



NSW LAW REFORM COMMISSION

Report 125

The Offices of the Information and Privacy Commissioners

December 2009

Copyright permissions

This publication may be copied, distributed, displayed, downloaded and otherwise freely dealt with for any personal or non-commercial purpose, on condition that proper acknowledgment is included on all uses.

However, you must obtain permission from the NSW Law Reform Commission if you wish to:

- charge others for access to the publication (other than at cost);
- include all or part of the publication in advertising or a product for sale; or
- modify the publication.

Disclaimer

While this publication has been formulated with due care, the NSW Law Reform Commission does not warrant or represent that it is free from errors or omission, or that it is exhaustive.

This publication deals with the law at the time it was first published and may not necessarily represent the current law.

Readers are responsible for making their own assessment of this publication and should verify all relevant representations, statements and information with their own professional advisers.

Other publication formats

The NSW Law Reform Commission is committed to meeting fully its obligations under State and Commonwealth anti-discrimination legislation to ensure that people with disabilities have full and equal access to our services.

This publication is available in alternative formats. If you require assistance, please contact the Commission (*details on back cover*).

Cataloguing-in-publication

Cataloguing-in-publication data is available from the National Library of Australia.

ISSN 1030-0244 (Report) | ISBN 978-0-7347-2640-7 (pbk)

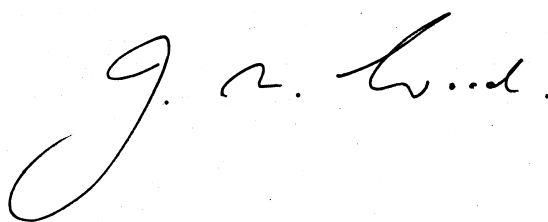
Letter to the Attorney General

To the Hon John Hatzistergos
Attorney General for New South Wales

Dear Attorney

The Offices of the Information and Privacy Commissioners

We make this Report pursuant to the reference to this Commission received June 2009.

A handwritten signature in black ink, appearing to read "J. Wood", is centered on the page. The signature is written in a cursive style with a large initial 'J'.

The Hon James Wood AO QC

Chairperson

December 2009

Table of Contents

Terms of Reference	vii
Participants.....	viii
LIST OF RECOMMENDATIONS	ix
1. Introduction.....	1
BACKGROUND	2
THIS REPORT	4
2. Institutional models.....	7
THE SEPARATED MODEL.....	8
Variation: ombudsman-separated model.....	9
THE SOLE AUTHORITY MODEL.....	9
Variation: sole authority with deputies	10
Variation: ombudsman-sole authority model	11
THE SHARED RESPONSIBILITIES MODEL.....	13
Variation: the Quebec model	15
3. Factors affecting the relationship between the Offices of the Information and Privacy Commissioners.....	17
COMMON GROUND.....	18
TENSION BETWEEN PRIVACY AND FOI	20
CONSISTENCY AND BALANCE	24
COOPERATIVE ARRANGEMENTS	26
FUNCTIONS AND WORKLOAD.....	28
COST AND EFFICIENCIES.....	29
4. A model for NSW	31
INDEPENDENCE AND RESOURCES	34
COMMON FOCUS – GOVERNMENT INFORMATION	37
CONSISTENT TREATMENT AND COOPERATIVE ARRANGEMENTS.....	38
APPOINTMENT OF THE PRIVACY COMMISSIONER.....	40
THE RELATIONSHIP BETWEEN THE COMMISSIONERS	41
NATIONAL UNIFORMITY	44

5. Consequential amendments	45
FUNCTIONS OF THE INFORMATION COMMISSIONER AND PRIVACY COMMISSIONER.....	46
Existing powers of the Information and Privacy Commissioners	46
Division of functions under proposed model.....	52
Functions to be performed by both the Information Commissioner and Privacy Commissioner	53
Functions to be performed by the Information Commissioner	54
Functions to be performed by the Privacy Commissioner	55
Functions to be performed by the Privacy Commissioner with the approval of the Information Commissioner.....	58
Liabilities and immunities of Commissioners and staff	61
PRIVACY ADVISORY COMMITTEE	62
OVERSIGHT BY THE JOINT COMMITTEE	64
REVIEW OF ADMINISTRATIVE ARRANGEMENTS.....	64
6. A separated model	67
GUIDELINES	68
COMPLAINTS.....	69
REGULATIONS	70
REVIEW BY JOINT COMMITTEE	70
Appendices	73
Appendix A: Overview of institutional models.....	74
Appendix B: Submissions.....	78
Appendix C: Submissions to Consultation Paper 3	79
Appendix D: Consultations	80
Tables	81
Table of legislation.....	82
Bibliography	89

Terms of Reference

In a letter to the Commission received on 1 June 2009, the Attorney General, the Hon J Hatzistergos issued the following terms of reference.

Pursuant to section 10 of the *Law Reform Commission Act 1967* (NSW), the Law Reform Commission is also to inquire and report on the legislation and policies governing the handling of access applications for personal information of persons other than the applicant under the *Freedom of Information Act 1989* (or any successor legislation).

In undertaking this review, the Commission is to consider in particular:

- The adequacy of the *Freedom of Information Act 1989* (and any successor legislation) concerning the handling of access applications for personal information in ensuring effective protection of individuals' privacy.
- The adequacy of existing policies, and whether any new policies should be recommended, for the handling of access applications for personal information of persons other than the applicant.
- The circumstances in which agencies should refuse to provide access to personal information of persons other than the applicant on public interest, including privacy, considerations.
- The extent to which public interest, including privacy, considerations against disclosure apply in respect of access applications for personal information of public officials.
- The intersection of, and desirability for a consistent legislative approach to, the treatment of personal information under the *Freedom of Information Act 1989* (and any successor legislation) and other legislation that is concerned with the protection of an individual's privacy.
- Any related matters.

The Attorney General subsequently asked the Commission to consider, as part of these terms of reference, the relationship between the Office of the Privacy Commissioner and that of the newly established Information Commissioner.

Participants

Division Members

His Hon Judge Kevin O'Connor AM

Professor Michael Tilbury (Commissioner-in-charge)

The Hon James Wood AO QC

Officers of the Commission

Executive Director

Ms Deborah Sharp (acting) (until 23 October 2009)

Legal research and writing

Ms Abi Paramaguru

Paralegal assistance

Mr Liam Boyle

Librarian

Ms Anna Williams

Desktop publishing

Mr Terence Stewart

LIST OF RECOMMENDATIONS

RECOMMENDATION 1 – *see page 32*

The Office of the Information Commissioner should be the sole statutory authority responsible for the administration and oversight of the *Privacy and Personal Information Protection Act 1998 (NSW)*, *Health Records and Information Privacy Act 2002 (NSW)*, *Government Information (Information Commissioner) Act 2009 (NSW)* and *Government Information (Public Access) Act 2009 (NSW)*. The Information Commissioner should be the head of the Office of the Information Commissioner.

RECOMMENDATION 2 – *see page 32*

The Office of the Information Commissioner should contain a Privacy Division responsible for administration and oversight of privacy legislation. The Privacy Commissioner should be the head of the Privacy Division.

RECOMMENDATION 3 – *see page 32*

A “Privacy Commissioner” should continue to perform functions under NSW privacy legislation.

RECOMMENDATION 4 – *see page 32*

The Privacy Commissioner should be appointed Deputy Information Commissioner.

RECOMMENDATION 5 – *see page 32*

Funding of the Office of the Information Commissioner should be reviewed to determine what additional funds the Office requires as a result of the establishment of the Privacy Division.

RECOMMENDATION 6 – *see page 40*

The Privacy Commissioner should be appointed and removed in the same manner as the Information Commissioner.

RECOMMENDATION 7 – *see page 53*

The *Privacy and Personal Information Protection Act 1998 (NSW)* and the *Health Records and Information Privacy Act 2002 (NSW)* should be amended so that, in addition to the Privacy Commissioner, the Information Commissioner has the function of promoting the objects of the legislation (including the protection of individual privacy and the promotion of the Information Protection Principles and the Health Privacy Principles).

RECOMMENDATION 8 – *see page 54*

The Information Commissioner should be responsible for:

- (1) making annual reports to Parliament in relation to the work and activities of the Office of the Information Commissioner including the Privacy Division; and
- (2) allocating staff to the Privacy Division.

The staff of the Privacy Division may also perform other functions as directed by the Information Commissioner.

RECOMMENDATION 9 – *see page 54*

The Information Commissioner should be required to report annually to Parliament on the operation of privacy legislation.

RECOMMENDATION 10 – *see page 54*

The Minister should be required to consult with the Information Commissioner before creating regulations pursuant to privacy legislation.

RECOMMENDATION 11 – *see page 55*

The Privacy Commissioner should perform the following:

- (1) preparing and implementing privacy management plans;
- (2) preparing and publishing personal information digests;
- (3) delegation of Privacy Commissioner functions to staff of the Privacy Division;
- (4) promoting the adoption of, and monitoring compliance with, the Information Protection Principles and Health Privacy Principles;
- (5) assisting agencies in adopting and complying with the Information Protection Principles, Health Privacy Principles and privacy codes of practice;
- (6) conducting research as well as collecting and collating information, about any matter relating to the protection of personal information or health information and the privacy of individuals;
- (7) providing advice on matters relating to the protection of personal information or health information and the privacy of individuals;
- (8) conducting education programs, and disseminating information for the purposes of promoting the protection of the privacy of individuals;

- (9) receiving, investigating and conciliating complaints about privacy related matters;
- (10) conducting inquiries and investigations into privacy related matters;
- (11) overseeing internal review processes; and
- (12) receiving notification from, and appearing before, the Administrative Decisions Tribunal where applications are made under privacy legislation.

RECOMMENDATION 12 – *see page 58*

The Privacy Commissioner should perform the following functions with the approval of the Information Commissioner:

- (1) the creation and amendment of privacy codes of practice;
- (2) the making of public interest directions;
- (3) the making of special reports to Parliament;
- (4) the delegation of Privacy Commissioner functions to staff members of the Office of the Information Commissioner who are not part of the Privacy Division;
- (5) the engagement of the services of an expert for the purposes of exercising Privacy Commissioner functions;
- (6) the making of public statements on matters relating to the privacy of individuals generally;
- (7) the preparation and publication of reports and recommendations about any matter that concerns the need for, or desirability of, legislative, administrative or other action in the interest of the privacy of individuals; and
- (8) the creation and amendment of guidelines under privacy legislation.

RECOMMENDATION 13 – *see page 61*

Provisions that create offences in relation to dealings with, or actions of, the Privacy Commissioner and staff members should apply to the Information Commissioner and all staff of the Office of the Information Commissioner exercising privacy functions.

RECOMMENDATION 14 – see page 61

Provisions that limit personal liability in relation to executing privacy functions should apply to the Information Commissioner, the Privacy Commissioner and any staff member exercising functions under privacy legislation.

RECOMMENDATION 15 – see page 62

The Privacy Advisory Committee should be replaced by an "Information Advisory Committee" with the function of assisting and advising the Information Commissioner and Privacy Commissioner on matters relating to the performance of their functions in relation to privacy and government information. The Committee should consist of:

- the Information Commissioner (chair);
- the Privacy Commissioner;
- two senior officers from agencies, nominated by the Minister in consultation with relevant Ministers;
- two persons with a special knowledge of, or interest in, matters affecting access to government information (who are not officers of agencies), nominated by the Minister; and
- two persons with special knowledge of, or interest in, matters affecting privacy of persons (who are not officers of agencies), nominated by the Minister.

RECOMMENDATION 16 – see page 64

The Joint Committee should be responsible for oversight of Privacy Commissioner functions in the same manner as Information Commissioner functions under s 44 of the *Government Information (Information Commissioner) Act 2009* (NSW).

RECOMMENDATION 17 – see page 64

There should be a review of the administrative arrangements under the *Government Information (Information Commissioner) Act 2009* (NSW), *Government Information (Public Access) Act 2009* (NSW), *Privacy and Personal Information Protection Act 1998* (NSW) and the *Health Records and Information Privacy Act 2002* (NSW) to determine whether administrative arrangements are appropriate for achieving the policy aims of the Acts. The review should be conducted within three years of the commencement of the *Government Information (Public Access) Act 2009* (NSW).

RECOMMENDATION 18 – *see page 68*

If distinct statutory authorities continue to exercise discrete privacy and FOI functions in NSW:

- (1) the Information Commissioner should be required to consult with the Privacy Commissioner before issuing guidelines on privacy-based public interest considerations against disclosure;
- (2) the Information Commissioner should be required to consult with the Privacy Commissioner before making a recommendation involving one or more of the privacy-based public interest considerations against disclosure;
- (3) the Privacy Commissioner should have the right to appear and be heard in any proceedings before the Administrative Decisions Tribunal in relation to a review under Part 5, Division 4 of the *Government Information (Public Access) Act 2009* (NSW), where such proceedings involve one or more of the privacy-based public interest considerations against disclosure;
- (4) the Minister should be required to consult with the Privacy Commissioner before making regulations under s 129(3) of the *Government Information (Public Access) Act 2009* (NSW), where such regulations affect privacy or involve one or more of the privacy-based public interest considerations against disclosure; and
- (5) the Joint Committee should be required to consult with the Privacy Commissioner when conducting a review of the public interest provisions of the *Government Information (Public Access) Act 2009* (NSW) insofar as such a review relates to privacy issues arising from the operation of the public interest provisions.

1. **Introduction**

- Background
- This report

BACKGROUND

1.1 In February 2009, the NSW Ombudsman released a comprehensive review of the *Freedom of Information Act 1989* (NSW) (“FOI Act”).¹ The Ombudsman recommended an overhaul of freedom of information (“FOI”)² laws in NSW, including the creation of a statutory position of Information Commissioner.³ After a period of consultation, new legislation aimed at reforming FOI laws was passed by Parliament and assented to on 26 June 2009.⁴ The reforms included the establishment of an independent Office of the Information Commissioner.⁵ The Commissioner is envisaged as a “champion of open government”.⁶ The Information Commissioner has been empowered with “robust investigative powers” and will play a critical role in the administration of the *Government Information (Public Access) Act 2009* (NSW) (“GIPA Act”) including the review of decisions made by agencies; receipt and investigation of complaints; education; advice; and reporting on the

-
1. NSW Ombudsman, *Opening Up Government, Review of the Freedom of Information Act 1989*, A Special Report to Parliament under s 31 of the Ombudsman Act 1974 (2009) (“NSW Ombudsman FOI Report”).
 2. In this report we use the term “freedom of information” (“FOI”), however this can be used interchangeably with other terms such as “right to information”, “access to information” and, to an extent, “open government”. All of these terms are associated with the entitlement to access government information.
 3. NSW Ombudsman FOI Report, Recommendation 83. Note that the NSW Ombudsman further recommended that the Information Commissioner should be established within the Office of the Ombudsman (Recommendation 84). The NSW Government did not agree with this proposal: NSW, Department of Premier and Cabinet, *Government Information – Public Access and Information Commissioner FOI Reforms in NSW, Ombudsman’s Recommendations and Public Submissions – Government Response* (2009) 5-6, <<http://www.dpc.nsw.gov.au>> 21 December 2009.
 4. *Government Information (Public Access) Act 2009* (NSW), *Government Information (Information Commissioner) Act 2009* (NSW) and *Government Information (Public Access) (Consequential Amendments and Repeal) Act 2009* (NSW).
 5. Substantial funding has been allocated to allow for the establishment the Office of the Information Commissioner: “\$3 million to establish new Information Commissioner”, Premier’s media release (17 June 2009), <http://www.premier.nsw.gov.au/Newsroom/Articles/2009_Articles/090617_3million_to_establish_Information_Commissioner.html> at 28 October 2009.
 6. New South Wales, *Parliamentary Debates*, Legislative Assembly, 17 June 2009, 16225 (The Hon Nathan Rees, Premier).

operation of the Act.⁷ The commencement of relevant legislation has been deferred to allow for the establishment of the institutional structure required to administer the legislation.⁸

1.2 The Office of the Privacy Commissioner (“Privacy NSW”) was established in 1999 under the *Privacy and Personal Information Protection Act 1998* (NSW) (“PPIPA”).⁹ Privacy NSW plays a pivotal role in the investigation and conciliation of complaints, education, advice, and research, under PPIPA and the *Health Records and Information Privacy Act 2002* (NSW) (“HRIPA”).¹⁰

1.3 The establishment of an independent Information Commissioner or Information Commission is part of a growing trend.¹¹ Many countries have also integrated FOI administration with the administration of privacy on a national and sub-national level.¹² Introducing the GIPA Act in Parliament, former Premier Nathan Rees signalled that:

As part of the future reform of privacy legislation, the Government intends to bring the Privacy Commissioner and the Information Commissioner together within a single office. The two roles will remain functionally independent within a combined office. It makes

-
7. New South Wales, *Parliamentary Debates*, Legislative Assembly, 17 June 2009, 16225 (The Hon Nathan Rees, Premier); *Government Information (Public Access) Act 2009* (NSW) s 17.
 8. See NSW Government, Department of Premier and Cabinet, “FOI Reform – Open Government Information”, <http://www.dpc.nsw.gov.au/prem/foi_reform_open_government_information> at 12 November 2009. The *Government Information (Information Commissioner) Act* commenced 17 July 2009.
 9. Privacy NSW, “About Us”, <<http://www.lawlink.nsw.gov.au/privacynsw>> at 9 November 2009.
 10. Privacy NSW, “About Us”, <<http://www.lawlink.nsw.gov.au/privacynsw>> at 9 November 2009; *Privacy and Personal Information Protection Act 1998* (NSW) s 36; *Health Records and Information Privacy Act 2002* (NSW) s 58.
 11. D Banisar, *Freedom of Information Around the World 2006, A Global Survey of Access to Government Information Laws* (Privacy International, 2006) 23, <<http://www.privacyinternational.org/foi/foisurvey2006.pdf>> at 21 December 2009.
 12. D Banisar, *Freedom of Information Around the World 2006, A Global Survey of Access to Government Information Laws* (Privacy International, 2006) 24, <<http://www.privacyinternational.org/foi/foisurvey2006.pdf>> at 21 December 2009.

sense to have a single body overseeing both the key issues relating to government information – privacy and public access.¹³

1.4 The integration of the administration of FOI and privacy gives emphasis to the Privacy Commissioner’s warning that “policy concerning public access to Government information should not be driven solely by the objective of giving members of the public access to information, but should also have due regard to the rights of members of the public to privacy”.¹⁴

THIS REPORT

1.5 We have been asked to consider how privacy and government information legislation should be administered, with specific attention to the relationship between the Office of the Privacy Commissioner and the Office of the Information Commissioner.¹⁵

1.6 In this report we explore different models for administering privacy and FOI laws, specifically looking at how the relationship between the two laws is addressed on an organisational level. We invited submissions on the administration of privacy and FOI as part of our privacy reference¹⁶ and also as part of our access to personal information reference.¹⁷ We note the contribution of Privacy Commissioner and Acting Information Commissioner, Judge Kenneth Taylor, to this aspect of our inquiry. Judge Taylor provided us with detailed submissions regarding the relationship between the Office of the Information Commissioner and the Office of the Privacy Commissioner.

