Submission No 21

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

Organisation: Pacific Privacy Pty Ltd

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Fair Information Practices, Privacy and Data Protection

Standing Committee on Law and Justice
Legislative Council
NSW Parliament

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Re: Inquiry into remedies for the serious invasion of privacy in New South Wales

I welcome the opportunity to make a submission to this Inquiry. I do so based on my by threefold experience:

- As a practicing privacy consultant, in which capacity I have undertaken numerous assignments for NSW government agencies operating under NSW privacy laws.
- As a former deputy Federal Privacy Commissioner
- As an active privacy advocate with the Australian Privacy Foundation and Privacy International, in which capacity I have authored numerous submissions, including to previous inquiries on NSW privacy laws

I have a particular interest in NSW privacy legislation as I was engaged in late 2009 to assist the then NSW Privacy Commissioner, Justice Ken Taylor in establishing the new office of Information Commissioner, including consideration of the relationship between the new Government Information (Public Access) GIPA Act and existing privacy laws. We also provided input at that time to the NSW Law Reform Commission inquiry into privacy law.

I hope that the Committee will take advantage of the broad terms of reference to consider not just the need for a private right of action for invasion of privacy, but other respects in which current privacy and surveillance laws in NSW fail to provide adequate remedies for serious invasions of privacy.

In this respect I fully support the well-argued submission already made to the Inquiry by Ms Anna Johnston of Salinger Privacy, who has a similar multi-faceted experience and background as myself. She has clearly identified numerous weaknesses both in the NSW information privacy laws (PPIPA and HRIPA) and in their implementation, and supported this with compelling evidence from cases brought in the Tribunal and Courts.

I highlight the following matters for consideration by the Committee:

A private right of action is clearly needed as a complement to existing information privacy laws and principles, and to surveillance laws. Existing breach of confidence

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common law clearly does not deal with the range of circumstances in which a private right of action would be appropriate. The case for a new statutory cause of action has been exhaustively argued in successive law reform commission inquiries and reports (Federal, NSW and Victorian), and the proposed designs for a statutory right of action have adequately addressed the legitimate concerns of media organisations and others. In relation to a right of action I endorse the comprehensive submission to this inquiry from the Australian Privacy Foundation (APF). With respect, this Committee does not need to revisit all the arguments – it should just urge the government to get on and implement previous recommendations.

The existing NSW information privacy laws (PPIPA and HRIPA) are riddled with complex provisions and exceptions which render them largely ineffective in addressing both minor and serious invasions of privacy by NSW government agencies and health care providers. The laws provide little more than a veneer of superficial protection which can be, and is, used by governments as a 'fig leaf' to re-assure the public that their privacy is protected when it reality it is not. Major government initiatives have routinely intruded excessively and unnecessarily into individuals' privacy but can satisfy the letter of the privacy laws because they are either 'authorised or required by law', or fall within one of the many broad exemptions and exceptions.

Consistently inadequate resourcing over many years for the Privacy Commissioner and more recently Information and Privacy Commission (IPC) have severely limited the effectiveness of these offices in promoting and enforcing the information privacy laws, in monitoring agency compliance and in adequately handling complaints in a timely and effective fashion.

The experiment of combining the offices of Privacy and Information Commissioners has manifestly failed, not only in NSW but also in other Australian jurisdictions. Whilst superficially attractive with several theoretical advantages, the reality has been that neither freedom of information (GIPA) nor privacy objectives have been well served. Tensions between the functions and competition for resources has been corrosive and distracting, and in cases where the objectives compete, privacy has all too often been the loser, with a prevailing presumption that transparency and accountability objectives of FoI/GIPA should 'trump' individual privacy. This has been a false and unnecessary conflict – a more sophisticated approach can in most cases reconcile what may appear to be, but are not, irreconcilable differences.

The failure of implementation of information privacy laws in NSW has been compounded by the long-standing practice of the government in appointing only a part-time Privacy Commissioner. However well-intentioned and committed the Commissioner, a part time appointment inevitably compromises their effectiveness and sends entirely the wrong signal to the bureaucracy.

In light of the above observations, it is not surprising that many NSW government agencies do not take privacy laws seriously. Privacy impact/risk assessments are not routinely undertaken, and even when done, are rarely implemented. Privacy

management plans and privacy policies are often incomplete or out of date, privacy responsibility is assigned, if at all, to junior staff without sufficient 'clout', and front line staff are not adequately trained or supported to understand their privacy obligations.

My experience consulting to NSW government agencies has too often been that they see privacy compliance as a nuisance to be 'worked around', with minimal effort and resources devoted to genuine compliance activity. Senior managers are often actively hostile to privacy objectives, refusing to recognize it as a legitimate (and statutory) constraint on their desired freedom to collect, share and re-use personal information at will.

The people of NSW will only have effective privacy protection, and effective remedies for breaches of privacy, if and when weaknesses in the information privacy laws are addressed, and the office of Privacy Commissioner adequately resourced and empowered.

Introduction of a statutory right of action for serious invasions of privacy is a long overdue complement to information privacy and surveillance laws – addressing invasions and intrusions – such as by individuals and private sector organisations, or not involving personal information – which those laws cannot address. But as well as recommending a right of action, the Committee should also recommend urgent reform of the existing laws and increased powers and resources for the Privacy Commissioner.

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