Submission No 27

INQUIRY INTO REMEDIES FOR THE SERIOUS INVASION OF PRIVACY IN NEW SOUTH WALES

Organisation: Information and Privacy Commission NSW

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The Director
Standing Committee on Law and Justice
Parliament House
Macquarie Street
SYDNEY NSW 2000

Dear Director,

Submission to Inquiry into remedies for the serious invasion of privacy in New South Wales

I write to provide you with my submission to the inquiry into remedies for the serious invasion of privacy in New South Wales.

This submission focuses, in particular, on the introduction of a statutory cause of action for serious invasions of privacy and discusses:

- the role of the NSW Information Commissioner and the Information and Privacy Commission (IPC)
- possible implications of a statutory cause of action on the release of government information, the *Government Information (Public Access) Act 2009* (the GIPA Act) regime and open government
- possible regulatory issues that may arise in the scoping of a statutory cause of action, such as jurisdictional questions
- other considerations relating to the impact of a statutory cause of action on the IPC
- national, international and state based mechanisms to promote information sharing by the public sector to inform policy and service delivery options including the NSW Government's commitment to the establishment of a Data Analytics Centre.

I approach these issues from two perspectives:

- as NSW Information Commissioner responsible for the GIPA Act and as champion of open government in NSW, and
- as Chief Executive Officer (CEO) of the IPC, responsible for providing a single point of service in respect to information access and privacy rights.

Additionally I understand my colleague Dr Elizabeth Coombs, the NSW Privacy Commissioner, has provided the Standing Committee with her submission to the inquiry.

1. Role of the Information Commissioner, Chief Executive Officer and the Information and Privacy Commission

The IPC is an independent agency established under the *Government Sector Employment Act 2013* (GSE Act). The Information Commissioner is recognised under the GSE Act as the agency head and performs all chief executive officer functions. The intent of Parliament was to create a single office while the roles of the Information Commissioner and Privacy Commissioner remained functionally

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independent. Parliament's intent was to provide a single point of service in respect to information access and privacy rights, so that agencies and individuals can access consistent information, guidance and coordinated training about information access and privacy matters.

The IPC administers the following NSW legislation:

- the GIPA Act
- *Government Information (Information Commissioner) Act 2009* (GIIC Act)
- *Privacy and Personal Information Protection Act 1998* (PPIP Act)
- *Health Records and Information Privacy Act 2002* (HRIP Act).

The Information Commissioner is an independent statutory officer that reports directly to Parliament. The Information Commissioner is overseen by the Parliamentary Joint Committee on the Ombudsman, the Police Integrity Commission and the Crime Commission. This independence enables the Information Commissioner to assist agencies, measure and monitor agency compliance with the GIPA Act and to consider, review and investigate agency conduct in an objective, transparent and arms-length manner.

Examples of specific functions of the Information Commissioner conferred by the GIPA Act and GIIC Act include: promoting public awareness and understanding the GIPA Act; promoting its object (i.e. open government); providing advice and training to agencies; receiving and dealing with complaints; conducting external reviews; conducting inquiries and investigations; monitoring, auditing and reporting on agency compliance with the GIPA Act; issuing guidelines and factsheets for agencies and the public; and reporting to NSW Parliament on the operation of the GIPA Act.

2. Possible implications of a statutory cause of action for the open access regime

The New South Wales Law Reform Commission (NSWLRC), Australian Law Reform Commission (ALRC) and the Victorian Law Reform Commission (VLRC) have previously considered the issue of how serious invasions of privacy should be addressed in Australian legal regimes. These Commissions have all broadly supported the development of a statutory cause of action in civil law for natural persons to take out against other private individuals and organisations.

The existence of a predominantly private action by individuals has relevance to access to government information and there are a number of implications for open government and the GIPA Act regime that the Committee may wish to consider. The comments below are confined to the potential implications of a statutory cause of action on the release of government information and for NSW public sector agencies.

