

[STATE ARMS]

New South Wales

# **Privacy and Personal Information Protection Bill 1998**

## **Explanatory note**

This explanatory note relates to this Bill as introduced into Parliament.

## Overview of Bill

The objects of this Bill are as follows:

- 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 those 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 practice,
- to establish an office of Privacy Commissioner and to confer on the Privacy Commissioner functions relating to privacy and the protection of personal information.

## Outline of provisions

## **Part 1 Preliminary**

Part 1 contains provisions setting out the name (also known as the short title) of the proposed Act (clause 1) and other preliminary matters. The proposed Act is to commence on a day or days to be proclaimed (clause 2). Certain terms used in the proposed Act are defined (clause 3). The term *personal information* is defined to mean information or an opinion (including information or an opinion forming part of a database) about an individual whose identity is apparent or can reasonably be ascertained from the information or opinion (clause 4). The proposed Act is not to affect the operation of the *Freedom of Information Act 1989* (clause 5) or the operation of courts, tribunals or Royal Commissions (clause 6), and the proposed Act is to bind the Crown (clause 7).

## **Part 2 Information protection principles**

Clauses 8–19 specify a number of requirements relating to the confidentiality and safeguarding of personal information that is collected, held and used by public sector agencies. These requirements (referred to as *information protection principles*) relate to such matters as restrictions on the collection of personal information, the giving of information when personal information is obtained, the use, storage and security of personal information, access to personal information, and alteration of personal information.

Clause 20 provides that the information protection principles are to apply to public sector agencies (subject to the proposed Act and to privacy codes of practice). Clause 21 provides that a public sector agency must not engage in any practice that contravenes a principle applying to it, and makes it clear that the contravention of a principle is conduct that is reviewable under Part 5 of the proposed Act.

Clauses 22–28 exempt public sector agencies from complying with information protection principles in certain circumstances.

## **Part 3 Privacy codes of practice and management plans**

Clauses 29–32 provide for the making of privacy codes of practice for the purposes of protecting the privacy of individuals. A privacy code of practice can regulate the manner in which a public sector agency may collect, use or disclose personal information (clause 29). A code can modify the application of the information protection principles to a particular public sector agency (clause 30). The Privacy Commissioner, or any public sector agency, may initiate the preparation of a code and develop it, but a code is made and comes into effect when the Minister makes an order published in the Gazette (clause 31). Clause 32 provides that a public sector agency must comply with any code applying to the agency, and makes it clear that the contravention of a code is conduct that is reviewable under Part 5 of the proposed Act.

Clause 33 requires each public sector agency to prepare privacy management plans detailing the policies and practices to be adopted by the agency to ensure compliance with the requirements of the proposed Act.

## **Part 4 Privacy Commissioner**

Clause 34 provides for the appointment of the Privacy Commissioner, and clause 35 provides for the employment of staff of the Privacy Commissioner.

Clauses 36–44 deal with the general functions of the Privacy Commissioner. These include promoting the adoption of, and monitoring compliance with, the information protection principles, initiating and recommending privacy codes of practice, conducting research into privacy matters, preparing and publishing privacy guidelines, receiving and investigating privacy related complaints, and conducting inquiries and investigations into privacy related matters (clause 36).

The proposed provisions also confer other powers on the Privacy Commissioner that may be exercised in connection with the Commissioner's general functions, including the power to require any person or public sector agency to give information or a copy of a document or to produce any document or other thing (clause 37). The Privacy Commissioner is to have certain of the powers, authorities, protections and immunities of a commissioner under the *Royal Commissions Act 1923* for the purpose of making or holding inquiries in the course of an investigation (clause 38). The Privacy Commissioner may

determine procedures for exercising his or her functions, is to act in an informal manner, is not bound by the rules of evidence and is to act according to the substantial merits of the case without undue regard to technicalities (clause 39).

The Privacy Commissioner may also publish a personal information digest setting out the nature and source of personal information held by public sector agencies, and any such digest is to be made publicly available (clause 40). The Privacy Commissioner is to have the power to exempt public sector agencies from complying with any information protection principle or privacy code of practice (clause 41) and may require public sector agencies to provide information about the arrangements made by them to comply with the personal information principles (clause 42). However, the Privacy Commission will not be able to require any person or public sector agency to disclose an exempt document (ie Cabinet documents and Executive Council documents) (clause 43). The functions of the Privacy Commissioner can be delegated to authorised persons (clause 44).

Clauses 45–51 relate to the making of complaints to the Privacy Commissioner about alleged violations of, or interference with, the privacy of individuals.

Clause 45 provides for the making and form of privacy related complaints. A complaint may relate to the contravention by a public sector agency of an information protection principle or a privacy code of practice. If a complaint is made to the Privacy Commissioner, the Privacy Commissioner is to conduct a preliminary assessment, and if the complaint relates to the contravention of a principle or code, the Privacy Commissioner must inform the complainant about the review process under Part 5 (clause 46). The Privacy Commissioner may decide to refer the complaint to another relevant authority (clause 47). The Privacy Commissioner may decide to deal with the complaint (clause 48), and must endeavour to resolve the complaint by conciliation (clause 49). The Privacy Commissioner may make a written report as to any findings or recommendations in relation to a complaint (clause 50). Clause 51 provides that, if the complaint is dealt with by the Privacy Commissioner, the complainant is not entitled to make an application under Part 5 for review of the conduct concerned. Clause 51 also makes it clear that the Privacy Commissioner may still conduct investigations and inquires into matters arising out of complaints that the Privacy Commissioner does not otherwise deal with.

