

# 2015/16

Annual Report



office of the  
privacy  
commissioner

new south wales

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The Hon. Don Harwin MLC  
President  
Legislative Council Parliament House  
Macquarie Street  
Sydney NSW 2000

The Hon. Shelley Hancock MP  
Speaker  
Legislative Assembly Parliament House  
Macquarie Street  
Sydney NSW 2000

28 October 2016

Dear Mr President,

In accordance with the *Annual Reports (Departments) Act 1985* and section 61A of the *Privacy and Personal Information Protection Act 1998*, I am pleased to present the following report on my work as Privacy Commissioner for the 12 months ending 30 June 2016.

A copy of the report has been provided to the Attorney General as Minister responsible for this legislation as specified under section 61A (2) and 61B (2) of the *Privacy and Personal Information Protection Act 1998*.

The report of my work and activities for the preceding 12 months is a part of the Annual Report of the information and Privacy Commission as per section 61A (3) of the above Act.

Yours sincerely,

DR ELIZABETH COOMBS  
NSW Privacy Commissioner

28 October 2016

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In accordance with the *Annual Reports (Departments) Act 1985* and section 61A of the *Privacy and Personal Information Protection Act 1998*, I am pleased to present the following report on my work as Privacy Commissioner for the 12 months ending 30 June 2016.

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Yours sincerely,

DR ELIZABETH COOMBS  
NSW Privacy Commissioner



53 NSW Civil and Administrative Tribunal privacy related cases closed in 2015/16. This is an increase of

# 82%

from the previous year.



312 Privacy specific complaints and review cases closed in 2015/16. This is an increase of

# 11%

from the previous year.



173 Privacy specific statutory advice files closed in 2015/16. This is an increase of

# 71%

from the previous year.



Parliament passed amendments to the Privacy and Personal Information Protection Act 1998 to address a

# 16 year

lack of protection of personal information moved out of NSW





office of the  
privacy  
commissioner  
new south wales

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# PRIVACY COMMISSIONER'S OVERVIEW



DR ELIZABETH COOMBS  
NSW Privacy Commissioner

2015/16 was a fast paced and productive year. After a number of years drawing attention to the need to amend the *Privacy and Personal Information Protection Act, 1998* some of the issues were addressed during 2015/16, in particular, the passage through the Parliament of the long needed amendments to the cross border movement of personal information. 2015/16 had a number of other highlights such as:

- the recommendations of the Parliamentary Inquiry into Serious Invasions of Privacy for a statutory cause of action and increased powers for the Privacy Commissioner,
- the privacy respectful approach to data sharing between NSW public sector agencies introduced by the *Data Sharing (Government Sector) Act, 2015*,
- the promotion of privacy and of particular note, the Privacy Awareness Month address by the Hon Michael Kirby AC CMG on 'Privacy Matters - Why NSW Should Lead',
- the growth in our strategic partnerships including that with the United Nations' Special Rapporteur on the Right to Privacy,
- the increased demand for statutory privacy assistance arising from the NSW Government's initiatives and from the wider environment – the Parliament, the private sector, the media and the community.

I am pleased to be able to say that recognition of the difficulties reported previously with relation to undertaking statutory privacy functions saw the re-establishment within the Commission of a small, separate privacy team in early 2016. I thank the Attorney General, the Hon. Gabrielle Upton, MP and the Secretary, Department of Justice for this support, and I am pleased to report the resulting improved stakeholder satisfaction and increased productivity.

Reporting the performance of my statutory privacy functions is an important accountability to the people of NSW, the Parliament and the Government. The

Annual Report is the only consolidated source of advice on the performance of statutory functions of the Privacy Commissioner and of the privacy matters arising during the financial year. The Parliament is entitled to a full account of the undertaking of the privacy statutory functions as well as the opportunities and challenges as it is responsible for reviewing the performance of the Privacy Commissioner.

My 2015/16 report of my performance of the Commissioner's statutory functions prescribed in NSW privacy legislation uses the structure of our Privacy Business Plan 2016-2019. The Plan has eight Objectives that underlie our statutory privacy work. The achievements, challenges and emerging issues of 2015/16 are reported against each of these Objectives. At the end of each section, the emerging issues and projects for privacy for 2016/17 year are outlined. I have endeavoured to prepare a statutory Annual Report which provides the greatest accountability and both qualitative and quantitative insight into the performance of the functions of the Privacy Commissioner.

Although it should be, but rarely is, the human rights context of privacy protection needs to be remembered. Advances in technology, while providing convenience and other benefits, have increased exponentially the privacy risks to individuals and the community as a whole. Internationally, privacy protection is recognised as a human right and this approach is also applied in relation to trade and commerce in personal and health information. In the global knowledge economy, where the NSW Government wishes to participate for economic and productivity reasons, clear accountability and strong privacy frameworks are important from an international trade and economic perspective. The greater awareness and expectations in Europe and the USA of the necessity for the protection of personal and health information within international commerce, means that Australia generally and NSW specifically



needs to recognise the strategic value of clear and strong privacy frameworks and regulations, and the dangers of not doing so. This need will become more relevant and pressing as the work of the United Nation's first Special Rapporteur on the Right to Privacy brings new scrutiny and comparative analysis to bear across jurisdictions.

In 1975, NSW was a leader in privacy protection being the second jurisdiction internationally to introduce privacy legislation. This leadership has been lost. Addressing an area where NSW had fallen behind was undertaken in late 2015 when the Attorney General the Hon. Gabrielle Upton, MP saw through the NSW Parliament, significant amendments to the *Privacy and Personal Information Protection Act 1998* to ensure privacy protections applied to the movement of the personal information of NSW citizens out of NSW.

The legislative amendments to the *Privacy and Personal Information Protection Act, 1998* also addressed the issue of the long standing nature of some of the Public Interest Directions that allow exemptions and which concerned the NSW Law Reform Commission.<sup>1</sup> The majority of these exemptions were incorporated into the legislation or regulation.

Further, in late 2015 the Minister for Innovation and Better Regulation, the Hon. Victor Dominello MP negotiated through Parliament, the *Data Sharing (Government Sector) Act, 2015*, which adopted NSW's privacy legislation as the appropriate and necessary frameworks for data shared under this Act. Within the NSW context this was a significant recognition of the importance of privacy regulation in achieving the aims of using government sector data as a resource that supports Government policy making, program management and service planning and delivery. It was refreshing to see the contemporary awareness that privacy protections are an enabler rather than a brake on innovation. I congratulate Minister Dominello for his understanding of this issue and his commitment to address it legislatively.

Other privacy enhancing legislation was

introduced into the Parliament but failed however to progress due to lack of support from the Government. The most significant was the Private Member's Bill to ensure access to formal and externally reviewable privacy protections for users of mainly utility services provided by State Owned Corporations. The Shadow Attorney General, Mr Paul Lynch, MP, introduced this Bill. Addressing the lack of external review for privacy complaints managed by these entities was a recommendation from my 2015 'Report on the Operation of the *Privacy and Personal Information Protection Act 1998*'.

The Parliament also initiated three key Inquiries relating to privacy during 2015/16. The first Inquiry, the Legislative Council Standing Committee on Social Issues Inquiry into Service Coordination for Communities of High Social Need chaired by the Hon. Bronnie Taylor MLC, a Coalition member, recognised that the barriers to sharing information for clients' benefit are not the provisions of privacy legislation but poor knowledge of privacy legislation, lack of privacy guidance as well as technical and cultural barriers. While the Government accepted many of the Inquiry's recommendations it only accepted in principle the development of privacy guidelines and felt funding of the Privacy Commissioner for this purpose required more consideration (see Objective 2).

The Inquiry by the Law and Justice Committee chaired by the Hon. Natasha McLaren-Jones MLC, Coalition member, unanimously recommended the introduction of a statutory cause of action for serious invasions of privacy. The Inquiry also recommended that the Privacy Commissioner be empowered to provide timely, practical and inexpensive means of redress through the ability to require apologies, cease and desist, and take down orders, and be funded adequately to do this. The Government's response is expected in September 2016.<sup>2</sup>

The Parliamentary Committee on the Ombudsman, the Police Integrity Commission and the Crime Commission in its Inquiry 2016 Review of the Annual Reports of Oversighted Bodies, reviewed the Annual Reports of my performance during 2013/14 and 2014/15. In evidence

in early March 2016, I raised the need for clear structural and organisational arrangements to enable the Privacy Commissioner to direct and co-ordinate the statutory privacy functions of the Information and Privacy Commission.

I also raised the issue of resourcing and Parliament's intent that the formation of the Information and Privacy Commission would provide significantly more resources for privacy. By way of example, I pointed to the inability to undertake research on privacy issues arising from advances in technology through lack of funds which has meant that a report requested by the Committee in 2012 on technology and surveillance still has not been produced.

The Committee noted the difficulties that compromised the undertaking of statutory privacy functions reported in my 2014/15 Annual Report and reported it was sympathetic to my resourcing concerns. The Committee stated it would continue to monitor staffing to ensure statutory officers are provided with adequate funding to perform their functions.<sup>3</sup>

There were other Parliamentary Inquiries to which submissions were made and these are reported primarily under Objective 2 of this Annual Report.

#### **Increased Growth Privacy Matters during 2015/16**

Privacy work compared to 2014/15 increased in volume and impact in response to the community's more vocal expressions of their expectations that government and business respect their privacy by protecting their personal and health information.

We provided substantive and expert statutory advice for proposals under consideration by the NSW Government as well as the Commonwealth Government that are significant for the management of the personal and health information of NSW citizens. These ranged from digital identity authentication, digital licencing, biometric facial recognition, domestic violence, child sexual abuse, reducing offending, countering violent extremism, issues concerning people with disabilities including the transfer to the National Disability Insurance Scheme, protocols for the use of drivers licence images, body worn cameras,

<sup>1</sup> NSW Law Reform Commission, Protecting Privacy in New South Wales, Report 127, May 2010.

<sup>2</sup> Details of the Government's response can be found on the NSW Parliament's website at <https://www.parliament.nsw.gov.au/committees/inquiries/Pages/inquiry-details.aspx?activetab=Reports&pk=1877#tab-governmentresponses>

<sup>3</sup> Parliamentary Committee on the Ombudsman, the Police Integrity Commission and the Crime Commission, 2016 Annual Report Review (staffing and resources), pps 31-32, June, 2016.

linkage of health records, *myHealthRecord* changes, the roll out of the NBN, and the 2016 Census amongst others. These are issues that have potentially major impacts upon privacy.

