIP Act and HRIP Act.

I offer the NSW LRC my general comments to assist with your review of the dispute resolution frameworks in NSW from a privacy perspective.

My role is an acknowledgement that NSW citizens need an independent voice. The role recognises the importance of the privacy rights of the people of NSW with respect to both their personal and health information. As Privacy Commissioner, I oversee two pieces of legislation that protect the privacy rights of citizens of NSW. These are the PPIP Act and HRIP Act.

The PPIP Act regulates the way in which all of NSW public sector agencies collect, use, access, store and disclose personal information. All NSW public sector agencies must comply with the Information Protection Principles (IPPs) under the PPIP Act and the Health Privacy Principles (HPPs) under the HRIP Act. The objective of the NSW privacy regime is to give citizens confidence that NSW public sector agencies manage their personal information appropriately in all circumstances.

In respect to ADR in the context of the NSW privacy regime, section 45 of the PPIP Act and section 42 of the HRIP Act enables complaints to be made to the Privacy Commissioner. Under section 49 of the PPIP Act and section 46 of the HRIP Act, I must endeavour to resolve the complaint by conciliation. I attach my survey results requested by the NSW LRC relating to section 49 of the PPIP Act and section 46 of the HRIP Act.

However there is a barrier to ADR mechanisms to address privacy complaints made by individuals under the PPIP Act and HRIP Act.

Under section 46(7) of the HRIP Act, I am unable to take further action after the conclusion of the conciliation proceedings, whether or not the parties reach any agreement as a result of the proceedings. This demonstrates that while ADR processes may be applied to resolve disputes between parties, in certain circumstances where no agreement is reached, that I am unable to resolve the privacy dispute further.

Presently under section 55 of the PPIP Act a person can only apply to NSW Civil and Administrative Tribunal (NCAT) after an internal review by a public sector agency has been conducted. Where an individual elects to make a complaint to me, and I decide to investigate, this has the consequence of depriving that individual of access to an appeal process through NCAT. This is a significant disadvantage if a complaint is made to me and I investigate it.

For this reason, it is more beneficial for complainants to use the internal review process as it is important for individuals to have the option for appeal by an independent body. Consequently, utilising my power to investigate complaints about public sector agencies must be weighed against the individual's option for an internal review and to allow the individual to preserve their options for further avenues of appeal. Open and transparent consideration of privacy complaints is important to NSW citizens and in light of this, the ADR mechanisms in the NSW privacy regime may not be the preferred option.

This situation is different to that under GIPA. It is appropriate to modernise this aspect of the complaint handling mechanism under PPIPA so individuals seeking a review of an investigation or conciliation made by the Privacy Commissioner can take their matter to NCAT.

Please do not hesitate to contact Catherine Tat, A/Manager Performance Reporting and Projects, on [REDACTED], or by email at [REDACTED] if you have any questions.

Yours sincerely



Dr Elizabeth Coombs
NSW Privacy Commissioner

18/6/2014