

Passed by both Houses



New South Wales

Privacy and Government Information Legislation Amendment Bill 2010

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I certify that this public bill, which originated in the Legislative Assembly, has finally passed the Legislative Council and the Legislative Assembly of New South Wales.

*Clerk of the Legislative Assembly.
Legislative Assembly,
Sydney, , 2010*



New South Wales

Privacy and Government Information Legislation Amendment Bill 2010

Act No , 2010

An Act to amend various Acts to provide for the Information and Privacy Commission and the Information and Privacy Advisory Committee, and to make further provision with respect to privacy protection principles and the office, role, functions and staff of the Information Commissioner and the Privacy Commissioner.

I have examined this bill and find it to correspond in all respects with the bill as finally passed by both Houses.

Assistant Speaker of the Legislative Assembly.

The Legislature of New South Wales enacts:

1 Name of Act

This Act is the *Privacy and Government Information Legislation Amendment Act 2010*.

2 Commencement

This Act commences on a day or days to be appointed by proclamation.

Schedule 1 **Amendment of Privacy and Personal Information Protection Act 1998 No 133**

[1] **Section 3 Definitions**

Insert in alphabetical order in section 3 (1):

Information Commissioner means the Information Commissioner under the *Government Information (Information Commissioner) Act 2009*.

[2] **Section 15 Alteration of personal information**

Insert after section 15 (4):

- (5) The Privacy Commissioner's guidelines under section 36 may make provision for or with respect to requests under this section, including the way in which such a request should be made and the time within which such a request should be dealt with.
- (6) In this section (and in any other provision of this Act in connection with the operation of this section), *public sector agency* includes a Minister and a Minister's personal staff.

[3] **Part 4 Privacy Commissioner, Division 1**

Omit the Division. Insert instead:

Division 1 Appointment of Privacy Commissioner

34 Appointment of Privacy Commissioner

- (1) The Governor may appoint a Privacy Commissioner.
- (2) The Privacy Commissioner holds office for such term not exceeding 5 years as may be specified in the instrument of appointment, but is eligible (if otherwise qualified) for re-appointment.
- (3) A person is not eligible to be appointed for more than 2 terms of office as Privacy Commissioner (whether or not consecutive terms).
- (4) A person is not eligible to be appointed as Privacy Commissioner or to act in that office if the person is the Information Commissioner.
- (5) A person is not eligible to be appointed as Privacy Commissioner or to act in that office if the person is a member of the Legislative Council or of the Legislative Assembly or is a member of a

House of Parliament or legislature of another State or Territory or of the Commonwealth.

- (6) The Privacy Commissioner may be appointed on a full-time or part-time basis. If the Privacy Commissioner is appointed to office on a full-time basis, the Privacy Commissioner is required to hold the office on that basis except to the extent permitted by the Governor.

35 Veto of proposed appointment of Privacy Commissioner

- (1) A person is not to be appointed as Privacy Commissioner until:
- (a) a proposal that the person be so appointed has been referred to the Joint Committee under section 31BA of the *Ombudsman Act 1974*, and
 - (b) the period that the Committee has under that section to veto the proposed appointment has ended without the Committee having vetoed the proposed appointment or the Committee notifies the Minister that it has decided not to veto the proposed appointment.
- (2) A person may be proposed for appointment on more than one occasion.
- (3) In this section, *appointment* includes re-appointment.

35A Remuneration

- (1) The Privacy Commissioner is entitled to be paid:
- (a) remuneration in accordance with the *Statutory and Other Offices Remuneration Act 1975*, and
 - (b) such travelling and subsistence allowances as the Minister may from time to time determine.
- (2) The Privacy Commissioner is not, if a Judge of a New South Wales Court and while receiving remuneration as such a Judge, entitled to remuneration under this Act.

35B Vacancy in office

The office of Privacy Commissioner becomes vacant if the holder:

- (a) dies, or
- (b) completes a term of office and is not re-appointed, or
- (c) resigns the office by instrument in writing addressed to the Governor, or

- (d) is nominated for election as a member of the Legislative Council or of the Legislative Assembly or as a member of a House of Parliament or a legislature of another State or Territory or of the Commonwealth, or
- (e) becomes bankrupt, applies to take the benefit of any law for the relief of bankrupt or insolvent debtors, compounds with his or her creditors or makes an assignment of his or her remuneration for their benefit, or
- (f) becomes a mentally incapacitated person, or
- (g) is convicted in New South Wales of an offence that is punishable by imprisonment for 12 months or more or is convicted elsewhere than in New South Wales of an offence that, if committed in New South Wales, would be an offence so punishable, or
- (h) is removed from office under section 35C.