2.1. The scope of the GIPA Act

The GIPA Act's objects are to maintain and advance a system of responsible and representative democratic government that is open, accountable, fair and effective. The second reading speech for the GIPA Bill and the GIIC Bill outlined Parliament's legislative intent for the GIPA Act to be a tool for open government supported by the Information Commissioner as a champion of open government.

The GIPA Act establishes an explicit presumption in favour of public disclosure of information, and is based on principles of proactive disclosure and a public interest decision-making test.

The GIPA Act applies to the release of government information, defined under section 4 as information contained in a record held by an agency. The broad definition includes electronic records and this definition creates an irrefutable nexus with electronic communications and data that may be used to re-identify individuals and thus result in an invasion of privacy. NSW public sector agencies are required to

comply with the GIPA Act and can be broadly categorised in the GIPA regime as the NSW government sector, local councils, universities and Ministerial offices.

2.2. Safeguards in the GIPA Act to protect an individual's privacy

There may be several circumstances in which information that is released under the GIPA Act may be characterised as an invasion of an individual's privacy. I provide two example scenarios:

- Scenario 1: An individual may request access to the personal information of another individual.
- Scenario 2: A NSW government agency may provide the personal information of a client to another NSW government agency who is delivering a service to that individual.

If a statutory cause of action for invasion of privacy is made out in NSW, the reason why the information was sought and how the information was used may become subject to the scrutiny of a range of potential bodies, such as the Privacy Commissioner, the NSW Civil and Administrative Tribunal (NCAT) or the courts.

This could have several implications for the GIPA regime.

Firstly, this type of scrutiny could impact on whether this kind of information is released in the future by other agencies. This is because the GIPA Act is based on an explicit presumption in favour of public disclosure of information. The introduction of a cause of action may affect the existing legislative regime which establishes the pre-eminence of release of information in the context of the existing NSW privacy regulatory regime, through provisions such as section 5 of the PPIP Act.

Secondly, the reason why access to the information is sought and the purpose for which the information will be used are not factors that a decision-maker under the GIPA Act is required to consider when determining whether to release government information. However, the GIPA regime demonstrates how, as an open government tool, information release can be done in a privacy respectful manner. The GIPA Act also has in-built safeguards to ensure that the privacy of individuals is appropriately taken into account by agency decision-makers when considering whether to release information. These safeguards are:

- use of a public interest balancing test which requires agency decision makers to identify and weigh up the public interest for and against disclosure of government information, before releasing the information
- requiring agencies to consult with third parties where a formal access application is for personal information about the third party or a close relative of a deceased person (section 54, GIPA Act). Third parties may object to the release of the personal information and are provided with review rights. These include internal review by an agency, external review by Information Commissioner and a right of review by NCAT. The IPC has developed specific guidance to assist agencies, applicants and third parties so that there is a consistent approach to applying the consultation provisions. This demonstrates the statutory intent of building a privacy respectful mechanism to facilitate consent-based sharing of personal information relating to formal access applications. However, the statutory intent of the GIPA Act in relation to release information is not predicated on consent and, notwithstanding an absence of consent, personal information may still be released in circumstances where a decision maker determines that the factors in favour of disclosure outweigh the factors against disclosure.

  This requirement to consult with third parties does not extend to information released under the other pathways, that is, mandatory release, proactive release and informal release.

- providing any person with the ability to make a complaint to the NSW Information Commissioner about the conduct (including action or inaction) of an agency in the exercise of functions under the GIPA Act (section 17, GIIC Act). For example, a complaint could be made in relation to the release of information that may have occurred under the other pathways (that is, mandatory release, proactive release and informal release). A complaint could also be made in relation to the conduct of the agency.

3. Potential regulatory issues

There are a number of regulatory issues that are relevant to the development of a statutory cause of action which the Committee may wish to consider.

3.1. Jurisdictional issues

No other jurisdiction in Australia has developed or introduced a statutory cause of action for serious invasions of privacy. This means that NSW could become the first jurisdiction in Australia to develop and implement a statutory cause of action.