We provided more expert statutory advice than in 2014/15 and more in the second half of 2015/16 than in the first half. We are careful in our use of available resources and consider carefully those matters we will address if there is any discretion around providing input. One such matter we addressed was the statutory review of the *Government Information (Public Access) Act, 2009*. The primary issues raised in submissions were the external, public facing nature of the 'open government' framework, access rights and adherence to processes for consideration of privacy issues specifically, the operation of section 94.

In relation to the operation of section 94 of the GIPA Act, the issue raised was whether consultation was occurring with the Privacy Commissioner as intended when recommendations relating to privacy considerations were invoked. I urged that in keeping with the understood intent of the Parliament and the legislation, more extensive consultation with the Office of the Privacy Commissioner occurs when recommendations are made under the GIPA Act when reviewing the decisions of agencies that concern privacy related public interest considerations against disclosure. Examination of the record indicates that no such consultations have occurred since September 2013 despite the quantum of relevant matters identified. This warrants closer examination to establish whether a solution is needed to better reflect the Parliament's intention.

It was satisfying to see the returns from engaging constructively with organisations covered by NSW privacy legislation. Prevention of privacy breaches is our focus rather than reliance upon regulatory might (such that it is). We encourage organisations to raise their operational problems and over the past year, while starting from a small base, we saw 300% more voluntary notifications of privacy breaches. This increase is not necessarily indicative of more breaches occurring but of greater willingness of organisations to come forward and seek the assistance my Office can provide. The bulk of these voluntary notifications were received in the second half of 2015/16. Feedback indicates there was greater confidence in making such notifications

following the re-establishment of the separate privacy office.

Despite the busy workload on the matters listed, much of our focus has been needed on Big Data and the implementation of the NSW Data Analytics Centre. The *Data Sharing (Government Sector) Act, 2015* is NSW's legislation governing the sharing of data between public sector agencies. I supported the introduction of the legislation for two reasons - the public benefits of good quality data analysis and the use of NSW privacy legislation as the applicable accountability framework for the analysis of the personal and health information of NSW citizens. While there have been some implementation issues, our working relations with Data Analytics Centre are strong. NSW public sector agencies have appreciated that there is a constructive relationship and a commitment to protect the privacy of the personal and health information while working to achieve the benefits of data analytics.

The implementation issues have concerned the compliance risks arising from confusion in the Government sector regarding 'big data', 'open data' and statutory roles and responsibilities. To assist, advice was issued to Departmental Secretaries on the relevant privacy legal and policy frameworks clarifying that management of personal and health information is covered by NSW privacy legislation and such information is not 'open data' but rather protected and separate from the application of 'open data' policy provisions and championing by the Open Data Advocate.

My contribution to the United Nation's Rapporteur on Privacy's work on 'Big Data' is likely to draw upon this experience. My aim is to ensure a privacy respectful approach to data analytics and if achieved, to see NSW's innovation in this area recognised.

We saw a great deal of interest from the media for comment and from public and private sector organisations for privacy presentations resulting in a busy public speaking schedule. The increase in media interest provided significant opportunities to communicate privacy messages in more informal and popular ways. A considerable proportion of the media requests related to matters being discussed by Parliamentary Inquiries and topical issues – particularly privacy breaches. The promotion of privacy during 2015/16 is described under Objective 1.

The *Privacy and Personal and Information Protection Act, 1998* requires the Privacy Commissioner to assist organisations adopt privacy principles and comply with privacy law. During the 2015/2016 reporting period I undertook a number of regulatory initiatives to promote compliance with the privacy legislation. These are outlined variously under Objectives 4, 6 and 7.

#### **Are We Providing Sufficient Information and Public Reporting of Privacy Work?**

The NSW Parliament, the former Attorney General's Department, civil society and academics have criticised Privacy Commissioners generally for insufficient systemic and comparative reporting of their work.

In previous Annual Reports I expressed my disquiet at the inability to report sufficiently in quantitative terms. Unfortunately there has not been a significant improvement this year. These problems are related to organisational barriers constraining our ability to evaluate our effectiveness, plan improvements and demonstrate due accountability.

I am concerned about the accuracy of privacy statistics publicly reported on the assistance provided to agencies and the public, the conduct of legislative and administrative reviews and other activities to ensure compliance with both pieces of NSW privacy legislation. Examination of the Government's Budget Statements indicates consistent underreporting since 2013/14 of the privacy workload within the Commission. In the 2016/17 Budget Papers the correct figure for privacy occasions of service to agencies and the public should be 541 - twice the published figure of 260.<sup>4</sup> My Office did not provide these statistics nor reviewed them, nor was it consulted prior to their provision to NSW Treasury by the Commission for publication as part of the NSW Government Budget Statements. This is not an issue I have the means to address and I have now raised the matter formally with the overseeing Parliamentary Committee, the Attorney General, the Department of Justice and NSW Treasury and I look forward to a response.

In terms of barriers to effectively undertaking my statutory functions, I am constrained in my ability as the Commissioner responsible for privacy statutory functions within the Commission, from monitoring in sufficient detail our performance as recorded on the Commission's shared Case Management System. My team has not been provided

despite requests, the systems access to enable proper quality assurance of the data or to efficiently record their activities.

Such issues while appearing minor and administrative in nature detract from efficiency in processes. For example, not having sufficient systems access to run the customised reports required, I formally requested in July 2016 that certain data analyses be undertaken and provided to me for this Annual Report. The aim was to provide new insights into the patterns of service demand. These new analyses were refused. As a result, the privacy data made available for this Annual Report from the Commission's shared Case Management System provides bare description, not the fuller analysis and recording of the performance of each statutory privacy functions throughout the entire relevant year.

Accountability for the provision of public funds to the Commission requires accuracy in reporting so as to avoid misleading the Parliament. Equally, the responsible oversighting and co-ordinating of statutory privacy work of the Commission requires the necessary tools and processes to be established for the Privacy Commissioner. It is unclear what authority exists to constrain the ability of the Privacy Commissioner to analyse data held by the Commission on the performance of privacy statutory functions.

### Increasing demand for Statutory Privacy Assistance

None of these difficulties and other administrative issues can disguise, however, that the demand for assistance in managing privacy has been increasing since 2011. This is not an increase generated by or felt only by my Office. The NSW Civil and Administrative Tribunal advised an increase in privacy matters brought by members of the public of almost 100% since 2014/15. Privacy was the only existing jurisdiction stream of the Tribunal that showed such an increase – all other established streams had numbers comparable to those of 2014/15.

Measures of statutory privacy activities show an increase of 29% in total formal matters handled over the past five years.<sup>5</sup>

In this 2015/16 Annual Report, where statistics are available for statutory privacy functions and allow comparisons with 2014/15, changes are shown. Overall, there have been increases in demand for statutory functions in comparison to 2014/15. Available comparative statistics show increases in:

- Statutory Complaints and Reviews: 312 cases closed in 2015/16 - an increase of 11% on 2014/15
- Statutory Advice: 173 advice files closed in 2015/16 - an increase of 71% on 2014/15
- Assistance to the NSW Civil and Administrative Tribunal: 53 privacy

related cases closed in 2015/16 - an increase of 83% on 2014/15. (Note: We do not attend all Tribunal privacy matters only those seen to require the Privacy Commissioner's input.)

The reasons for such significant increases need to be analysed to deliver more effective and efficient regulation and service delivery. This is why I raise here, and in my recent evidence to the Parliamentary Committee, my disquiet about the inability to obtain appropriate access to the database holding data on the performance of privacy statutory functions.

### Greater Productivity due to Re-establishment of the Office of the Privacy Commissioner

As mentioned above, in early 2016, there was the re-establishment of a separate Office of the Privacy Commissioner within the Commission. To evaluate this reform, we undertook a manual analysis of the volume of statutory privacy work by function undertaken in the first six months of 2015/16 and the second half of 2015/16 when the Office of the Privacy Commissioner was re-established within the Commission. This analysis clearly demonstrates the resulting improved productivity.

As shown below, measures for all statutory functions have increased in the six months since the re-establishment of the Office of

**Table 1: Complaints managed, comparative data for 2015/16 and between 2015/16 and 2014/15**

| Privacy Statutory Function   | No OPC<br>July - Dec 2015 | Separate OPC<br>Jan - Jun 2016 | Total 2015/16 | Total 2014/15 | % Change from<br>2014/15 to<br>2015/16 |
|--|---------------------------|--------------------------------|---------------|---------------|--|
| Oversight Agencies' complaint handling of Internal Reviews                       | 74                        | 135                            | 209           | 161           | ^ 29%                                  |
| Investigate complaints (eg on health information)                                | 51                        | 52                             | 103           | 120           | v 14%                                  |
| Provide statutory advice   | 46                        | 127                            | 173           | 101           | ^ 71%                                  |
| Review of agencies' privacy management plans, and voluntary breach notifications | 18                        | 38                             | 56            | 31            | ^ 80%                                  |
| NSW Civil and Administrative Tribunal  | 18                        | 35                             | 53            | 29            | ^ 82%                                  |
| <b>TOTALS</b>  | <b>207</b>                | <b>387</b>                     | <b>594</b>    | <b>442</b>    | <b>^ 34%</b>                           |

<sup>4</sup> The total of 541 excludes Tribunal work. The reference is 2016/17 Budget Paper 3, Section 7-35.

<sup>5</sup> Based on 419 as per 2011/12 Budget Paper 3, Information and Privacy Commission, Service Group Statements, Section 2- 65 and the equivalent correct figure of 541 for 2015/16.

### Maintaining the Gains in Privacy Productivity

Since 2013/14 I have raised concerns in my statutory reports and in evidence to the Parliament about the Information and Privacy Commission model compromising the undertaking of statutory privacy functions.<sup>6</sup>

The reason for this concern is the non-implementation of Parliament's intention that the Commission support two equal and independent Commissioners and, significantly increase the resources available for privacy. The Commission's organisational charts from 2011 to 2014 give insight diagrammatically of the organisational move away from two equal Commissioners each accountable for their statutory function with a team which they co-ordinate and direct, to effectively reducing the Privacy Commissioner's role to an advisor within the Commission. Such an arrangement contradicts Parliament's intent, ignores legislative provisions and fails to adequately serve the needs of the public and the Government. Basically, the Information and Privacy Commission model has a structural deficit at its core.

There can be no guarantee of equality for privacy protection work in the Commission when the Privacy Commissioner is dependent for resourcing upon the Information Commissioner who as CEO controls the Commission's resources and is the 'Open Data Advocate'.

The Privacy Commissioner has not been provided with a budget, the extension of the current staffing beyond 31 December 2016 is unknown, there is not full and equal access to the joint case management system nor is the alternative of data being provided on request, occurring. It has not been possible despite numerous efforts to get basic customer service information of the physical address of the Privacy Commissioner's separate office placed on the Commission's website. This has resulted in comments and complaints from members of the public and legal profession about difficulties in locating us and serving papers.