35C Removal from office

- (1) The Governor may remove the Privacy Commissioner from office on the address of both Houses of Parliament.
- (2) The Governor may suspend the Privacy Commissioner from office:
 - (a) for misbehaviour, or
 - (b) for incapacity, or
 - (c) if the Privacy Commissioner is absent from duty for a period in excess of his or her leave entitlement as approved by the Governor unless the absence is caused by illness or other unavoidable cause.
- (3) The Minister is to lay or cause to be laid before each House of Parliament, within 7 sitting days of that House after the Privacy Commissioner has been suspended from office, a full statement of the grounds for the suspension.
- (4) The suspension is to be lifted unless each House of Parliament, within 21 sitting days from the time when the statement was laid before it, declares by resolution that the Privacy Commissioner ought to be removed from office.
- (5) If each House does so declare within that period, the Privacy Commissioner is to be removed from office by the Governor.
- (6) For the purposes of this section, sitting days are to be counted whether or not they occur in the same session.

35D Filling of vacancy

If the office of Privacy Commissioner becomes vacant, a person is, subject to this Act, to be appointed to fill the vacancy.

35E Public Sector Employment and Management Act 2002

The *Public Sector Employment and Management Act 2002* does not apply to the appointment of the Privacy Commissioner, and the holder of that office is not, as holder, subject to that Act.

35F Appointment of acting Privacy Commissioner

- (1) The Minister may, from time to time, appoint a person to act in the office of the Privacy Commissioner during the illness or absence of the Privacy Commissioner or during a vacancy in the office of the Privacy Commissioner. The person, while so acting, has all the functions of the Privacy Commissioner and is taken to be the Privacy Commissioner.
- (2) The Minister may, at any time, remove a person from office as acting Privacy Commissioner.
- (3) An acting Privacy Commissioner is entitled to be paid such remuneration (including travelling and subsistence allowances) as the Minister may from time to time determine.

35G Staff of Privacy Commissioner

The staff of the Privacy Commissioner are to be employed under Chapter 1A of the *Public Sector Employment and Management Act 2002*.

35H Delegation

The Privacy Commissioner may delegate the exercise of any function of the Privacy Commissioner (other than this power of delegation) to:

- (a) any member of staff of the Privacy Commissioner, or
- (b) any person, or any class of persons, authorised for the purposes of this section by the regulations.

[4] Section 36 General functions

Insert after section 36 (2):

- (3) The Privacy Commissioner must consult with the Information Commissioner before preparing any guidelines concerning the information protection principle set out in section 18 (Limits on disclosure of personal information).

[5] Section 44 Delegation of functions

Omit the section.

[6] Section 44A

Insert after section 44:

44A Oversight of functions by Joint Committee

- (1) The Joint Committee has the following functions under this Act:
 - (a) to monitor and review the exercise by the Privacy Commissioner of the Privacy Commissioner's functions,
 - (b) to report to both Houses of Parliament, with such comments as it thinks fit, on any matter appertaining to the Privacy Commissioner or connected with the exercise of the Privacy Commissioner's functions to which, in the opinion of the Joint Committee, the attention of Parliament should be directed,
 - (c) to examine each annual and other report of the Privacy Commissioner and report to both Houses of Parliament on any matter appearing in, or arising out of, any such report,
 - (d) to recommend to both Houses of Parliament any changes to the functions of the Privacy Commissioner that the Joint Committee thinks desirable,
 - (e) to inquire into any question in connection with its functions which is referred to it by both Houses of Parliament, and report to both Houses on that question.
- (2) Nothing in this section authorises the Joint Committee:
 - (a) to investigate a matter relating to any particular conduct, or
 - (b) to reconsider any decision to investigate, not to investigate or to discontinue investigation of any particular matter, or
 - (c) to reconsider the findings, recommendations or other decisions of the Privacy Commissioner in relation to any particular matter.
- (3) The provisions of Part 4A of the *Ombudsman Act 1974* apply in relation to the Joint Committee's functions under this Act in the same way as they apply in relation to the Joint Committee's functions under that Act.
- (4) In this section:

Joint Committee means the Committee on the Office of the Ombudsman and the Police Integrity Commission constituted under the *Ombudsman Act 1974* or such other joint committee of

members of Parliament as may be appointed to exercise the functions of the Joint Committee under this Act.