13. New South Wales, *Parliamentary Debates*, Legislative Assembly, 17 June 2009, 16227 (The Hon Nathan Rees, Premier).

14. NSW, Department of Premier and Cabinet, *Government Information – Public Access and Information Commissioner FOI Reforms in NSW, Ombudsman’s Recommendations and Public Submissions – Government Response* (2009) 6, <<http://www.dpc.nsw.gov.au>> 21 December 2009.

15. See Terms of Reference on page vii.

16. See NSW Law Reform Commission, *Privacy Legislation in New South Wales*, Consultation Paper No 3 (2008) Issue 65. The Terms of Reference are set out in viii of that report. A list of submissions appears in Appendix B to this report. Consultations appear in Appendix D.

17. See Terms of Reference on page vii. A list of submissions appears in Appendix C to this report.

1.7 This report begins by surveying, in Chapter 2, institutional models that have been adopted in different jurisdictions. In Chapter 3 we explore common factors that affect the relationship between the Information Commissioner and the Privacy Commissioner. In Chapter 4 we put forward the model that should be adopted in NSW, having regard to the current institutional setting as well as the scope and nature of PPIPA, HRIPA, the GIPA Act and the *Government Information (Information Commissioner) Act 2009* (NSW) (“GIIC Act”). Chapter 5 deals with consequential considerations as a result of the model we propose. We conclude, in Chapter 6, by recommending safeguards that should be implemented if our proposed model is not adopted.

2. **Institutional models**

- The separated model
- The sole authority model
- The shared responsibilities model

2.1 There are several ways in which the relationship between privacy authorities and FOI authorities can be managed. In light of existing and proposed institutional arrangements we explore three basic models that could be utilised to administer privacy and FOI in NSW.¹

THE SEPARATED MODEL

2.2 Under a “separated model”, independent statutory offices exercise discrete functions relating to privacy and FOI. There are no explicit statutory ties between the two offices. However, in practice, there is often overlap in the legislation administered by both offices.² This is the model that will be adopted in NSW after the establishment of the Office of the Information Commissioner if no legislative change takes place.

2.3 The separated model is also the model that has been adopted in Canada on a federal level where the Office of the Information Commissioner and the Office of the Privacy Commissioner are independent statutory authorities.³ This is in contrast to the system adopted in the Canadian provinces where a single office performs duties relating to privacy as well as FOI.⁴ A possible merger of the federal Canadian Offices of the Information and Privacy Commissioners was the subject of an extensive 2005 report undertaken by the Hon Gérard La Forest, a former justice of the Supreme Court of Canada (the “La Forest Report”). The report recommends that there should not be a merger of the two offices or the appointment of a single commissioner to oversee

-
1. An overview of institutional models from various jurisdictions appears in Appendix A to this report.
 2. In NSW, the applicable legislation is the *Freedom of Information Act 1989* (NSW) (soon to be replaced by the *Government Information (Public Access) Act 2009* (NSW)), *Privacy and Personal Information Protection Act 1998* (NSW) and the *Health Records and Information Privacy Act 2002* (NSW). These Acts allow individuals to access information held by NSW government agencies.
 3. The Privacy Commissioner is appointed under the *Privacy Act*, RSC 1985, c P-21, s 53(1). Information Commissioner is appointed under *Access to Information Act*, RSC 1985, c A-1, s 54(1). Each Commissioner is to engage in duties listed under relevant legislation ‘exclusively’: K V Taylor, *Submission* (4 September 2009) Appendix 1, iii.
 4. La Forest, G V, *The Offices of the Information and Privacy Commissioners: The Merger and Related Issues, Report of the Special Advisor to the Minister of Justice* (Canada, Department of Justice, 2005) (“La Forest Report”) 20, <<http://www.justice.gc.ca/eng/ip/rep-rap.pdf>> at 21 December 2009.

both offices. The report argues that such a change would have detrimental impact upon the policy aims of the relevant privacy and FOI legislation.⁵

Variation: ombudsman-separated model

2.4 Under the ombudsman-separated model separate authorities conduct oversight of privacy and FOI, but one of these authorities is an ombudsman. The ombudsman undertakes FOI functions in addition to other functions such as administrative review. This is the current approach adopted in NSW (until the GIPA Act commences) where the Privacy Commissioner is responsible for overseeing NSW privacy laws and the NSW Ombudsman is responsible for FOI laws. The New Zealand model is similar to NSW with a Privacy Commissioner responsible for privacy legislation and an Ombudsman overseeing FOI laws.⁶

THE SOLE AUTHORITY MODEL

2.5 Under the sole authority model, a single statutory office is responsible for the administration of both privacy and FOI.⁷ This is the approach adopted in Queensland, the Northern Territory, the United Kingdom and many of the Canadian provinces and territories. There are however variations in how the offices are structured.

2.6 Canadian jurisdictions such as British Columbia, Nunavut and Saskatchewan have appointed an “Information and Privacy Commissioner” to administer FOI and privacy legislation.⁸ The legislation does not explicitly provide for the appointment of deputies. However, the

5. La Forest Report, 55.

6. Oversight functions under the *Official Information Act 1982* (NZ) s 28 are conferred on the Ombudsman. The Privacy Commissioner is constituted under the *Privacy Act 1993* (NZ). The Ombudsman must consult the Privacy Commissioner when investigating a complaint, in certain circumstances: *Official Information Act 1982* (NZ) s 29B.

7. K V Taylor, *Submission* (4 September 2009) 5.

8. *Freedom of Information and Protection of Privacy Act*, RSBC 1996, c 165; *Access to Information and Protection of Privacy Act*, SNWT 1994, c 20; *Freedom of Information and Protection of Privacy Act*, SS 1990-91, c F 22.01.

“Information and Privacy Commissioner” may delegate particular duties, powers or functions if required.⁹

2.7 The Northern Territory model provides for the appointment of an Information Commissioner exercising responsibilities under the *Information Act 2002* (NT), which addresses both privacy and FOI.¹⁰

Variation: sole authority with deputies

2.8 A variation of the sole authority model is the creation of a sole authority responsible for both privacy and FOI, with the appointment of one or more statutorily expressed deputy or assistant privacy or FOI commissioners. In Queensland an “Information Commissioner” is appointed with a “Privacy Commissioner” and “Right to Information Commissioner” appointed as deputies.¹¹ In the United Kingdom, an “Information Commissioner” is appointed to perform functions under local privacy and freedom of information laws.¹² Up to two deputy commissioners can be appointed, and the Information Commissioner is to specify which of the Commissioner’s functions are to be performed by each deputy commissioner.¹³ Currently two deputies have been appointed, a Deputy Commissioner FOI and a Deputy Commissioner Data Protection.¹⁴

2.9 A similar approach has been adopted in Ontario, where the “Information and Privacy Commissioner” can appoint up to two assistant

9. For example, *Freedom of Information and Protection of Privacy Act*, RSBC 1996, c 165, s 49.

10. *Information Act 2002* (NT) s 86.

11. *Right to Information Act 2009* (Qld) ch 4 pt 2, ch 4 pt 4; *Information Privacy Act 2009* (Qld) s 142.

12. *Freedom of Information Act 2000* (UK) c 36, s 47; *Data Protection Act 1998* (UK) c 29, s 51. In 2001 the Data Protection Commissioner was renamed the Information Commissioner after the Commissioner was given added freedom of information responsibilities: *Freedom of Information Act 2000* (UK) c 36, s 18(1); Information Commissioner’s Office, “History of the ICO”, <http://www.ico.gov.uk/about_us/who_we_are/history_of_ico_page.aspx> at 3 November 2009.

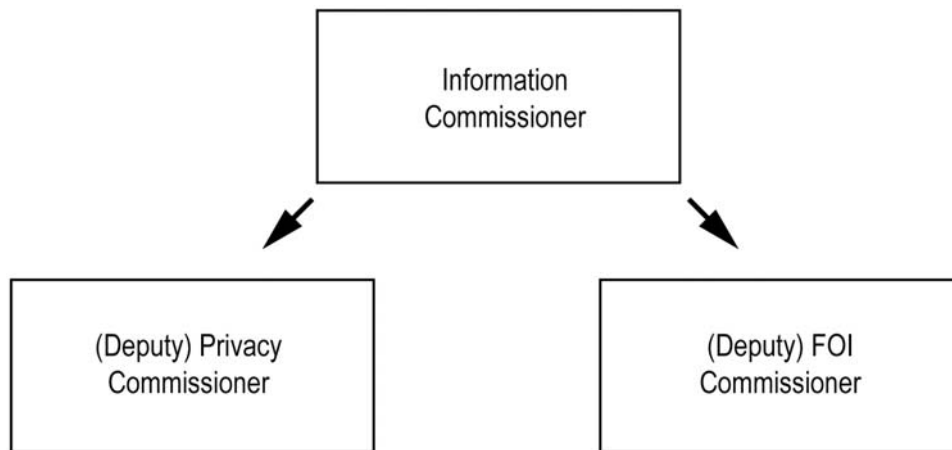
13. *Data Protection Act 1998* (UK) c 29, sch 5 para 4 (as amended by the *Freedom of Information Act 2000* (UK) c 36, sch 2 para 20).

14. Information Commissioner’s Office, “ICO Organisational Structure”, <http://www.ico.gov.uk/upload/documents/library/corporate/practical_application/organisational_chart.pdf> at 4 November 2009.

commissioners and an additional commissioner for personal health information.¹⁵

2.10 In Slovenia, separate FOI and privacy authorities were merged in 2006. The Commissioner for Access to Public Information and the Inspectorate for Personal Data Protection (previously a body within the Slovenian Ministry of Justice) were amalgamated under the Information Commissioner.¹⁶ The Commissioner for Access to Public Information continued as Information Commissioner and assumed supervision of privacy responsibilities; “[t]hus the jurisdiction of the office that had previously been responsible for the unimpeded access to public information evolved and expanded to encompass the protection of personal data”.¹⁷ The organisational structure of the Information Commissioner’s office includes three deputy commissioners.¹⁸

Figure 1: Sole Authority with Deputies



Variation: ombudsman-sole authority model

2.11 Under the ombudsman-sole authority model both privacy and FOI are co-located within the office of the ombudsman and these functions are

15. *Freedom of Information and Protection of Privacy Act*, RSO 1990, c F.31, s 4(4).

16. Information Commissioner, Republic of Slovenia, *Annual Report 2007* (2007) 1, <www.ip-rs.si> at 24 November 2009.

17. Information Commissioner, Republic of Slovenia, *Annual Report 2007* (2007) 1, <www.ip-rs.si> at 24 November 2009.

18. Information Commissioner, Republic of Slovenia, “Deputies to the IC”, <<http://www.ip-rs.si/index.php?id=312>> at 24 November 2009.

performed alongside the ombudsman's other functions. This model is currently in place in Tasmania, and the Canadian provinces of New Brunswick and Manitoba, where complaints can be made to the Ombudsman regarding privacy as well as FOI.¹⁹ In the Canadian territory of Yukon, the Ombudsman is also the Information and Privacy Commissioner, and this is provided for in legislation.²⁰

2.12 In February 2009, the NSW Ombudsman recommended that the Information Commissioner should be established within the Office of the Ombudsman and that "consideration should be given to making the Information Commissioner responsible for the oversight of privacy as well as FOI".²¹ In response to this, we noted that the "functions and powers of the Ombudsman have a focus different from those of the proposed Information Commissioner".²² An ombudsman-sole authority model may impact upon the ability of the Ombudsman to monitor and review the Commissioner's functions impartially and compromise public perception of the Ombudsman as an "independent scrutineer".²³ The government ultimately rejected the ombudsman-sole authority model, stating that:

establishing a new stand alone Commissioner gives greater status and emphasis to the new role. Establishing the Commissioner in the Ombudsman's office, on the other hand, could give the impression that nothing has really changed, except the name of the office holder.²⁴

19. *Personal Information Protection Act 2004* (Tas) s 18; *Freedom of Information Act 1991* (Tas) s 48; *Protection of Personal Information Act*, SNB 1998, c P-19.1, s 3; *Right to Information Act*, SNB 1978, c R-10.3, s 9-10; *The Freedom of Information and Protection of Privacy Act*, CCSM 1997, c F175, s 49.

20. *Access to Information and Protection of Privacy Act*, RSY 2002, c 1, s 40.

21. NSW Ombudsman FOI Report, Recommendation 84, Recommendation 86. The Ombudsman notes that co-locating privacy and FOI "would certainly help rationalise the current arrangements for access to information": NSW Ombudsman FOI Report, 101.

22. NSW Law Reform Commission, *The Ombudsman's Review of the Freedom of Information Act 1989 (NSW)* (2009) [29].

23. NSW Law Reform Commission, *The Ombudsman's Review of the Freedom of Information Act 1989 (NSW)* (2009) [30]-[31].

24. NSW, Department of Premier and Cabinet, *Government Information – Public Access and Information Commissioner FOI Reforms in NSW, Ombudsman's Recommendations and Public Submissions – Government Response* (2009) 5, <<http://www.dpc.nsw.gov.au>> 21 December 2009.

THE SHARED RESPONSIBILITIES MODEL

2.13 Under the shared responsibilities model of administering privacy and FOI there are multiple independent statutory office holders within a single office. Each office holder has designated responsibilities and functions. However, particular functions overlap or are interchangeable. This is the model currently proposed by the Commonwealth government.

2.14 The current Commonwealth Bill²⁵ establishes three commissioners – a newly appointed Information Commissioner, a newly appointed Freedom of Information Commissioner and the Privacy Commissioner – all within the Office of the Information Commissioner.²⁶ The Information Commissioner is the head of the Office “both strategically and administratively”²⁷ and is capable of performing all the functions of the Office.²⁸ These functions include reporting to the responsible Minister on any matter relating to government policy and practice in relation to information management (“information commissioner functions”); functions under the *Freedom of Information Act 1982* (Cth) (“FOI functions”); and functions conferred to the Information Commissioner by an Act if the functions relate to the privacy of an individual and are not freedom of information functions (“privacy functions”). The explanatory memorandum notes that the information commissioner functions “reflect the capacity for the structural reforms to deliver coordinated policy advice to the Government on government information management matters (beyond privacy and FOI)”.²⁹

2.15 The Freedom of Information Commissioner is conferred FOI functions. However, particular functions, such as issuing guidelines and making particular reports to the Minister, can only be done with the approval of the Information Commissioner.³⁰ The Privacy Commissioner can perform privacy functions. However, functions such as issuing codes, guidelines and determinations as well as reporting to the Minister on particular matters requires the approval of the Information

25. Information Commissioner Bill 2009 (Cth). See also Freedom of Information Amendment (Reform) Bill 2009 (Cth).

26. Explanatory Memorandum, Information Commissioner Bill 2009 (Cth) 1.

27. Explanatory Memorandum, Information Commissioner Bill 2009 (Cth) 1.

28. Information Commissioner Bill 2009 (Cth) cl 10; Explanatory Memorandum, Information Commissioner Bill 2009 (Cth) 1.

29. Explanatory Memorandum, Information Commissioner Bill 2009 (Cth) 2.

30. Information Commissioner Bill 2009 (Cth) cl 8, cl 11(1), cl 11(4).

Commissioner.³¹ The approval requirement is to “ensure consistency in policy advice and, in case of disagreement, that the Information Commissioner’s view prevails”.³² While the Privacy Commissioner and Freedom of Information Commissioner will “mainly” perform their own functions they can also perform each other’s functions, to allow for “flexibility”.³³

2.16 Functions are not conferred on the Freedom of Information Commissioner and Privacy Commissioner by delegation from the Information Commissioner. The provisions are, however, meant to work in a similar way to a delegation.³⁴ The provisions specify that the Commissioner who exercises the particular function must apply their own discretion and cannot be directed by the Information Commissioner.³⁵ When the Freedom of Information Commissioner or Privacy Commissioner performs a function, the function is deemed to have been exercised by the Information Commissioner.³⁶ Further, when a Commissioner exercises a function or power, the other Commissioners are not prevented from exercising that function or power in relation to a different matter.³⁷ These provisions are aimed at ensuring the Commissioners are able to exercise their powers appropriately and also to prevent duplication in decision-making.³⁸

2.17 The Commonwealth model has been developed in this manner because it is argued that “[t]he nature of the FOI functions and privacy functions are too extensive for one office holder to effectively manage”.

31. Information Commissioner Bill 2009 (Cth) cl 9, cl 12(1), cl 12(4).

32. Explanatory Memorandum, Information Commissioner Bill 2009 (Cth) 6.

33. Information Commissioner Bill 2009 (Cth) cl 11(2), cl 12(2); Explanatory Memorandum, Information Commissioner Bill 2009 (Cth) 1.

34. Information Commissioner Bill 2009 (Cth) cl 11(5), cl 12(5); Explanatory Memorandum, Information Commissioner Bill 2009 (Cth) 6-8.

35. Information Commissioner Bill 2009 (Cth) cl s11(5)(a), cl 12(5)(a); Explanatory Memorandum, Information Commissioner Bill 2009 (Cth) 6-8.

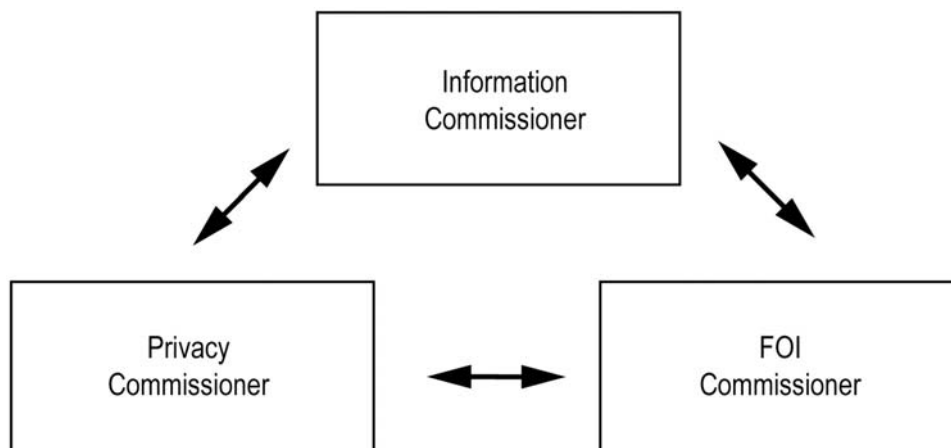
36. Information Commissioner Bill 2009 (Cth) cl 11(5)(b), cl 12(5)(b); Explanatory Memorandum, Information Commissioner Bill 2009 (Cth) 6-8.

37. Information Commissioner Bill 2009 (Cth) cl 11(5)(c), cl 12(5)(c); Explanatory Memorandum, Information Commissioner Bill 2009 (Cth) 6-8.