The ALRC, NSWLRC and Victorian Privacy Commission supported the development of a nationally-consistent statutory cause of action based on the goal of national consistency for privacy regulation. The ALRC and NSWLRC supported development of statutory action in Commonwealth legislation. The Victorian Privacy Commission's submission to the 2014 ALRC report also supported the proposal that a statutory cause of action should be contained in Commonwealth legislation to ensure uniformity and avoid the problems associated with inconsistent legislation.

The Committee may wish to consider the following issues:

- The risks and benefits of NSW developing a statutory case of action in the absence of a commitment by other jurisdictions to do the same.
- The interaction of a NSW regime with any future regime by the Commonwealth and other jurisdictions.
- The impacts of a fragmented, piecemeal approach to privacy protection.
- The impact, if any, of a NSW statutory regime would have on the development of common law approaches in other jurisdictions.
- The effect, if any, of a NSW statutory cause of action on the relationship between the NSW and Commonwealth privacy regimes.
- The likelihood of unintended consequences, if any, that separate statutory regimes in each jurisdiction could have, such as forum shopping.
- The kinds of factors that have and could give rise to a privacy breach, and whether these could be characterised as a serious invasion of privacy, such as the dissemination of information through electronic means.
- How jurisdiction over a matter would be determined. A number of factors could impact on how jurisdiction is determined, such as by the location of the parties to the matter, where the invasion occurred, the type of defendant and how the invasion occurred. Situations could arise where the matter could fall under multiple privacy regimes, for example, where matter could be covered by the NSW privacy regime and the Commonwealth privacy regime.

  One scenario where this issue could arise is where one party is located in NSW and the other is a private company with an annual turnover of more than $3 million and therefore arguably subject to Commonwealth regulation.

  Other situations could involve invasions of privacy on social media. A determination of jurisdiction in this scenario could present significant legal issues which may add further complexity and uncertainty to the existing privacy regime.

The Australian Consumer Law (ACL) provides a useful example of how national harmonisation on an important legal, regulatory and public policy issue was

addressed in Australia. The ACL is a single, national consumer law that replaced provisions in 20 national, State and Territory consumer laws. Laws to apply the ACL as a law of each State and Territory have been enacted in all States and Territories. The ACL is enforced and administered by the Australian Competition and Consumer Commission (ACCC), each State and Territory's consumer agency, and, in respect of financial services, the Australian Securities and Investments Commission (ASIC).

3.2. Complementarity of the information access and privacy regimes within NSW

If developed, any statutory cause of action should recognise and support the complementarity of the information access and privacy regulatory regimes. The citizens of NSW would be better served if there was a clear, cohesive legislative framework for the management of government held information. In that regard, the Committee may wish to assess the impact, if any, that a statutory cause of action could have on this legislative framework.

For example, there are different paths to access personal information under the PPIP Act, the HRIP Act and the GIPA Act. However, NSW privacy legislation recognises the intersect with the GIPA Act which requires the decision maker to instead apply the GIPA Act to a privacy determination in relation to access to personal information. This coordinated approach to information release is consistent with the establishment of a single IPC for information access and privacy matters. Complementarity is supported through statutory recognition of the preeminence of information release (section 5 and section 20(5)) of the PPIP Act).

3.3. Balancing the public interest in release of information against other public interests, including privacy

Through the GIPA Act, the NSW Parliament recognised that there are a range of public interests in favour of and against disclosure of information.

The GIPA Act allows for the disclosure of information held by a NSW public sector agency unless it is contrary to the public interest to do so and requires the balancing of competing public interests when deciding whether to release information. An overriding public interest against disclosure is made out if there are public interest considerations against disclosure, and on balance, those considerations outweigh the public interest considerations in favour of disclosure.

Factors in favour of disclosure could include the promotion of open discussion of public affairs and informing the public about the operations, policies and practices of agencies. A non-exhaustive list of examples of these factors is contained in a note to section 12 of the GIPA Act.

In contrast, the GIPA Act contains a confined list of factors against disclosure. These include revealing a person's personal information or where release could contravene the *Privacy and Personal Information Protection Act 1998* (PPIP Act) or the *Health Records Information Privacy Act 2002* (HRIP Act). These factors are listed as a table in section 14 of the GIPA Act.