[7] Section 53 Internal review by public sector agencies

Insert after section 53 (1):

- (1A) There is no entitlement under this section to the review of the conduct of a Minister (or a Minister's personal staff) in respect of a contravention of section 15 (Alteration of personal information).

Note. Any such conduct can still be reviewed by the Tribunal. See section 55 (1A).

[8] Section 55 Review of conduct by Tribunal

Insert after section 55 (1):

- (1A) A person (*the applicant*) who is aggrieved by the conduct of a Minister (or a Minister's personal staff) constituting a contravention of section 15 (Alteration of personal information) may apply to the Tribunal for a review of the conduct.

[9] Section 55 (6) and (7)

Omit the subsections. Insert instead:

- (6) The Privacy Commissioner is to be notified by the Tribunal of any application for a review under this section. The Privacy Commissioner has a right to appear and be heard in any proceedings before the Tribunal in relation to a review under this section.
- (7) The Information Commissioner is to be notified by the Tribunal of any application for a review under this section that concerns the provision of government information by an agency (within the meaning of the *Government Information (Public Access) Act 2009*). The Information Commissioner has a right to appear and be heard in any proceedings before the Tribunal in relation to such a review.

[10] Part 6A Amendment of records (as inserted by Schedule 1 [1] to Government Information (Public Access) (Consequential Amendments and Repeal) Act 2009)

Omit the Part.

[11] Part 7

Omit the Part. Insert instead:

Part 7 Information and Privacy Advisory Committee

60 Establishment of Information and Privacy Advisory Committee

- (1) There is established by this Act an Information and Privacy Advisory Committee.
- (2) The Committee is to consist of the Information Commissioner, the Privacy Commissioner, and the following part-time members appointed by the Governor:
 - (a) 2 persons who are senior officers of public sector agencies and who are nominated by the Minister in consultation with such other Ministers as the Minister considers appropriate,
 - (b) 2 persons (not being officers of public sector agencies) who are nominated by the Minister and who, in the opinion of the Minister, have special knowledge of or interest in matters affecting access to government information,
 - (c) 2 persons (not being officers of public sector agencies) who are nominated by the Minister and who, in the opinion of the Minister, have special knowledge of or interest in matters affecting the privacy of persons.
- (3) The Information Commissioner is to be the Chairperson of the Committee and is to preside at meetings of the Committee.
- (4) Schedule 2 contains provisions relating to the members and procedure of the Committee.

61 Functions of Information and Privacy Advisory Committee

The Information and Privacy Advisory Committee has the following functions:

- (a) to advise on matters relevant to the functions of the Information Commissioner and the Privacy Commissioner,
- (b) to advise the Minister on such matters as may be referred to it by the Minister.

[12] Part 7A

Insert after Part 7:

Part 7A Reports by Privacy Commissioner

61A Annual report

- (1) The Privacy Commissioner is, as soon as practicable after 30 June in each year, to prepare a report of the Privacy Commissioner's work and activities for the 12 months preceding that date and is to furnish the report to the Presiding Officer of each House of Parliament.
- (2) A copy of the report is to be provided to the Minister.
- (3) The report is to be included as part of the annual report of the Information and Privacy Commission.

61B Report on operation of Act

- (1) The Privacy Commissioner is, as soon as practicable after 30 June in each year, to prepare and publish a report on the operation of this Act (generally, across all public sector agencies) for the 12 months preceding that date and is to furnish the report to the Presiding Officer of each House of Parliament.
- (2) A copy of the report is to be provided to the Minister.

61C Special report to Parliament

- (1) The Privacy Commissioner may, at any time, make a special report on any matter relating to the functions of the Privacy Commissioner to the Presiding Officer of each House of Parliament and must also provide the Minister with a copy of the report.
- (2) The Privacy Commissioner may include in a report under this section a recommendation that the report be made public immediately.