38. Explanatory Memorandum, Information Commissioner Bill 2009 (Cth) 6-8.

However “the appointment of multiple statutory officers of equal standing does not present an effective governance model”.³⁹

Figure 2: Shared Responsibilities Model



Variation: the Quebec model

2.18 A different “shared responsibilities” model has been adopted in Quebec where the *Commission d'accès à l'information* is responsible for the administration of FOI as well as privacy in both the public sector and the private sector.⁴⁰ The Commission consists of at least five members including a chair and vice chair.⁴¹ Interestingly, the Commission consists of two divisions, the oversight division and the adjudicative division.⁴² The oversight division oversees and promotes the relevant legislation and

39. Commonwealth, *Parliamentary Debates*, House of Representatives, 26 November 2009, 5 (The Hon Anthony Byrne, Parliamentary Secretary to the Prime Minister).

40. *An Act Respecting Access to Documents Held by Public Bodies and the Protection of Personal Information*, RSQ, c A-2.1; *An Act Respecting the Protection of Personal Information in the Private Sector*, RSQ, c P-39.1.

41. *An Act Respecting Access to Documents Held by Public Bodies and the Protection of Personal Information*, RSQ, c A-2.1, s 104.

42. *An Act Respecting Access to Documents Held by Public Bodies and the Protection of Personal Information*, RSQ, c A-2.1, s 103; *An Act Respecting the Protection of Personal Information in the Private Sector*, RSQ, c P-39.1.

also monitors compliance.⁴³ The adjudicative division plays the role of an administrative tribunal and is able to review particular decisions, conduct hearings and also facilitate settlement of matters.⁴⁴ Under this model, all the Commissioners play a role that relates to both privacy and FOI.

43. *An Act Respecting Access to Documents Held by Public Bodies and the Protection of Personal Information*, RSQ, c A-2.1, s 122, s 122.1.

44. *An Act Respecting Access to Documents Held by Public Bodies and the Protection of Personal Information*, RSQ, c A-2.1, s 134.2.

3. **Factors affecting the relationship between the Offices of the Information and Privacy Commissioners**

- Common ground
- Tension between privacy and FOI
- Consistency and balance
- Cooperative arrangements
- Functions and workload
- Cost and efficiencies

3.1 In this Chapter, we explore some of the factors that will help to evaluate the strengths and weaknesses of the various models discussed above. In Chapter 4, we discuss these factors in the context of privacy and FOI legislation in NSW.

COMMON GROUND

3.2 Privacy and FOI involve “information rights” or “information duties and obligations on those who are holding either personal or official information”.¹ They are both concerned with transparency and access and have “wide horizontal impact affecting virtually every aspect of public, commercial and private life”.² Privacy and FOI are also core aspects of “social, cultural and democratic values”,³ helping to ensure that government bodies are held accountable for their practices and operate in an appropriate manner.

3.3 The Australian Law Reform Commission (“ALRC”) has noted that “[a]ccess to one’s own personal information not only promotes government accountability but also enables individuals to protect their privacy”.⁴ Both privacy and FOI can also assist in the protection of other rights. For example, by allowing access and correction of personal information, individuals are able to see what benefits and services they are entitled to.⁵

-
1. R Thomas, “Freedom of Information and Privacy – the Regulatory Role of the Information Commissioner” (Paper presented at the Centre for Regulated Industries Occasional Lecture 21, National Liberal Club, London, 9 January 2008) 4.
 2. R Thomas, “Freedom of Information and Privacy – the Regulatory Role of the Information Commissioner” (Paper presented at the Centre for Regulated Industries Occasional Lecture 21, National Liberal Club, London, 9 January 2008) 4.
 3. R Thomas, “Freedom of Information and Privacy – the Regulatory Role of the Information Commissioner” (Paper presented at the Centre for Regulated Industries Occasional Lecture 21, National Liberal Club, London, 9 January 2008) 5.
 4. Australian Law Reform Commission and Administrative Review Council, *Open government: a review of the federal Freedom of Information Act 1982*, ALRC Report No 77/ ARC Report No 40 (1995) 13.
 5. D Banisar, *Freedom of Information Around the World 2006, A Global Survey of Access to Government Information Laws* (Privacy International, 2006) 7.

3.4 Privacy and FOI are often considered “two sides of the same coin”.⁶ In fact, it has been suggested that “it is relevant in the interests of legislative economy, and in clarity of legislative intention, that the two concepts, freedom of information and privacy, should be dealt with in the one blow”.⁷ Jurisdictions such as the Northern Territory, British Columbia and Ontario have even implemented combined FOI and privacy legislation in recognition of this.⁸ Others have viewed privacy and FOI as “overlapping rights that are simultaneously complementary and conflicting”.⁹

3.5 Many years ago the Hon Michael Kirby, former Chair of the ALRC, stressed the fact that FOI and privacy legislation have the capacity to reinforce each other:

nowadays, the greater threat to privacy is the accumulation of information about people, available to others to which the subject may have no right of access. It is on this basis that freedom of information, meaning access to information, may overlap the positive aspects of privacy protection. If you can have access to information about yourself, check it, remove it in some cases and correct it when it is wrong, you have a most powerful weapon to protect your privacy. This is privacy not used as a shield, to protect another from the inquisitiveness of the applicant for government-held information. It is privacy used as a sword by which the

<<http://www.privacyinternational.org/foi/foisurvey2006.pdf>> at 21 December 2009.

6. R Boulding, *Making Trust a Two Way Street: A Freedom of Information and Privacy Act for the United Kingdom*, All Party Committee for Freedom of Information (1976) 7.
7. R Boulding, *Making Trust a Two Way Street: A Freedom of Information and Privacy Act for the United Kingdom*, All Party Committee for Freedom of Information (1976) 5.
8. *Information Act 2002* (NT); *Freedom of Information and Protection of Privacy Act*, RSBC 1996, c 165; *Freedom of Information and Protection of Privacy Act*, RSO 1990, c F.31; *Municipal Freedom of Information and Protection of Privacy Act*, RSO 1990, c M.56.
9. D Banisar, *Freedom of Information Around the World 2006, A Global Survey of Access to Government Information Laws* (Privacy International, 2006) 31, <<http://www.privacyinternational.org/foi/foisurvey2006.pdf>> at 21 December 2009.

applicant may seek to protect and assert his own personal interests from the inquisitiveness of government and of others alike.¹⁰

TENSION BETWEEN PRIVACY AND FOI

3.6 While there are times when the interests of privacy and FOI “run parallel”, there are other times when these values will be “opposed”.¹¹ For example, a primary area of overlap and possible conflict occurs where applications for government information involve the personal information of a third party. A key question is whether such conflicts can be adequately resolved where there is a single body administering privacy and FOI. A further question is whether both privacy and FOI can maintain equal and appropriate levels of visibility if administered by a single authority.

3.7 There is a fine balance between privacy and FOI. Bias, or even perceived bias, could damage the effectiveness of legislative regimes representing fundamental values.¹² In fact, it has been suggested that there is “no doubt that the functions of the two Commissioners are incompatible” and the “divergent duties imposed on each Commissioner demand that there be no real or perceived conflict of interest”.¹³ It has been argued that it is important that both FOI and privacy have its own champions, separate office holders to act as identifiable and unambiguous advocates.¹⁴ It is possible that a single commissioner model could “diminish the vigour with which the access or privacy regimes (or

10. M D Kirby, “Freedom of Information vs. Privacy”, (Paper presented at the Second Symposium on Law and Justice, Australian Capital Territory, 26 March 1977) 9, Speeches vol 2 No 36, <<http://www.michaelkirby.com.au>> at 15 December 2009.

11. R Boulding, *Making Trust a Two Way Street: A Freedom of Information and Privacy Act for the United Kingdom*, All Party Committee for Freedom of Information (1976) 5.

12. Australian Law Reform Commission and Administrative Review Council, *Open government: a review of the federal Freedom of Information Act 1982*, ALRC Report No 77/ ARC Report No 40 (1995) 77.

13. Canada, House of Commons, *Open and Shut: Enhancing the Right to Know and the Right to Privacy*, Report of the Standing Committee on Justice and Solicitor General on the Review of the Access to Information Act and the Privacy Act (1987) 37-38.

14. Australian Law Reform Commission and Administrative Review Council, *Open government: a review of the federal Freedom of Information Act 1982*, ALRC Report No 77/ ARC Report No 40 (1995) 77.

both) are overseen” and “whether by reason of predilection or circumstance” underscore one area at the expense of the other.¹⁵

3.8 Arguing in favour of a sole authority model, the former Information Commissioner of Canada noted:

The single-agency model of oversight of access and privacy rights is a proven approach. On the other hand, the dual-agency, federal model, has given rise to real problems, among them: conflicting advice to Parliament, government, the courts and the public; emphasis on single values rather than a balanced consideration of multiple values; an adversarial relationship between single-issue commissioners and public officials who must balance many factors in making decisions on secrecy and disclosure; unnecessarily inflated administrative costs and public confusion over how to seek redress for infringements of their information rights.¹⁶

3.9 The Information Commissioner later “recanted” his views on merger and conceded that:

I no longer advocate the single-commissioner model. I accept that there are few shortcomings in the dual-commissioner model and I now admit that the dual-commissioner model is far less open to abuse than would be the single-commissioner model. In the single-commissioner model, it is certainly possible that one value – openness or privacy – would get preferential treatment. In the single-commissioner model, that which is most healthy in a democracy – public debate – gives way to internal, bureaucratic discussion and compromise.¹⁷

3.10 In contrast, former UK Information Commissioner, Richard Thomas, has noted that sometimes it can be culturally difficult for an organisation to be protective of information and also be open at the same time but “the approaches can be reconciled in the sense that one area of regulation safeguards *personal* information and the other seeks greater

15. La Forest Report, 37-38.

16. J Reid, “Position Paper: Oversight Models under the Federal Access and Privacy Acts: Single Commissioner vs. Dual-Commissioners” (Speech, Office of the Information Commissioner of Canada, 24 October 2003), <<http://www.infocom.gc.ca/speeches/speechview-e.asp?intspeechId=90>> at 21 December 2009.

17. J Reid, “The Access Act – Moving Forward – A Commissioner’s Perspective” (Speech, Office of the Information Commissioner of Canada, 8 September 2005), <<http://www.infocom.gc.ca/speeches/speechview-e.asp?intspeechId=113>> at 21 December 2009.

transparency for *official* information”.¹⁸ In response to occasions when FOI and privacy do conflict, Judge Taylor notes there is “little reason, if any, to consider that a single commissioner could not fairly and impartially balance any conflict between privacy and public access concerns in the few circumstances this might arise, especially where the office-holder is statutorily independent from the government”.¹⁹

3.11 The shared responsibilities model proposed by the Commonwealth government is an attempt to address administratively the “common ground” between privacy and FOI and resolve the “inherent tension”. A single office overseen by three independent office holders could allow for integrated information management and also ensure that there is an independent champion for privacy and FOI within this coordinated regime.²⁰

3.12 Judge Taylor criticises the proposed Commonwealth model because it is “open to confusion” due to the interchangeability of various functions.²¹ As one submission to the Commonwealth Government, responding to exposure draft Bills, indicated:

Obviously one would hope for a collegiate team approach by the three Information Officers (IOs) to the functions of the OIC, but it is not clear what would happen in the event of a disagreement between any two of the IOs, either in terms of performance of functions or in relation to employment and assignment of staff or consultants. We suggest that the relationships need to be made clearer.²²

-
18. R Thomas, “Freedom of Information and Privacy – the Regulatory Role of the Information Commissioner” (Paper presented at the Centre for Regulated Industries Occasional Lecture 21, National Liberal Club, London, 9 January 2008) 6.
19. K V Taylor, *Submission* (4 September 2009) 6. Judge Taylor further notes that privacy and FOI functions rarely come into conflict and statutory guidance is provided to help deal with any cases of conflict.
20. See M Paterson, *Freedom of Information (FOI) Reform* (undated), “Department of Prime Minister and Cabinet FOI Submissions”, 1 <http://www.dpmc.gov.au/consultation/foi_reform/submissions.cfm> at 29 October 2009. This submission was in response to the exposure draft Bills.
21. K V Taylor, *Submission* (4 September 2009) 5 (in reference to an earlier exposure draft of the Bill).
22. Australian Privacy Foundation, *Freedom of Information Reform, Submission to the Commonwealth Department of Prime Minister and Cabinet* (May 2009), “Department of Prime Minister and Cabinet FOI Submissions”, 2, <<http://www.dpmc>.

3.13 The ability to “share responsibilities” may also undermine the value in having separate commissioners advocating privacy and FOI and therefore have some of the same shortcomings as the sole authority model.²³

3.14 Attempts have previously been made to consolidate privacy and FOI within the same body. In 2003, the Privacy and Personal Information Protection Amendment Bill 2003 (NSW) was tabled in Parliament. The Bill was aimed at transferring responsibility for privacy protection to the NSW Ombudsman. One of the drivers for this proposed reform was to “promote an integrated and coherent approach to information handling”.²⁴ The 2003 proposal to absorb privacy within the Ombudsman’s office met with significant opposition. One of the major concerns related to the visibility of privacy and the danger that advocacy of privacy would “sink without trace” if consolidated within another office.²⁵ The example of the abolition of the Community Services Commission and subsequent amalgamation within the Ombudsman’s Office as a Deputy Ombudsman position was used to illustrate the danger that structural changes can cause.²⁶ The perceived diminishment of the advocacy of children’s services was thought to be a direct result of this change.²⁷ It was feared that privacy would share the same fate;

gov.au/consultation/foi_reform/submissions.cfm> at 29 October 2009. This submission was in response to the exposure draft Bills.

23. Public Interest Advocacy Centre, *Putting Public Interest at the Heart of FOI: Submission in response to the Commonwealth Government’s exposure draft of the Freedom of Information Amendment (Reform) Bill 2009 and the Information Commissioner Bill 2009* (19 May 2009), “Department of Prime Minister and Cabinet FOI Submissions”, 25 <http://www.dpmc.gov.au/consultation/foi_reform/submissions.cfm> at 29 October 2009.

24. New South Wales, *Parliamentary Debates*, Legislative Assembly, 17 October 2003, 4106 (Bryce Gaudry).

25. New South Wales, *Parliamentary Debates*, Legislative Assembly, 17 October 2003, 4401 (Andrew Tink, Shadow Attorney General).

26. New South Wales, *Parliamentary Debates*, Legislative Assembly, 17 October 2003, 4401 (Andrew Tink, Shadow Attorney General). See also NSW Ombudsman, *Annual Report 2002-2003* (2003) 102; Parliament of NSW, Committee on the Office of the Ombudsman and the Police Integrity Commission, *Stakeholder Review of the Merger of the Community Services Commission into the Office of the Ombudsman*, Report No 14/53 (2006) 21.

27. New South Wales, *Parliamentary Debates*, Legislative Assembly, 17 October 2003, 4401 (Andrew Tink, Shadow Attorney General).

“[p]rivacy needs advocacy; it must be pushed; it must be pressed; it needs a champion”.²⁸ There is a danger that where “we subsume one body within another, the body subsumed loses its identity”.²⁹ While the danger of this occurring would be more apparent if amalgamated within the Ombudsman’s office, because of the wide scope of functions performed by the Ombudsman, this obviously remains an important consideration. As we have previously noted, incorporation of the Office of the Privacy Commissioner within the Office of the Information Commissioner runs the risk of affecting the independence of the Privacy Commissioner’s Office and also “represent a downgrading in the perceived importance of privacy as a concept”.³⁰

CONSISTENCY AND BALANCE

3.15 A sole authority administering privacy and FOI would obviously have to be familiar with the objects, purposes and intricacies of both legislative regimes. Familiarity with the operation of these regimes, and awareness that their operation occasionally involves weighing competing policies and interests, suggests that a single authority could be better placed to adopt a “balanced” and “fair” approach where the two areas overlap. Commentators note that agencies subject to FOI and privacy legislation have to perform a similar balancing exercise.³¹ Importantly, merging the administration of privacy and FOI could also help ensure that agencies and legislators are provided with consistent advice.

3.16 The Slovenian Information Commissioner, responsible for both privacy and FOI, notes:

Adoption of the Information Commissioner Act has enabled the co-existence of the right to freedom of expression and the protection of privacy. Co-ordinated interpretation and a considered approach to both legal domains is exceptionally important in the legal protection and - in particular - for an awareness that the mission of the

28. New South Wales, *Parliamentary Debates*, Legislative Assembly, 17 October 2003, 4401 (Andrew Tink, Shadow Attorney General).

29. New South Wales, *Parliamentary Debates*, Legislative Assembly, 17 October 2003, 4401 (Andrew Tink, Shadow Attorney General).

30. NSW Law Reform Commission, *The Ombudsman’s Review of the Freedom of Information Act 1989 (NSW)* (2009) [37].

31. La Forest Report, 29.

Information Commissioner is commensurate with the upholding of both of these basic human rights.³²

3.17 Richard Thomas has observed that as Commissioner responsible for both the *Freedom of Information Act 2000* (UK) and *Data Protection Act 1998* (UK) he was “well-placed to ensure that both strands of public policy are fully ventilated and balanced in those cases where public disclosure may unduly threaten individual privacy”.³³

3.18 While the La Forest Report suggests that arguments relating to consistency and balance have “some merit”, it took the view that such arguments overstate “both the frequency and magnitude of conflict between government’s access and privacy obligations”.³⁴ The report further notes that in the Canadian context there was limited evidence to suggest that a commissioner devoted solely to FOI could not undertake the balancing process required under FOI legislation.³⁵

3.19 A single authority responsible for both privacy and FOI could also improve the legitimacy of decisions made by the authority, especially where decisions relate to an overlap between FOI and privacy.³⁶ However separate champions for privacy and FOI have the potential to promote reasoned and healthy debate and “enliven and enrich our democracy”.³⁷ The La Forest Report argues that a sole authority model is not necessarily better than a separated model “in achieving reasonable accommodations between the principles of access and privacy”.³⁸

32. Information Commissioner, Republic of Slovenia, *Annual Report 2007* (2007) i, <www.ip-rs.si> at 24 November 2009.

33. R Thomas, “Freedom of Information and Privacy – the Regulatory Role of the Information Commissioner” (Paper presented at the Centre for Regulated Industries Occasional Lecture 21, National Liberal Club, London, 9 January 2008) 6.

34. La Forest Report, 29.

35. La Forest Report, 30.

36. J Reid, “Position Paper: Oversight Models under the Federal Access and Privacy Acts: Single Commissioner vs. Dual-Commissioners” (Speech, Office of the Information Commissioner of Canada, 24 October 2003), <<http://www.infocom.gc.ca/speeches/speechview-e.asp?intspeechId=90>> at 21 December 2009.