### **Part 5 Review of certain conduct**

Part 5 provides for the review of conduct involving the contravention by a public sector agency of an information protection principle or privacy code of practice, and of conduct involving the disclosure by a public sector agency of personal information in a public register. Clause 52 specifies the type of conduct to which the Part applies.

A person who is aggrieved by the conduct of a public sector agency may apply for an internal review of that conduct by the agency concerned (clause 53). Following the internal review, the public sector agency may decide to take certain action (eg apology, remedial action, or payment of monetary compensation to the applicant). The Privacy Commissioner is to have a role in the internal review process (clause 54).

If the person who made the application is dissatisfied with the findings of the review or the action taken by the agency, the applicant may apply to the Administrative Decisions Tribunal for a review of the conduct (clause 55). The Tribunal may make orders in relation to the review it conducts, including an order requiring the agency to pay damages of up to \$40,000 to the applicant (but only if the Tribunal is satisfied that the conduct of the agency has contributed to financial loss or that the applicant has suffered harm). Clause 56 provides for appeals against the Tribunal's orders.

### **Part 6 Public registers**

A public register is a register of personal information that is required by a law to be, or is made, publicly available and is prescribed by regulations to be a public register for the purposes of the proposed Act.

The public sector agency responsible for keeping a public register must not disclose any personal information contained in the register unless satisfied that it is to be used for a purpose relating to the purpose of the register or the Act under which it is kept (clause 57). A person may request to have

information removed from a public register or not placed on a register, as publicly available, or not disclosed to the public (clause 58). Clause 59 provides that the provisions of Part 6 prevail to the extent of any inconsistency with the requirements of the law under which the public register concerned is established.

### **Part 7 Privacy Advisory Committee**

Clause 60 establishes the Privacy Advisory Committee. The Committee's functions include advising the Privacy Commissioner on matters relevant to the Privacy Commissioner's functions and to recommend material for inclusion in guidelines issued by the Privacy Commissioner (clause 61).

### **Part 8 Miscellaneous**

Part 8 includes certain offence provisions relating to dealings with personal information. It will be an offence for a public sector official to corruptly disclose or use personal information to which the official has or had access to in exercising his or her official functions, and it will be an offence for a person to induce a public sector official to disclose any such information (clause 62). Clause 63 provides that it will also be an offence for a person to offer to supply, or to hold himself or herself out as being able to supply, personal information that the person knows, or ought reasonably to know, was disclosed in contravention of proposed section 62.

Part 8 also requires the Privacy Commissioner to make an annual report to the Minister, who is to lay it before each House of Parliament as soon as practicable (clause 64). It also provides that a special report may be made by the Privacy Commissioner at any time on any matter arising in connection with the discharge of the Privacy Commissioner's functions to the Presiding Officer of each House of Parliament for presentation to Parliament (clause 65), exempts the Privacy Commissioner and certain other persons from personal liability for things done in good faith for the purposes of the proposed Act (clause 66), prohibits the disclosure of information by the Privacy Commissioner or a staff member except in exercising his or her functions (clause 67) and creates offences relating to certain dealings with the Privacy Commissioner (clause 68).

Clause 69 provides that legal rights are not created or affected by the information protection principles or privacy codes of practice (although the contravention of a principle or a code is reviewable conduct under Part 5 of the proposed Act). Clause 70 provides that proceedings for offences under the proposed Act are to be dealt with summarily before a Local Court, and clause 71 contains a general regulation-making power.

Part 8 also contains formal provisions giving effect to Schedule 3 which amends certain Acts consequentially on the enactment of the proposed Act (clause 72), and to Schedule 4 which contains savings and transitional provisions (clause 74). The *Privacy Committee Act 1975* is repealed (clause 73), and provision is made for the proposed Act to be reviewed by the Minister 5 years after the date of assent (clause 75).

**Schedule 1** contains provisions relating to the appointment, remuneration and vacation of office of the Privacy Commissioner.

**Schedule 2** contains provisions relating to deputies for, and the appointment, remuneration and vacation of office of, members of the Privacy Advisory Committee and to the procedure of the Committee.

**Schedule 3** makes consequential amendments to the *Children (Care and Protection) Act 1987*, the *Defamation Act 1974*, the *Freedom of Information Act 1989*, the *Independent Commission Against Corruption Act 1988*, the *Ombudsman Act 1974*, the *Police Integrity Commission Act 1996*, the *Royal Commission (Police Service) Act 1994* and the *Statutory and Other Offices Remuneration Act 1975*.

**Schedule 4** contains savings, transitional and other provisions, including a power to make regulations of a savings and transitional nature consequent on the enactment of the proposed Act. The proposed Schedule also provides for the abolition of the Privacy Committee.