61D Procedure for reporting

(1) Tabling

A copy of a report made or furnished to the Presiding Officer of a House of Parliament under this Part must be laid before that House on the next sitting day of that House after it is received by the Presiding Officer.

(2) **Public reports**

If a report includes a recommendation by the Privacy Commissioner that the report be made public forthwith, the Presiding Officer of a House of Parliament may make it public whether or not that House is in session and whether or not the report has been laid before that House.

(3) **Privileges and immunities**

A report that is made public by the Presiding Officer of a House of Parliament before it is laid before that House attracts the same privileges and immunities as it would if it had been laid before that House.

(4) **Report procedures**

A Presiding Officer need not inquire whether all or any conditions precedent have been satisfied as regards a report purporting to have been made or furnished in accordance with this Act.

(5) **Reference to Presiding Officer**

In this Part, a reference to a Presiding Officer of a House of Parliament is a reference to the President of the Legislative Council or the Speaker of the Legislative Assembly. If there is a vacancy in the office of President, the reference to the President is taken to be a reference to the Clerk of the Legislative Council and, if there is a vacancy in the office of Speaker, the reference to the Speaker is taken to be a reference to the Clerk of the Legislative Assembly.

[13] Sections 64 and 65

Omit the sections.

[14] Section 66 Personal liability of Privacy Commissioner and others

Omit "Privacy Advisory Committee" wherever occurring.

Insert instead "Information and Privacy Advisory Committee".

[15] Schedule 1 Provisions relating to Privacy Commissioner

Omit the Schedule.

[16] Schedule 2, heading

Omit the heading. Insert instead:

**Schedule 2 Provisions relating to members and
procedure of Information and
Privacy Advisory Committee**

[17] Schedule 2

Omit “Privacy Advisory Committee” wherever occurring.

Insert instead “Information and Privacy Advisory Committee”.

[18] Schedule 2, clause 1

Insert “Information Commissioner or the” before “Privacy Commissioner”.

[19] Schedule 2, clause 2 (2)

Omit the subclause.

[20] Schedule 2, clause 4

Insert “(other than a member who is an officer of a public sector agency)” after “A member”.

[21] Schedule 2, clause 8

Omit “Privacy Commissioner”. Insert instead “Information Commissioner”.

[22] Schedule 4 Savings, transitional and other provisions

Insert at the end of clause 1 (1):

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[23] Schedule 4

Insert after clause 6:

**7 Provisions consequent on enactment of Privacy and Government
Information Legislation Amendment Act 2010**

- (1) The group of staff employed in the Department of Justice and Attorney General as staff of the Privacy Commissioner or otherwise to enable the Privacy Commissioner to exercise the Privacy Commissioner’s functions are removed from that Department and added to the Information and Privacy Commission.

- (2) The Privacy Advisory Committee established under this Act before the substitution of Part 7 by the *Privacy and Government Information Legislation Amendment Act 2010* is abolished.
- (3) An appointment of a person as Privacy Commissioner or acting Privacy Commissioner in force immediately before the commencement of Division 1 of Part 4 (as substituted by the *Privacy and Government Information Legislation Amendment Act 2010*) is taken to have been made under that Division as so substituted.
- (4) A delegation in force under section 44 immediately before the repeal of that section is taken to have been made under section 35H.

Schedule 2 Amendment of Government Information (Information Commissioner) Act 2009 No 53

[1] Section 3 Definitions

Insert in alphabetical order in section 3 (1):

Privacy Commissioner means the Privacy Commissioner under the *Privacy and Personal Information Protection Act 1998*.

[2] Section 4 Appointment of Information Commissioner

Insert after section 4 (3):

(3A) A person is not eligible to be appointed as Information Commissioner or to act in that office if the person is the Privacy Commissioner.

[3] Section 11 Appointment of acting Commissioner

Insert “(including as Chairperson of the Information and Privacy Advisory Committee under the *Privacy and Personal Information Protection Act 1998*)” after “taken to be the Commissioner” in section 11 (1).

[4] Section 36 Annual report

Insert after section 36 (2):

(2A) The report is to be included as part of the annual report of the Information and Privacy Commission.

[5] Section 36 (3)

Omit “annual reports of the Commissioner”.

