

**Submission  
No 3**

## **REVIEW OF THE PUBLIC INTEREST DISCLOSURES ACT 1994**

**Organisation:** Office of the Privacy Commissioner New South Wales  
**Name:** Dr Elizabeth Coombs  
**Position:** NSW Privacy Commissioner  
**Date Received:** 1 August 2016



office of the  
privacy  
commissioner  
new south wales



Mr Lee Evans, MP  
Chair of the Committee on the  
Ombudsman, the Police Integrity  
Commission and the Crime Commission  
Parliament of New South Wales  
Macquarie Street  
Sydney NSW 2000

Enquiries: Sean McLaughlan  
Telephone: [REDACTED]  
Our Reference: **IPC16/A000160**

1 AUG 2016

Dear Mr ~~Evans~~ Lee,

Thank you for the opportunity to provide a submission to the Committee on the Ombudsman, the Police Integrity Commission and the Crime Commission (the Committee) for review of the *Public Interest Disclosures Act 1994* (PID Act).

As NSW Privacy Commissioner I have responsibility for protection of the privacy of NSW citizens. The relevant legislation establishing my position and statutory functions are the *Privacy and Personal Information Protection Act 1998* (PPIP Act) and the *Health Records and Information Privacy Act 2002* (HRIP Act).

The Committee's proposal to look at whether the provisions of the PID Act to support the operations of the public interest disclosure scheme remain appropriate, has prompted me to make a submission to the Committee. Grounds for the PID Act need to be expanded to cover public interest disclosures about a failure of agencies to properly fulfil functions and responsibilities under the PPIP Act and the HRIP Act. I submit amending the PID Act to allow the Privacy Commissioner to directly receive and investigate public interest disclosures in relation to personal and health information contravention by public agencies is necessary.

The PID Act does not currently have a provision allowing public sector officials to make public interest disclosures directly to my Office and there is a definite concern that this creates a barrier to monitoring the potentially increasing use of personal information by public sector agencies, and, to investigating decisions that may contravene privacy principles. The existing complaints mechanisms under the PPIP Act and the HRIP Act are available to persons aggrieved by the conduct of a public sector agency, and as such, are also insufficient in addressing this concern.

I have provided more detailed comments to this letter at Attachment A. My submission addresses the following:

- 1) Current limitations of the PID Act;
- 2) Powers under the PID Act; and
- 3) Proposed amendment to the PID Act.

The submission was provided via email to [ombopic@parliament.nsw.gov.au](mailto:ombopic@parliament.nsw.gov.au) on Monday 1 August 2016.

In light of the significance of this matter I would welcome an opportunity to discuss this submission further. I can be contacted on [REDACTED] (direct line, Monday, Wednesday and Friday) or [REDACTED]. Alternatively, for any further information or assistance please contact Sean McLaughlan on [REDACTED] quoting the reference number at the top of this letter.

Yours sincerely,

[REDACTED]

Dr Elizabeth Coombs  
NSW Privacy Commissioner

*1/8/16*



## ATTACHMENT A

### *Limitations of the existing PID Act*

The current provisions of the PID Act to support the operation of the public interest disclosure scheme are ceasing to be effective in safeguarding the privacy of individuals. With the growth of big data and the technological ability to capture and process a great volume and variety of information, there is an increasing risk of agencies using personal data in contravention of privacy legislation.

The complaint mechanisms currently available under the PPIP Act and the HRIP Act provide recourse for individuals aggrieved by the conduct of a public sector agency. As such, these mechanisms are not sufficient in identifying or remedying more systemic breaches of privacy that could give rise to a real risk of serious harm to affected individuals, where the individuals are unaware of the breach. The complaint mechanisms under the PPIP and HRIP Acts also do not provide the confidentiality and the specialist protections that the PID Act was specifically designed to introduce in the regulatory framework of NSW public administration.

Nor is there currently an option for individuals working within the NSW public sector who may become aware of systemic privacy breaches or practices involving the use of person and health information as data, to make a public interest disclosure on adverse use of personal information under the PID Act.

Details on what types of data are used by agencies are largely confidential and unavailable to the public. This means there is often no meaningful avenue for either holding the agency accountable or identifying harms associated with the type of data used. Because of this lack of transparency and accountability, individuals have little recourse to understand or contest the information that has been collected about them or the way in which it is used, including the purpose for which it has been used and how it may have been analysed. Officials, however, may have awareness of these issues. Of particular concern is the increasing use of personal data, such as ethnicity, in algorithms to produce outcomes which are potentially discriminatory for disadvantage groups, even absent discriminatory intent.

Under the current system, the provisions in the PID Act apply only to corrupt conduct, serious maladministration, serious and substantial waste, a failure to properly fulfil functions and responsibilities under the *Government Information (Public Access) Act 2009* (GIPA Act), and a pecuniary interest contravention under the *Local Government Act 1993*. These existing disclosure provisions do not necessarily address the underlying issue of the breach of privacy. While the provisions might cover some privacy breaches, alleged privacy contravention may fall outside the capture of the PID Act.

The current lack of a separate provision in the PID Act allowing individuals to make public interest disclosures in relation to the contravention of the privacy legislation to the Privacy Commissioner prevents effective monitoring of responsible use of personal data, and



holding data collectors and users accountable for how they manage the data and any harms it may cause. It also means that important notification channels and protections provided under the PID Act against detrimental action in reprisal for making a public interest disclosure are not available for individuals wishing to report on privacy breaches.

The amendment to the PID Act is needed to rectify these limitations. The mechanism to achieve this is to allow individuals, wishing to report on the conduct (including action or inaction) of an agency exercising functions under the privacy legislation, or, that may be a contravention of privacy principles, to make public interest disclosures directly to the Privacy Commissioner.

#### *Powers under the PID Act*

Under the PID Act ss10 - 13 certain agencies have powers to directly receive and investigate public interest disclosures. In particular the PID Act provides a system under which people working within the NSW public sector can report conduct breaches of an agency which is exercising its functions under the GIPA Act to the Information Commissioner.

Allowing individuals to make public interest disclosures to the Information Commissioner improves public trust in systems to access government information. However, access to government data is only one aspect of transparency. Individuals must also be able to trust the systems agencies use in relation to their personal data. The PID Act should therefore have equal mechanisms for dealing with public interest disclosures relating to contravention of government information and breaches of privacy legislation.

It is a significant function of the Privacy Commissioner to provide independent oversight of agencies' use of personal information and investigate privacy breaches. Should the proposed amendment be adopted, my Office has the experience and expertise to oversee and investigate public interest disclosures directly, based on our current legislative oversight responsibilities under the PPIP Act and the HRIP Act, subject to appropriate resourcing. Active use of the oversight and investigatory capacity is critical to effective regulation by a specialist Commissioner, similarly to the engagement of other specialist regulatory bodies in the other grants in ss10-13.

#### *Recommendations*

I submit amending the PID Act to provide the ability for public sector officials to make public interest disclosures to the Privacy Commissioner about the conduct (including action or inaction) of an agency in the exercise of functions under the PPIP or the HRIP Acts, including conduct that is alleged by the person to constitute a contravention of these Acts is necessary.