In the context of a statutory cause of action for serious invasions of privacy, a similar mechanism has been discussed by the NSWLRC and ALRC, and was supported by the Queensland OIC in its submission to the 2014 ALRC report. The Committee may wish to consider including such a public interest balancing test in the design of a statutory cause of action.

3.4. Supporting open government and the management of information

Any statutory cause of action should be designed so as to avoid having a chilling effect on the release and sharing of government information. Rather, it should

support the public release of government information and a culture that is committed to open, accountable and transparent government while being respectful of privacy.

In addition, a statutory cause of action should not have an adverse impact on information management approaches adopted by NSW public sector agencies that are efficient and effective. For example, the design of a statutory cause of action should be mindful of the action not having the effect of increasing the regulatory burden for information management on agencies.

3.5. Accessible to members of the public

All individuals who have been subject to a serious invasion of their privacy should be able to have access to taking the action. A statutory cause of action should provide a low cost avenue for taking action and operate in a simple, easy to understand manner.

3.6. Meeting community expectations

A statutory cause of action should be flexible and adaptable to community expectations. The design of a statutory cause of action should be capable of taking into account:

- the expectations of NSW citizens that government decision-making is open, transparent and accountable
- changing community views of what government information should be released publicly.

I have raised in my submission to the GIPA Act statutory review that I would support reforms that better promote the proactive release of government-held information. This is essential in taking the next step in open government and could assist to promote greater public confidence in government decision-making. It encourages accountability and transparency in the exercise by agencies and government of powers and discretion.

At the same time, any statutory cause of action should be sufficiently flexible and adaptable to accommodate changing community norms about what information should be made publicly available. The focus on proactive release of government information represents the key shift that has been occurring since 2009 when the FOI Act was replaced with the GIPA Act, that is, a shift from providing access to government information on request, to a 'push model' where government information is proactively released, considered a core strategic asset and supported by a commitment to open government.

An important benefit from this shift has been the proactive release of information that may not have been considered for public release during the period when the FOI Act was in force. For example, in NSW, Ministerial diaries are now publicly available and published on the Department of Premier and Cabinet website as part of transparency reforms by the NSW government. This publication builds trust with the community, and comes at a time of increased scrutiny in the media of the cost and purpose of travel by Ministers and other members of parliament.

3.7. Mechanisms to promote information sharing

Internationally, there are a number of mechanisms being used to promote information sharing by government agencies. These include:

- legislative/structural features that build success and promote a model of proactive agency information sharing
- promoting proactive release of government data across organisational walls, to recognise and reward the individual
- building inter-agency trust through the use of soft regulation.

A recent notable initiative in NSW has been to establish a 'Data Analytics Centre' to encourage and support the sharing and analysis of data to enable better service delivery by agencies.

These approaches have the potential to offer significant benefits to the community. The Committee is encouraged to consider how a statutory cause may limit their benefits.

4. Other considerations – impact on IPC corporate matters

Depending on the approach taken, a statutory cause of action in NSW might require an expanded role for the NSW Privacy Commissioner. For example, the ALRC's report 123, *Serious Invasions of Privacy in the Digital Era*, in 2014, recommended that the Commonwealth Privacy Commissioner's existing power to investigate complaints be extended to include complaints about serious invasions of privacy more generally.

There would be significant resourcing implications for the IPC if a similar regulatory reform is considered in NSW to expand the role of the NSW Privacy Commissioner. Any analysis of such reforms should be accompanied by careful consideration by the Committee of how best to equip the agency to support its existing functions as well any additional privacy responsibilities.

Please do not hesitate to contact me if you have any queries. Alternatively, your officers may contact David Marcus, Manager Performance Reporting and Projects, on (02) 8071 7041, or by email at david.marcus@ipc.nsw.gov.au.

Yours sincerely

22 October 2015

Ms Elizabeth Tydd

Chief Executive Officer and NSW Information Commissioner