

INQUIRY INTO CYBERSECURITY

Name: Name suppressed

Date Received: 1 October 2020

Partially
Confidential

**Supplementary submission for the consideration of esteemed members of the
Parliament of New South Wales,
Upper House Committee Inquiry into Cybersecurity**

September 30th, 2020

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I: Introduction**1. Outline of argument as put forward by appellant,**

September 30th, 2020

To: the Esteemed Members of the Parliament of New South Wales,
Upper House Committee Inquiry into Cybersecurity,

I am writing and submitting this document to you as a supplemental submission to support my prior and initial submission to the Inquiry Into Cybersecurity, which was written and submitted by myself on Friday the 28th of August 2020.

I would like to thank you for taking the time to read this document, and in hopefully taking it into consideration when deliberating and deciding a verdict or in deciding future policy. For the sake of convenience, I have footnoted all correspondence and statements to what I deem to be relevant articles of NSW State Legislation Acts - as well as definitions as provided by these acts.

As an appellant to the Inquiry Into Cybersecurity I am putting forward the following argument:

“Due to the NSW Police Force disclosing¹ my personal information² in a August 13th 2020 communique to _____ I have had identifying personal information, as well as my political and personal beliefs and associations⁴, disclosed by NSW Police Force to an external source without the direct consent⁵ of myself:

1. I believe and argue that my identifying personal information,⁶ as well as my contact information, have been shared without my consent by virtue of the New South Wales Police Force sharing my email address with _____.⁷

¹ As defined in 'LAW ENFORCEMENT CONDUCT COMMISSION ACT 2016 - SECT 175' - Page 16

² As defined in 'PRIVACY AND PERSONAL INFORMATION PROTECTION ACT 1998 - SECT 4 Definition of "personal information" - Page 8

³ Item 2 - Confirmation of my personal information being disclosed to _____, Page 34

⁴ In violation of 'PRIVACY AND PERSONAL INFORMATION PROTECTION ACT 1998 - SECT 19 - (1) "A public sector agency must not disclose personal information relating to an individual's ethnic or racial origin, political opinions, religious or philosophical beliefs, trade union membership or sexual activities unless the disclosure is necessary to prevent a serious and imminent threat to the life or health of the individual concerned or another person." - Page 10

⁵ As per 'LAW ENFORCEMENT CONDUCT COMMISSION ACT 2016 - SECT 187' - Page 13

⁶ As defined in 'PRIVACY AND PERSONAL INFORMATION PROTECTION ACT 1998 - SECT 4 Definition of "personal information" - Page 17

⁷ Item 2 - Confirmation of my personal information being disclosed to _____, Page 34

2. I also believe and further argue that due to this breach of privacy my political and personal beliefs have been shared with _____ without my consent due, to the initial nature of my original June 7th, 2020 complaint being about 'the excessive use of force on participants in a peaceful Black Lives Matter protest through the use of a technique called 'kettling.'⁹
3. In doing so, the New South Wales Police Force have (and by their own admission¹⁰) committed an act of maladministration¹¹¹² through committing a 'technical breach¹³,' in which their negligent¹⁴ handling of identifying personal information¹⁵¹⁶ resulted in the publication of my personal information into the 'public domain'.¹⁷
4. I also argue that it is irrelevant whether this disclosure was intentional or unintentional¹⁸, and that intent has no bearing on the objective fact: through this negligent handling of private information, an offence has been inadvertently committed by the New South Wales Police Force.
5. I also disagree with the following statement provided in a letter addressed to myself from New South Wales Police Force: 'that your email address, and no other personal details, were inadvertently disclosed to that one person (external to the NSWPF) by the Central Metropolitan Region Professional Standards Unit. That person then posted/disclosed your email address on the public domain.'¹⁹

I argue that through disclosing my email address to the New South Wales Police Force have inadvertently published my personal information to the 'the public domain' without my permission. I further argue that _____ only notified myself of the inadvertent 'technical breach' after I approached him for confirmation that my information was in the communication he received from NSWPF.²⁰

⁸ Item 2 - Confirmation of my personal information being disclosed to _____, Page 34.

⁹ Item 1 - Initial Complaint to New South Wales Police In Regards to 'Kettling' Practise, Page 33

¹⁰ Item 2 - Confirmation of my personal information being disclosed to _____, Page 34

¹¹ As defined in 'LAW ENFORCEMENT CONDUCT COMMISSION ACT 2016 - SECT 11' - Page 13

¹² As defined in "What is Maladministration?" as published by NSW Ombudsman - Page 27

¹³ Item 3, as provided by appellant. - Page 33

¹⁴ As defined in the 'Civil Liability Act 2002 No 22 - Part 1A Negligence' - Page 19

¹⁵ As defined in 'PRIVACY AND PERSONAL INFORMATION PROTECTION ACT 1998 - SECT 4 Definition of "personal information" - Page 13

¹⁶ As defined in 'NSW Police Force Privacy Management Plan.' - Page 30

¹⁷ Item 4 - Letter from _____ - Page 35

¹⁸ Item 4 - Letter from _____ - Page 35

¹⁹ Item 4 - Letter from _____ - Page 35

²⁰ Item 2 - Confirmation of my personal information being disclosed to _____, Page 34

I would like to state for any and all record that [redacted] has done more for the correction of this mistake and has acted in a considerably better nature than the investigating officers of the NSW Police Force.