37. La Forest Report, 33.

38. La Forest Report, 34.

3.20 It should also be noted that potential for “balance” and “consistency” under a single commissioner or authority also carries with it the possibility of abuse of power as well as opaque decision-making and oversight. It is critical that checks and balances are implemented to ensure that power is not abused and privacy and FOI are applied fairly, without one collapsing due to partisan administration.

3.21 An alternative way of achieving consistency and balance under a separated model is to implement safeguards that could be triggered in particular circumstances. For example, separate commissioners could regularly be required to consult on particular matters, and to issue joint guidelines on others. However, such an approach may not be as effective in achieving consistency and balance as the adoption of a sole authority or shared responsibilities model.

COOPERATIVE ARRANGEMENTS

3.22 Increasingly agencies and organisations are vast repositories of information, much of it sensitive or personal in nature. The NSW Ombudsman has noted that often, the same individuals carry out both FOI and privacy functions within agencies implying that the same concerns and challenges apply to both legislative schemes.³⁹ A similar situation occurs in Canada where “[i]n each and every government institution covered by the Access to Information and Privacy Acts, the laws are administered by one access to information and privacy coordinator”.⁴⁰ This unified structure has been adopted because the administration of privacy and FOI cannot be done without referring to the other and harmonisation of interpretation and administration is required in order to achieve the aims of both regimes.⁴¹

39. NSW Ombudsman FOI Report, 101.

40. J Reid, “Position Paper: Oversight Models under the Federal Access and Privacy Acts: Single Commissioner vs. Dual-Commissioners” (Speech, Office of the Information Commissioner of Canada, 24 October 2003), <<http://www.infocom.gc.ca/speeches/speechview-e.asp?intspeechId=90>> at 21 December 2009.

41. J Reid, “Position Paper: Oversight Models under the Federal Access and Privacy Acts: Single Commissioner vs. Dual-Commissioners” (Speech, Office of the Information Commissioner of Canada, 24 October 2003), <<http://www.infocom.gc.ca/speeches/speechview-e.asp?intspeechId=90>> at 21 December 2009.

3.23 A single office responsible for privacy and FOI could develop closer, more productive, relationships with agencies.⁴² This is because a single commissioner responsible for both privacy and FOI could be considered more impartial than a “single-value advocate”, and the “goodwill generated by the typically more consultative privacy work” can be leveraged to ease any hostility associated with the administration of FOI.⁴³ This, in turn, could help ensure greater compliance with both regimes. In the Canadian provinces, which have adopted a sole authority model, the commissioners appear to have developed better working relationships with government on issues relating to access than has been the experience at the federal level.⁴⁴ The La Forest Report argues that this distinction may be associated with differences in history, structure and culture. Federal agencies are larger and more decentralised, “[f]ostering a culture of openness and transparency may therefore be more challenging in the federal sphere than in the provinces”.⁴⁵

3.24 A single office responsible for both regimes would mean that individuals will only be required to familiarise themselves with the processes of one organisation rather than two. A single office administering both privacy and FOI could also reduce the problem of “referral fatigue” which can occur where an individual is constantly referred to different bodies to address their issues, or have to speak to multiple bodies that may provide inconsistent advice.

3.25 It is also possible that the government will assign greater weight to the opinion of a sole authority administering both privacy and FOI. As the La Forest Report puts it:

The recommendations of an “Information and Privacy Czar” ... may have more of an impact on legislation, policy and practice than the sum of advice of separate information and privacy commissioners.⁴⁶

3.26 A single officer holder may also be able to attract more attention from members of the public, agencies and the media. This in turn will enhance the Information Commissioner’s authority.⁴⁷

42. La Forest Report, 34-35.

43. La Forest Report, 35.

44. La Forest Report, 35.

45. La Forest Report, 35.

46. La Forest Report, 36.

47. La Forest Report, 36.

3.27 While finding there may be minimal gains in the federal context, the La Forest Report notes that the experience of the Canadian provinces illustrates the real benefits that can be obtained by moving to a sole authority model.⁴⁸ Such a model can assist in cultivating cooperative and productive relationships with the government.⁴⁹ Judge Taylor agrees with this view, noting that a single office will help develop “strong, cooperative and open relationships with agencies and emphasise not only the importance of openness and transparency but also protecting individuals’ privacy when handling personal information”.⁵⁰

FUNCTIONS AND WORKLOAD

3.28 A common feature in many jurisdictions is the similarity of the functions performed by the individuals and bodies responsible for privacy and FOI. For example, many such bodies exercise functions such as investigation, reporting, complaints handling, providing advice and general oversight, occasionally with added powers or responsibilities such as review or adjudication. Nearly all will involve the development of close relationships with government agencies, which are often responsible for managing vast amounts of personal information and sensitive information generally.

3.29 The similarity in the functions performed by FOI and privacy bodies, in addition to other factors such as efficiency and common ground, suggests that an administrative merger could produce good results on an operational level. However, analysis of the functions and framework that exist in any particular jurisdiction is required and examination of whether there is sufficient overlap to justify a merger should be conducted.

3.30 It has been suggested that the amalgamation of privacy and FOI responsibilities could present too heavy a workload for a single commissioner.⁵¹ The ability of a single commissioner to have personal involvement in complaints handling would diminish. Yet “it is vitally important for the commissioner to be actively and visibly involved in the

48. La Forest Report, 36-37.

49. La Forest Report, 36.

50. K V Taylor, *Submission* (22 October 2009) 4. See also K V Taylor, *Submission* (4 September 2009) 6.

51. La Forest Report, 39.

complaints resolution process”.⁵² This is so the commissioner can develop closer relationships with agencies, while allowing “the moral authority attaching to the office to be brought to bear, where necessary, to persuade government institutions to comply with their obligations”.⁵³ There is also the question of the capacity of a single commissioner to engage in education, research, consultation, policy advice and other responsibilities outside the realm of complaints handling and whether such areas would suffer as a result of a merged commission.⁵⁴ However, the experience in the Canadian provinces has demonstrated that a single commissioner responsible for privacy and FOI is able to play an active role in complaints resolution, policy development and other necessary activities.⁵⁵

3.31 A further challenge associated with a sole authority model is ensuring the appropriate individual is appointed to the role of Information Commissioner, possessing the requisite skills and knowledge to be able to oversee FOI and privacy regimes appropriately.⁵⁶ Speaking in relation to Canadian federal administration, the La Forest Report concludes that “while I am confident that a single commissioner would be able to act fairly and impartially in the infrequent occasions when access and privacy values conflict, I am not nearly as confident that he or she would be able to devote adequate concern and attention to both values”.⁵⁷

COST AND EFFICIENCIES

3.32 We have discussed how there might be similarities in the functions performed by an office administering FOI and an office that administers privacy. This may also demonstrate that pooling resources may result in cost savings and efficiencies.

3.33 “Efficiency arguments” were discussed in the La Forest Report. The Report cautions that a comprehensive assessment of organisation and management of the two offices should be undertaken before efficiency is

52. La Forest Report, 40.

53. La Forest Report, 40.

54. La Forest Report, 40.

55. La Forest Report, 40.

56. La Forest Report, 42.

57. La Forest Report, 42-43.

relied upon to justify a merger.⁵⁸ In the context of federal Canadian administration of privacy and FOI, the La Forest Report found that it was unlikely that a merger would result in substantial efficiencies.⁵⁹ The position is, of course, different in NSW where the Office of the Information Commissioner is only in the process of being established.

3.34 One option is to keep the offices separated but consolidate “corporate services” to provide efficiencies. The La Forest Report notes that while this may yield some minor cost benefits there were still problems associated with “divided loyalties and conflicts of interest among staff responsible to two co-equal masters”.⁶⁰ This is also an issue that may arise under a shared responsibilities model where co-location occurs and the hierarchy of authority is unclear.

3.35 We have not undertaken the exercise of determining what (if any) cost savings would be involved in re-establishing the Office of the Privacy Commissioner as a Division of the Office of the Information Commissioner, as we recommend in the following Chapter. We are, however, inclined to agree with Judge Taylor that a merger has “the potential to yield cost-savings through the elimination of duplication and greater economies of scale”.⁶¹ A merged office also offers flexibility in the allocation of work depending on demands. In any event, we believe that reform of this significance should not be driven principally by cost.⁶²

58. La Forest Report, 24-25.

59. La Forest Report, 25.

60. La Forest Report, 27.

61. K V Taylor, *Submission* (22 October 2009) 5. The Law Society of NSW notes, “resources and administrative support could be shared” providing savings in administration and also establishing a “one stop shop front” for complaints handling: The Law Society of NSW, *Submission*, 2.

62. See NSW Government, NSW, Department of Premier and Cabinet, *Government Information – Public Access and Information Commissioner FOI Reforms in NSW, Ombudsman’s Recommendations and Public Submissions – Government Response* (2009) 5, <<http://www.dpc.nsw.gov.au>> 21 December 2009. See also NSW Law Reform Commission, *The Ombudsman’s Review of the Freedom of Information Act 1989 (NSW)* (2009) [35] where we responded to the proposal to establish the Information Commissioner within the Ombudsman’s Office by noting that “we do not believe that the question of resources should be the ultimate driver in a matter as significant as the one at hand”.

4. **A model for NSW**

- Independence and resources
- Common focus – government information
- Consistent treatment and cooperative arrangements
- Appointment of the Privacy Commissioner
- The relationship between the Commissioners
- National uniformity

RECOMMENDATION 1

The Office of the Information Commissioner should be the sole statutory authority responsible for the administration and oversight of the *Privacy and Personal Information Protection Act 1998* (NSW), *Health Records and Information Privacy Act 2002* (NSW), *Government Information (Information Commissioner) Act 2009* (NSW) and *Government Information (Public Access) Act 2009* (NSW). The Information Commissioner should be the head of the Office of the Information Commissioner.

RECOMMENDATION 2

The Office of the Information Commissioner should contain a Privacy Division responsible for administration and oversight of privacy legislation. The Privacy Commissioner should be the head of the Privacy Division.

RECOMMENDATION 3

A “Privacy Commissioner” should continue to perform functions under NSW privacy legislation.

RECOMMENDATION 4

The Privacy Commissioner should be appointed Deputy Information Commissioner.

RECOMMENDATION 5

Funding of the Office of the Information Commissioner should be reviewed to determine what additional funds the Office requires as a result of the establishment of the Privacy Division.

4.1 We support, as did the majority of submissions,¹ the formation of a single office (the Office of the Information Commissioner) responsible for

1. Australian Privacy Foundation, *Submission to CP 3*, 15; Consumer Credit Legal Centre NSW, *Submission to CP 3*, 1; Cyberspace Law and Policy Centre, *Submission to CP 3*, 36; NSW FOI/Privacy Practitioners’ Network, *Submission to CP 3*, 13; Public Interest Advocacy Centre, *Submission to CP 3*, 33. However, the Intellectual Disability Rights Services, *Submission to CP 3*, 15; The Law Society of

administering FOI and privacy. The Office should consist of the Information Commissioner, who is the head of the Office, and the Privacy Commissioner, who is head of a Privacy Division within the Office of the Information Commissioner. The Privacy Commissioner will also be a Deputy Information Commissioner. The Privacy Commissioner will continue to perform most of the functions currently entrusted to him or her under privacy legislation. We believe that this administrative model will best achieve the objects of both FOI and privacy legislation and, in particular, strengthen privacy protection in NSW. This is because:

- The enactment of the GIPA Act and the establishment of the Office of the Information Commissioner create a unique opportunity to enhance the protection of information privacy in NSW.
- Creating a Privacy Division within the Office of the Information Commissioner will increase the level of statutory independence of the Privacy Commissioner.
- Privacy NSW is currently under resourced and would be better resourced if it were an integral part of the Office of the Information Commissioner.
- The GIPA Act creates a presumption in favour of disclosure, while recognising personal information, IPPs and HPPs as potentially overriding public interest considerations against disclosure. An Information Commissioner responsible for the administration of FOI and privacy legislation will help ensure consistent and balanced application of the GIPA Act where there is overlap with privacy considerations.
- Privacy and FOI share a common focus; consistency and balance will result in better privacy protection.
- Integration of privacy and FOI may result in operational efficiencies.
- Our preferred model for the integration of the Offices does not marginalise privacy, as there will be a separate “champion” of privacy in the Office of the Information Commissioner.

NSW, *Submission*, 1 and NSW Department of Corrective Services, *Submission*, 1, did not support a merger. See also Inner City Legal Centre, *Submission to CP 3*, 16, 44. The Office of State Revenue, *Submission* (22 October 2009) 1 suggests that, in order to balance the competing interests, privacy and FOI legislation and administration should be combined.

4.2 This Chapter expands on these points.

INDEPENDENCE AND RESOURCES

4.3 Reform is currently taking place to both the FOI regime and the privacy regime in NSW. The GIPA Act goes further than the previous FOI Act in that it creates a presumption in favour of disclosure.² The GIPA Act also recognises that there may be an overriding public interest against disclosure in certain circumstances including where disclosure involves personal information or where disclosure contravenes an Information Protection Principle (“IPP”) or a Health Privacy Principle (“HPP”).³

4.4 The Information Commissioner will head a “fully independent office”.⁴ A joint parliamentary committee (“Joint Committee”) is responsible for oversight of the Information Commissioner’s functions⁵ and the Information Commissioner is required to report directly to Parliament.⁶ Reporting requirements include an annual report regarding work and activities as well as an annual report on the operation of the GIPA Act.⁷ The Information Commissioner also has the power to make a special report to Parliament at any time.⁸ Establishing the Information Commissioner as an independent agency reporting directly to Parliament “enhances the role of the commissioner and recognises the proper role of Parliament in its oversight of Executive Government”.⁹

4.5 The Office of the Information Commissioner is funded directly from the consolidated fund managed by NSW Treasury. This will allow the Information Commissioner to enter into budget negotiations directly with Treasury.¹⁰ The government has already pledged substantial funding indicating that the Information Commissioner “will receive at

2. See *Government Information (Public Access) Act 2009* (NSW) s 5.

3. *Government Information (Public Access) Act 2009* (NSW) s 14.

4. New South Wales, *Parliamentary Debates*, Legislative Assembly, 17 June 2009, 16225 (The Hon Nathan Rees, Premier).

5. *Government Information (Information Commissioner) Act 2009* (NSW) s 44.

6. *Government Information (Information Commissioner) Act 2009* (NSW) pt 4. The Privacy Commissioner’s reporting requirements vary; see para 5.5.

7. *Government Information (Information Commissioner) Act 2009* (NSW) s 36-37.

8. *Government Information (Information Commissioner) Act 2009* (NSW) s 38.

9. New South Wales, *Parliamentary Debates*, Legislative Assembly, 23 June 2009, 16575 (Paul Pearce).

10. K V Taylor, *Submission* (22 October 2009) 5.

least \$3 million for 2009-2010 and \$4 million a year thereafter, a guaranteed minimum commitment”.¹¹ This commitment will, of course, need to be enhanced if the Office of the Information Commissioner is to incorporate the Office of the Privacy Commissioner as a Division.

4.6 In contrast to the Office of the Information Commissioner, Privacy NSW is administratively responsible to the Director General of the Department of Justice and Attorney General (“DJAG”).¹² DJAG is not responsible for the everyday operation of Privacy NSW. However, Privacy NSW is still subject to DJAG’s budget and financial policies.¹³ Judge Taylor notes that such administrative dependence can potentially undermine the performance of statutory functions by the Privacy Commissioner. In principle, the Privacy Commissioner requires the same level of administrative independence currently afforded to the Information Commissioner to operate effectively.¹⁴ Privacy NSW’s lack of resources and the consequent impact on its ability to fulfil its statutory functions have been cited frequently since its establishment.¹⁵ In 2002,

11. New South Wales, *Parliamentary Debates*, Legislative Assembly, 17 June 2009, 16225 (The Hon Nathan Rees, Premier).

12. Privacy NSW, *Annual Report 2008/2009* (2009) 8.

13. Privacy NSW, *Annual Report 2008/2009* (2009) 23.

14. K V Taylor, *Submission* (22 October 2009) 4-5.

15. “[W]e submit that the effectiveness of the Commissioner and Privacy NSW has been seriously limited by lack of resources. Taking into account the additional resources provided for functions under the separate *Health Records and Information Privacy Act 2002*, the Commissioner’s office is hardly enlarged from its predecessor the Privacy Committee, which had a much more limited range of functions. Compared to privacy regulatory agencies in equivalent jurisdictions, (principally Privacy Victoria, the Office of the Federal Privacy Commissioner, and the New Zealand and Hong Kong Commissioners’ offices) Privacy NSW is significantly under-resourced.”: Australian Privacy Foundation, *New South Wales Attorney-General’s Department: Review of the Privacy and Personal Information Protection Act 1998, Submission by the Australian Privacy Foundation* (Australian Privacy Foundation, May 2004) 8, <www.privacy.org.au> at 16 December 2009; “[T]he NSW Office of the Privacy Commissioner is significantly under-resourced, impeding the effective resolution of privacy complaints by consumers, such complaints typified by significant delays in case management and waiting lists.”: Combined Community Legal Centres’ Group (NSW) Inc, *Submission on the Draft Report, Investigation into the Burden of Regulation in NSW and Improving Regulatory Efficiency* (IPART, 18 August 2008) 3, <www.ipart.nsw.gov.au> at 16 December 2009; “Privacy NSW does not have the resources required to carry out their tasking under the PIPP Act”: Privacy NSW,

former Privacy Commissioner, Chris Puplick pointed out that the Office was “grossly under-resourced”, with only six staff – the same number that the former Privacy Committee had some 20 years previously – compared with Privacy Victoria’s 15 staff.¹⁶ In 2008-2009 Privacy NSW had a total of seven staff, some of whom work part time.¹⁷ It is evident that resource issues have not improved over time. Privacy NSW would likely be better resourced if it were an integral part of the Office of the Information Commissioner.¹⁸

4.7 An alternative would be to re-establish the Office of the Privacy Commissioner on the same footing as the Office of the Information Commissioner. It is unlikely that such an approach will operate successfully in NSW. Invariably, either privacy or FOI will end up better resourced and one should not be given preference over the other. Merging the administration would avoid this difficulty and ensure equal weight is given to both FOI and privacy.

4.8 The enactment of the GIPA Act presents a unique opportunity to enhance privacy protection in NSW, re-evaluate the current administration of privacy and FOI, and rectify funding problems. Two submissions we received highlighted that “[t]he prospect of significant FOI reform offers an opportunity to create a powerful and effective Information Commissioner with both FOI and Privacy responsibilities”. These submissions point to the United Kingdom, Canada and the Northern Territory as examples of sole authority jurisdictions where Information Commissioners exercise responsibilities relating to privacy and FOI effectively.¹⁹

Annual Report 2001-02 (2003) 69 (quoting from the “Andersen Report”, an independent resourcing review of Privacy NSW conducted during 2001-2002 funded by the Attorney General’s Department).