Resourcing, staffing and the seniority of staff in addition to those matters raised above need to be addressed. To illustrate these points, the staffing servicing the Information Commissioner is advised to be 27 of the total 29 positions of the Commission.<sup>7</sup> While around six of these positions are corporate

support staff, this Shared Services Team does not provide events management or communication support to the Privacy Commissioner. The Privacy Commissioner has around two of the 29 positions with another four privacy positions filled by temporary agency staff funded by the Department of Justice. The position of Privacy Commissioner has been maintained as a part time role for five years despite acknowledgement of the full time nature of the statutory functions of promoting privacy, providing expert advice, monitoring and investigating privacy breaches.

These are serious barriers to the successful, effective and efficient undertaking of privacy statutory functions that meet the needs and rights of NSW citizens at a time when the NSW Government is introducing major initiatives affecting privacy and which in turn, prompt organisations to seek the assistance of the Privacy Commissioner and her Office. There is no way the job of Privacy Commissioner can be done properly without these matters being addressed. It is a significant understatement to say it is challenging. I stress it is not solely a matter of establishing the Privacy Commissioner as a full time position but of addressing structural and organisational issues, some of which have been raised in this report and in a number of previous reports. Proposals have been put forward to address these issues but a response has not been received to date.

By way of background, the formation of the Information and Privacy Commission in 2010 brought together Privacy NSW and the newly created position of Information Commissioner. At the time, the then Leader of the Opposition, the Hon. Barry O'Farrell, MP said when the Coalition came to Government that they would place the Information Commissioner in the NSW Ombudsman's Office. Essentially, simplicity in organisational arrangements was favoured then and is needed now.

The Information and Privacy Commission's structural difficulties will not be resolved by adding a third position above the Privacy Commissioner and Information Commissioner as in the Federal model, or combining privacy and access to information statutory functions into one position holder. Both of these options reduce accountability and reporting to Parliament. The debates

needed for deciding the public interest are best undertaken in the public arena with due involvement of the Parliament.

The privacy rights of individuals and the benefits to NSW's knowledge economy from respecting these rights will be more efficiently delivered in an arrangement that does not contain inherent and ongoing deficits. Indeed, the most successful models for providing privacy statutory functions are those that provide a separate auspice without unnecessary bureaucratic overlay such as in Victoria and New Zealand. Separation of the Offices of the Information Commissioner and the Privacy Commissioner need not entail duplicative administration given the availability within the Department of Justice of shared services for back office activities.

Against the backdrop of demonstrated increased demand for privacy assistance, there is an ongoing need for funding to maintain the increased productivity of privacy statutory functions, as it is unlikely demand will abate in the coming year. In June 2016 I provided as requested, a budget submission to the Department of Justice. This was a budget neutral proposal that sought equitable allocation of existing resources contained within the Information and Privacy Commission. No response has been received.

Currently the temporary and uncertain arrangements for the Office of the Privacy Commissioner have meant the recurring loss of skilled privacy expertise for the Office. Continuity and efficiency are very difficult to achieve and maintain in these circumstances. The increases in requests for privacy assistance ultimately stem from the NSW community and organisations. Efficiencies in meeting this increased demand have been secured by the re-establishment of the Office of the Privacy Commissioner. It will not be maintained by reverting to the former arrangement in place prior to early 2016. I express my deepest reservations about the likely outcomes if that should eventuate.

The need for adequate resourcing for undertaking Privacy Commissioner statutory functions has been a common theme in the findings of different Parliamentary Inquiries. To date, the NSW Government has not acted upon these recommendations. I have appreciated the Attorney General's

<sup>6</sup> Refer to the '2015 Report on the Operation of NSW Privacy and Personal Information Protection Act, 1998' and Privacy Commissioner's Annual Reports of 2014/15 and 2013/14.

<sup>7</sup> 2016/17 Budget Paper 3, Section 7-35 and advice from the Department of Justice.

support and legislative action however the NSW Government's commitment to protecting its citizens' privacy and their personal and health information is called into question when it maintains the undertaking of statutory privacy functions in a demonstrably structurally inequitable arrangement, despite the increasing requests for assistance and importance of privacy in successfully achieving the Government's agenda.

Without adequate resources and appropriate organisational arrangements, neither the people of NSW nor its Parliament can have confidence that their privacy rights are being adequately protected in accordance with the law.

**Privacy Matters in 2016/17**

The Privacy Business Plan 2016 – 2019 provides the forward work agenda. Of course, unexpected issues will arise that will exert an influence upon priorities but this is normal.

I am keen to see proactive and substantive work on health privacy and will seek the views of the Minister for Health on this proposal.

Digital identity and Big Data will also remain an area where we need to provide substantive advice and facilitate appropriately to our regulatory role, the resolution of issues arising. Promotion of privacy throughout NSW will continue to be a priority and will be informed by international, national and community specific consultations. The main communications event will be Privacy Awareness Month in May 2017 with distribution of the new 'Privacy Commissioner's Update' and new animations and publications for the NSW community, planned for throughout 2016/17.

Depending upon the reform agendas and legislative programs of the NSW and Commonwealth Governments, statutory advice will continue as a major work strand and is likely to also include the privacy implications of the findings and recommendations stemming from Parliamentary Inquiries, reviews and the Royal Commission into Child Sexual Abuse.

Continuation of the work with Commonwealth, State and Local

Government instrumentalities on issues such as digital identity authentication, digital licensing, transport safety regulation, security and surveillance technologies such as CCTV and body worn cameras will be required. It is also becoming necessary to address a number of the privacy issues arising in Local Government.

Strategic relationships will be important and the Office would consider joint initiatives with other Privacy Commissioners while seeking the engagement of civil society bodies and conducting consultations in regional and rural NSW. I acknowledge the invaluable support of First State Super in enabling our 'Privacy Matters' forums.

It will be important to continue to seek the implementation of recommendations of the 2015 report on the operation of the NSW privacy legislation including IT security and suitable arrangements for privacy protection in firearm and ammunition regulation.

There is a need to take up constructively with Government and the Parliament the issues posed by shifts of service provision to non-government service providers. It is not always clear that privacy protections for service users follow the transfer of service responsibility from the government sector.

**Thanks and acknowledgements**

As in previous years, the work of an independent statutory office holder is undertaken in a dynamic environment where many people contribute to protecting privacy.

I pay particular thanks to the Chair of the Parliamentary Committee, the Hon Lee Evans, MP and the Committee members, the Attorney General, the Hon. Gabrielle Upon, MP and her advisors, the Minister for Innovation and Better Regulation, the Hon Victor Dominello, MP and his staff, the United Nations Special Rapporteur on Privacy, Professor Joseph A. Cannataci, Mr Michael Dwyer, CEO, First State Super, former NSW Privacy Commissioner, Mr Chris Puplick, as well as my privacy colleagues Federally and in other States and Territories of Australia. Thanks are also due to the many dedicated privacy practitioners within the NSW public sector who provide useful feedback and insights that have assisted my team undertake their work. I also wish to thank the Department of Transport for NSW and the Roads and Maritime Services for agreeing to the initial secondment and then subsequent

extension of Mr Yetzotis.

Most of all I am indebted to the staff who have made up the backbone of the privacy team since early 2016 despite the difficulties – particularly Mr Sean McLaughlan, Mr Nick Yetzotis and Ms Amy McKenna, as well as Ms Nikki Gibbs-Steele and other officers. I also thank the Secretary and staff of the Department of Justice who have assisted with the re-establishment of the Office of the Privacy Commissioner.

DR ELIZABETH COOMBS  
NSW Privacy Commissioner  
27 October, 2016

# About Us

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## **Vision**

*To be the leading Australian privacy authority through protecting and promoting the privacy rights of NSW citizens and by assisting stakeholders to gain the benefits of good privacy practices.*

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## Who are we

The NSW Privacy Commissioner, and her Office, are part of the Information and Privacy Commission. Our focus is to promote and protect the privacy rights of NSW citizens.

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## What we do

The NSW Privacy Commissioner administers the following NSW legislation:

- *Privacy and Personal Information Protection Act 1998 (PPIP Act)*
- *Health Records and Information Privacy Act 2002 (HRIP Act)*

The Privacy Commissioner reports to the Parliamentary Joint Committee on the Ombudsman, the Police Integrity Commission and the Crime Commission, which oversees the performance of the statutory functions of the Privacy Commissioner.

The Privacy Commissioner and her Office promote and protect privacy rights in NSW and provide information, statutory advice, assistance with complaints, and training for organisations and individuals on privacy matters. The Office reviews internal review decisions and investigates and conciliates complaints relating to public sector agencies, health service providers (both public and private) and some large organisations that deal with health information. The Office also provides advice on privacy legislation and relevant developments in the law and technology as well as guidance for program development and change management when it comes to the privacy rights of NSW citizens.

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## Our purpose

The champion, promote and protect the privacy rights of the NSW community, advise the Parliament and the Government and provide information, assistance and training for agencies and individuals on privacy specific matters.

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## Our approach

|                 |   |
|-----------------|---|
| Independent     | We give expert privacy advice that is impartial and objective   |
| Service focused | We are flexible, innovative, reliable and fair in delivering quality services to meet the needs of agencies, the community and business.  |
| Accountable     | We take responsibility for our decisions and actions. We use resources efficiently and effectively and foster a positive, inclusive and safe working environment.                                 |
| Proactive       | We monitor trends and developments in the law and technology, identify emerging issues and recommend changes and tailor our work to the changing environment in privacy law, policy and practice. |

## Our Staff and business

The IPC has a total of 29 staff. The Office of the Privacy Commissioner has six (6) team members, the majority of whom are provided via the Department of Justice. The position of NSW Privacy Commissioner was established as a part time position. The Office is located at Level 3, 47 Bridge Street, Sydney NSW.

### NSW Privacy Commissioner

Dr Coombs has had an extensive public service career, holding statutory, CEO and Senior Executive positions within the NSW public sector. Previous statutory roles have included Commissioner for Fair Trading and Commissioner, Local Government Grants Commission. Chief Executive experience includes the Department of Fair Trading, Juvenile Justice and Department for Women.

The Privacy Commissioner role is based upon statutory functions prescribed in the *Privacy and Personal Information Protection Act 1998* (PPIP Act) and the *Health Records and Information Privacy Act 2002* (HRIP Act). This includes promoting privacy in NSW, recommending legislative, administrative or other action in the interests of privacy for the NSW citizens as well as conducting inquiries and investigations into privacy related matters. The Privacy Commissioner reports to the NSW Parliament and is oversighted

by the Parliamentary Committee on the Ombudsman, the Police Integrity Commission and the Crime Commission, a joint statutory committee.