I also would like to express my formal gratitude for his considerate and valient act in stepping forward to highlight this example of the New South Wales Police Force's neglectful data management practises through speaking to [redacted] of

[redacted] did the right thing in making the affected parties aware of this significant breach of their security personal information, whilst New South Wales Police Force made no efforts to contact the 154 other people who have had their personal contact information and political beliefs disclosed, whilst to then seemingly deny it, to only then admit a 'technical breach' of Section 169A.

It is not [redacted] fault that an extra party was contacted. It is the fault of the New South Wales Police Force that he received this information. By disclosing this information to him, the New South Wales Police Force have published it into the public domain.

I hope that the Inquiry finds this supplemental submission to be of assistance, and I thank you for your time. If I may be of any further assistance please let myself know.

Appellant

II: Relevant Articles of State Legislation

A. Privacy And Personal Information Protection Act 1998



New South Wales Consolidated Acts

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PRIVACY AND PERSONAL INFORMATION PROTECTION ACT 1998 - SECT 4

Definition of "personal information"

4 [Definition](#) of "personal information"

- (1) In this Act,
"personal information" means information or an opinion (including information or an opinion forming part of a database and whether or not recorded in a material form) about an individual whose identity is apparent or can reasonably be ascertained from the information or opinion.
- (2) [Personal information](#) includes such things as an individual's fingerprints, retina prints, body samples or genetic characteristics.
- (3) [Personal information](#) does not include any of the following--
 - (a) information about an individual who has been dead for more than 30 years,
 - (b) information about an individual that is contained in a [publicly available publication](#),
 - (c) information about a witness who is included in a witness protection program under the [Witness Protection Act 1995](#) or who is subject to other witness protection arrangements made under an Act,
 - (d) information about an individual arising out of a warrant issued under the [Telecommunications \(Interception\) Act 1979](#) of the Commonwealth,
 - (e) information about an individual that is contained in a public interest disclosure within the meaning of the [Public Interest Disclosures Act 1994](#), or that has been [collected](#) in the course of an investigation arising out of a public interest disclosure,

- (f) information about an individual arising out of, or in connection with, an authorised operation within the meaning of the [Law Enforcement \(Controlled Operations\) Act 1997](#),
 - (g) information about an individual arising out of a Royal Commission or Special Commission of Inquiry,
 - (h) information about an individual arising out of a complaint made under Part 8A of the [Police Act 1990](#),
 - (i) information about an individual that is contained in Cabinet information or Executive Council information under the [Government Information \(Public Access\) Act 2009](#),
 - (j) information or an opinion about an individual's suitability for appointment or employment as a [public sector official](#),
 - (ja) information about an individual that is obtained about an individual under Chapter 8 (Adoption information) of the [Adoption Act 2000](#),
 - (k) information about an individual that is of a class, or is contained in a document of a class, prescribed by the regulations for the purposes of this subsection.
- (4) For the purposes of this Act, [personal information](#) is "held" by a [public sector agency](#) if--
- (a) the [agency](#) is in possession or control of the information, or
 - (b) the information is in the possession or control of a person employed or engaged by the [agency](#) in the course of such employment or engagement, or
 - (c) the information is contained in a [State record](#) in respect of which the [agency](#) is responsible under the [State Records Act 1998](#).
- (5) For the purposes of this Act, [personal information](#) is not "collected" by a [public sector agency](#) if the receipt of the information by the [agency](#) is unsolicited.



Privacy and Personal Information Protection Act 1998 No 133

Current version for 1 March 2020 to date (accessed 29 September 2020 at 17:11)

[Part 2](#) > [Division 1](#) > Section 19

19 Special restrictions on disclosure of personal information

- (1) A public sector agency must not disclose personal information relating to an individual's ethnic or racial origin, political opinions, religious or philosophical beliefs, trade union membership or sexual activities unless the disclosure is necessary to prevent a serious and imminent threat to the life or health of the individual concerned or another person.
- (2) A public sector agency that holds personal information about an individual must not disclose the information to any person or body who is in a jurisdiction outside New South Wales or to a Commonwealth agency unless—
 - (a) the public sector agency reasonably believes that the recipient of the information is subject to a law, binding scheme or contract that effectively upholds principles for fair handling of the information that are substantially similar to the information protection principles, or
 - (b) the individual expressly consents to the disclosure, or
 - (c) the disclosure is necessary for the performance of a contract between the individual and the public sector agency, or for the implementation of pre-contractual measures taken in response to the individual's request, or
 - (d) the disclosure is necessary for the conclusion or performance of a contract concluded in the interest of the individual between the public sector agency and a third party, or
 - (e) all of the following apply—
 - (i) the disclosure is for the benefit of the individual,
 - (ii) it is impracticable to obtain the consent of the individual to that disclosure,
 - (iii) if it were practicable to obtain such consent, the individual would be likely to give it, or
 - (f) the disclosure is reasonably believed by the public sector agency to be necessary to lessen or prevent a serious and imminent threat to the life, health or safety of the individual or another person, or

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Privacy and Personal Information Protection Act 1998 No 133 - NSW Legislation

