

REPORT ON PROCEEDINGS BEFORE

**COMMITTEE ON THE OMBUDSMAN, THE LAW
ENFORCEMENT CONDUCT COMMISSION AND THE
CRIME COMMISSION**

**2018 REVIEW OF THE ANNUAL REPORTS OF OVERSIGHTED
BODIES**

At Parliament House, Sydney on Thursday 12 April 2018

The Committee met at 1:35 pm

PRESENT

Mr Lee Evans (Chair)
Mr Stephen Bromhead
The Hon. Wes Fang
The Hon. Trevor Khan
Mr Paul Lynch
Dr Hugh McDermott
The Hon. Adam Searle

SAMANTHA GAVEL, Privacy Commissioner, Information and Privacy Commission, sworn and examined

SONIA MINUTILLO, Director, Investigation and Reporting, Information and Privacy Commission, sworn and examined

DAVID MARCUS, Acting Director, Business Improvement, Information and Privacy Commission, affirmed and examined

The CHAIR: I declare open the Committee on the Ombudsman, Law Enforcement Conduct Commission and Crime Commission hearing of the 2018 Review of Annual Reports and Oversight Bodies. I thank witnesses for appearing before the Committee today. Before we proceed, do you have any questions about the hearing?

Ms GAVEL: No.

The CHAIR: Would you like to make a short opening statement?

Ms GAVEL: Yes, I would. I am very pleased to have this opportunity to appear before the joint Committee for the first time since taking up the role of New South Wales Privacy Commissioner in September last year. I am conscious that my role is an important one. New South Wales has always been a leader in the privacy space, and I plan to continue that tradition. Privacy is important to all of us and is becoming increasingly important as new technology provides ever faster ways for information about us to be collected, stored and shared. The increasingly rapid pace of technological change means it is essential that privacy considerations are taken into account from the very earliest stages of designing and developing new government projects and service delivery initiatives.

Despite rapid advances in new technology, many of the issues that arise in a privacy context are not new issues. These issues, however, are exacerbated by the sheer extent of data collection and storage and the speed with which it can now be disseminated. Nor should we neglect the historical and low-tech ways in which privacy can be compromised. There are two significant developments in 2018, which will inform privacy within Australia and here in New South Wales. The first is the Commonwealth Government's mandatory data breach scheme, which commenced on 22 February. I will be very interested to monitor how the scheme works in practice and what lessons can be learned that could be applied in New South Wales.

While the scheme has minimal impact on most of our regulated entities in New South Wales, the Information and Privacy Commission [IPC] has produced a fact sheet to inform agencies about their obligations, in particular in relation to tax file numbers. In May, the European Union General Data Protection Regulation [GDPR] will come into effect. The GDPR is intended to be a single, uniform set of data protection requirements across the European Union [EU], which will encompass both companies within the EU and overseas companies that do business with the EU. We can expect that the commencement of the GDPR will have a significant influence on privacy developments across the world, including here in New South Wales.

Since commencing as Privacy Commissioner I have focused on engaging with stakeholders to discuss my priorities and privacy issues associated with the work they are doing. I intend to work collaboratively with New South Wales government organisations to ensure that they are managing their privacy obligations appropriately and the privacy rights of New South Wales citizens are effectively protected. It has been pleasing to see that those agencies I have engaged with in the past six months do take their privacy obligations seriously.

The privacy stream was reintegrated into the IPC from July 2017. I would like to acknowledge the work of the IPC team who completed the integration and have done an excellent job of aligning processes and ensuring a seamless transition of all aspects of privacy work. From my perspective, the reintegration is working well. The Information Commissioner and I have established a good working relationship that enables us to effectively oversight information governance within our regulated sectors across the spectrum of information, from open data to sensitive data that must be protected and managed in a privacy respectful way.

I have identified a number of key areas which have been incorporated into the IPC's business and regulatory plans for 2018 onwards to improve privacy practice and capability. Firstly, the provision of data breach guidance to agencies. Currently, New South Wales agencies provide voluntary notification of data breaches to the IPC. I would like to provide more detailed guidance to agencies to assist them to better manage data breaches. Secondly, work to provide guidance to citizens and healthcare providers about access to medical records. The IPC will be producing guidance to assist both groups to understand their rights and responsibilities. Thirdly, work on providing data sharing advice to agencies, to assist with the design and implementation of priority projects and service delivery initiatives informed by data sharing and analysis. The IPC will work with agencies to ensure that these initiatives are managed in a privacy respectful way so that citizens can continue to have confidence in the way government handles their personal and health information.

Providing advice to New South Wales government agencies and organisations continues to be a significant part of the privacy workload at the IPC. I plan to focus on encouraging agencies to improve their privacy capability and promote a privacy respectful culture, to reinforce and enhance compliance with privacy obligations. The IPC has an oversight role in relation to internal privacy reviews conducted by New South Wales government agencies and can also receive privacy complaints. While there was a small increase in oversight of privacy reviews by the IPC in 2016-17, there was a 43 per cent increase in privacy complaints. Analysis of the complaints data indicates that the increase has largely been driven by an increase in complaints under the *Health Records and Information Privacy Act 2002* about the ability to access health information held by private sector providers.