As Privacy Commissioner, Elizabeth is committed to lifting the profile of privacy within the NSW public and private health sector and addressing strategic governance issues to protect the privacy of NSW individuals and assist organisations meet their privacy responsibilities.

### Statutory Advice function:

The Statutory Advice function is focused upon proposed legislative changes and statutory advice to Parliament, the Government and individuals and as well as advising agencies on policy reforms or projects which have privacy implications.

Assisting the NSW Civil and Administrative Appeals Tribunal as the representative of the Privacy Commissioner is shared between these two functions.

### Senior Advisor to the NSW Privacy Commissioner

The position of Senior Advisor is responsible for the provision of statutory advice and representing the Privacy Commissioner in the NSW Civil and Administrative Tribunal. Mr Sean MacLaughlan has held this role since it was established in January 2016.

### Investigation and Review function:

The Investigation and Review function assists NSW organisations and individuals with privacy complaints, facilitating internal review processes and general statutory functions of the Privacy Commissioner.

### Senior Investigation and Review Officer

The Senior Investigation and Review Officer is responsible for overseeing the Investigations and Review work which entails reviewing complaints and investigations. Mr Nick Yetzotis has held this role since February 2016. The role was established in January 2016.

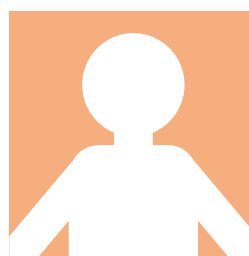
### Business Support activity:

This work ensures there are appropriate processes to support the business of the Office according to legislative, regulatory, financial and administrative requirements. The Executive Officer has also had to assume responsibility for publications and privacy events.

## Privacy Commissioner Dr Elizabeth Coombs



Senior Advisor  
Mr Sean  
MacLaughlan



Senior Investigation and  
Review Officer  
Mr Nick Yetzotis



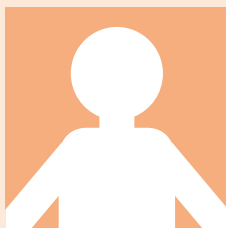
## Our key strategic Objectives

1. To protect and promote the privacy rights of individuals in NSW
2. To independently advise on privacy issues of concern
3. To promote awareness of privacy related issues to stakeholders
4. To respond to actual and potential privacy breaches
5. To research and report on emerging issues, including those rising from technological advances
6. To develop privacy capability across public and private sectors
7. To ensure efficient and effective regulation and operation
8. To engage and partner with stakeholders to deliver good privacy outcomes

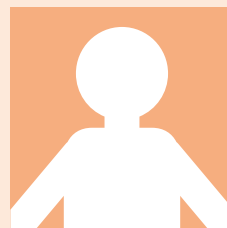
## The Information and privacy Commission:

The Commission is comprised of two statutory office holders; the NSW Privacy Commissioner (part-time) and the NSW Information Commissioner (full time). The Information Commissioner also acts as CEO of the Commission.

## Information & Privacy Commission



Privacy Commissioner  
Dr Elizabeth Coombs



Information Commissioner,  
Open Data Advocate, CEO  
Ms Elizabeth Tydd

Shared Services



# Reporting against our objectives:

- OBJECTIVE

1

To protect and promote the privacy rights of individuals in NSW
- OBJECTIVE

2

To independently advise on privacy issues of concern
- OBJECTIVE

3

To promote awareness of privacy related issues to stakeholders
- OBJECTIVE

4

To respond to issues arising from actual and potential privacy breaches

OBJECTIVE **5**  
To research and report on emerging issues, including those rising from technological advances

OBJECTIVE **6**  
To develop privacy capability across public and private sectors

OBJECTIVE **7**  
To ensure efficient and effective regulation and operation

OBJECTIVE **8**  
To engage and partner with stakeholders to deliver good privacy outcomes

# OBJECTIVE 1:

To protect and promote the privacy rights of individuals in NSW

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## Overview of goals of Objective

*Ensuring members of the public, and organisations know their rights and obligations for privacy, is paramount in effectively championing privacy. This statutory function is undertaken in a variety of ways from responding to enquiries through to the preparation of submissions to Parliamentary Inquiries, legislative advice and reports.*

## Highlights for 2015/16

Privacy Awareness Month 2016 in May saw keynote address given by the Hon. M. Kirby AC CMG attended by over 70 representatives from a number of sectors.

Much interest from the public and private sectors in privacy issues saw a busy public speaking schedule for the Privacy Commissioner and officers

Good engagement with Parliamentary Inquiries which saw proactive and positive privacy recommendations

Media requests increased this year and provided significant opportunity to get the privacy message out in popular communication channels.

30 publications were produced by the Office of the Privacy Commissioner which is an increase of 190% on last financial year.

The Privacy Commissioner participated in over 20 speaking engagements, with numerous requests for interviews and media throughout 2015/16

## Privacy Awareness Month 2016

Privacy Awareness Week is an initiative of the Asia Pacific Privacy Authorities (APPA) traditionally held in the first week of May. It offers an opportunity for NSW public sector agencies, including local councils and universities to highlight and share their commitment to good privacy practices with the NSW community.

This year, NSW marked Privacy Awareness Week with a month long celebration, dubbing it Privacy Awareness Month (PAM). PAM was celebrated under the theme of Privacy and You, encompassing all aspects of privacy in day to day lives and which encouraged the community of NSW to be privacy minded.

To launch PAM 2016, the NSW Privacy Commissioner in collaboration with the First State Super (FSS) hosted an event with an address by the Hon Michael Kirby AC CMG entitled 'Privacy Matters: Why NSW Should Lead'.

In his address, the Hon. Michael Kirby centred on the recommendations of the NSW Parliamentary Committee Inquiry into for the remedies into serious invasions of privacy in NSW.

The lecture provided attendees the opportunity to ask the Hon. M Kirby questions which promoted a robust discussion around the mechanics of introducing a statutory cause of action for serious invasions of privacy in NSW. 70 people attended the lecture.

The overall PAM campaign focused on four key themes:

- 'Welcome' explained Privacy Awareness Month and activities throughout the month of May;
- 'Privacy and You' explained what privacy is and how it affects every individual as well as giving a brief on privacy legislation and the basic principles by which NSW public sector organisations are governed;

- 'Privacy Manners' reminded the public to mind their privacy manners online, with the reminder that 'if you can't say it face to face, don't say it in cyber space';
- 'Privacy for the Future' discussed the recommendations from the Inquiry into remedies for the serious invasions of privacy in NSW and noted that NSW should lead Australia with the introduction of statutory cause of action for serious invasions of privacy.

Twitter was used to spread the message that #PrivacyMatters with a series of tweets linked to animations created by the Office as a quick source of information. 10 tweets were released throughout the month of May, which was seen by 498 followers and generated 458 profile visits (an increase of 142% on last year). Four animations were created during the month based around the four key themes.

A designated PAM 2016 web page was developed and included a range of free downloadable resources such as fact sheets, brochures, checklists, four short video animations and posters for agencies, organisations and the NSW community. The overall website received over one thousand page views. There were 750 unique users to the website during PAM 2016 and there were 77 unique downloads during the month.

The PAM 2016 messages and resources were disseminated to key stakeholder groups. An updated version of the 'Privacy Online Checklist' was included in the online downloadable resources and a 'Media Toolkit' was prepared and provided to a range of media outlets.



The Hon. Michael Kirby, AC CMG  
Presenting at Privacy Awareness Month launch.

## Publications

During 2015/16, the Office of the Privacy Commissioner assisted members of the NSW community to understand their privacy rights by providing guidance through the enquiries services and website. New guidelines and resources also commenced developed to assist agencies to comply with NSW privacy legislation and are to be made available in the first quarter of the next financial year.

Around 30 new resources were created and updated during 2015/16. This is an increase from the previous year (2014/15), where 11 privacy specific publications/resources had been developed. A review of privacy specific resources and publications will be conducted during 2016/17.

In 2015/16, The Privacy Governance Framework was updated with health information and the following guidance material is under consultation and due to be completed early in the next financial year:

- Privacy Impact Assessment guide for Agencies;
- Reasonably Ascertainable Identity fact sheet;
- Guidance on Trans-border principles;
- Guidance on consent; and
- Statutory Guidelines on Research.

See the full list at Appendix 1.

During Privacy Awareness Month, over 20 new resources were created to assist the public and public sector agencies with relation to privacy issues. These included animations based around the four key themes, as well as online checklists, suggested newsletter copy and information around what's coming up in the privacy space in NSW. More detail is provided further in this chapter.

All resources are available in accessible formats and for download on our website [www.ipc.nsw.gov.au/privacy](http://www.ipc.nsw.gov.au/privacy)

## Presentations

As part of meeting the statutory requirements and effectively championing privacy, the Privacy Commissioner, and representative's, undertake presentations on privacy specific topics. During 2015/16, the Privacy Commissioner, and representative officers, gave presentations following requests from agencies and external stakeholders on a variety of privacy specific topics. These included presentations to NSW government agencies, interested state

owned corporations and privacy partners. Topics included the 'Privacy Matters' series, 'Privacy – its everyone's business' and 'Big Data Technology and National Security'.

Another key activity undertaken to meet statutory responsibilities is to appear before Parliamentary committees and draft and submit subject matter expert advice to Parliamentary Inquiries.

### Presentations and Participation

During 2015/16 the NSW Privacy Commissioner appeared before a number of Parliamentary Inquiries. Three key Inquiries to which the Privacy Commissioner gave evidence were:

- NSW Parliamentary Inquiry into service coordination for communities of high social need;
- NSW Parliamentary Inquiry into remedies for serious invasions of privacy in NSW; and
- NSW Parliamentary Committee on the Ombudsman, the Police Integrity Commission and the Crime Commission

More information can be found in Objective 2.

The Privacy Commissioner also assisted a number of administrative committees by providing privacy guidance or information to:

- Information and Privacy Advisory Committee;
- Data Analytics Centre Steering Committee;
- Digital Licence Steering Committee;
- Global Privacy Enforcement Network;
- Right to Information and Privacy Practitioners Network;
- Privacy Authorities of Australia;
- Enabling Information Sharing Working Group;
- NSW Digital Information Security Community of Practice Committee.

The Privacy Commissioner has also been contributing to the United Nations Special Rapporteur on the Right to Privacy's thematic priorities with particular attention to the Big Data taskforce.