- (g) the public sector agency has taken reasonable steps to ensure that the information that it has disclosed will not be held, used or disclosed by the recipient of the information inconsistently with the information protection principles, or
 - (h) the disclosure is permitted or required by an Act (including an Act of the Commonwealth) or any other law.
- (3)–(5) (Repealed)

II: Relevant Articles of State Legislation

B. Law Enforcement Conduct Commission Act 2016



NSW legislation

Results: Document Types="Acts, Regulations, EPs", Search In="All Content", All Words="maladministration", Point In Time="23/06/2020" match 35 of 285 provisions

Law Enforcement Conduct Commission Act 2016 No 61

Current version for 23 June 2020 to date (accessed 29 September 2020 at 16:33)

[Part 2](#) > [Division 2](#) > Section 11

11 Maladministration

- (1) For the purposes of this Act, **agency** *maladministration* means any conduct (by way of action or inaction) of the NSW Police Force or the Crime Commission other than excluded conduct—
 - (a) that is unlawful (that is, constitutes an offence or is corrupt conduct or is otherwise unlawful), or
 - (b) that, although it is not unlawful—
 - (i) is unreasonable, unjust, oppressive or improperly discriminatory in its effect, or
 - (ii) arises, wholly or in part, from improper motives, or
 - (iii) arises, wholly or in part, from a decision that has taken irrelevant matters into consideration, or
 - (iv) arises, wholly or in part, from a mistake of law or fact, or
 - (v) is conduct of a kind for which reasons should have (but have not) been given, or
 - (c) that is engaged in in accordance with a law or established practice, being a law or practice that is, or may be, unreasonable, unjust, oppressive or improperly discriminatory in its effect.
- (2) For the purposes of this Act, **officer** *maladministration* means any conduct (by way of action or inaction) of a police officer, administrative employee or Crime Commission officer that, although it is not unlawful (that is, does not constitute an offence or corrupt conduct)—
 - (a) is unreasonable, unjust, oppressive or improperly discriminatory in its effect, or
 - (b) arises, wholly or in part, from improper motives, or

- (c) arises, wholly or in part, from a decision that has taken irrelevant matters into consideration, or
 - (d) arises, wholly or in part, from a mistake of law or fact, or
 - (e) is conduct of a kind for which reasons should have (but have not) been given.
- (3) For the purposes of this Act, agency **maladministration** or officer **maladministration** is **serious maladministration**—
- (a) in the case of an agency—if the conduct involved is unlawful (that is, constitutes an offence or is corrupt conduct or is otherwise unlawful), or
 - (b) in the case of an agency or officer—if the conduct involved is of a serious nature and, although it is not unlawful—
 - (i) is unreasonable, unjust, oppressive or improperly discriminatory in its effect, or
 - (ii) arises, wholly or in part, from improper motives.
- (4) In this section—

excluded conduct means any of the following—

- (a) conduct of the Crime Commission in relation to a decision that could be the subject of an application for review by the Supreme Court under section 33 of the [Crime Commission Act 2012](#),
- (b) conduct of the Crime Commission or Crime Commission officers in relation to the carrying on or determination of a hearing under Division 4 of Part 2 of the [Crime Commission Act 2012](#) or any proceeding relating to an investigation conducted by the Crime Commission,
- (c) conduct of the Crime Commission or its officers where acting as a legal advisor to a public authority or as a legal representative of a public authority (including as counsel assisting a public authority),
- (d) conduct of the Crime Commission or its officers relating to the carrying on of any proceedings before a court (including a coronial inquiry and committal proceedings before a magistrate) or before any other person or body before whom witnesses may be compelled to appear and give evidence,
- (e) conduct in carrying out the functions of an executive officer or member of the Management Committee of the Crime Commission.



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LAW ENFORCEMENT CONDUCT COMMISSION ACT 2016 - SECT 12

Meaning of "complainant" and "complaint"

12 Meaning of "complainant" and "complaint"

In this Act--

"**complainant**" means a person by whom, or on whose behalf, a [complaint](#) is made.

"**complaint**" means an allegation that any conduct--

(a) of a [police officer](#) (whether or not named or identified)--is (or could be) conduct that falls within the description of [police misconduct](#) or [officer maladministration](#) (a "**police complaint**"), or

(b) of a [Crime Commission officer](#) (whether or not named or identified)--is (or could be) conduct that falls within the description of [Crime Commission officer misconduct](#) or [officer maladministration](#) (a "**Crime Commission complaint**"), or

(c) of an [administrative employee](#) (whether or not named or identified)--is (or could be) conduct that falls within the description of [administrative employee misconduct](#) or [officer maladministration](#) (an "**administrative employee complaint**"), or

(d) of the NSW Police Force or the [Crime Commission](#)--is (or could be) conduct that falls within the description of [agency maladministration](#) (an "**agency complaint**").

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LAW ENFORCEMENT CONDUCT COMMISSION ACT 2016 - SECT 175

Definitions

175 [Definitions](#)

In this Part--

"**disclose**" [examination](#) material, police information or any other information includes the following--

- (a) to make available,
- (b) to [disclose](#) copies, contents or descriptions of [examination](#) material or information.

"**use**" of [examination](#) material or information includes use of copies, contents or descriptions of that material or information.