16. C Puplick, “NSW Privacy Commissioner Rejects Ministerial Interference” (2002) 9(7) *Privacy Law and Policy Reporter* 133, 135.
17. Privacy NSW, *Annual Report 2008/2009* (2009) 8.
18. Privacy NSW notes that “with greater resources, there is capacity for greater community outreach on privacy issues, particularly if co-located with the Information Commissioner’s Office”: Privacy NSW, *Annual Report 2008/2009* (2009) 7.
19. Australian Privacy Foundation, *Submission to CP 3*, 15; Cyberspace Law and Policy Centre, *Submission to CP 3*, 36. This view is supported by the Consumer Credit Legal Centre NSW, *Submission to CP 3*, 1.

COMMON FOCUS – GOVERNMENT INFORMATION

4.9 The object of the GIPA Act is to “open government information to the public”.²⁰ While there are aspects of NSW privacy legislation that extend beyond government information, the majority of the provisions in PPIPA apply to personal information held by government agencies and government responsibilities in relation to the management of personal information.²¹ As Judge Taylor puts it: “the core focus of this State’s privacy and public access laws is *government*”.²²

4.10 There are two qualifications to the government information focus of NSW privacy legislation. First, the Privacy Commissioner has powers in relation to health information held by the private sector under HRIPA.²³ As we have previously indicated, our tentative view is that HRIPA should no longer apply to the handling of personal information by private sector organisations.²⁴ This accords with moves to create uniform laws protecting privacy across Australia.²⁵ Health information

20. *Government Information (Public Access) Act 2009* (NSW) s 3.

21. Upon introducing the Privacy and Personal Information Protection Bill 1998 (NSW) to Parliament the then-Attorney General noted that “the objects of the bill are: to promote the protection of the privacy of individuals; to specify information protection principles that relate to the collection, use and disclosure of personal information held by public sector agencies; to require public sector agencies to comply with these principles; to provide for the making of privacy codes of practice for the purpose of protecting the privacy of individuals; to provide for the making of complaints about privacy-related matters, and for review of conduct that involves the contravention of the information protection principles or privacy codes of practices; and to establish an office of Privacy Commissioner and to confer on the Privacy Commissioner functions relating to privacy and the protection of personal information”: *New South Wales, Parliamentary Debates, Legislative Council, 17 September 1998, 7599* (The Hon Jeffrey Shaw, Attorney General).

22. K V Taylor, *Submission* (22 October 2009) 3.

23. *Health Records and Information Privacy Act 2002* (NSW) pt 7.

24. NSW Law Reform Commission, *Privacy Legislation in New South Wales*, Consultation Paper No 3 (2008) 4, Proposal 3.

25. See Australian Law Reform Commission, *For Your Information: Australian Privacy Law and Practice*, Report No 108 (2008), vol 1, Recommendation 3-1. The Australian Government has agreed in principle: Australian Government, *Enhancing National Privacy Protection, Australian Government First Stage Response to the Australian Law Reform Commission Report 108 For Your Information: Australian Privacy Law and Practice* (Department of Prime Minister and Cabinet, 2009) 21, <http://www.dpmc.gov.au/privacy/alrc_docs/stage1_au_govt_

held by the public sector would continue to fall under NSW privacy legislation.

4.11 Secondly, the Privacy Commissioner is also able to conduct inquiries and investigations as well as receive and conciliate complaints regarding “privacy related matters” *generally*.²⁶ Additionally the Privacy Commissioner can provide advice, make public statements, conduct research and education as well as prepare and publish reports in relation to privacy *generally*.²⁷ Privacy NSW has noted that their “residual discretion and limited jurisdiction to investigate physical privacy matters and privacy matters that do not only relate to data protection” is “exercised sparingly”.²⁸ Judge Taylor notes that this residual function can lead to confusion in the community regarding the focus of the Privacy Commissioner’s powers.²⁹ The need for residual powers may not be so pressing if, as we have recommended, there is a statutory cause of action for invasion of privacy.³⁰ However, in the absence of this cause of action we support retaining this important residual power and believe that it could be exercised more frequently if the Privacy Commissioner has the resources to do so within the confines of the Office of the Information Commissioner.

CONSISTENT TREATMENT AND COOPERATIVE ARRANGEMENTS

4.12 The GIPA Act, PPIPA and HRIPA all provide avenues to access government information. Further, under the GIPA Act, disclosures that reveal “personal information” or contravene an IPP or HPP are included in the list of public interest considerations against disclosure.³¹ Agency officers will be required to determine whether information should be disclosed, and also determine what piece of legislation provides a basis for this disclosure. A single office administering privacy and FOI would

response.pdf> at 21 December 2009.

26. *Privacy and Personal Information Protection Act 1998* (NSW) s 36(2)(k), s 36(2)(l), s 45(1).

27. *Privacy and Personal Information Protection Act 1998* (NSW) s 36(2)(g), s 36(2)(h), s 36(2)(f), s 36(2)(l), s 36(2)(j).

28. Privacy NSW, *Annual Report 2008/2009* (2009) 14.

29. K V Taylor, *Submission* (22 October 2009) 3.

30. See NSW Law Reform Commission, *Invasion of Privacy*, Report No 120 (2009).

31. *Government Information (Public Access) Act 2009* (NSW) s 14, table, note 3.

help ensure that agencies and individuals receive consistent information and advice.³² For the reasons discussed above, such a model could also ensure that a balanced approach is adopted, especially when addressing areas where privacy and FOI conflict.³³ This may be extremely beneficial in circumstances such as complaints handling, the development of guidelines and reporting.

4.13 It has been suggested that since the GIPA Act encourages proactive and informal release of government information, agencies will need to coordinate staff in diverse areas such as communications, information technology and policy to ensure compliance with their obligations under the GIPA Act.³⁴ Because of the close relationship between the GIPA Act and privacy legislation, the same agency staff members will also have to be aware of obligations under privacy legislation. This suggests that coordinated assistance could be provided to agencies emphasising the complementary relationship between the legislation and how to resolve areas of conflict. A single office responsible for both privacy and FOI could help foster closer more productive relationships with agencies and allow for coordinated privacy and FOI training.³⁵ The challenge, however, is to ensure that the proposed structure gives equal weight to both privacy and FOI.³⁶

4.14 As discussed, there is a chance that there could be a perceived conflict of interest and inherent tension with a sole authority responsible for both disclosure of government information and the protection of privacy of personal information held by government.³⁷ We believe that in

32. The NSW Department of Community Services acknowledged that “[t]he relationship between PPIPA and GIPAA would suggest that it may be appropriate to establish a single commissioner to provide oversight of the administration of the two Acts”: NSW Department of Community Services, *Submission* (30 October 2009) 2.

33. See also K V Taylor, *Submission* (22 October 2009) 3-4. See para 3.15-3.21.

34. K V Taylor, *Submission* (22 October 2009) 3.

35. Privacy NSW notes that co-location presents the opportunity to “revitalise its operations and develop strong, cooperative relationships with agencies in the provision of balanced guidance on their open government and privacy obligations”: Privacy NSW, *Annual Report 2008/2009* (2009) 7.

36. Australian Privacy Foundation, *Submission to CP 3*, 15; Cyberspace Law and Policy Centre, *Submission to CP 3*, 36. This view is supported by the Consumer Credit Legal Centre NSW, *Submission to CP 3*, 1.

37. See para 3.6-3.14.

most cases a responsible commissioner will be able to balance considerations under NSW privacy and FOI legislation. However, checks should be in place to ensure that obligations under *both* Acts are being met. By creating a single authority with an Information Commissioner who has overarching responsibilities, and a Privacy Division headed by a Deputy Information Commissioner responsible only for privacy, the authority can foster cooperative relationships with agencies, ensure consistent and balanced advice is provided as well as ensure that the objects of both privacy and FOI are being met.

APPOINTMENT OF THE PRIVACY COMMISSIONER

RECOMMENDATION 6

The Privacy Commissioner should be appointed and removed in the same manner as the Information Commissioner.

4.15 Currently the Governor appoints the Privacy Commissioner upon the recommendation of the Minister³⁸ and terms and conditions of appointment are subject to approval by the Minister.³⁹ The Governor appoints the Information Commissioner and any proposal for appointment is subject to veto by the Joint Committee.⁴⁰ Under the Queensland sole authority model, the Information Commissioner, Privacy Commissioner and Right to Information Commissioner are all appointed in the same manner.⁴¹ However, the Privacy Commissioner and the Right to Information Commissioner are expressly designated as “staff of the OIC”.⁴²

38. *Privacy and Personal Information Protection Act 1998* (NSW) s 34.

39. *Privacy and Personal Information Protection Act 1998* (NSW) sch 1.

40. *Government Information (Information Commissioner) Act 2009* (NSW) s 4-5.

41. All appointed by “the Governor in Council”. Minister must consult with parliamentary committee about selection process and appointment. Information Commissioner: *Right to Information Act 2009* (Qld) s 134-135; Right to Information Commissioner: *Right to Information Act 2009* (Qld) s 150-151; Privacy Commissioner: *Information Privacy Act 2009* (Qld) s 144-145.

42. *Right to Information Act 2009* (Qld) s 147(2); *Information Privacy Act 2009* (Qld) s 141(2).

4.16 In contrast, in the United Kingdom, the Information Commissioner is permitted to appoint deputy commissioners.⁴³ The Ontario model allows the Information Commissioner to appoint “assistant commissioners” from the Commissioner’s staff.⁴⁴

4.17 Given the importance of the position within the Office of the Information Commissioner, it is our view that the Privacy Commissioner should be appointed and removed in the same manner as the Information Commissioner.

THE RELATIONSHIP BETWEEN THE COMMISSIONERS

4.18 The Public Interest Advocacy Centre (“PIAC”) submits that if privacy and FOI are brought within the Office of the Information Commissioner, two deputy commissioners should be appointed, one responsible for privacy and another responsible for FOI, noting that:

The advantage of this proposal is that it would ensure that the Office of the Information Commissioner is uniquely placed to consider questions about how to balance privacy issues against the public interest in maximising the disclosure of government information to the public.⁴⁵

4.19 PIAC warns that the advantages of a sole authority model would be lost if deputy commissioners are not appointed and the Privacy Commissioner is simply subsumed within the Office of the Information Commissioner. It is essential that there this a “separate champion” who can advocate to the Information Commissioner on privacy issues.⁴⁶ Judge Taylor also supports the implementation of express statutory provisions allowing for the appointment of a deputy commissioner with the designation of “Privacy Commissioner”.⁴⁷

4.20 In our view, the Information Commissioner should be the head of the Office of the Information Commissioner and be able to perform functions under the GIPA Act and the GIIC Act while also being responsible for ensuring that the objectives of NSW privacy legislation

43. *Data Protection Act 1998* (UK) c 29, sch 5 para 4.

44. *Freedom of Information and Protection of Privacy Act*, RSO 1990, c F.31, s 4(4).

45. Public Interest Advocacy Centre, *Submission* (21 October 2009) 2. See also Public Interest Advocacy Centre, *Submission to CP 3*, 33-34.

46. Public Interest Advocacy Centre, *Submission* (21 October 2009) 2.

47. K V Taylor, *Submission* (22 October 2009) 6.

are being met. The Information Commissioner should be responsible for the strategic direction of the office. A Division should be established within the Office of the Information Commissioner responsible for the administration of NSW privacy legislation (“Privacy Division”). The Privacy Division should consist of the Privacy Commissioner, who is head of the Division, as well as staff allocated to the Division

4.21 The existence of a Privacy Division implies that there will be at least one other Division within the Office of the Information Commissioner, presumptively, a “GIPA Division” to deal with matters of access to government information. However, this may not prove to be a sufficient, or the most optimal, organisational structure. In particular, bearing in mind the similar functions performed by the Information and Privacy Commissioners – for example, in relation to complaint handling, advice, education and training⁴⁸ – the Information Commissioner may well decide to have separate divisions, or sub-divisions, dealing with such matters. Nothing in this report is intended to affect the ability of the Information Commissioner to deal with operational issues with the flexibility that will be necessary.⁴⁹ This includes the appointment, if necessary, of further Deputy Commissioners to assist the Information Commissioner in the management of particular Divisions.

4.22 In making this recommendation, we have carefully considered the desirability of adopting the model proposed by PIAC, namely, a single Information and Privacy Commissioner with two deputy or assistant commissioners, one responsible for privacy, the other for freedom of information. In the final analysis, this model may not differ significantly from the model that we propose. However, we believe that our proposed model is more suited to the circumstances of NSW and will better enhance the protection of privacy in this State. In particular, the Privacy Commissioner, a statutory officer appointed in the same manner as the Information Commissioner, will continue as the independent voice of privacy in NSW (not of privacy qualified by open government concerns). The Privacy Commissioner will bring a public profile to the Office of the Information Commissioner, and will have a status within the Office, that will ensure that privacy is not marginalised. This would not necessarily be so if the Privacy Commissioner were simply a Deputy Commissioner who did not have statutorily defined functions (but, for example,

48. See para 5.4.

49. See para 5.9 (a) and Recommendations 8 and 12(4).

particular delegated functions). The role of the Information Commissioner, who will share the responsibility for promoting the objectives of privacy legislation,⁵⁰ will strengthen the protection of privacy in this State.

4.23 Moreover, as we note in Chapter 5, the current legislative framework not only creates similarities, but also key differences, in the functions and powers of the Information and Privacy Commissioners.⁵¹ Our proposed model addresses these similarities through the creation of a single Office responsible for privacy and access to government information. Our model also recognises the differences by maintaining separate Commissioners with defined functions within the Office. If there were to be a single Information and Privacy Commissioner, the powers of the Commissioner may need to be clarified where powers under the legislation are dissimilar and their exercise impacts differently on privacy and on access to government information, as where there is a power to determine an issue under the GIPA Act, but no power to determine a like issue under PPIPA.⁵²

4.24 Our model could, conceivably, accommodate PIAC's recommendation that the title of "Information Commissioner" be changed to that of "Information and Privacy Commissioner".⁵³ We do not support this proposal. "Information Commissioner" sufficiently encompasses the Commissioner's primary responsibilities under both FOI and privacy legislation. Moreover, we believe it would be confusing to have a "Privacy Commissioner" in addition to an "Information and Privacy Commissioner". PIAC's recommendation is, however, important in drawing attention to a matter that must not be overlooked in the appointment of an Information Commissioner in this State, namely, that the person appointed must have a deep understanding of privacy issues as well as issues relating to access to government information.

50. See para 5.8 and Recommendation 7.

51. See para 5.4, 5.5.

52. We address the powers of the Privacy Commissioner in the final report of the privacy reference.

53. See Public Interest Advocacy Centre, *Submission* (21 October 2009) 3.

NATIONAL UNIFORMITY

4.25 The model we propose here is closely aligned with the shared responsibilities model proposed by the Commonwealth Government while also being cognisant of features unique to NSW.⁵⁴ The Commonwealth Government indicated that:

The co-location of FOI and Privacy in this new structure will strengthen and elevate the role and importance of privacy laws.

In particular, this co-location will assist in the development of guidance and policy on issues relating to the interaction between the two Acts, and contribute to efforts to ensure individuals are able to obtain access to their own personal information through simple and user-friendly processes.⁵⁵

-
54. The Public Interest Advocacy Centre notes that a sole authority model with appropriate deputies appointed would be consistent with the proposal by the Commonwealth Government: Public Interest Advocacy Centre, *Submission* (21 October 2009) 2. See also K V Taylor, *Submission* (22 October 2009) 6.
55. Australian Government, *Enhancing National Privacy Protection, Australian Government First Stage Response to the Australian Law Reform Commission Report 108 For Your Information: Australian Privacy Law and Practice* (Department of Prime Minister and Cabinet, 2009) 66, <http://www.dpmc.gov.au/privacy/alrc_docs/stage1_au_govt_response.pdf> at 21 December 2009.

5. **Consequential amendments**

- Functions of the Information Commissioner and Privacy Commissioner
- Privacy Advisory Committee
- Oversight by the Joint Committee
- Review of administrative arrangements

5.1 The implementation of the recommendations in the last Chapter will require the amendment of relevant legislation relating to:

- the functions of the Information and Privacy Commissioners;
- the liabilities and immunities of the Commissioners and of the staff of the Office of the Information Commissioner;
- the Privacy Advisory Committee;
- oversight by the Joint Committee; and
- provision for a review of the administrative arrangements recommended in Chapter 4.

FUNCTIONS OF THE INFORMATION COMMISSIONER AND PRIVACY COMMISSIONER

5.2 Our recommended model for the creation of a Privacy Division in the Office of the Information Commissioner results in the Office containing two independently appointed statutory officers. The functions and powers of the Information Commissioner are contained principally in the GIIC Act and the GIPA Act; those of the Privacy Commissioner in PPIPA and HRIPA. This section considers whether or not there should be any redistribution of the powers of the Information Commissioner and the Privacy Commissioner when the Privacy Commissioner heads the Privacy Division within the Office of the Information Commissioner.

5.3 To answer this question, we first set out the existing powers of the Information and Privacy Commissioners, and then consider the ways in which those powers should be divided under the administrative arrangements proposed in Chapter 4.

Existing powers of the Information and Privacy Commissioners

5.4 There are similarities in the *nature* of the functions performed by Offices of the Information and Privacy Commissioners.¹ While there may be minor differences, these functions include:

- (a) *Promoting the Acts*: The Information Commissioner is required to promote the objects of the GIPA Act and the Privacy

1. See K V Taylor, *Submission* (22 October 2009) 1-2.

Commissioner is required to promote the IPPs, HPPs and the guidelines he or she issues.²

- (b) *Compliance*: Both Commissioners are required to assist agencies in complying with the legislation they administer.³
- (c) *Guidelines*: Both Commissioners are required to issue guidelines.⁴
- (d) *Subject matter*: Both Commissioners' functions relate to information held by public sector agencies.⁵ However the Privacy Commissioner's functions also go beyond this.⁶
- (e) *Advice*: Both Commissioners are required to provide advice. The Information Commissioner is required to provide advice on any matters relevant to the GIPA Act and the Privacy Commissioner is required to provide advice on "the

-
- 2. *Privacy and Personal Information Protection Act 1998* (NSW) s 36; *Health Records and Information Privacy Act 2002* (NSW) s 58(a); *Government Information (Public Access) Act 2009* (NSW) s 17;
 - 3. *Privacy and Personal Information Protection Act 1998* (NSW) s 36; *Health Records and Information Privacy Act 2002* (NSW) s 58(c); *Government Information (Public Access) Act 2009* (NSW) s 17.
 - 4. The Information Commissioner may issue guidelines in relation to the public interest considerations in favour of disclosure; the public interest considerations against disclosure; agencies' functions under the GIPA Act; public rights under the GIPA Act; publication guides; and discounted processing charges where there is a "special public benefit": *Government Information (Public Access) Act 2009* (NSW) s 12(3), s 14(3), s 17(d), s 17(e), s 22(2), s 66(3). The Privacy Commissioner may publish guidelines in relation to the protection of personal or health information and "other privacy matters"; retention and amendment of health information held by private sector persons; any matter referred to the Privacy Commissioner that the Minister considers should be the subject of guidelines; and in relation to particular Health Privacy Principles: *Privacy and Personal Information Protection Act 1998* (NSW) s 36(2)(b); *Health Records and Information Privacy Act 2002* (NSW) s 58(b), s 24, s 64(3), sch 1 cl 3, sch 1 cl 4, sch 1 cl 10.
 - 5. Scope of *Privacy and Personal Information Protection Act 1998* (NSW); Scope of *Government Information (Public Access) Act 2009* (NSW).
 - 6. See para 4.9-4.11.

protection of personal information and the privacy of individuals".⁷

- (f) *Complaints*: Both Commissioners can receive complaints in relation to contraventions of the legislation they administer.⁸
- (g) *Inquiries/Investigations*: Both Commissioners can conduct inquiries and investigations.⁹ However, the Privacy Commissioner's powers are slightly more limited¹⁰ and the Information Commissioner has reporting requirements linked to investigative powers.¹¹
- (h) *Coercive powers*: Both Commissioners have coercive powers. They can compel agencies to provide a statement and/or documents. Exceptions apply in the case of legal professional privilege.¹² Interestingly, this exception cannot be used by an agency (but can be used by others) where the Information Commissioner exercises coercive powers.¹³ Additionally, the Information Commissioner may enter and inspect premises occupied or used by an agency and inspect any record or

7. *Privacy and Personal Information Protection Act 1998* (NSW) s 36; *Government Information (Public Access) Act 2009* (NSW) s 17(b). See also *Health Records and Information Privacy Act 2002* (NSW) s 58(e).