As noted above, I have made the provision of guidance to the public and healthcare providers about access to health records a priority for this year. Privacy complaints and reviews to the IPC provide important insights into issues of concern to New South Wales citizens about the way government organisations handle their personal and health information. They are also pointers to areas where there may be systemic issues that the IPC can assist agencies to address. I am looking forward to working with IPC staff and stakeholders to deliver communications and other initiatives that we can use to highlight Privacy Awareness Week in May this year. Privacy Awareness Week provides me with an excellent opportunity to engage with New South Wales government agencies and organisations as well as citizens to highlight the importance of privacy, as well as people's rights and obligations.

During 2018, we can expect rapid technological changes to continue, along with the challenges they pose to privacy. Much of the work of the IPC will be focused on providing advice to assist agencies to meet these challenges. There are potentially significant benefits to be gained for citizens in harnessing new technology, and good privacy practice is an important enabler of trustworthy technology projects that will improve service delivery for citizens.

The Hon. ADAM SEARLE: Given the recent controversy about significant data breaches like those involving Facebook and Cambridge Analytica, what protections against this kind of intrusion by big data should we be looking at here in New South Wales?

Ms GAVEL: Firstly, I would be looking at protections that apply to the area of my jurisdiction, which is New South Wales government agencies as well as private healthcare providers. Obviously, Facebook and some of those big, private, overseas companies are not within the jurisdiction of the New South Wales Privacy Commissioner. Having said that, of course we are all concerned when we hear about those sorts of issues. As I said in my opening statement, we have voluntary data breach reporting in New South Wales. I certainly encourage agencies to have robust ways to report data breaches to my office and to have robust processes for managing data breaches, identifying data breaches and mitigating data breaches.

I am certainly very keen to make sure that any reporting is robust, as I have said. That is one reason why one of the first priorities that I have put into the regulatory plan for the coming year is to improve the guidance that the IPC provides to agencies. That is something that we are working on at the moment. I am aware that the Commonwealth Government recently introduced its own mandatory data breach notification scheme, and I am certainly going to be very interested to monitor how that develops, how it works in practice and what lessons there are for New South Wales that we might want to tap into. I certainly consider that the idea of a mandatory breach notification scheme for New South Wales has merit, and that it bears review and consultation with government agencies so that if and when such a scheme were to be brought into New South Wales we could bring in the very best scheme, which would work in the context of the New South Wales public sector.

Dr HUGH McDERMOTT: My question is about medical health records, especially digital ones. As you would know, the Federal Government is going through a process of putting people's medical health records online digitally. I was reading the other day that on the dark web you can buy someone's financial records for \$30 but their medical health records are \$300. So there is a significant concern with regards to privacy of medical health records—the digital ones. I am just wondering what the New South Wales Government is doing—or you are doing—in that regard to safeguard the records that are held by NSW Health or others.

Ms GAVEL: I do know that NSW Health has robust practices around records and e-health records, which, as you know, are becoming more common. Probably in five to 10 years access to medical records will not be the issue that it is now because they will be available electronically. That might make it easier for people who want to have access to their records. It is an ongoing issue to make sure that those medical records are dealt with in a privacy respectful way. I know that NSW Health has done a lot of work in that context. They have the eHealth NSW agency that does a lot of work in that area. It is certainly something that I, as Privacy Commissioner, will be monitoring. There is a review of the Health Records and Information Privacy Act underway at the moment. That will look at some of the issues associated with the provisions of the Act and what

can be strengthened and what might need to be changed to manage the transition to e-health records, as well as some of the other areas that may need to be updated, relating to the Health Records and Information Privacy Act.

The CHAIR: You were speaking quite positively about the reintegration into one office. Is there anything that is missing out of that blending back? Is there enough revenue? Do you have a big enough budget? Is there anything that we could possibly help you with?

Ms GAVEL: The IPC does have some 30 staff allocated. We have a budget of just over \$5 million. Like all New South Wales government entities and agencies we need to make sure that we work efficiently within that budget and make sure that we apply our resources in such a way that we give value for the money. We do things as efficiently as we can so that we can achieve that. In privacy, I am aware that there is a lot of important work to do, so I will certainly be monitoring the resources we have. If I feel that there is a need to talk to the appropriate people about resourcing I would certainly do that. At the moment I feel that things are working well. I feel that the resourcing for privacy is working well. The IPC held off its business and regulatory planning until I came on board so that my priorities could be included in that planning. I mentioned some of those in my opening statement. That means that those priorities are resourced for the coming year, which I am very pleased about.

To an extent, the resourcing of casework is driven by what comes in the door. Whether that is in information access or privacy, it needs to be resourced as it comes in. At this stage I am very happy with the resourcing for both aspects—what is in the regulatory and business plan, and what is coming through for casework. I feel that privacy is getting the resources that it needs. If that were to change or if something came through that meant that I felt we needed more resourcing then I would certainly take that up.