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LAW ENFORCEMENT CONDUCT COMMISSION ACT 2016 - SECT 187

Identity of complainant not to be disclosed

187 Identity of [complainant](#) not to be [disclosed](#)

An [officer of the Commission](#) must not [disclose](#) to any person the identity of a [complainant](#) unless the disclosure is made--

- (a) in accordance with guidelines established by the [Commission](#), or
- (b) with the consent of the [complainant](#), or
- (c) in accordance with a requirement of or made under this or any other Act,
or
- (d) for the purposes of any legal proceedings before a court or tribunal.

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II: Relevant Articles of State Legislation
C. Civil Liability Act 2002 No 22

4 Miscellaneous provisions

- (1) **Act to bind Crown** This Act binds the Crown in right of New South Wales and, in so far as the legislative power of the Parliament of New South Wales permits, the Crown in all its other capacities.
- (2) **Regulations** The Governor may make regulations, not inconsistent with this Act, for or with respect to any matter that by this Act is required or permitted to be prescribed or that is necessary or convenient to be prescribed for carrying out or giving effect to this Act.
- (3) **Notes** Notes included in this Act do not form part of this Act.
- (4) **Savings and transitional provisions** Schedule 1 has effect.

Part 1A Negligence**Division 1 Preliminary****5 Definitions**

In this Part—

harm means harm of any kind, including the following—

- (a) personal injury or death,
- (b) damage to property,
- (c) economic loss.

negligence means failure to exercise reasonable care and skill.

personal injury includes—

- (a) pre-natal injury, and
- (b) impairment of a person's physical or mental condition, and
- (c) disease.

5A Application of Part

- (1) This Part applies to any claim for damages for harm resulting from negligence, regardless of whether the claim is brought in tort, in contract, under statute or otherwise.
- (2) This Part does not apply to civil liability that is excluded from the operation of this Part by section 3B.

Division 2 Duty of care**5B General principles**

- (1) A person is not negligent in failing to take precautions against a risk of harm unless—
 - (a) the risk was foreseeable (that is, it is a risk of which the person knew or ought to have

- known), and
- (b) the risk was not insignificant, and
 - (c) in the circumstances, a reasonable person in the person's position would have taken those precautions.
- (2) In determining whether a reasonable person would have taken precautions against a risk of harm, the court is to consider the following (amongst other relevant things)—
- (a) the probability that the harm would occur if care were not taken,
 - (b) the likely seriousness of the harm,
 - (c) the burden of taking precautions to avoid the risk of harm,
 - (d) the social utility of the activity that creates the risk of harm.

5C Other principles

In proceedings relating to liability for negligence—

- (a) the burden of taking precautions to avoid a risk of harm includes the burden of taking precautions to avoid similar risks of harm for which the person may be responsible, and
- (b) the fact that a risk of harm could have been avoided by doing something in a different way does not of itself give rise to or affect liability for the way in which the thing was done, and
- (c) the subsequent taking of action that would (had the action been taken earlier) have avoided a risk of harm does not of itself give rise to or affect liability in respect of the risk and does not of itself constitute an admission of liability in connection with the risk.

Division 3 Causation

5D General principles

- (1) A determination that negligence caused particular harm comprises the following elements—
 - (a) that the negligence was a necessary condition of the occurrence of the harm (*factual causation*), and
 - (b) that it is appropriate for the scope of the negligent person's liability to extend to the harm so caused (*scope of liability*).
- (2) In determining in an exceptional case, in accordance with established principles, whether negligence that cannot be established as a necessary condition of the occurrence of harm should be accepted as establishing factual causation, the court is to consider (amongst other relevant things) whether or not and why responsibility for the harm should be imposed on the negligent party.
- (3) If it is relevant to the determination of factual causation to determine what the person who suffered harm would have done if the negligent person had not been negligent—
 - (a) the matter is to be determined subjectively in the light of all relevant circumstances, subject

to paragraph (b), and

- (b) any statement made by the person after suffering the harm about what he or she would have done is inadmissible except to the extent (if any) that the statement is against his or her interest.
- (4) For the purpose of determining the scope of liability, the court is to consider (amongst other relevant things) whether or not and why responsibility for the harm should be imposed on the negligent party.

5E Onus of proof

In proceedings relating to liability for negligence, the plaintiff always bears the onus of proving, on the balance of probabilities, any fact relevant to the issue of causation.

Division 4 Assumption of risk

5F Meaning of “obvious risk”

- (1) For the purposes of this Division, an *obvious risk* to a person who suffers harm is a risk that, in the circumstances, would have been obvious to a reasonable person in the position of that person.
- (2) Obvious risks include risks that are patent or a matter of common knowledge.
- (3) A risk of something occurring can be an obvious risk even though it has a low probability of occurring.
- (4) A risk can be an obvious risk even if the risk (or a condition or circumstance that gives rise to the risk) is not prominent, conspicuous or physically observable.

5G Injured persons presumed to be aware of obvious risks

- (1) In proceedings relating to liability for negligence, a person who suffers harm is presumed to have been aware of the risk of harm if it was an obvious risk, unless the person proves on the balance of probabilities that he or she was not aware of the risk.
- (2) For the purposes of this section, a person is aware of a risk if the person is aware of the type or kind of risk, even if the person is not aware of the precise nature, extent or manner of occurrence of the risk.