Privacy Awareness Month  
Privacy matters lecture  
'Why NSW should lead'

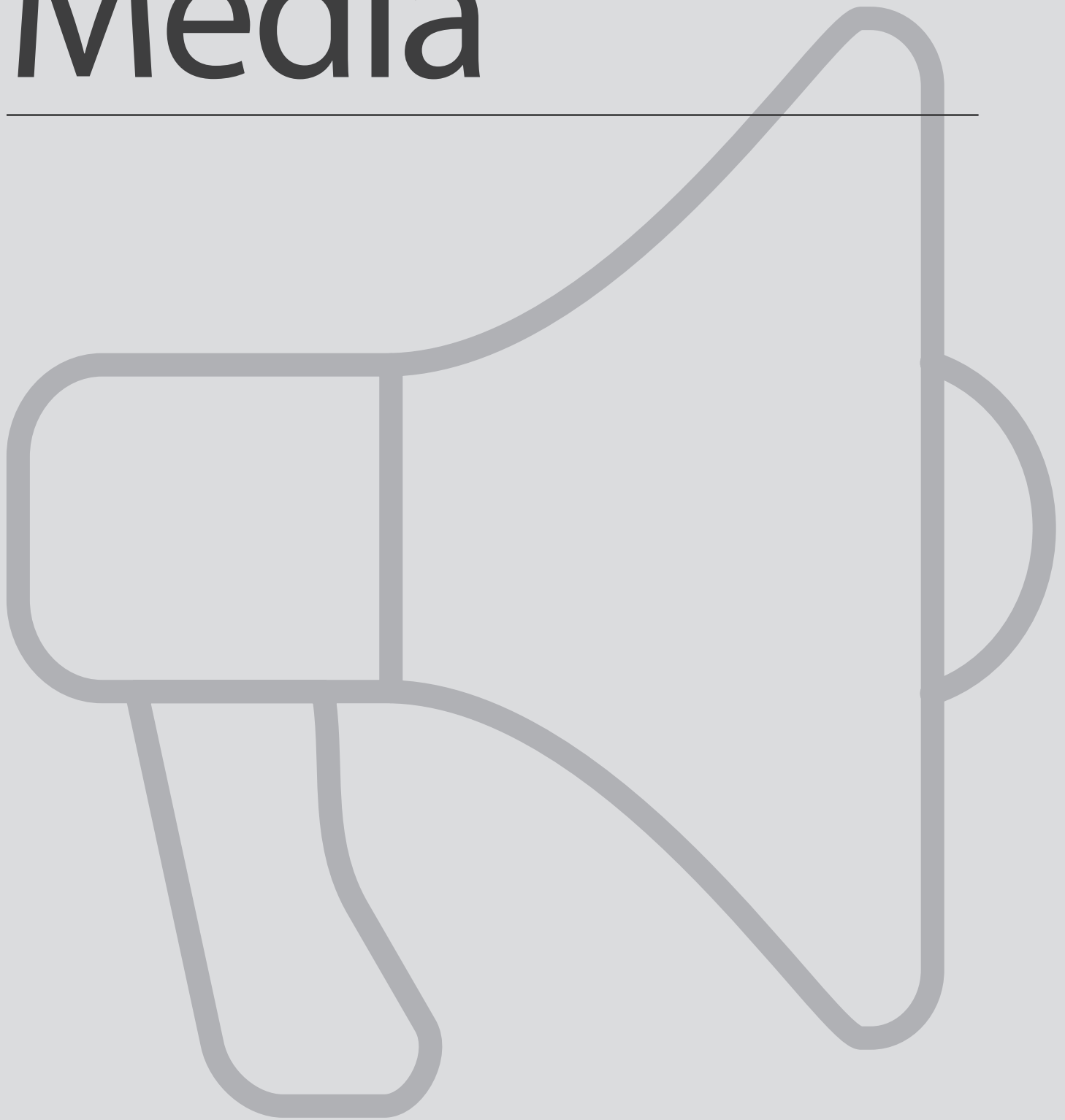
### What's on in 2016/17

- The Privacy Commissioner will continue to promote privacy through consultation and by communicating privacy issues. The main promotional event will be Privacy Awareness Month 2017;
- A review of privacy specific resources and publications will be conducted during 2016/17;
- Updating and delivering privacy specific resources to target audiences by including updated content in current publications and new animations and publications for the NSW community;
- Distribution of the new 'Privacy Commissioner's Update';
- Maintaining an active public speaking schedule.



# Media

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The NSW Privacy Commissioner has a statutory responsibility to raise public awareness around privacy and during 2015/16, made a number of public statements on privacy matters.

These included:

On service coordination for communities of high social need (see later in this chapter for more information):

*“It [privacy law] provides ample opportunity for agencies to respond to the needs of communities, families and individuals in a coordinated and effective way. But there is a knowledge gap in the sector about how the privacy regime works and how it can be used to achieve the best outcomes for the community. Educating the sector is key to resolving these issues”*

The Mandarin ‘Service coordination possible under privacy laws: Commissioner’;

On remedies for serious invasions of privacy in NSW (see later in this chapter for more information):

*“...New South Wales privacy Commissioner Dr Elizabeth Coombs said she was deeply concerned by what she called a “serious invasion” of privacy. “As Privacy Commissioner, I think people of New South Wales deserve to have their privacy protected, and have a means to get redress when a serious invasion has occurred.” – ABC Online ‘Sydney nurse who took explicit photo of patient under anaesthetic still practising in NSW’;*

On the NSW Parliamentary Inquiry into remedies for serious invasions of privacy in NSW (see later in this chapter for more information):

*“...The inquiry has also heard from the NSW Privacy Commissioner, Elizabeth Coombs, who said there were gaps in the system that had been exposed by technology changes...*

*“We have instant and worldwide communication, where anyone with a smart phone can become an internet superstar in a matter of hours,” Dr Coombs said...” The ability of the common law to protect privacy rights and regulate appropriately and comprehensively the appropriate use of people’s information or incursions into their privacy is hampered by a lack of flexibility and timeliness.” –*

*– ABC Online ‘Laws to prevent ex-lovers who distribute ‘revenge porn’ are inadequate, a NSW inquiry hears’.*

Promotion of privacy rights increased during 2016 aided by greater media interest. There was considerable interest in the Inquiry into remedies for the serious invasions of privacy of NSW citizens. The Commissioner released a statement in October 2015 calling for statutory remedies for serious invasions of privacy in NSW and in March 2016 supporting the findings recommendations of the Committee. *“This is a win for those people who have had their privacy breached in unimaginable ways and then suffered further indignity in discovering that they had no right to recourse...”* Dr Coombs said

The increased media engagement in 2015/16 has reflected the growing interest in the impacts of technological advances upon privacy and an appreciation that the community is increasingly concerned about these effects.

# OBJECTIVE 2:

To independently advise on privacy issues of concern

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## Purpose

*Providing independent advice on legislative issues concerning compliance with NSW privacy legislation is a key statutory function. It also includes, if it is in the public interest, advice on the use of mechanisms which modify the application of privacy provisions.*

*This entails providing advice on Bills introduced into Parliament, correspondence and submissions on State and Federal policy developments including statements on requests for modification of privacy principles, Parliamentary Inquiries, statutory reports to the Parliament, providing advice on legislative provisions for complaint handling as well as participating in consultations and attending in an advisory capacity, Steering Committees and Working Groups.*

## Highlights for 2015/16

**Increased recognition of privacy in the establishment of Parliamentary Inquiries with three key Parliamentary Inquiries seeking statutory privacy advice;**

**Submission to the Parliamentary Inquiry for Serious Invasion of Privacy;**

**Submission to Parliamentary Inquiry into Service Coordination for Communities of High Social Need;**

**Submission to the Statutory Review of the *Government Information (Public Access)*, 2009;**

**4 Directions made during 2015/16 providing independent advice with relation to a range of public issues concerning privacy;**

**173 statutory advice files closed in 2015/16, an increase of 71% from 2014/15.**

## Providing Expert Privacy Statutory Advice

The Office of the Privacy Commissioner provided advice to individuals, the Parliament, the Government and the broader public and private sector on privacy issues during 2015/16. The majority of the statutory advice was sought from the public sector which includes local government, universities, NSW Parliament and Ministers, and Commonwealth government agencies. Often these requests for assistance relate to legislative or program proposals, policy developments and agencies understanding of the applicability of the legislation. The

private sector has asked for more advice and assistance from the Office during 2015/16; more requests for assistance originated from non-government organisations now providing services formerly provided by the public sector. This emerging issue is discussed further under Objective 4 (p 38).

In 2015/16, the Office of the Privacy Commissioner responded to 173 requests for statutory advice from our stakeholders. This was a significant increase (71%) from the 101 requests received in 2014/15.

Of the 173 matters, 127 (176%) were received and finalised after the re-establishment of the Office of the Privacy

Commissioner.

While it is difficult to interrogate the data as required, the estimate is that the majority of requests for advice (almost two thirds) were from the NSW Government sector, followed by private individuals (roughly 1 in 10 requests) as the second major category. This increase is indicative of the growth in awareness of the need to properly manage privacy issues.

During 2015/16, the Privacy Commissioner was approached on a range of projects and policy developments including:



Domestic violence;



Child protection issues;



Social housing reforms;



NSW Police Force Body Worn Camera Standard Operating Procedure; GPS vehicle tracking



policy; People Matters



Survey; Australian Bureau



of Statistics, 2016 Census; MyHealth eRecord;



Transport for NSW



Opal Electronic Ticketing Scheme; RMS Heavy Vehicle



Operator Safety Information Program; NSW Digital Licence



Program; and Australian Productivity



Commission Inquiry into Data Availability and Use.

<sup>1</sup> 173 includes matters entered on the Resolve system (146) and the Privacy team's secure folder (27).

<sup>2</sup> The statistics made available were limited to yearly totals not disaggregated by source.

## Who Requested Statutory Advice?

Typically, the majority of requests for advice originate from the State Government sector and 2015/16 was no different in this regard. On statutory advice numbers in the Resolve database, which does not include the 27 secure closed matters, the majority arose from the State Government sector, 64%.

The non-mutually exclusive nature of the categories under which data provided to the Office of the Privacy Commissioner is disaggregated is noted, however, it is not possible to interrogate and correct these.

In the previous 2014/15 IPC Annual Report, there were two advice requests that were both GIPA and privacy related and 12 advice requests that were neither privacy or GIPA related. It is unknown what, if any, matters were both privacy and GIPA (or if any were received that were neither privacy nor information access during 2015/16).