8. *Privacy and Personal Information Protection Act 1998* (NSW) s 45; *Government Information (Information Commissioner) Act 2009* (NSW) s 17.

9. *Privacy and Personal Information Protection Act 1998* (NSW) s 37-39; *Government Information (Information Commissioner) Act 2009* (NSW) pt 3 div 3-4.

10. "[D]oes not confer any function on the Privacy Commissioner that may be exercised in relation to the Independent Commission Against Corruption, the Inspector of the Independent Commission Against Corruption, the staff of the Inspector of the Independent Commission Against Corruption, Police Integrity Commission, Inspector of the Police Integrity Commission, staff of the Inspector of the Police Integrity Commission or New South Wales Crime Commission": *Privacy and Personal Information Protection Act 1998* (NSW) s 38(2).

11. For example, where an investigation reveals a failure to exercise agency functions in accordance the GIPA Act the Information Commissioner must report this to the Minister, the principal officer of the agency and in certain cases the head of the Department of Premier and Cabinet: *Government Information (Information Commissioner) Act 2009* (NSW) s 24.

12. *Privacy and Personal Information Protection Act 1998* (NSW) s 37(1)-(2); *Government Information (Information Commissioner) Act 2009* (NSW) s 24(1), s 26-27.

13. *Government Information (Information Commissioner) Act 2009* (NSW) s 27.

thing in or on the premises for the purposes of an investigation.¹⁴

- (i) *ADT*: Both Commissioners have the right appear in proceedings before the Administrative Decisions Tribunal (“ADT”).¹⁵
- (j) *Reporting*: Both Commissioners have reporting powers but this power varies in scope.¹⁶
- (k) *Staff/Delegation*: Both Commissioners have staff and have the power to delegate particular functions to staff members.¹⁷ However, the Privacy Commissioner has the additional power to delegate, in writing, the power of sub-delegation.¹⁸
- (l) *Expert assistance*: Both Commissioners are able to engage expert assistance however the Privacy Commissioner must first obtain the permission of the Minister.¹⁹
- (m) *Education/Training/Research*: Both Commissioners undertake education and/or training. The Information Commission is required to provide “information ... assistance and training” on matters relevant to the GIPA Act.²⁰ The Privacy Commissioner is required to “conduct education programs, and to disseminate information, for the purpose of promoting

14. *Government Information (Information Commissioner) Act 2009* (NSW) s 26.

15. *Privacy and Personal Information Protection Act 1998* (NSW) s 55; *Government Information (Public Access) Act 2009* (NSW) s 104.

16. *Privacy and Personal Information Protection Act 1998* (NSW) s 40, s 64, s 65; *Government Information (Information Commissioner) Act 2009* (NSW) s 24, s 36-38. See para 5.5.

17. *Privacy and Personal Information Protection Act 1998* (NSW) s 35, s 44; *Government Information (Information Commissioner) Act 2009* (NSW) s 12- 13.

18. *Privacy and Personal Information Protection Act 1998* (NSW) s 44(2);

19. *Privacy and Personal Information Protection Act 1998* (NSW) s 35(4); *Government Information (Information Commissioner) Act 2009* (NSW) s 16.

20. *Government Information (Information Commissioner) Act 2009* (NSW) s 17(b).

the protection of the privacy of individuals”.²¹ The Privacy Commissioner is additionally required to conduct research.²²

5.5 There are also key ways in which the functions of the Information Commissioner are different from the functions of the Privacy Commissioner:

- (a) *Reporting*: The Information Commissioner reports directly to Parliament. The Privacy Commissioner’s reporting requirements are less extensive with additional responsibility given to the Minister.²³ Privacy NSW is also financially dependent on the Department of Justice and Attorney General.²⁴
- (b) *Review*: The Information Commissioner has expansive powers to review agency conduct under pt 5 of the GIPA Act. The Privacy Commissioner only has the power to oversee internal reviews conducted by agencies.²⁵ The Information Commissioner does not play an equivalent role under the GIPA Act.
- (c) *Subject matter*: While both PPIPA and the GIPA Act apply to information held by public sector agencies, PPIPA also applies to “privacy related matters”.²⁶

21. *Privacy and Personal Information Protection Act 1998* (NSW) s 36(2)(i).

22. *Privacy and Personal Information Protection Act 1998* (NSW) s 36(2)(f); *Health Records and Information Privacy Act 2002* (NSW) s 58(d).

23. The Privacy Commissioner’s reporting requirements vary in that the Commissioner is required to report annually to the Minister on work and activities, not directly to Parliament. The Privacy Commissioner, like the Information Commissioner, also has the power to make a special report to Parliament. Unlike the Information Commissioner, the Privacy Commissioner is not required to report annually on the operation of legislation: *Privacy and Personal Information Protection Act 1998* (NSW) s 64- 65.

24. See para 4.6.

25. *Privacy and Personal Information Protection Act 1998* (NSW) s 54.

26. *Privacy and Personal Information Protection Act 1998* (NSW) s 36. The Privacy Commissioner can investigate complaints about the “alleged violation of, or interference with, the privacy of an individual” and is not limited to information held by public sector agencies: See para 4.9-4.11.

- (d) *Codes of Practice/Public Interest Directions/Privacy Management Plans*: The Privacy Commissioner has the power to initiate, develop and submit privacy codes of practice under PPIPA and make submissions to the Minister in relation to the draft code.²⁷ The power to make the code remains with the Minister. The Privacy Commissioner can also make a written direction exempting an agency from compliance with an IPP or code with approval from the Minister.²⁸ Additionally, the Privacy Commissioner is required to assist agencies in preparing and implementing privacy management plans.²⁹
- (e) *Oversight/Advisory*: The Joint Committee oversees the functions of the Information Commissioner.³⁰ There is no oversight committee under PPIPA. However, the Act does allow for the establishment of a Privacy Advisory Committee. The Joint Committee monitors and reviews the exercise of Commissioner functions, reports directly to Parliament and recommends changes to Parliament; whereas the Advisory Committee can only provide advice to the Privacy Commissioner and Minister.³¹
- (f) *Injunctive power*: The Information Commissioner may apply to the Supreme Court to obtain an injunction where a person is engaged in conduct, or failing to perform an act, in contravention of an Information Act.³² A similar power is not available under NSW privacy legislation.
- (g) *Standing*: The Information Commissioner has the power to “bring proceedings by way of judicial review in connection with the exercise of the functions of an agency under the

27. *Privacy and Personal Information Protection Act 1998* (NSW) s 31.

28. *Privacy and Personal Information Protection Act 1998* (NSW) s 41.

29. *Privacy and Personal Information Protection Act 1998* (NSW) s 36(2)(e).

30. *Government Information (Information Commissioner) Act 2009* (NSW) s 44.

31. *Privacy and Personal Information Protection Act 1998* (NSW) s 61; *Government Information (Information Commissioner) Act 2009* (NSW) s 44.

32. *Government Information (Information Commissioner) Act 2009* (NSW) s 28.

GIPA Act”.³³ The Privacy Commissioner does not have comparable power under PPIPA.

- (h) *Regulations*: The Minister must consult with the Information Commissioner prior to recommending the creation of regulations under the GIPA Act.³⁴ There is no such requirement under PPIPA.³⁵

Division of functions under proposed model

5.6 Under our proposed model, privacy functions will need to be divided between the Information Commissioner and the Privacy Commissioner to reflect the role of the Information Commissioner as head of the Office but also to ensure that the Privacy Commissioner is able effectively to discharge discrete and statutorily expressed functions. Our starting point is that, as at present, the Information Commissioner should exercise powers under an Information Act, while the Privacy Commissioner should exercise powers under privacy legislation. The fact that functions are exercised under separate pieces of legislation means that the potential for conflict between the functions of the two Commissioners is reduced. There may, of course, be disagreement between the two Commissioners at the point at which FOI and privacy legislation intersect; that is, where the question arises whether, in given circumstances, a public interest consideration against the disclosure of personal information amounts to an overriding interest sufficient to defeat the presumption in favour of the disclosure of government information. The institutional structure implies that, in such situations, the view of the Information Commissioner prevails. We now consider how relevant legislation needs to be amended to achieve this result.

5.7 The powers, functions and obligations of the Information and Privacy Commissioners should be divided in the following ways:

- Functions to be performed by both the Information Commissioner and the Privacy Commissioner.
- Functions to be performed by the Information Commissioner.
- Functions to be performed by the Privacy Commissioner.

33. *Government Information (Information Commissioner) Act 2009* (NSW) s 28(5).

34. *Government Information (Public Access) Act 2009* (NSW) s 129(3).

35. *Privacy and Personal Information Protection Act 1998* (NSW) s 71.

- Functions to be performed by the Privacy Commissioner with the approval of the Information Commissioner.

This will help overcome the shortcomings of the shared responsibilities model proposed by the Commonwealth government in that there is clear division of functions under the relevant legislation. The approval requirements ensure that consistent advice emanates from the Office of the Information Commissioner.

Functions to be performed by both the Information Commissioner and Privacy Commissioner

RECOMMENDATION 7

The *Privacy and Personal Information Protection Act 1998* (NSW) and the *Health Records and Information Privacy Act 2002* (NSW) should be amended so that, in addition to the Privacy Commissioner, the Information Commissioner has the function of promoting the objects of the legislation (including the protection of individual privacy and the promotion of the Information Protection Principles and the Health Privacy Principles).

5.8 The GIIC Act confers on the Information Commissioner powers under that or any other Act.³⁶ Under the proposed model, one of the functions of the Information Commissioner, as head of the Office of Information Commissioner, will be to promote the policy objectives of privacy legislation, including the protection of individual privacy. In our view, this should be spelled out in privacy legislation.

36. *Government Information (Information Commissioner) Act 2009* (NSW) s 14.

Functions to be performed by the Information Commissioner

RECOMMENDATION 8

The Information Commissioner should be responsible for:

- (1) making annual reports to Parliament in relation to the work and activities of the Office of the Information Commissioner including the Privacy Division; and
- (2) allocating staff to the Privacy Division.

The staff of the Privacy Division may also perform other functions as directed by the Information Commissioner.

RECOMMENDATION 9

The Information Commissioner should be required to report annually to Parliament on the operation of privacy legislation.

RECOMMENDATION 10

The Minister should be required to consult with the Information Commissioner before creating regulations pursuant to privacy legislation.

5.9 The Information Commissioner should perform the following functions:

- (a) All staff should be staff of the Office of the Information Commissioner and the Information Commissioner should have the power to allocate staff to the Privacy Division as appropriate. To allow for flexibility, staff in the Privacy Division should be able to perform FOI functions as directed by the Information Commissioner.³⁷
- (b) The Information Commissioner should be responsible for annually reporting directly to government on the Office of the

37. The Privacy Commissioner may delegate functions to the staff of the Office of the Information Commissioner outside the Privacy Division, with Information Commissioner approval. See Recommendation 12(4).

Information Commissioner's work and activities in relation to PPIPA and HRIPA.³⁸

- (c) The Information Commissioner is required to provide annual reports to Parliament on the "operation of the GIPA Act".³⁹ The Information Commissioner should also be required to report on the operation of PPIPA and HRIPA.
- (d) Under the GIPA Act the Minister must consult with the Information Commissioner prior to recommending the creation of regulations.⁴⁰ There is no equivalent requirement under PPIPA and HRIPA.⁴¹ We believe that the Minister should also be required to consult with the Information Commissioner before creating regulations pursuant to privacy legislation.

Functions to be performed by the Privacy Commissioner

RECOMMENDATION 11

The Privacy Commissioner should perform the following:

- (1) preparing and implementing privacy management plans;
- (2) preparing and publishing personal information digests;
- (3) delegation of Privacy Commissioner functions to staff of the Privacy Division;
- (4) promoting the adoption of, and monitoring compliance with, the Information Protection Principles and Health Privacy Principles;

38. *Government Information (Information Commissioner) Act 2009* (NSW) s 36.

39. "The Commissioner is, as soon as practicable after 30 June in each year, to prepare and publish a report on the operation of the GIPA Act (generally, across all agencies) for the 12 months preceding that date and is to furnish the report to the Presiding Officer of each House of Parliament": *Government Information (Information Commissioner) Act 2009* (NSW) s 37.

40. *Government Information (Public Access) Act 2009* (NSW) s 129(3).

41. See *Privacy and Personal Information Protection Act 1998* (NSW) s 71; *Health Records and Information Privacy Act 2002* (NSW) s 75.

- (5) assisting agencies in adopting and complying with the Information Protection Principles, Health Privacy Principles and privacy codes of practice;
- (6) conducting research as well as collecting and collating information, about any matter relating to the protection of personal information or health information and the privacy of individuals;
- (7) providing advice on matters relating to the protection of personal information or health information and the privacy of individuals;
- (8) conducting education programs, and disseminating information for the purposes of promoting the protection of the privacy of individuals;
- (9) receiving, investigating and conciliating complaints about privacy related matters;
- (10) conducting inquiries and investigations into privacy related matters;
- (11) overseeing internal review processes; and
- (12) receiving notification from, and appearing before, the Administrative Decisions Tribunal where applications are made under privacy legislation.

5.10 The following should be the functions of the Privacy Commissioner:

- (a) Preparing and implementing privacy management plans.⁴²
- (b) Preparing and publishing personal information digests.⁴³
- (c) Delegating Privacy Commissioner functions. The Privacy Commissioner should be permitted to delegate their functions to authorised persons. An authorised person should be a member of the Privacy Division or any other member of the Office of the Information Commissioner (with the approval of the Information Commissioner).⁴⁴

42. *Privacy and Personal Information Protection Act 1998* (NSW) s 33, s 36(2)(e).

43. *Privacy and Personal Information Protection Act 1998* (NSW) s 40.

44. See also Recommendation 12(4).

- (d) Promoting the adoption of, and monitoring compliance with, the IPPs and HPPs.⁴⁵
- (e) Assisting agencies in adopting and complying with the IPPs, HPPs and privacy codes of practice.⁴⁶
- (f) Conducting research, as well as collecting and collating information, about any matter relating to the protection of personal information or health information and the privacy of individuals.⁴⁷
- (g) Providing advice on matters relating to the protection of personal information or health information and the privacy of individuals.⁴⁸
- (h) Conducting education programs, and disseminating information for the purposes of promoting the protection of the privacy of individuals.⁴⁹
- (i) Receiving, investigating and conciliating complaints about privacy related matters.⁵⁰
- (j) Conducting inquiries and investigations into privacy related matters.⁵¹

45. *Privacy and Personal Information Protection Act 1998* (NSW) s 36(2)(a); *Health Records and Information Privacy Act 2002* (NSW) s 58(a).

46. *Privacy and Personal Information Protection Act 1998* (NSW) s 36(2)(d); *Health Records and Information Privacy Act 2002* (NSW) s 58(c). The Privacy Commissioner also currently has the function of assisting organisations in adopting and complying with provisions relating to private sector persons and health information.

47. *Privacy and Personal Information Protection Act 1998* (NSW) s 36(2)(f); *Health Records and Information Privacy Act 2002* (NSW) s 58(d).

48. *Privacy and Personal Information Protection Act 1998* (NSW) s 36(2)(g); *Health Records and Information Privacy Act 2002* (NSW) s 58(e).

49. *Privacy and Personal Information Protection Act 1998* (NSW) s 36(2)(i).

50. *Privacy and Personal Information Protection Act 1998* (NSW) s 36(2)(k), s 50, pt 4 div 3; *Health Records and Information Privacy Act 2002* (NSW) s 42-47, s 58(f), s 65-67. There are slight variations in receipt and conciliation of complaints by the Information Commissioner under the GIIC Act: *Government Information (Information Commissioner) Act 2009* (NSW) pt 3 div 2.

- (k) Overseeing internal review processes.⁵²
- (l) Receiving notification from, and appearing before, the ADT in relation to proceedings under privacy legislation.⁵³

Functions to be performed by the Privacy Commissioner with the approval of the Information Commissioner

RECOMMENDATION 12

The Privacy Commissioner should perform the following functions with the approval of the Information Commissioner:

- (1) the creation and amendment of privacy codes of practice;
- (2) the making of public interest directions;
- (3) the making of special reports to Parliament;
- (4) the delegation of Privacy Commissioner functions to staff members of the Office of the Information Commissioner who are not part of the Privacy Division;
- (5) the engagement of the services of an expert for the purposes of exercising Privacy Commissioner functions;
- (6) the making of public statements on matters relating to the privacy of individuals generally;
- (7) the preparation and publication of reports and recommendations about any matter that concerns the need for, or desirability of, legislative, administrative or other action in the interest of the privacy of individuals; and

51. *Privacy and Personal Information Protection Act 1998* (NSW) s 36(2)(l), s 37-39, s 42; *Health Records and Information Privacy Act 2002* (NSW) s 59-61, s 63. The Information Commissioner currently has slightly different, and more extensive investigatory and coercive powers under the GIIC Act. For example, the Information Commissioner has the power to enter and inspect premises and inspect any record or thing in or on the premises for the purposes of an investigation under an Information Act. There are also variations in relation to privilege; an agency is not permitted to claim privilege with respect to the Information Commissioner's coercive entry and investigatory powers: *Government Information (Information Commissioner) Act 2009* (NSW) pt 3 div 3-4. See para 5.4-5.5.

52. *Privacy and Personal Information Protection Act 1998* (NSW) s 53-54.