5H No proactive duty to warn of obvious risk

- (1) A person (*the defendant*) does not owe a duty of care to another person (*the plaintiff*) to warn of an obvious risk to the plaintiff.
- (2) This section does not apply if—
 - (a) the plaintiff has requested advice or information about the risk from the defendant, or
 - (b) the defendant is required by a written law to warn the plaintiff of the risk, or
 - (c) the defendant is a professional and the risk is a risk of the death of or personal injury to the plaintiff from the provision of a professional service by the defendant.

- (3) Subsection (2) does not give rise to a presumption of a duty to warn of a risk in the circumstances referred to in that subsection.

5I No liability for materialisation of inherent risk

- (1) A person is not liable in negligence for harm suffered by another person as a result of the materialisation of an inherent risk.
- (2) An *inherent risk* is a risk of something occurring that cannot be avoided by the exercise of reasonable care and skill.
- (3) This section does not operate to exclude liability in connection with a duty to warn of a risk.

Division 5 Recreational activities

5J Application of Division

- (1) This Division applies only in respect of liability in negligence for harm to a person (*the plaintiff*) resulting from a recreational activity engaged in by the plaintiff.
- (2) This Division does not limit the operation of Division 4 in respect of a recreational activity.

5K Definitions

In this Division—

dangerous recreational activity means a recreational activity that involves a significant risk of physical harm.

obvious risk has the same meaning as it has in Division 4.

recreational activity includes—

- (a) any sport (whether or not the sport is an organised activity), and
- (b) any pursuit or activity engaged in for enjoyment, relaxation or leisure, and
- (c) any pursuit or activity engaged in at a place (such as a beach, park or other public open space) where people ordinarily engage in sport or in any pursuit or activity for enjoyment, relaxation or leisure.

5L No liability for harm suffered from obvious risks of dangerous recreational activities

- (1) A person (*the defendant*) is not liable in negligence for harm suffered by another person (*the plaintiff*) as a result of the materialisation of an obvious risk of a dangerous recreational activity engaged in by the plaintiff.
- (2) This section applies whether or not the plaintiff was aware of the risk.

5M No duty of care for recreational activity where risk warning

- (1) A person (*the defendant*) does not owe a duty of care to another person who engages in a recreational activity (*the plaintiff*) to take care in respect of a risk of the activity if the risk was the subject of a risk warning to the plaintiff.

- (2) If the person who suffers harm is an incapable person, the defendant may rely on a risk warning only if—
 - (a) the incapable person was under the control of or accompanied by another person (who is not an incapable person and not the defendant) and the risk was the subject of a risk warning to that other person, or
 - (b) the risk was the subject of a risk warning to a parent of the incapable person (whether or not the incapable person was under the control of or accompanied by the parent).
- (3) For the purposes of subsections (1) and (2), a risk warning to a person in relation to a recreational activity is a warning that is given in a manner that is reasonably likely to result in people being warned of the risk before engaging in the recreational activity. The defendant is not required to establish that the person received or understood the warning or was capable of receiving or understanding the warning.
- (4) A risk warning can be given orally or in writing (including by means of a sign or otherwise).
- (5) A risk warning need not be specific to the particular risk and can be a general warning of risks that include the particular risk concerned (so long as the risk warning warns of the general nature of the particular risk).
- (6) A defendant is not entitled to rely on a risk warning unless it is given by or on behalf of the defendant or by or on behalf of the occupier of the place where the recreational activity is engaged in.
- (7) A defendant is not entitled to rely on a risk warning if it is established (on the balance of probabilities) that the harm concerned resulted from a contravention of a provision of a written law of the State or Commonwealth that establishes specific practices or procedures for the protection of personal safety.
- (8) A defendant is not entitled to rely on a risk warning to a person to the extent that the warning was contradicted by any representation as to risk made by or on behalf of the defendant to the person.
- (9) A defendant is not entitled to rely on a risk warning if the plaintiff was required to engage in the recreational activity by the defendant.
- (10) The fact that a risk is the subject of a risk warning does not of itself mean—
 - (a) that the risk is not an obvious or inherent risk of an activity, or
 - (b) that a person who gives the risk warning owes a duty of care to a person who engages in an activity to take precautions to avoid the risk of harm from the activity.
- (11) This section does not limit or otherwise affect the effect of a risk warning in respect of a risk of an activity that is not a recreational activity.
- (12) In this section—

incapable person means a person who, because of the person's young age or a physical or mental disability, lacks the capacity to understand the risk warning.

parent of an incapable person means any person (not being an incapable person) having parental responsibility for the incapable person.

5N Waiver of contractual duty of care for recreational activities

- (1) Despite any other written or unwritten law, a term of a contract for the supply of recreation services may exclude, restrict or modify any liability to which this Division applies that results from breach of an express or implied warranty that the services will be rendered with reasonable care and skill.
- (2) Nothing in the written law of New South Wales renders such a term of a contract void or unenforceable or authorises any court to refuse to enforce the term, to declare the term void or to vary the term.
- (3) A term of a contract for the supply of recreation services that is to the effect that a person to whom recreation services are supplied under the contract engages in any recreational activity concerned at his or her own risk operates to exclude any liability to which this Division applies that results from breach of an express or implied warranty that the services will be rendered with reasonable care and skill.
- (4) In this section, *recreation services* means services supplied to a person for the purposes of, in connection with or incidental to the pursuit by the person of any recreational activity.
- (5) This section applies in respect of a contract for the supply of services entered into before or after the commencement of this section but does not apply in respect of a breach of warranty that occurred before that commencement.
- (6) This section does not apply if it is established (on the balance of probabilities) that the harm concerned resulted from a contravention of a provision of a written law of the State or Commonwealth that establishes specific practices or procedures for the protection of personal safety.