**Table 2: Statutory advice requests by year and source 2014/15 to 2015/16**

| Source of request for Advice <sup>(1)</sup> | 2015/16 |    | 2014/15 |
|---|---------|----|---------|
|   |         |    |         |
| TOTALS                                      | 146     | 27 | 101     |
| State government                            | 94      | 25 | 61      |
| Private individual                          | 14      | 0  | 7       |
| Private organisation <sup>(2)</sup>         | 11      | 0  | 5       |
| Other government                            | 10      | 0  | 3       |
| Other <sup>(3)</sup>                        | 9       | 0  | 11      |
| Local government                            | 7       | 0  | 9       |
| Parliamentary inquiry                       | 1       | 2  | 5       |
| Advocate/lawyer                             | 0       | 0  | 0       |

**Notes:**

1. Statutory advice files are held in two systems, the latter and smaller group under more secure arrangements. The combined total of statutory advice work is 173 matters.
2. Private organisation includes private business, non-government organisations and peak bodies
3. Other includes universities, Members of Parliament, Parliamentary Committees, and unknown

## What is driving the Requests for Privacy Statutory Advice in 2015/16?

For our service improvement and planning purposes, understanding why requests for statutory advice assistance are being made is important. Indicative data made available to the Privacy Commissioner suggests that the privacy principle of 'Disclosure' contained in both Acts has given rise many of the requests received. It has not proven possible to ascertain what has occurred in previous years as a breakdown in data, by sector for statutory advice sought.

More detail on the mix of principles involved in the statutory advice is provided in Appendix 2.

As many of the requests concern disclosing personal or health information, a considerable amount of time and liaison occurs around the use of the mechanisms within privacy legislation which modify the privacy principles where it is in the public interest to do so.

<sup>3</sup>Matters recorded in the joint resolve database system only.

## Public Interest Directions

The *Privacy and Personal Information Protection Act 1998* (PPIP Act) provides flexibility to the Privacy Commissioner to exempt agencies from complying with privacy principles and codes with the approval of the Attorney General if the Privacy Commissioner considers it is in the public interest to make the direction (section 41, *Privacy and Personal Information Protection Act, 1998*).

For more information on the Public Interest Directions made by the Commissioner, see Objective 4.

## NSW Parliamentary Inquiries:

Providing advice to the Parliament is a significant responsibility of the Privacy Commissioner. This advice is usually of two forms; requests for advice on Bills and other matters before the House while the Parliament is sitting and formal submissions to Inquiries and Committees. The key Inquiry, with direct privacy implications, established in 2015/16 was the Legislative Council's Law and Justice Committee to examine the remedies available for serious invasions of privacy. This inquiry is reported further in this chapter.

### Parliamentary Inquiry into Service Coordination in Communities with high social needs

The NSW Privacy Commissioner made a submission (submission No 45, 26 August 2015) to the Inquiry on Service Co-ordination in Communities with High Social Needs, advocating the importance of improving service coordination in these communities by seeing privacy protections and education on privacy rights and obligations, as an enabler of service coordination.

In her appearance before the Standing Committee on Social Issues, chaired by the Hon. Bronnie Taylor, MLC, the Privacy Commissioner stressed that service coordination and delivery of services to high social need communities can be improved by securing the trust of service users by addressing their privacy needs explicitly and effectively. This was stated to be very important, as case coordination and case management requires the collection, sharing and consideration of considerable amounts of sensitive personal and health information

of individuals and also frequently of their families.

In December 2015 the Parliamentary Committee issued its Final Report making 19 recommendations. Two recommendations related directly to the role of the Privacy Commissioner, while a number impacted on the privacy and protection of personal information of the NSW public. The two specific recommendations were:

- **[Recommendation 7]** That the Privacy Commissioner develop guidelines for both government and non-government organisations on appropriate information handling and information sharing, including information on how organisations can meet their obligations under the privacy framework when contracted to deliver services on behalf of the NSW Government.
- **[Recommendation 8]** That the NSW Government:
  - Establish the Privacy Commissioner as a central point of coordination with other bodies within the privacy field, both within New South Wales and federally;
  - Fund the Privacy Commissioner to assist in the development, implementation, training and oversight of adherence to the guidelines proposed in recommendation above.

The Privacy Commissioner welcomed these recommendations. In mid June 2016, the NSW Government provided its response, supporting in principle the Privacy Commissioner being the central co-ordination point for advice on privacy matters that the Privacy Commissioner develop guidelines to assist service providers; but on the issue of appropriate resourcing to undertake this and other assistance, the Government needed further consideration

### Parliamentary Inquiry into the Regulation of Brothels

In 2015, the Legislative Assembly Select Committee conducted an Inquiry into the Regulation of Brothels chaired by the Hon. Alister Henskens, SC, MP. The final report was published in November 2015. One of the recommendations, Recommendation 12, acknowledged the need for privacy protocols if a register of licensed premises or individuals was introduced as a part of the regulatory arrangements. This

requirement was supported by the Privacy Commissioner if registers were to be established, however, the Government's response did not support the introduction of a licensing system.

The relevant Inquiry (Recommendation 12) read *"Any register of licensed premises or individuals created under the proposed brothel licensing system should not be made public and privacy protocols should be established for their management"*.

### Parliamentary Inquiry into Elder Abuse

During 2015/16 the NSW Parliament established an inquiry into elder abuse in New South Wales. The committee was chaired by the Hon Greg Donnelly, MLC.

The Inquiry concerned the abuse of some of the most vulnerable people in the NSW community. It was not possible to provide a submission within the timeframe, but during 2015/16 the Privacy Commissioner did raise with the Committee that abuse can take the form of severe and unwarranted intrusion into the elderly person's privacy and in some circumstances, can involve identity theft and fraud.

The Committee's final report was tabled in June 2015. The first recommendation takes a rights based approach which is supported and further in Recommendation 4, explicitly refers to privacy being included in the review of the NSW Interagency policy for preventing and responding to abuse of older people.

The Government's response is due 9 January 2017.

### Parliamentary Inquiry into Sexualisation of Children and Young People

During 2015/16, the NSW Parliament's Committee on Children and Young People established an Inquiry into matters relating to the sexualisation of children and young people. The committee was chaired by the Ms M. R. Gibbons, MP.

In her submission to this inquiry, in February, 2016, the Privacy Commissioner noted that the sexualisation of children and young people has serious privacy implications. She also noted that parents concerned with the protection of their children's and teenagers' privacy seek practical and timely assistance with these issues, particularly the taking down content on the internet. The Commissioner brought to the Committee's attention the 'right to be forgotten' legislation in California.

The final report had not been tabled by the end of 2015/16.

### **Statutory Review of the Government Information (Public Access) Act 2009 (GIPA Act)**

The Department of Justice requested the Privacy Commissioner's advice with relation to the issues to be considered in the review of the GIPA Act. In light of the significance of this legislation to the well-being of the NSW community and its interaction with the PPIP and HRIP Acts, the Privacy Commissioner provided detailed comments to the Secretary of the Department on the operation of the GIPA Act particularly in relation to the 'open government' framework, the access rights and the operation of section 94.

The Commissioner's submissions drew attention to the important distinction between the GIPA Act and the *Data Sharing (Government Sector) Act 2015*. She advised that it was the role of the Data Sharing Act, not the GIPA Act, to act as the legislative mechanism for facilitating data sharing between agencies, or between the Data Analytics Centre (DAC) and agencies. In her submissions, the Commissioner also stated that the appropriate legislation for the access right, when applications are solely for personal and health information of the applicant, is the privacy legislation. In her submissions she recommended an amendment to section 9 of the GIPA Act to the effect that members of the public cannot make an access application for government information, if the application is solely for access to their own personal and/or health information. This would increase efficiency.

Another important concern raised by the Commissioner was in relation to the operation of section 94 of the GIPA Act.

The concern here is that sufficient consultation occurs with the Privacy Commissioner as Parliament intended. The submissions noted that the last such consultation was September, 2013, despite the number of relevant matters.

The Commissioner urged more extensive consultation to be undertaken with her Office when reviewing the decisions of agencies where those decisions concern privacy related public interest considerations against disclosure.

## **Consultation**

Throughout 2015/16, Commonwealth and State organisations sought advice from the Privacy Commissioner on the operation of privacy legislation with a view to reforms of specific programs or activities. These requests varied widely from digital identity authentication, digital licensing and financial reforms through to big data, terrorism and crime prevention, as well as domestic violence initiatives.

### **Federal Royal Commission into Institutional Responses to Child Sexual Abuse**

In 2015/16 the Privacy Commissioner participated in a consultation held by the Royal Commission's Inquiry into Institutional Responses to Child Sexual Abuse. The Privacy Commissioner provided input into issues of public concern that raised privacy considerations. An important issue is the balance between the public interest in privacy law exemption by law enforcement and associated agencies to access personal information held by other NSW government agencies with the need to protect the privacy of individuals some of whom can be minors. The Royal Commission will release its report on these consultations in the first quarter of 2016/17 ahead of its final report.

NSW Activities in relation to 'Institutional responses to Child Sexual Abuse' Preventing and managing child sexual abuse was also discussed at a roundtable held by the Office of the Ombudsman, NSW, which the Privacy Commissioner attended on 24 June 2016. Of particular note was the public release of personal information in the context of the handling of reportable allegations. The Privacy Commissioner addressed the role of privacy in situations where, after a reportable allegation has been made, an agency provides certain information relating to the matter to the broader community, or to particular groups with a more direct 'interest' in the matter (for example, parents associated with a government or non-government school, or a child care centre, in which the individual the subject of the reportable allegation works).

Discussed in detail were circumstances which may justify the 'public' disclosure of personal information and which raised

related questions such as:

- precisely what information should be conveyed
- when should information be conveyed; and
- who should be the target audience.

Decisions around 'public' disclosure of personal information in any circumstances require an agency to consider a range of legal and policy issues. The most prominent of these, in these instances, relate to privacy and defamation, but it is also necessary to consider the legislative framework in which the agency operates, its duty of care, its obligations of confidentiality and the need to ensure procedural fairness and avoid any interference with police and judicial processes. At the same time, it is important that those affected by the allegation are given some information about what is being done.

This roundtable was directly linked to a series of the case studies considered at the Royal Commission into Institutional Responses to Child Sexual Abuse.

Some agencies had attempted to construct guidelines to assist them in making decisions around the public release of this kind of information. Against this background the roundtable discussed the related legal and policy issues to inform the development of sound practice in this critical area.

The NSW Ombudsman is set to release a series of outcomes from this roundtable early in 2016/17.

### **Domestic Violence Consultation**

The NSW Privacy Commissioner participated in workshops and consultations for the NSW Government's Domestic Violence reforms. These led to the introduction of the Domestic Violence Disclosure Scheme. With the approval of the Attorney General, the Privacy Commissioner made a new Public Interest Direction under section 41 of the *Privacy and Personal Information Protection Act 1998* (PPIP Act) and with the approval of the Minister for Health, a corresponding direction under section 62 of the *Health Records and Information Privacy Act 2002* (HRIP Act) to support the Department of Justice and the Ministry of Health's Domestic Violence Disclosure Scheme.