Insert instead “annual reports of the Information and Privacy Commission”.

[6] Section 36 (3) (c)

Insert “or the Information and Privacy Commission” after “Commissioner”.

[7] Section 36 (4)

Omit “Commissioner”. Insert instead “Information and Privacy Commission”.

Schedule 3 Amendment of Government Information (Public Access) Act 2009 No 52

[1] Section 14 Public interest considerations against disclosure

Insert after section 14 (3):

- (4) The Information Commissioner must consult with the Privacy Commissioner before issuing any guideline about a privacy-related public interest consideration (being a public interest consideration referred to in clause 3 (a) or (b) of the Table to this section).

[2] Section 94 Recommendation as to public interest against disclosure

Insert at the end of section 94:

- (2) The Information Commissioner must consult with the Privacy Commissioner before making a recommendation under this section about a decision that concerns a privacy-related public interest consideration (being a public interest consideration referred to in clause 3 (a) or (b) of the Table to section 14).

[3] Section 104 Right of appearance before ADT

Re-number section 104 (2) as section 104 (3) and insert as new section 104 (2):

- (2) The Privacy Commissioner has a right to appear and be heard in any proceedings before the ADT (and proceedings on an appeal in respect of any such proceedings) in relation to a review under this Division of a decision that concerns a privacy-related public interest consideration (being a public interest consideration referred to in clause 3 (a) or (b) of the Table to section 14).

[4] Section 129 Regulations

Insert after section 129 (3):

- (4) The Minister is to consult with the Privacy Commissioner before recommending the making of a regulation under this Act that concerns the protection of the privacy of individuals or a privacy-related public interest consideration (being a public interest consideration referred to in clause 3 (a) or (b) of the Table to section 14).

[5] Section 130 Review of Act

Insert after section 130 (1):

- (1A) The review is to include a consideration of the relationship between this Act and the *Privacy and Personal Information Protection Act 1998*.

[6] Section 130 (2)

Omit the subsection. Insert instead:

- (2) The Minister is to consult with the Information Commissioner and the Privacy Commissioner on a review under this section and the Information Commissioner and Privacy Commissioner may assist the Minister and provide advice in connection with the review.

[7] Section 131 Review of public interest provisions by Joint Committee

Insert after section 131 (2):

- (2A) The Joint Committee is to consult with the Privacy Commissioner on any review under this section that concerns a privacy-related public interest consideration (being a public interest consideration referred to in clause 3 (a) or (b) of the Table to section 14), and the Privacy Commissioner may assist the Joint Committee and provide advice in connection with any such review.

[8] Schedule 4 Interpretative provisions

Insert in alphabetical order in clause 1:

Privacy Commissioner means the Privacy Commissioner under the *Privacy and Personal Information Protection Act 1998*.

Schedule 4 Amendment of other Acts

4.1 Ombudsman Act 1974 No 68

[1] Section 31A Constitution of Joint Committee

Insert “the *Privacy and Personal Information Protection Act 1998*,” after “the *Government Information (Information Commissioner) Act 2009*,” in section 31A (2).

[2] Section 31BA Power to veto proposed appointments

Insert “Privacy Commissioner,” after “Information Commissioner,” in section 31BA (1).

[3] Section 31BA (5) (b2)

Insert after section 31BA (5) (b1):

- (b2) in the context of an appointment of Privacy Commissioner, a reference to the Minister administering section 35 of the *Privacy and Personal Information Protection Act 1998*, and

[4] Section 31H Confidentiality

Insert “Privacy Commissioner,” after “Information Commissioner,” wherever occurring in section 31H (1A) and (1C).

4.2 Public Finance and Audit Act 1983 No 152

Schedule 3 Departments

Insert in alphabetical order in Columns 1 and 2, respectively:

Information and Privacy Commission Information Commissioner

4.3 Public Sector Employment and Management Act 2002 No 43

Schedule 1 Divisions of the Government Service

Omit “Office of the Information Commissioner” from Division 2 of Part 1.

Insert instead “Information and Privacy Commission”.

4.4 Statutory and Other Offices Remuneration Act 1975 (1976 No 4)

Schedule 1 Public offices

Omit “Full-time Privacy Commissioner”.

Insert instead “Privacy Commissioner”.