Division 6 Professional negligence

5O Standard of care for professionals

- (1) A person practising a profession (*a professional*) does not incur a liability in negligence arising from the provision of a professional service if it is established that the professional acted in a manner that (at the time the service was provided) was widely accepted in Australia by peer professional opinion as competent professional practice.
- (2) However, peer professional opinion cannot be relied on for the purposes of this section if the court considers that the opinion is irrational.
- (3) The fact that there are differing peer professional opinions widely accepted in Australia concerning a matter does not prevent any one or more (or all) of those opinions being relied on for the purposes of this section.
- (4) Peer professional opinion does not have to be universally accepted to be considered widely accepted.

5P Division does not apply to duty to warn of risk

This Division does not apply to liability arising in connection with the giving of (or the failure to give) a warning, advice or other information in respect of the risk of death of or injury to a person associated with the provision by a professional of a professional service.

Division 7 Non-delegable duties and vicarious liability**5Q Liability based on non-delegable duty**

- (1) The extent of liability in tort of a person (*the defendant*) for breach of a non-delegable duty to ensure that reasonable care is taken by a person in the carrying out of any work or task delegated or otherwise entrusted to the person by the defendant is to be determined as if the liability were the vicarious liability of the defendant for the negligence of the person in connection with the performance of the work or task.
- (2) This section applies to an action in tort whether or not it is an action in negligence, despite anything to the contrary in section 5A.

Division 8 Contributory negligence**5R Standard of contributory negligence**

- (1) The principles that are applicable in determining whether a person has been negligent also apply in determining whether the person who suffered harm has been contributorily negligent in failing to take precautions against the risk of that harm.
- (2) For that purpose—
 - (a) the standard of care required of the person who suffered harm is that of a reasonable person in the position of that person, and
 - (b) the matter is to be determined on the basis of what that person knew or ought to have known at the time.

5S Contributory negligence can defeat claim

In determining the extent of a reduction in damages by reason of contributory negligence, a court may determine a reduction of 100% if the court thinks it just and equitable to do so, with the result that the claim for damages is defeated.

5T Contributory negligence—claims under the [Compensation to Relatives Act 1897](#)

- (1) In a claim for damages brought under the [Compensation to Relatives Act 1897](#), the court is entitled to have regard to the contributory negligence of the deceased person.
- (2) Section 13 of the [Law Reform \(Miscellaneous Provisions\) Act 1965](#) does not apply so as to prevent the reduction of damages by the contributory negligence of a deceased person in respect of a claim for damages brought under the [Compensation to Relatives Act 1897](#).

6–8 (Repealed)

III: Relevant Literature

What is Maladministration

Public administration

While the word '*maladministration*' is not used in the Ombudsman Act, it is a convenient word to describe the nature and scope of the general administrative review jurisdiction of the Ombudsman in relation to the NSW public sector.

In the Ombudsman's general administrative review role, the office is able to investigate conduct of a public authority that appears to be:

- ' (a) *contrary to law*
- (b) *unreasonable, unjust, oppressive or improperly discriminatory*
- (c) *in accordance with any law or established practice but the law or practice is, or may be, unreasonable, unjust, oppressive or improperly discriminatory*
- (d) *based wholly or partly on improper motives, irrelevant grounds or irrelevant consideration*
- (e) *based wholly or partly on a mistake of law or fact*
- (f) *conduct for which reasons should be given but are not given*
- (g) *otherwise wrong...* (s 26(1))

The word '*maladministration*' is used and defined in the *Protected Disclosures Act 1994*, which provides that for the purposes of that Act,

- '...conduct is of a kind that amounts to maladministration if it involves an action or inaction of a serious nature that is:*
- (a) *contrary to law, or*
 - (b) *unreasonable, unjust, oppressive or improperly discriminatory, or*
 - (c) *based wholly or partly on improper motives.'* (s 11)

The conduct covered by the above terms in the Ombudsman Act and the Protected Disclosures Act includes:

Contrary to law:

- decisions or actions contrary to law or to lawful and reasonable orders from people or agencies with authority to give such orders
- decisions or actions ultra vires, eg. the decision-maker had no power to make the decision or to do the act
- breaches of natural justice/procedural fairness

Public administration

- unauthorised disclosures of confidential information.

Unreasonable:

- decisions or actions so unreasonable that no reasonable person would so decide or act, eg. irrational
- arbitrary, partial, unfair or inequitable decisions or actions
- applying a policy inflexibly without regard to the merits of an individual case
- decisions or actions that do not take into account all relevant considerations, or that take into account irrelevant considerations
- serious delays in making a decision or taking action
- provision of wrong, inaccurate or misleading advice
- failures to rectify identified mistakes, errors, oversights or improprieties
- failures to properly investigate.

Unjust:

- decisions or actions not justified by any evidence or that are unreasonable
- partial, unfair, inequitable or unconscionable decisions or actions.