The Direction allows for the collection, withholding, use and disclosure of personal and health information by participating

entities for the purposes of the operation of the Scheme without requiring authorisation from some of the individuals involved. It came into effect on 13 April 2016 and will expire on 12 April 2018.

The Scheme is the first of its kind in Australia and one of the NSW Government's strategies to help reduce domestic violence in NSW. It is designed to enable a person who has concerns about their current/former partner to ascertain if that person has a history of domestic violence offending. It also allows concerned third parties such as family, friends and professionals working with the family, to make an application for the person to receive information about their partner.

## Providing advice on legislative provisions for complaint handling

A significant area of work for the Office of the Privacy Commissioner instigated in 2016 is advice on how the oversighting complaint investigations that are undertaken through the internal review provisions of the *Privacy and Personal Information Protection Act 1998* (PPIP Act), is set out in the legislation.

Internal reviews do not represent all of the privacy complaints received by organisations, however, this legislative privacy complaint handling mechanism requires particular processes and actions by the Privacy Commissioner, including:

- Sections 52 to 57 of the PPIP Act provide the scheme of complaint making to public sector agencies and review of privacy allegations by the Tribunal. The scheme provides agencies the first opportunity to investigate privacy complaints, identify systems issues for improvement and provide for appropriate remedies to complaints.
- Resolution of complaints at the internal investigation stage instils confidence in the community that agencies take complaint concerns seriously and respond quickly with objectivity. Efficient resolution of privacy complaints alleviates the risk of costs to agencies, complainants and the overall justice system by reducing the number of review applications to the Tribunal.
- The Privacy Commissioner performs an oversight role during internal

investigations of complaints. The Appeal Panel of the former Administrative Decisions Tribunal has stated that the legislation gives the Privacy Commissioner a central role to make the scheme work.

- The main oversight responsibility of the Privacy Commissioner is to review draft internal review reports agencies submit before they finalise their findings.
- The Privacy Commissioner's review primarily focuses on whether drafts: correctly identify privacy allegations, discuss all of the privacy principles that complaints engage, contain examination of all necessary evidence, make findings that reasonably flow from the evidence, and, propose any appropriate systems or remedial actions that have the capacity to resolve the complaint.
- The legislation empowers the Privacy Commissioner to make submissions to agencies, so that final reports may be as thorough a response to the subject matter of complaints as practicable.

During the reporting period, submissions included assistance to internal reviewers in the following significant areas:

- Interpretation of the law regarding time limits to lodge applications.
- How to analyse information complainants submitted in order to best decide what content makes allegations capable of investigation under the statutory scheme.
- Interpretation of information from complainants regarding which privacy principles need examination.
- Interpretation of provisions in the legislation that provide exemptions from compliance with privacy principles.
- What kind of enquiries may tend to assist resolve apparent factual disputes.
- Complainant requests for outcomes and how to ensure that adequate discussion of those requests is included in internal review findings. For example, when and how to deal with requests for compensation and what engagement with the complainant is necessary in order for a final report to be as a complete treatment of the complaint as possible.
- What attachments may be necessary to make a final report adequately transparent without unnecessarily undermining other interests, such as the privacy of others or other parties'

commercial interests?

Under the new operating arrangements the Office of the Privacy Commissioner handled 83% more oversight matters than during the previous half yearly period. The number of such matters and analysis can be found at Objective 4 (p 38).

## What's on in 2016/17

Advise as required on:

- Privacy matters raised by the Terms of Reference of Parliamentary Inquiries
- Privacy implications of findings and recommendations that may be made by the Royal Commission into Child Sexual Abuse and related reviews.
- Issues such as digital identity authentication, digital licensing, transport safety regulation, security and surveillance technologies such as CCTV and body worn cameras for Commonwealth, State and Local Government instrumentalities.
- Social reforms particularly those involving shifts of service provision to other non-government service providers
- Statutory requirements for handling of privacy complaints and requests for modification of the application of privacy principles.
- Continuing to seek adoption and implementation of recommendations of the 2015 report on the operation of the NSW privacy legislation.

# Parliamentary Inquiry into remedies for serious invasions of privacy in NSW

On 24 June 2015 an Inquiry was established to inquire into and report on remedies for the serious invasion of privacy in NSW. The terms of reference required the Standing Committee on Law and Justice, chaired by The Hon Natasha Maclaren-Jones MLC, to consider the adequacy of existing remedies for serious invasions of privacy, including the equitable action of breach of confidence; and to consider whether a statutory cause of action for serious invasions of privacy should be introduced.



The Inquiry was established to consider the adequacy of remedies to serious invasions of privacy amidst increasing community concern about the use of technology, including social media and surveillance technology, in ways that intrude upon people's day-to-day lives. Of particular concern in the lead up to the inquiry was the 'revenge pornography' phenomenon, involving the distribution or threatened distribution of intimate images without the person's (most frequently the woman's) consent.

The Inquiry followed a number of reports from distinguished legal bodies, including the Australian and State Law Reform Commissions, all of which supported the introduction of a statutory cause of action for a serious invasion of privacy.

Submissions were received from a range of stakeholders including individuals, legal groups, academics, media representatives as well as from various government agencies and independent statutory officers such as that of the Privacy Commissioner.

The Privacy Commissioner provided her submission on 28 September 2015 in

which she supported the development of a statutory cause of action to provide an avenue of redress for serious invasions of privacy of individuals. The Privacy Commissioner stated that 'remedies available under NSW privacy legislation are inadequate to protect the person's sense of self and safety when they are subject to a severe privacy invasions through the use of technology.'

On 3 March 2016 the Standing Committee on Law and Justice released their final report. The Committee recommended that NSW introduce a statutory cause of action for serious invasions of privacy and also recommended expansion of the powers of the NSW Privacy Commissioner to enable the Commissioner to hear complaints between individuals relating to alleged serious invasions of privacy, and to make determinations for non-financial forms of redress such as apologies.

The recommendations of the Inquiry produced a significant amount of media and public interest and provided the topic for the keynote address for Privacy Awareness Month given by the Hon. Michael Kirby AC CMG.

The response of the NSW Government is due on 5 September 2016.

*...NSW was the second jurisdiction in the world to introduce laws dealing directly with privacy, so it is appropriate that NSW again takes a leadership role and acts as the catalyst for other Australian jurisdictions to take similar action."*

# OBJECTIVE 3:

## To promote awareness of privacy related issues to stakeholders

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### Purpose

*The NSW Privacy Commissioner and Office regularly engages with stakeholders to gain feedback on emerging issues and to provide guidance on privacy related matters.*

*Engagement takes a variety of forms according to the issue, the context and the timing including organising formal training sessions and seminars, speaking engagements and advice to working groups and committees.*

### Highlights for 2015/16

The increased interest from both public and private sectors in promoting privacy awareness saw acceptance of over 20 requests for public addresses.

During 2015/16 the Commissioner engaged with a number of key stakeholders both nationally and internationally, participating in a range of workshops and providing advice to a number of agencies. These included the NSW Cross Border Commissioner, the Federal Privacy Commissioner and the UN Special Rapporteur on the Right to Privacy. The Commissioner participated in Global Privacy Enforcement Network, Asia Pacific Privacy Authorities as well as national initiatives by agencies such as Digital Transformation Office and was a member of roundtable consultation with Royal Commission on Institutional Responses to Child Sexual Abuse.

Committee participation included Data Analytics Centre project steering committee, Digital Licensing Program steering committee and Privacy Authorities Australia, to name a few.

## Stakeholder Engagement

During 2015/16, the Privacy Commissioner (or a nominated representative) engaged with stakeholders at local, regional, state, national and international levels. When addressing specific issues, the standard approach of the Office is to look at underlying causes of the matters notified. The opportunity to combine with other bodies to address any systemic issues is also examined as such combined efforts are more likely to result in lasting change.

It is vital for agencies to ensure that the privacy rights of the NSW community are considered early in program development and appropriate risk management mechanisms are in place to comply with privacy legislation, such as the obligation to undertake reasonable steps to protect personal or health information. 'Privacy by Design' is a proactive and preventative risk management strategy that the Privacy Commissioner and the Office advocate as an effective way to achieve compliance and mitigate risks to corporate reputation.

Spending time on issues raised by stakeholders also provided valuable feedback and better understanding of the circumstances of agencies as well as the opportunity to promote awareness of privacy related issues.

The Privacy Commissioner has also raised with other independent regulatory bodies, the relevance of the protection of privacy to their function. One such agency is the NSW Audit Office, which reviews public sector agencies' risk management strategies as part of assessing their operational performance. In 2014/15 and again in 2015/16 the Privacy Commissioner has raised with the Auditor General, recommendations regarding the management of personal information collected as part of the regulation of firearm ammunition and the personal information contained in the NSW Firearms

Register. The Privacy Commissioner's concern has been that a breach of the personal information of firearm owners could potentially lead to a community safety risk. The relevant recommendations are contained in the statutory report to the Parliament on the operation of the *Privacy and Personal Information Protection Act, 1998*.

The NSW Privacy Commissioner will continue to raise these concerns with the NSW Audit Office with the aim of seeing these risks to individual privacy and then community safety become a part of view of forward performance audit programs.

The Privacy Commissioner also engaged with the following bodies on the following matters:

- Office of the Federal Privacy Commissioner on big data and cross border movements of personal information, the 2016 Census, the 'myHealth Record' initiative, digital identity authentication as well as Privacy Awareness Month (APPA initiative);
- Victorian Privacy and Data Protection Commissioner on domestic violence and data protection standards;
- Department of Premier and Cabinet on various reforms for NSW including data availability and use;
- The Office of Local Government and the peak body, Local Government NSW, on a forward program of work that would identify the top priorities for action as well as the risks associated with the scale of change occurring through council amalgamations and other reforms.

A specific issue was the need to re-write the Model Local Council Privacy Management Plan.

International engagement included the Asia Pacific Privacy Authorities, the Global Privacy Enforcement network and the United Nations Special Rapporteur on the Right to Privacy. The aim was to understand international trends and movements in

privacy and advise the Parliament and Government of these so the best alignment can occur to secure NSW's position in the global knowledge economy. For more information on international engagement see Objective 8.

For more information on the type of advice provided to NSW public sector agencies, see 'Statutory Advice' in Objective 2.