53. *Privacy and Personal Information Protection Act 1998* (NSW) s 55(6), s 55(7); *Health Records and Information Privacy Act 2002* (NSW) s 50.

- (8) the creation and amendment of guidelines under privacy legislation.

5.11 We believe that the Privacy Commissioner should perform the following functions with the approval of the Information Commissioner. This will help to ensure the consistent and balanced approach to FOI and privacy that is the benefit of a single authority model.⁵⁴ It will also ensure that where the Information Commissioner and Privacy Commissioner disagree about the functions, the decision of the Information Commissioner will prevail. Powers and functions that should require approval include:

- (a) Functions in relation to developing and amending privacy codes of practice.⁵⁵
- (b) Functions in relation to public interest directions.⁵⁶
- (c) The power to make special reports to Parliament. The Information Commissioner is empowered to make special reports to Parliament “on any matter relating to the functions of the Commissioner” and we support the retention of this power under our proposed model.⁵⁷ Under PPIPA the Privacy Commissioner also has the power to make special reports to Parliament “on any matter arising in connection with the discharge of his or her functions”.⁵⁸ Special reports have previously been released stemming from investigations and complaints handled by the Privacy Commissioner.⁵⁹ The

54. See para 3.15-3.21.

55. *Privacy and Personal Information Protection Act 1998* (NSW) s 36(2)(c); *Health Records and Information Privacy Act 2002* (NSW) s 40.

56. *Privacy and Personal Information Protection Act 1998* (NSW) s 41; *Health Records and Information Privacy Act 2002* (NSW) s 62.

57. *Government Information (Information Commissioner) Act 2009* (NSW) s 38. The Information Commissioner could then submit special reports regarding the Commissioner’s FOI functions and the Commissioner’s limited privacy functions.

58. *Privacy and Personal Information Protection Act 1998* (NSW) s 65.

59. Privacy NSW, Special Report to NSW Parliament under section 65 of the Privacy and Personal Information Protection Act 1998, *Complaint by Ms Carol Atkins against Queenbeyan City Council*, Special Report No 1 (September 2001); Privacy

Privacy Commissioner should retain this power but it should only be exercised with the approval of the Information Commissioner.

- (d) Delegating functions to the staff of the Office of the Information Commissioner, who are not part of the Privacy Division.
- (e) Engaging the services of an expert for the purposes of exercising Privacy Commissioner functions.⁶⁰
- (f) Making public statements on matters relating to the privacy of individuals generally.⁶¹
- (g) Preparing and publishing reports and recommendations about any matter that concerns the need for, or desirability of, legislative, administrative or other action in the interest of the privacy of individuals.⁶²
- (h) Creating and amending guidelines under privacy legislation.⁶³

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

- 60. Previously the Privacy Commissioner required the approval of the Minister: *Privacy and Personal Information Protection Act 1998* (NSW) s 35(4).
- 61. *Privacy and Personal Information Protection Act 1998* (NSW) s 36(2)(h).
- 62. *Privacy and Personal Information Protection Act 1998* (NSW) s 36(2)(j).
- 63. *Privacy and Personal Information Protection Act 1998* (NSW) s 36(2)(b); *Health Records and Information Privacy Act 2002* (NSW) s 24, s 28(2), s 29, s 58(b), s 64, sch 1 cl 3, sch 1 cl 4, sch 1 cl 10.

Liabilities and immunities of Commissioners and staff

RECOMMENDATION 13

Provisions that create offences in relation to dealings with, or actions of, the Privacy Commissioner and staff members should apply to the Information Commissioner and all staff of the Office of the Information Commissioner exercising privacy functions.

RECOMMENDATION 14

Provisions that limit personal liability in relation to executing privacy functions should apply to the Information Commissioner, the Privacy Commissioner and any staff member exercising functions under privacy legislation.

5.12 It is an offence for the Privacy Commissioner or member of staff of the Privacy Commissioner to disclose information obtained in the course of their office unless the information was disclosed for the purposes of discharging functions under PPIPA or any other Act.⁶⁴ We believe this provision should apply to all of staff of the Office of the Information Commissioner exercising functions under privacy legislation.

5.13 Offences currently apply in relation to dealings with the Privacy Commissioner (or member of staff) with respect to functions under privacy legislation.⁶⁵ This includes where a person is hindering, obstructing or resisting the Commissioner or a member of staff in relation to their functions or falsely representing they are the Privacy Commissioner or member of staff.⁶⁶ We also believe this provision should apply to all of the staff of the Office of the Information Commissioner exercising functions under privacy legislation.

5.14 Section 66 limits personal liability where “a matter or thing done (or omitted to be done) by the Privacy Commissioner, a member of staff

64. *Privacy and Personal Information Protection Act 1998* (NSW) s 67; *Health Records and Information Privacy Act 2002* (NSW) s 68.

65. *Privacy and Personal Information Protection Act 1998* (NSW) s 68; *Health Records and Information Privacy Act 2002* (NSW) s 70. See also *Government Information (Information Commissioner) Act 2009* (NSW) s 43.

66. *Privacy and Personal Information Protection Act 1998* (NSW) s 68(2).

of the Privacy Commissioner ... or a person acting under the direction of the Privacy Commissioner" was done in good faith for the purposes of executing the Act.⁶⁷ A similar provision applies in the GIIC Act.⁶⁸ We believe that it should be made clear that limited liability extends to the staff of the Office of the Information Commissioner executing functions under privacy legislation.

PRIVACY ADVISORY COMMITTEE

RECOMMENDATION 15

The Privacy Advisory Committee should be replaced by an "Information Advisory Committee" with the function of assisting and advising the Information Commissioner and Privacy Commissioner on matters relating to the performance of their functions in relation to privacy and government information. The Committee should consist of:

- the Information Commissioner (chair);
- the Privacy Commissioner;
- two senior officers from agencies, nominated by the Minister in consultation with relevant Ministers;
- two persons with a special knowledge of, or interest in, matters affecting access to government information (who are not officers of agencies), nominated by the Minister; and
- two persons with special knowledge of, or interest in, matters affecting privacy of persons (who are not officers of agencies), nominated by the Minister.

5.15 Section 60 of PPIPA provides for the appointment of a Privacy Advisory Committee. The Committee consists of the Privacy Commissioner (chair), one member of the Legislative Assembly or Legislative Council nominated by the Minister and another member nominated by the Leader of the Opposition in the Legislative Assembly, as well as up to four members, nominated by the Minister, who the Minister believes to have special knowledge of or interest in matters affecting privacy of persons.⁶⁹ Appointments have included lawyers,

67. *Privacy and Personal Information Protection Act 1998* (NSW) s 66.

68. *Government Information (Information Commissioner) Act 2009* (NSW) s 45.

69. *Privacy and Personal Information Protection Act 1998* (NSW) s 60.

representatives from agencies, union representatives and Tribunal members.⁷⁰ The Committee is to advise on matters that are relevant to the Privacy Commissioner's functions, to recommend material to the Privacy Commissioner for inclusion in guidelines to be issued by the Privacy Commissioner and to advise the Minister on such matters as may be referred to it by the Minister.⁷¹

5.16 The Information Commissioner Bill 2009 (Cth) establishes an Information Advisory Committee to assist and advise the Commonwealth Information Commissioner in matters that relate to the performance of "information commissioner" functions.⁷² The Committee consists of the Information Commissioner (chair), and senior officers of agencies "nominated in writing by the Minister, in consultation with the relevant Ministers" and "other persons as the Minister thinks fit and who, in the Minister's opinion, hold suitable qualifications or experience".⁷³ The Committee does not explicitly have the function of advising the Information Commissioner in relation to privacy and FOI functions.⁷⁴

5.17 PIAC submits that an "Information Advisory Committee" should be created under the GIIC Act to provide advice and assistance to the Information Commissioner, similar to the Privacy Advisory Committee established under PPIPA.⁷⁵ In our view, it is appropriate to retain a single advisory committee to advise both the Information Commissioner and the Privacy Commissioner on matters relating to the performance of their functions. Hence we recommend the establishment of an Information Advisory Committee, representing varied interest groups, with expertise in both privacy and FOI.

70. See Privacy NSW, *Annual Report 2006/2007* (2007) 44.

71. *Privacy and Personal Information Protection Act 1998* (NSW) s 61.

72. Information Commissioner Bill 2009 (Cth) cl 27(2).

73. Information Commissioner Bill 2009 (Cth) cl 27(2).

74. Explanatory Memorandum, Information Commissioner Bill 2009 (Cth) 10.

75. Public Interest Advocacy Centre, *Submission* (21 October 2009) 1.

OVERSIGHT BY THE JOINT COMMITTEE

RECOMMENDATION 16

The Joint Committee should be responsible for oversight of Privacy Commissioner functions in the same manner as Information Commissioner functions under s 44 of the *Government Information (Information Commissioner) Act 2009* (NSW).

5.18 Section 44 of the GIIC Act provides for oversight of the Information Commissioner's functions by the Joint Committee. The Committee monitors and reviews Commissioner functions, reports to Parliament in relation to functions if required, examines Commissioner reports, recommends changes to Commissioner functions if required and inquires into aspects of Commissioner functions if asked to do so by Parliament. In our view, the Joint Committee should be responsible for oversight of Privacy Commissioner functions in a same manner as Information Commissioner functions.

REVIEW OF ADMINISTRATIVE ARRANGEMENTS

RECOMMENDATION 17

There should be a review of the administrative arrangements under the *Government Information (Information Commissioner) Act 2009* (NSW), *Government Information (Public Access) Act 2009* (NSW), *Privacy and Personal Information Protection Act 1998* (NSW) and the *Health Records and Information Privacy Act 2002* (NSW) to determine whether administrative arrangements are appropriate for achieving the policy aims of the Acts. The review should be conducted within three years of the commencement of the *Government Information (Public Access) Act 2009* (NSW).

5.19 Under s 130 of the GIPA Act the Minister administering the Act is to review the Act as soon as possible after 5 years from the date of its Assent in order to determine "whether the policy objectives of the Act remain valid and whether the terms of the Act remain appropriate for securing those objectives".

5.20 Independently of this review, we believe that administrative arrangements relating to the Offices of the Information Commissioner and Privacy Commissioner should be reviewed within 3 years of the commencement of the GIPA Act to ensure that such arrangements are operating effectively in achieving the aims of both FOI and privacy legislation in NSW.

6. **A separated model**

- Guidelines
- Complaints
- Regulations
- Review by the Joint Committee

RECOMMENDATION 18

If distinct statutory authorities continue to exercise discrete privacy and FOI functions in NSW:

- (1) the Information Commissioner should be required to consult with the Privacy Commissioner before issuing guidelines on privacy-based public interest considerations against disclosure;
- (2) the Information Commissioner should be required to consult with the Privacy Commissioner before making a recommendation involving one or more of the privacy-based public interest considerations against disclosure;
- (3) the Privacy Commissioner should have the right to appear and be heard in any proceedings before the Administrative Decisions Tribunal in relation to a review under Part 5, Division 4 of the *Government Information (Public Access) Act 2009* (NSW), where such proceedings involve one or more of the privacy-based public interest considerations against disclosure;
- (4) the Minister should be required to consult with the Privacy Commissioner before making regulations under s 129(3) of the *Government Information (Public Access) Act 2009* (NSW), where such regulations affect privacy or involve one or more of the privacy-based public interest considerations against disclosure; and
- (5) the Joint Committee should be required to consult with the Privacy Commissioner when conducting a review of the public interest provisions of the *Government Information (Public Access) Act 2009* (NSW) insofar as such a review relates to privacy issues arising from the operation of the public interest provisions.

6.1 If the model we propose in this report is not adopted and a separated model continues to operate in NSW, changes need to be made to ensure that privacy and FOI are applied consistently and fairly.

GUIDELINES

6.2 Under the GIPA Act the Information Commissioner can issue guidelines about public interest considerations against the disclosure of government information listed in the table in s 14. Agencies are required to “have regard to any relevant guidelines issued by the Information Commissioner” when determining whether there is an overriding public

interest against disclosure of government information.¹ Two of the considerations listed in the table in s 14 include where disclosure reveals an individual's personal information or where disclosure contravenes an IPP or an HPP ("privacy-based public interest considerations against disclosure"). If consultation with the privacy commissioner is undertaken prior to issuing guidelines relating to privacy-based public interest considerations against disclosure it would help to ensure that such guidelines adequately achieve the objectives of the GIPA Act as well as appropriately apply the relevant requirements in PPIPA and HRIPA.²

6.3 If a separated model is implemented in NSW the Information Commissioner should be required to consult with the Privacy Commissioner before guidelines are issued relating to privacy-based public interest considerations against disclosure.

COMPLAINTS

6.4 A list of "reviewable decisions" of agencies is provided for under s 80 of the GIPA Act. This includes "a decision to provide access or refuse to provide access or to refuse to provide access to information in response to an access application". The Information Commissioner has the power to review "reviewable decisions" of an agency under pt 5, div 3 of the GIPA Act. Upon review, the Information Commissioner may make such recommendations to the agency as the Information Commissioner considers appropriate.³ Judge Taylor submits, "[w]here a decision involves one or more of the privacy-based public interest considerations against disclosure ... the Information Commissioner should be required to consult with the Privacy Commissioner before making his or her proposed recommendations under s 92".⁴

6.5 Section 93 indicates that the Information Commissioner may recommend that an agency reconsider the decision that is the subject of review. Under s 94, the Information Commissioner can make a recommendation against a decision that there is an overriding public

-
1. *Government Information (Public Access) Act 2009* (NSW) s 15.
 2. This view is supported in submissions: K V Taylor, *Submission* (22 October 2009) 6-7; The NSW Department of Community Services, *Submission* (30 October 2009) 2, supported issuing joint guidelines and policies generally.
 3. *Government Information (Public Access) Act 2009* (NSW) s 92.
 4. K V Taylor, *Submission* (22 October 2009) 7.

interest against disclosure. Section 95 gives the Information Commissioner the power to recommend that any general procedure of an agency in relation to dealing with access applications be changed to conform to the requirements in the Act.

6.6 In our view, the Information Commissioner should be required to consult with the Privacy Commissioner when making any recommendation that involves one or more of the privacy-based public interest considerations against disclosure. This will assist in ensuring a balanced and consistent approach is adopted when balancing privacy and FOI.

6.7 Under s 104 of the GIPA Act the Information Commissioner has the right to appear and be heard in any proceedings before the ADT in relation to an ADT review under pt 5, div 4. The Privacy Commissioner has a similar power in relation to complaints under PPIPA.⁵ In the interests of balance and consistency we believe that the Privacy Commissioner should also have the right to appear and be heard in ADT proceedings that involve one or more of the privacy-based public interest considerations against disclosure under the GIPA Act.

REGULATIONS

6.8 The Minister is required to consult with the Information Commissioner before recommending the making of regulations under the GIPA Act.⁶ There is a fine balance between privacy and FOI and there is the danger that privacy protections built into the GIPA Act could be subverted through the implementation of regulations. To minimise the danger of this occurring we believe that where regulations impact upon privacy, or involve the privacy-based public interest considerations against disclosure, the Minister should also be required to consult with the Privacy Commissioner.⁷

REVIEW BY THE JOINT COMMITTEE

6.9 The Joint Committee is responsible for reviewing public interest provisions of the GIPA Act to “determine whether the policy objectives of

5. *Privacy and Personal Information Protection Act 1998* (NSW) s 55(7).

6. *Government Information (Public Access) Act 2009* (NSW) s 129(3).

7. This view was supported by Judge Taylor: K V Taylor, *Submission* (22 October 2009) 7.

those provisions remain valid and whether the content of those provisions remains appropriate for securing those objectives".⁸ These provisions include the table in s 14 containing the privacy-based public interest considerations against disclosure.⁹ The Joint Committee is required to consult with the Information Commissioner when conducting a review and the Information Commissioner may assist and provide advice to the Committee in connection with the review.¹⁰

6.10 Application of the GIPA Act should be as consistent as possible with the aims of privacy legislation. To ensure that the mechanisms in the GIPA Act are working effectively and appropriately to protect privacy, this obligation to consult should extend to the Privacy Commissioner where the review relates to any privacy issues that may arise under the GIPA Act.¹¹

8. *Government Information (Public Access) Act 2009* (NSW) s 131.

9. The Joint Committee is specifically responsible for sch 1 (information for which there is conclusive presumption of overriding public interest against disclosure), sch 2 (excluded information of particular agencies) and the table to s 14 (public interest considerations against disclosure): *Government Information (Public Access) Act 2009* (NSW) s 131(1).

10. *Government Information (Public Access) Act 2009* (NSW) s 131(2).

11. This view was supported by Judge Taylor: K V Taylor, *Submission* (22 October 2009) 7.

Appendices

- Appendix A: Overview of institutional models
- Appendix B: Submissions
- Appendix C: Submissions to Consultation Paper 3
- Appendix D: Consultations

Appendix A: Overview of institutional models

Jurisdiction	Model	Coverage	Title(s)	Legislation
Australia (Commonwealth Current)	Separated (Ombudsman)	Public/ Private	Privacy Commissioner Ombudsman	<i>Privacy Act 1988</i> (Cth) <i>Freedom of Information Act 1982</i> (Cth)
Australia (Commonwealth Proposed)	Shared	Public/ Private	Information Commissioner Privacy Commissioner FOI Commissioner	Information Commissioner Bill 2009 (Cth) <i>Privacy Act 1988</i> (Cth) <i>Freedom of Information Act 1982</i> (Cth)
Australia (New South Wales)	Separated (Ombudsman)	Public/ Private (limited)	Privacy Commissioner Ombudsman	<i>Privacy and Personal Information Protection Act 1998</i> (NSW) <i>Health Records and Information Privacy Act 2002</i> (NSW) <i>Freedom of Information Act 1989</i> (NSW) soon to be replaced by the <i>Government Information (Information Commissioner) Act 2009</i> (NSW) and <i>Government Information (Public Access) Act 2009</i> (NSW)
Australia (Northern Territory)	Sole	Public	Information Commissioner	<i>Information Act 2002</i> (NT)
Australia (Tasmania)	Sole (Ombudsman)	Public	Ombudsman	<i>Personal Information Protection Act 2004</i> (Tas) <i>Freedom of Information Act 1991</i> (Tas)
Australia (Queensland)	Sole (Deputies)	Public	Information Commissioner Privacy Commissioner (Deputy) Right to Information Commissioner (Deputy)	<i>Information Privacy Act 2009</i> (Qld) <i>Right to Information Act 2009</i> (Qld)

Jurisdiction	Model	Coverage	Title(s)	Legislation
Australia (Victoria)	Other	Public/ Private (limited)	Privacy Commissioner ¹ Health Services Commissioner	<i>Information Privacy Act 2000</i> (Vic) <i>Health Records Act 2001</i> (Vic) <i>Freedom of Information Act</i> <i>1982</i> (Vic)
Australia (Western Australia)	Other	Public	Information Commissioner ²	<i>Freedom of Information Act</i> <i>1992</i> (WA)
Canada (Alberta)	Sole	Public/ Private	Information and Privacy Commissioner	<i>Freedom of Information and Protection of Privacy Act</i> , RSA 2000, c F-25 <i>Health Information Act</i> , RSA 2000, c H-5 <i>Personal Information Protection Act</i> , SA 2003, c P- 6.5
Canada (British Columbia)	Sole	Public/ Private	Information and Privacy Commissioner	<i>Freedom of Information and Protection of Privacy Act</i> , RSBC 1996, c 165 <i>Personal Information Protection Act</i> , SBC 2003, c 63
Canada (Federal)	Separated	Public/ Private	Information Commissioner ³ Privacy Commissioner	<i>Privacy Act</i> , RSC 1985, c P- 21 <i>Access to Information Act</i> , RSC 1985, c A-1 <i>Personal Information Protection and Electronic Documents Act</i> , SC 2000, c 5

-
1. No FOI equivalent to the Privacy Commissioner.
 2. No privacy equivalent to the Information Commissioner.
 3. Note under s 55(1) of the *Privacy Act* the Information Commissioner may be appointed as the Privacy Commissioner – can change from a separated model to a sole authority model without legislative amendment: Information Commissioner of Canada (John Reid), “Position Paper: Oversight Models under the Federal Access and Privacy Acts: Single Commissioner vs. Dual-Commissioners”, Ottawa, Ontario (24 October 2003), <<http://www.infocom.gc.ca/speeches/speechview-e.asp?intspeechId=90>> at 2 November 2009.