Oppressive:

- unconscionable decisions or actions
- means used to achieve ends are not reasonably proportional to these ends
- abuses of power, intimidation or harassment.

Improperly discriminatory:

- inconsistent application of a law, policy or practices when there is no reasonable, justifiable or appropriate reason to do so
- application of distinctions not authorised by law, or failing to make distinctions which are authorised or required by law.

Based wholly or partly on improper motives:

- decisions or actions for a purpose other than that for which a power was conferred
- conflicts of interests
- bad faith or dishonesty

- decisions or actions induced or affected by fraud
- misuse of public property, official services or facilities.

Irrelevant grounds/considerations:

- relevant considerations not adequately taken into account or irrelevant considerations taken into account
- policies applied inflexibly without regard to the merits of each case
- exercise of discretionary powers at the direction or at the behest of another, eg. acting under 'dictation'.

Mistake of law:

- incorrect interpretation or application of the law
- ignorance of the law.

Mistake of fact:

- decisions or actions based on information that is factually in error or misinterpreted
- important facts omitted from reports or deliberations, or ignored.

Failure to give reasons:

- statements of reasons are not given when required by law or it is otherwise reasonable to do so
- statements of reasons are inadequate because all relevant issues are not addressed or the relevant criteria on which the decision is based are not stated
- reasons given are not comprehensible to the likely recipient.

Otherwise wrong:

- negligent conduct
- results of decisions or actions are uncertain
- failures to give effect to lawful government or agency policy
- failures to give accurate, frank, impartial, complete or timely advice
- failures to honour commitments
- failures to meet acceptable or industry standards for public administration, good judgement, integrity and the like.

Maladministration and corrupt conduct

Maladministration can include conduct considered corrupt under the ICAC Act. Dishonest or partial exercise of official functions by a public official falls into this category. This is obviously conduct at the more serious end of the maladministration spectrum, as it must also involve criminal or disciplinary offences to constitute corrupt conduct under that Act.

Further information

For further information see also:

- *The Complaint Handlers Tool Kit* (2nd edition), NSW Ombudsman, June 2004
- *Good Conduct and Administrative Practice – Guidelines for state and local government*, NSW Ombudsman, August 2003
- *Protected Disclosures Guidelines* (6th edition), NSW Ombudsman, April 2009.

Public administration

please follow us:



Contact us for more information

Our business hours are: Monday to Friday,
9am–5pm (*Inquiries section closes at 4pm*)

If you wish to visit us, we prefer you make an appointment. Please call us first to ensure your complaint is within our jurisdiction and our staff are available to see you.

Level 24, 580 George Street
Sydney NSW 2000

Email nswombo@ombo.nsw.gov.au

Web www.ombo.nsw.gov.au

General inquiries 02 9286 1000

Toll free (outside Sydney metro) 1800 451 524

National Relay Service 133 677

Telephone Interpreter Service (TIS): 131 450
We can arrange an interpreter through TIS or you can contact TIS yourself before speaking to us.

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This fact sheet is one of a series produced by the NSW Ombudsman. Feedback is welcome.

Use

NSWPF is only bound by this protection principle when exercising their administrative or educative functions.

When NSWPF uses personal information, it means that we are using it internally *within* NSWPF. We are not lawfully able to use the information without taking reasonable steps to ensure that, having regard to the purpose for which the information is to be used, the information is relevant, accurate, up to date, complete and not misleading.

NSWPF will only use information for the purpose for which it was collected, unless the person has consented to the use for another purpose or the law permits or requires us to use it for another purpose.

Some examples of where the law may permit or require us to use personal information for another purpose includes:

- It is necessary to prevent or lessen a serious and imminent threat to a person's life or health.
- Work health safety laws require that we use information to ensure the safety of our employees.
- NSWPF may use health information as a necessary part of investigating employee disciplinary matters or in reporting our concerns to relevant persons/authorities.
- The information relates to a person's suitability for appointment or employment as a public sector official, including as an employee of NSWPF.
- The information about a person arises out of a complaint made under Part 8A of the *Police Act 1990*.
- The information is being used for law enforcement purposes.

Disclosure

NSWPF will not disclose personal information, unless the person has consented to the disclosure or the law permits or requires us to disclose the information.

When NSWPF discloses personal information

Some examples of when the law may permit or require NSWPF to disclose personal information includes:

- It is necessary to prevent or lessen a serious and imminent threat to a person's life of health.
- NSWPF may disclose health information as a necessary part of investigating employee disciplinary matters or in reporting our concerns to relevant persons/authorities.

- Workers compensation law requires us to provide our insurer with information about workers. Failure to do so within seven days without reasonable excuse is an offence (punishable by up to \$5,500).
- Work health safety laws requires us to ensure the safety of our workers.
- NSWPF has made the person aware that the information is usually disclosed to another person, such as our solicitors for the purposes of defending a claim made against NSWPF.
- NSWPF is exercising a law enforcement function.
- The information is disclosed to the NSW Department of Housing where that agency is investigating a complaint about a tenant or where NSWPF is investigating an offence which may breach a tenancy agreement with NSW Department of Housing.
- Information about motor vehicle accident or crime incident reports to an insurance company or insurer or its agent, where the information relates to a claim that has been lodged against the insurance company or insurer.
- The information about a person arises out of a complaint made under Part 8A of the *Police Act 1990*.
- Disclosure is to the Minister for Police and Emergency Services for the purpose of informing the Minister about a matter under the Minister's administration.
- Disclosure is to an agency administered by the Premier for the purpose of informing the Premier about a matter.
- NSWPF has been ordered to provide the information under a subpoena or other lawful direction.
- There is an exemption provided under the Privacy Code of Practice or a Practice Direction issued under section 41, PPIPA.