The Hon. TREVOR KHAN: On the issue of data breaches and you becoming aware of them, what is the mechanism for you to be advised of a data breach?

Ms GAVEL: Normally the agency would advise us. It is not just agencies, because local government is one of our regulated entities, so it could be councils who advise us that they have had a data breach.

The Hon. TREVOR KHAN: When?

Ms GAVEL: They are usually fairly quick. The ones I have seen have been quite good. They have written to us and said, "We've had this breach. This is the action we've taken." In many cases they have taken good action. If they have not, it is still early enough for us to either ring them or write to them and say, "We suggest that you also do X, Y and Z to manage the breach."

The Hon. TREVOR KHAN: Do you have a standard protocol that you have with, say, government departments or local governments that are entered into and that set out the circumstances in which the reports are to be made, when they need to be made and what it should involve?

The Hon. ADAM SEARLE: Indeed: What governs the voluntary reporting mechanism?

The Hon. TREVOR KHAN: That is where I am going. Well put.

Ms GAVEL: That is right. That is why we are doing our guidance so that we can put those parameters in place and give far better guidance to agencies about what is reasonable and what they should be doing.

The Hon. ADAM SEARLE: I will put it more sharply: What is the document that governs the voluntary scheme? Can we see its content?

The Hon. TREVOR KHAN: You can see that I was just a traffic lawyer and he was a barrister.

Ms GAVEL: We will certainly be able to make that available. I hope to have that within the coming months.

The Hon. ADAM SEARLE: It does not exist presently?

Ms GAVEL: No, but we are working on it at the moment.

The Hon. ADAM SEARLE: There has been a significant increase in privacy complaints. Can you tell us—given you have been there for a short time—what has driven that?

Ms GAVEL: As I mentioned earlier, we have found through our analysis that a lot of the increase is coming from people who want to access their health information under the Health Records and Information Privacy Act. That is a particular issue, because they are often going to small private providers like doctors' surgeries, which may not have good processes or understanding of their responsibilities to enable people to

access. Another common complaint in that area is the cost, because they are allowed to charge a cost for access to these records. People sometimes come to us because they feel that the proposed cost is unreasonable. These are all things that we want to look at in providing guidance.

The Hon. ADAM SEARLE: Is the 43 per cent increase in privacy complaints attributed to health-related complaints? I am happy for you to take it on notice and give us a breakdown of where the increase has come from.

Ms GAVEL: I can give you some basic information and, if you want more, I am certainly happy to do that, but basically we have complaints which mainly centre around those private providers because—

The Hon. ADAM SEARLE: Is the dispute over who owns the medical records—the medical practitioner or the patient?

Ms GAVEL: Patients have rights to access their records.

The Hon. ADAM SEARLE: Yes, they do.

Ms GAVEL: It is often—well, I should defer to Sonia.

The Hon. ADAM SEARLE: There is some dispute about the degree to which they have those rights.

Ms MINUTILLO: There is a combination of issues of complaints. Some of the issues will be simply about failure to respond to a request for access. Some of the complaints we deal with, a request has been responded to. Sometimes it is cost prohibitive for the person to actually get access. The issues we have been dealing with mainly in respect of the complaints that we have been receiving are complaints that there has been a complete non-response to a request. They are largely the issues of complaint that we have received in respect of health.

The Hon. TREVOR KHAN: Is there any guidance given to providers as to what is a fair and reasonable charge?

Ms MINUTILLO: Not currently, and the legislation is not prescriptive about what cost can be charged: It just says "a reasonable cost".

The Hon. TREVOR KHAN: How long is a piece of string?

Ms MINUTILLO: Correct, and that is what has driven us to develop the guidance that we will be focusing on when looking at those issues and, through that, trying to provide some guidance on what reasonable costs might look like within the context of the legislation.

The Hon. TREVOR KHAN: Do you have a view as to how you would structure a cost basis?

Ms MINUTILLO: Not at this point in time. That is part of what we would like to develop as part of the guidance, having looked at the types of issues that have been raised and the consultation that we would like to do as part of the development of our guidance.

The Hon. ADAM SEARLE: In some of the disputes that I have been aware of, the medical practitioner or the healthcare providers have used the issue of cost to avoid the actual issue, which is: What is the information? Often a patient wants their records. The doctors or providers say, "We own the records. We are happy to extract information and put it into some anodyne form for you, but that is going to cost us time and money." Whereas often what the patient wants is a copy of the record, having been run through the photocopier. Are you getting that level of granular visibility about the underlying nature of the disputes?

Ms MINUTILLO: In respect of those that I have seen, no, not that level of granularity. It is not to say that that may not be the case, but not from what I have seen.

The Hon. ADAM SEARLE: I think that might be a lot of the issue.

The CHAIR: Thank you for appearing before the Committee today. We may send you some additional questions in writing. Your replies will form part of the evidence and be made public. Are you happy to provide written replies to any further questions?

Ms GAVEL: Yes.

The CHAIR: Thank you very much for joining us today.

(The witnesses withdrew)

(The Committee adjourned at 13:58)