Jurisdiction	Model	Coverage	Title(s)	Legislation
Canada (Manitoba)	Sole (Ombudsman)	Public	Ombudsman	<i>Freedom of Information and Protection of Privacy Act</i> , CCSM 1997, c F175 <i>Personal Health Information Act</i> , CCSM 1997, c. P33.5
Canada (New Brunswick)	Sole (Ombudsman)	Public	Ombudsman	<i>Protection of Personal Information Act</i> , SNB 1998, c P-19.1 <i>Right to Information Act</i> , SNB 1978, c R-10.3
Canada (Newfoundland and Labrador)	Sole	Public	Information and Privacy Commissioner	<i>Access to Information and Protection of Privacy Act</i> , SNL 2002, c-A-1.1
Canada (Northwest Territories)	Sole	Public	Information and Privacy Commissioner	<i>Access to Information and Protection of Privacy Act</i> , SNWT 1994, c 20
Canada (Nova Scotia)	Sole	Public	Freedom of Information and Protection of Privacy Review Officer	<i>Freedom of Information and Protection of Privacy Act</i> , SNS 1993, c 5
Canada (Nunavut)	Sole	Public	Information and Privacy Commissioner	<i>Access to Information and Protection of Privacy Act</i> , SNWT 1994, c 20
Canada (Ontario)	Sole (Deputies)	Public/ Private (limited)	Information and Privacy Commissioner ⁴	<i>Freedom of Information and Protection of Privacy Act</i> , RSO 1990, c F.31 <i>Municipal Freedom of Information and Protection of Privacy Act</i> , RSO 1990, c M.56 <i>Personal Health Information Protection Act</i> , SO 2004, c 3
Canada (Prince Edward Island)	Sole	Public	Information and Privacy Commissioner	<i>Freedom of Information and Protection of Privacy Act</i> , SPEI 1988, c F-15.01

-
4. The “Information and Privacy Commissioner” can appoint up to two assistant commissioners and an additional commissioner for personal health information.

Jurisdiction	Model	Coverage	Title(s)	Legislation
Canada (Quebec)	Sole/Shared	Public/ Private	Commission d'accès à l'information	<i>An Act Respecting Access to Documents Held by Public Bodies and the Protection of Personal Information, RSQ, c A-2.1</i> <i>An Act Respecting the Protection of Personal Information in the Private Sector, RSQ, c P-39.1</i>
Canada (Saskatchewan)	Sole	Public/ Private (limited)	Information and Privacy Commissioner	<i>Freedom of Information and Protection of Privacy Act, SS 1990-91, c F 22.01</i> <i>Local Authority Freedom of Information and Protection of Privacy Act, SS 1990-91, c L- 27.1</i> <i>Health Information Protection Act, SS 1999, c H-0.021</i>
Canada (Yukon)	Sole (Ombudsman)	Public	Information and Privacy Commissioner ⁵	<i>Access to Information and Protection of Privacy Act, RSY 2002, c 1</i>
New Zealand	Separated (Ombudsman)	Public/ Private	Privacy Commissioner Ombudsman	<i>Privacy Act 1993 (NZ) s 13</i> <i>Official Information Act 1982 (NZ) s 28</i>
United Kingdom	Sole (Deputies)	Public/ Private	Information Commissioner Deputy Commissioner Data Protection Deputy Commissioner FOI	<i>Data Protection Act 1998 (UK) c 29</i> <i>Freedom of Information Act 2000 (UK) c 36</i>

5. The Ombudsman is also the Information and Privacy Commissioner.

Appendix B: Submissions

South Eastern Sydney and Illawarra Area Health Service, 16 July 2009

Sydney Olympic Park Authority, 31 July 2009

Mr Phillip Youngman, 3 August 2009

Office of the Privacy Commissioner, 20 August 2009

Office of State Revenue, 21 August 2009, 22 October 2009

NSW Department of Community Services, 26 August 2009, 30 October 2009

NSW Police Force, 26 August 2009

State Records Authority of NSW, 27 August 2009

Public Interest Advocacy Centre, 28 August 2009, 21 October 2009

Ms Megan Carter, 31 August 2009

University of Sydney, 31 August 2009

Legal Aid, 31 August 2009

NSW Government Department of Premier and Cabinet, 31 August 2009

Australian Press Council, 31 August 2009

Law Society of NSW, 31 August 2009, 13 November 2009

State Library of New South Wales, 31 August 2009

Community Relations Commission, 1 September 2009

Mr Stepan Kerkyasharian AM, President of the Anti-Discrimination Board of NSW, 3 September 2009

Judge KV Taylor AM RFD, NSW Privacy Commissioner and Acting NSW Information Commissioner, 4 September 2009, 21 October 2009, 22 October 2009

Roads and Traffic Authority, 7 September 2009

Housing NSW, 24 September 2009

NSW Department of Corrective Services, 7 October 2009

Department of Ageing, Disability & Home Care, received 13 October 2009

NSW Department of Health (undated)

Appendix C: Submissions to Consultation Paper 3

Office of the Privacy Commissioner, 13 October 2008

Justice Health, NSW Health, 15 October 2008

NSW Commission for Children & Young People, 15 October 2008

NSW Department of Primary Industries, 15 October 2008

Motor Accidents Authority of NSW, 16 October 2008

Australian Press Council, 17 October 2008

Legal Aid NSW, 17 October 2008

NSW Department of Corrective Services, 17 October 2008

Law Society of NSW, 21 October 2008

Office of Fair Trading, NSW Department of Commerce, 22 October 2008

State Records Authority of NSW, 23 October 2008

NSW FOI/Privacy Practitioners' Network, 28 October 2008

Department of Ageing, Disability & Home Care, 30 October 2008

Minister for Community Services, 30 October 2008

Australian Privacy Foundation, 31 October 2008

Cyberspace Law & Policy Centre, University of NSW, 3 November 2008

HIV/AIDS Legal Centre, 4 November 2008

Intellectual Disability Rights Service, 5 November 2008

Office of Industrial Relations, NSW Department of Commerce,
7 November 2008

Inner City Legal Centre, 10 November 2008

Consumer Credit Legal Centre (NSW) Inc, 13 November 2008

Guardianship Tribunal, 17 November 2008

Privacy NSW, Office of the NSW Privacy Commissioner,
28 November 2008

Public Interest Advocacy Centre Ltd, 24 December 2008

NSW Department of Education and Training, 2 February 2009

Appendix D: Consultations

Cyberspace Law and Policy Centre, 22 September 2009

Privacy NSW, 22 September 2009

Ms Kaye Sato, Office of the Information Commissioner,
26 November 2009

Mr John McAteer, Privacy NSW, 26 November 2009

Cyberspace Law and Policy Centre, 30 November 2009

Tables

- Table of legislation

Table of legislation

Commonwealth

<i>Freedom of Information Act 1982</i>	2.14
Freedom of Information Amendment (Reform) Bill 2009	2.14
Information Commissioner Bill 2009	2.14
cl 8.....	2.15
cl 9.....	2.15
cl 10.....	2.14
cl 11(1).....	2.15
cl 11(2).....	2.15
cl 11(4).....	2.15
cl 11(5).....	2.16
cl 12(1).....	2.15
cl 12(2).....	2.15
cl 12(4).....	2.15
cl 12(5).....	2.16
cl 27(2).....	5.16

New South Wales

<i>Freedom of Information Act 1989</i>	1.1, 2.2
<i>Government Information (Information Commissioner) Act 2009</i>	1.1
pt 3 div 2	5.10
pt 3 div 3-4.....	5.4, 5.10
pt 4.....	4.4
s 4-5.....	4.15
s 12-13.....	5.4
s 14.....	5.8
s 16.....	5.4
s 17.....	5.4

s 24.....	5.4
s 26-27.....	5.4
s 28.....	5.5
s 36.....	4.4, 5.4, 5.9
s 37.....	4.4, 5.4, 5.9
s 38.....	4.4, 5.4, 5.11
s 43.....	5.13
s 44.....	4.4, 5.5, 5.18, R 16
s 45.....	5.14
<i>Government Information (Public Access) (Consequential Amendments and Repeal) Act 2009</i>	1.1
<i>Government Information (Public Access) Act 2009</i>	1.1, 2.2, 5.4
s 3.....	4.9
s 5.....	4.3
s 12(3).....	5.4
s 14.....	4.3, 4.12, 5.4, 6.2, 6.9
s 15.....	6.2
s 17.....	5.4
s 22(2).....	5.4
s 66(3).....	5.4
s 80.....	6.4
s 92.....	6.4
s 93-95.....	6.5
s 104.....	5.4, 6.7, R 18(3)
s 129(3).....	5.5, 5.9, 6.8, R 18(4)
s 130.....	5.19
s 131.....	6.9, R 18(5)
s 131(1).....	6.9
s 131(2).....	6.9
<i>Health Records and Information Privacy Act 2002</i>	2.2

pt 7	4.10
sch 1 cl 3	5.4, 5.11
sch 1 cl 4	5.4, 5.11
sch 1 cl 10	5.4, 5.11
s 24	5.4, 5.11
s 28(2)	5.11
s 29	5.11
s 40	5.11
s 42-47	5.10
s 50	5.10
s 58	1.2, 5.4, 5.10, 5.11
s 59-61	5.10
s 62	5.11
s 63	5.10
s 64	5.11
s 64(3)	5.4
s 65-67	5.10
s 68	5.12
s 70	5.13
s 75	5.9
<i>Privacy and Personal Information Protection Act 1998</i>	1.2, 2.2, 5.4
pt 4 div 3	5.10
sch 1	4.15
s 31	5.5
s 33	5.10
s 34	4.15
s 35	5.4
s 35(4)	5.4, 5.11
s 36	1.2, 5.4, 5.5

s 36(2)(a).....	5.10
s 36(2)(b)	5.4, 5.11
s 36(2)(c).....	5.11
s 36(2)(d)	5.10
s 36(2)(e).....	5.5, 5.10
s 36(2)(f)	5.4, 5.10
s 36(2)(g)	4.11, 5.10
s 36(2)(h)	4.11, 5.11
s 36(2)(i).....	5.4, 5.10
s 36(2)(j).....	4.11, 5.11
s 36(2)(k)	4.11, 5.10
s 36(2)(l).....	4.11, 5.10
s 37(1)-(2)	5.4
s 37-39.....	5.4, 5.10
s 38(2)	5.4
s 40	5.4, 5.10
s 41	5.5, 5.11
s 42	5.10
s 44.....	5.4
s 45	5.4
s 45(1)	4.11
s 50	5.10
s 53-54.....	5.10
s 54.....	5.5
s 55	5.4
s 55(6)	5.10
s 55(7)	5.10, 6.7
s 60.....	5.15
s 61.....	5.5, 5.15

s 64.....	5.4, 5.5
s 65.....	5.4, 5.5, 5.11
s 66.....	5.14
s 67.....	5.12
s 68.....	5.13
s 71.....	5.5, 5.9
Privacy and Personal Information Protection Amendment Bill 2003.....	3.14
Privacy and Personal Information Protection Bill 1998.....	4.9
Northern Territory	
<i>Information Act 2002</i>	3.4
s 86.....	2.7
Queensland	
<i>Information Privacy Act 2009</i>	
s 141(2).....	4.15
s 142.....	2.8
s 144-145.....	4.15
<i>Right to Information Act 2009</i>	
ch 4 pt 2.....	2.8
ch 4 pt 4.....	2.8
s 134-135.....	4.15
s 147(2).....	4.15
s 150-151.....	4.15
Tasmania	
<i>Freedom of Information Act 1991</i>	
s 48.....	2.11
<i>Personal Information Protection Act 2004</i>	
s 18.....	2.11

British Columbia

<i>Freedom of Information and Protection of Privacy Act,</i> RSBC 1996, c 165.....	2.6, 3.4
s 49	2.6

Canada

<i>Access to Information Act, RSC 1985, c A-1</i>	
s 54(1)	2.3
<i>Privacy Act, RSC 1985, c P-21</i>	
s 53(1)	2.3

Manitoba

<i>The Freedom of Information and Protection of Privacy Act, CCSM 1997, c F175</i>	
s 49	2.11

New Brunswick

<i>Protection of Personal Information Act, SNB 1998, c P-19.1</i>	
s 3	2.11
<i>Right to Information Act, SNB 1978, c R-10.3</i>	
S 9-10	2.11

New Zealand

<i>Official Information Act 1983</i>	
s 28	2.4
s 29B.....	2.4
<i>Privacy Act 1993</i>	2.4

North West Territories/ Nunavut

<i>Access to Information and Protection of Privacy Act, SNWT 1994, c 20</i>	2.6
---	-----

Ontario

<i>Freedom of Information and Protection of Privacy Act, RSO 1990, c F.31</i>	3.4
s 4(4)	2.9, 4.16
<i>Municipal Freedom of Information and Protection of Privacy Act, RSO 1990, c M.56</i>	3.4

Quebec

<i>An Act Respecting Access to Documents Held by Public Bodies and the Protection of Personal Information, RSQ, c. A-2.1</i>	
s 103	2.18
s 104	2.18
s 122	2.18
s 122.1	2.18
s 134.2	2.18
<i>An Act Respecting the Protection of Personal Information in the Private Sector, RSQ, c. P-39.1</i>	2.18

Saskatchewan

<i>Freedom of Information and Protection of Privacy Act, SS 1990-91, c F 22.01</i>	2.6
---	-----

United Kingdom

<i>Data Protection Act 1998, c 29</i>	3.17
s 51	2.8
sch 5 para 4	2.8, 4.16
<i>Freedom of Information Act 2000, c 36</i>	3.17
s 18(1)	2.8
s 47	2.8
sch 2 para 20	2.8

Yukon

<i>Access to Information and Protection of Privacy Act, RSY 2002, c 1</i>	
s 40	2.11

Bibliography

Australian Government, *Enhancing National Privacy Protection, Australian Government First Stage Response to the Australian Law Reform Commission Report 108 For Your Information: Australian Privacy Law and Practice* (Department of Prime Minister and Cabinet, 2009) <http://www.dpmc.gov.au/privacy/alrc_docs/stage1_aus_govt_response.pdf> at 21 December 2009

Australian Law Reform Commission and Administrative Review Council, *Open government: a review of the federal Freedom of Information Act 1982*, ALRC Report No 77/ ARC Report No 40 (1995)

Australian Law Reform Commission, *For Your Information: Australian Privacy Law and Practice*, Report No 108 (2008)

Banisar, D, *Freedom of Information Around the World 2006, A Global Survey of Access to Government Information Laws* (Privacy International, 2006), <<http://www.privacyinternational.org/foi/foisurvey2006.pdf>> at 21 December 2009

Boulding, R, *Making Trust a Two Way Street: A Freedom of Information and Privacy Act for the United Kingdom*, All Party Committee for Freedom of Information (1976)

Canada, House of Commons, *Open and Shut: Enhancing the Right to Know and the Right to Privacy*, Report of the Standing Committee on Justice and Solicitor General on the Review of the Access to Information Act and the Privacy Act (1987)

Kirby, M D, "Freedom of Information vs. Privacy" (Paper presented at the Second Symposium on Law and Justice, Australian Capital Territory, 26 March 1977) Speeches vol 2 No 36, <<http://www.michaelkirby.com.au>> at 15 December 2009

La Forest, G V, *The Offices of the Information and Privacy Commissioners: The Merger and Related Issues*, Report of the Special Advisor to the Minister of Justice (Canada, Department of Justice, 2005) <<http://www.justice.gc.ca/eng/ip/rep-rap.pdf>> at 21 December 2009

NSW, Department of Premier and Cabinet, *Government Information – Public Access and Information Commissioner FOI Reforms in NSW, Ombudsman’s Recommendations and Public Submissions – Government Response* (2009) <<http://www.dpc.nsw.gov.au>> 21 December 2009

NSW Law Reform Commission, *Privacy Legislation in New South Wales*, Consultation Paper No 3 (2008)

NSW Law Reform Commission, *The Ombudsman's Review of the Freedom of Information Act 1989 (NSW)* (2009)

NSW Ombudsman, *Opening Up Government, Review of the Freedom of Information Act 1989*, A Special Report to Parliament under s 31 of the Ombudsman Act 1974 (2009)

Parliament of NSW, Committee on the Office of the Ombudsman and the Police Integrity Commission, *Stakeholder Review of the Merger of the Community Services Commission into the Office of the Ombudsman*, Report No 14/53 (2006)

Puplick, C, "NSW Privacy Commissioner Rejects Ministerial Interference" (2002) 9(7) *Privacy Law and Policy Reporter* 133

Reid, J, "The Access Act – Moving Forward – A Commissioner's Perspective" (Speech, Office of the Information Commissioner of Canada, 8 September 2005) <<http://www.infocom.gc.ca/speeches/speechview-e.asp?intspeechId=113>> at 21 December 2009

Reid, J, "Position Paper: Oversight Models under the Federal Access and Privacy Acts: Single Commissioner vs. Dual-Commissioners" (Speech, Office of the Information Commissioner of Canada, 24 October 2003) <<http://www.infocom.gc.ca/speeches/speechview-e.asp?intspeechId=90>> at 21 December 2009

Thomas, R, "Freedom of Information and Privacy – the Regulatory Role of the Information Commissioner" (Paper presented at the Centre for Regulated Industries Occasional Lecture 21, National Liberal Club, London, 9 January 2008)