Disclosure of sensitive personal information

The following personal information is considered sensitive information and is given particular recognition under PPIPA:

- a person's ethnic and racial origin
- political opinions
- religious or philosophical beliefs
- trade union membership
- sexual activities.

When exercising administrative and/or educative functions, NSWPF does not disclose any of the above personal information unless the disclosure is necessary to prevent a serious and imminent threat to a person's life or health or where the law otherwise allows or permits NSWPF to do so.

IV: Relevant Items

Item 1 - Initial Complaint to New South Wales Police In Regards to 'Kettling' Practise

30/09/2020

Gmail - (no subject)



(no subject)1 message

Sun, Jun 7, 2020 at 11:46 PM

To: customerassistance@police.nsw.gov.au

To whom it may concern,

I wish to make a formal complaint about the NSW police force officers who at the conclusion of Saturday;s peaceful Black Lives Matter Protest, used kettling to move remaining protestors into Central Station. They then blocked off exits, and without issuing formal move on orders, used pepper spray in an enclosed space on peaceful protestors. The crowd included a minor and a disabled woman.

While I was not at the incident myself, I have seen the footage of the act and have heard first hand accounts from people that were there. I would like to request an investigation into why these tactics were used and why this level of force was deemed as appropriate instead of alternative tactics such as simply issuing 'move on' orders if the issue was clearing the crowd.

It is not okay for police officers to use excessive force against peaceful protestors and I urge you to take this complaint seriously and conduct a proper investigation into the incident.

Leaked Email.jpg_large

Central Metropolitan Region
Professional Standards Unit

[illegible]

Item 3 - Admission of 'Technical Breach'

Sensitive: Personal



AD2020/82
DD:pj

Dear _____

Complaint against NSW Police Force dated 14/08/20

I refer to your complaint against the NSW Police Force dated 14 August 2020 regarding the release of your personal email address to a third party and your concerns relating to a breach of your privacy.

Your correspondence with the Law Enforcement Conduct Commission (LECC) dated 17 August 2020, was referred to the Administrative Officer Conduct Unit (AOCU), of the NSW Police Force Professional Standards Command (PSC).

Enquiries have now been completed. I can advise that your email address was inadvertently disclosed to one person (*external to the NSWPF*) on the 13 August 2020 by the Central Metropolitan Region Professional Standards Unit. It was that person who then posted/disclosed your email address on the public domain. Furthermore, I am of the view a technical breach s169A of the *Police Act 1990* may have occurred when that email was sent however the lack of intent to disclose your identity as a complainant does not amount to misconduct.

It is my view the release of your personal email address was the result of an administrative error with no intent behind the disclosure.

In regard to your enquiries as to the findings of the Privacy Commissioner I suggest you make those enquiries with the Privacy Commissioner. I note your view that the internal dissemination of your email address is a breach of s.169A(a)&(b) of the *Police Act 1990*, for the effective management of your complaint your details are shared with complaint managers in accordance with subsection (c) of that section.

The NSW Police Force will not be taking any further action in relation to the allegation of misconduct in this matter, however the Central Metropolitan Region will be in contact with you in regard to your concerns about the privacy breach.

Sincerely

Detective Superintendent
Commander, Investigations
Professional Standards Command
23rd September 2020

PROFESSIONAL STANDARDS COMMAND

Locked Bag 5102 Parramatta NSW 2124

[W www.police.nsw.gov.au](http://www.police.nsw.gov.au)

TTY 02 9211 3776 for the hearing and speech impaired ABN 43 406 613 190

TRIPLE ZERO (000)
Emergency only

POLICE ASSISTANCE LINE (131 444)
for non-emergencies

CRIME STOPPERS (1800 333 000)
Report crime anonymously

Sensitive: Personal

Item 4 - Letter from Acting Inspector

Sensitive: Personal



Dear Complainant,

I am writing in relation to complaint received from you regarding a protest that occurred on the 6 June 2020. Following the resolution of that complaint, on the 12 August 2020, the Professional Standards Manager for the Central Metropolitan Region wrote a letter to you indicating the outcome of the complaint. This letter was sent by email on the 13 August 2020.

Subsequently the outcome letter was distributed to one further person.

It is the purpose of this letter to inform you that your email address, and no other personal details, were inadvertently disclosed to that one person (*external to the NSWPF*) by the Central Metropolitan Region Professional Standards Unit.

That person then posted/disclosed your email address on the public domain.

The matter was independently investigated by the Professional Standards Command. This investigation has now been concluded.

The release of your email address was as the result of an administrative error with no intent behind the disclosure. I wish to apologise for any inconvenience or concern this may have caused.

Acting Inspector
Professional Standards Manager
Central Metropolitan Region
28 September 2020

Sensitive: Personal

Central Metropolitan Region
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