## Advisory Role in Committee Participation

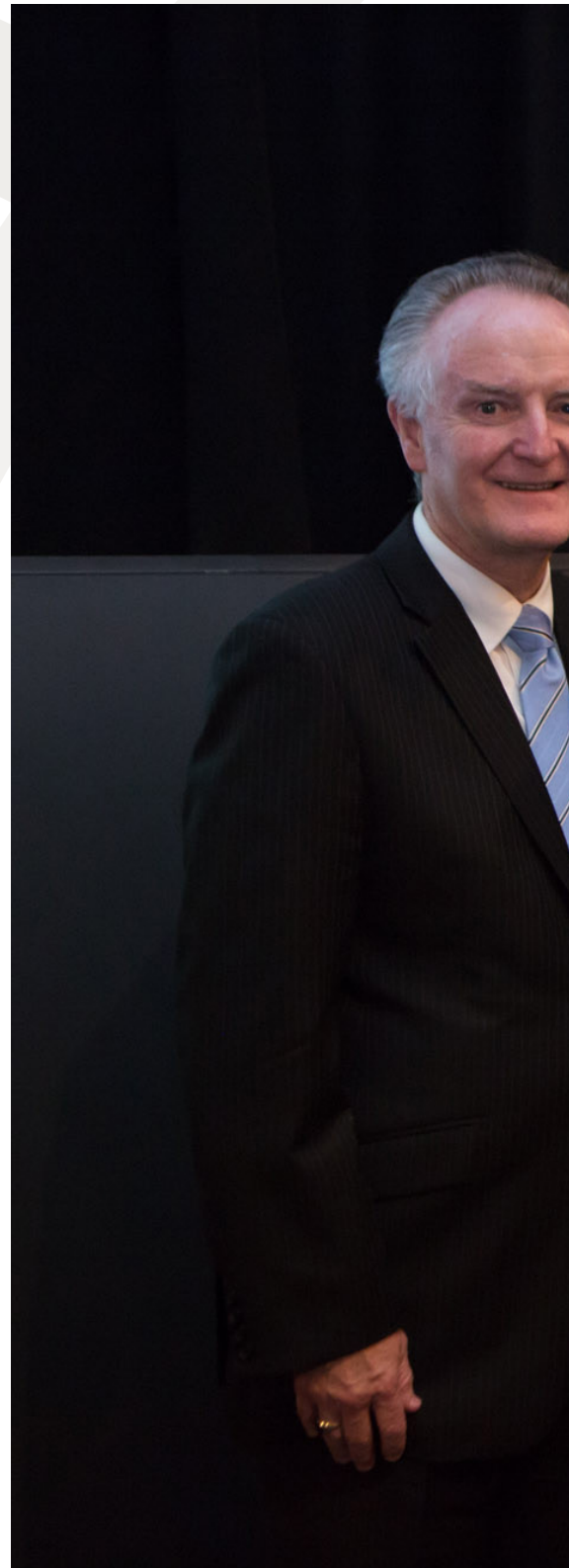
In order to champion privacy in NSW, the Commissioner (or a nominated representative) participates in an advisory capacity on a number of working groups and sits on a number of Committees.

During 2015/16, the Privacy Commissioner, or a representative, assisted a number of Committees sometimes providing training or other activities to promote awareness of privacy related matters to internal and external stakeholders.

The following is a brief snapshot of the Committees the Commissioner, or a privacy representative took part in:

- Information and Privacy Advisory Committee
- Data Analytics Centre Steering Committee
- Digital Licensing Program Steering Committee
- Global Privacy Enforcement Network Program Scheduling Committee (see Objective 8)
- Practitioners network consultative group (see Objective 6)
- Privacy Authorities Australia
- Enabling information sharing working group
- NSW Digital Information Security Community of Practice Committee
- United Nations Special Rapporteur on the Right to Privacy Thematic Priorities (more information in Objective 8)

Due to the nature of the statutory role, that is its independent regulatory component, the Privacy Commissioner attends in an advisory capacity. The Privacy Commissioner, as an independent statutory office holder, and attendance and participation in working parties is undertaken on this basis





### What's on in 2016/17

- Monitor developments in privacy in Australia and internationally and brief the NSW Parliament, the government and organisations of these trends and their impacts.
- Continue to promote sound privacy governance as means to secure trust of service users and benefits of a good corporate privacy reputation
- Provide, according to resourcing, expert input into Parliamentary Inquiries and reviews with substantial potential privacy impacts.

Mr Michael Dwyer, Dr Elizabeth Coombs and Mr Hugh Mackay at the first 'Privacy Matters' series

# OBJECTIVE 4:

## Respond to issues arising from actual and potential privacy breaches

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### Overview of goals of Objective

To assist individuals and organisations address actual and potential privacy breaches as required by NSW privacy law. The Privacy Commissioner undertakes this statutory function by:

1. Taking appropriate action that is in the public interest when a potential breach needs to be addressed by recommending to the relevant Minister the making of a Privacy Code of Practice under either the Privacy and Personal Information Protection Act, 1998 or the Health Records and Information Privacy Act, 2002. A Code modifies the application of the privacy principles;
2. Reviewing public sector agencies' management of privacy complaints handled under NSW privacy legislation;
3. Undertaking direct complaint handling under relevant sections of the privacy legislation;
4. Providing assistance to organisations when they make a voluntary breach notification; and
5. Assisting the NSW Civil and Administrative Appeals Tribunal on privacy matters before it.

It does not include reviewing how public sector agencies deal with privacy complaints managed under general complaints procedures.

### Highlights for 2015/16

A Privacy Code of Practice for NBN Co was made enabling local councils to lawfully provide personal information to NBN Co for roll out of the broadband network

Overall handling of alleged breaches (combination of 2 and 3 above) totalled 312, an increase of 11% from 2014/15 where 281 matters were closed. This included:

- Oversighting agencies' privacy complaint reviews: 209 internal review matters were closed, an increase of 29% from 2014/15 where 161 matters were closed.
- Direct complaint handling: 103 matters were closed, a decrease of 14% from 2014/15 where 120 matters were closed.

Voluntary Breach Notification: assistance was provided on 44 occasions to organisations that notified voluntarily a privacy breach. This was an increase of 300% from 2014/15 where only 11 cases of assistance were reported.

NSW Civil and Administrative Tribunal: 53 privacy related cases closed in 2015/16; an increase of 83% from 2014/15 where 29 cases were closed. In the first half of 2015/16, 17 privacy cases were actioned. In the second half of 2015/16, 35 new cases were actioned; an increase of 94%.

## Our Approach to Managing Actual and Potential Privacy Breaches

The Privacy Commissioner's focus is on preventing privacy breaches by emphasising the need for strong privacy governance arrangements and encouraging proactive constructive management when they do occur or are alleged to have occurred. A major portion of the Office's work includes addressing complaints raised by individuals regarding alleged breaches of privacy across NSW public sector and private sector health organisations.

During 2015/16, the Privacy Commissioner continued the practice of assessing, investigating and facilitating complaint handling with relation to breaches of individual privacy, identifying and addressing systemic issues as well as appearing at the NSW Civil and Administrative Tribunal in privacy cases.

## Modifying the Application of the Privacy Principles - Codes of Practice

A Privacy Code of Practice is a legal instrument made under Part 3 Division 1 of the *Privacy and Personal Information Protection Act, 1998* (PPIP Act) that typically modifies the application of any one or more privacy principles. Codes must not establish a standard higher than the legislated principles. The Code is made by the Attorney General, however, consultation must occur with Privacy Commissioner prior to the Code being submitted to the Attorney.

During 2015/16, the Privacy Commissioner received queries from agencies to aid in the creation of a number of Codes of Practice. One Code was finalised during 2015/16 and discussions commenced with the Privacy Commissioner about the development of two other Privacy Codes of Practice.

### Privacy Code of Practice for NBN Co

A Privacy Code of Practice for the Disclosure of Personal Information by NSW councils to NBN Co Ltd for the delivery and ongoing operation of the NBN Network was made during 2015/16.

Under Clause 17 and 18 of Schedule 3 to the *Telecommunications Act 1997 (Cth)*, the NBN Co is required to give written notice to owner/occupiers of private land of its intention to inspect the land, install or maintain the NBN Network, or to remove a tree or undergrowth to install or maintain the Network.

For NBN Co to fulfil this obligation, the contact details of residents held by local councils were required. This information however, is personal information and therefore subject to NSW privacy legislation which protects the disclosure of such personal information.

To support clause 17 and 18, Schedule 3 of the *Telecommunications Act, 1997* NBN Co developed a Code of Practice that was submitted to the Privacy Commissioner who recommended to the Attorney General that it be made. The Code allows Local Councils to disclose personal information of its residents so that the NBN Co can generate mailing lists to fulfil its notification obligations.

The Code prescribes that Councils must be satisfied that the personal information will be used by NBN Co for this purpose and that the NBN contractor has approached the Council in writing.

### Privacy Code of Practice for the Youth on Track Scheme

During 2015/16, two Public Interest Directions were made with relation to the Youth on Track scheme. The Youth on Track is a trial strategy for reducing juvenile reoffending through improved early intervention. It achieves this by identifying young people at risk of reoffending, identifying their needs to reduce this risk and addressing this risk through early case

management.

The Youth on Track Scheme has provided early intervention of 555 young people who are at risk of reoffending in its three years of operation. The NSW Government has committed to extending the Scheme for a further three years.

To facilitate effective case management and determine individuals who are eligible to participate, Juvenile Justice provides a young offender's personal or health information to several entities, including NSW Police Force and NGO case management service providers.

The need for Codes of Practice was raised with the Office of the NSW Privacy Commissioner, during 2015/16, to replace the Public Interest Direction and Health Public Interest Direction which will expire on 31 December 2016. The matter is currently under consideration and anticipated to be made in 2016/17 by the relevant Minister.

### Privacy Code of Practice for the Strategy to Reduce Reoffending

The Strategy to Reduce Reoffending is a cluster wide reform initiative to enable more targeted, consistent and coordinated case management of persistent reoffenders.

Several elements of the Strategy involve new or additional information sharing arrangements between NSW Police Force, Corrective Services, Family and Community Services and NSW Health. These agencies provide services that address needs common in reoffenders such as antisocial, drug dependency and accommodation problems.

The need for a code of practice was raised with the Office of the NSW Privacy Commissioner during 2015/16 by the Department of Justice in order to enable the continued operation of the Strategy to Reduce Reoffending. The matter is currently under consideration and anticipated to be made in 2016/17 by the relevant Minister.

## How are Privacy Complaints made by Members of the Public Managed?

The full quantum of privacy complaints made by members of the public is unknown, as many complaints are handled through agency general complaints mechanisms and there is no statutory requirement for reporting these to the Privacy Commissioner. The privacy complaints addressed by the Privacy Commissioner are those that fall under the NSW privacy legislation.

Under the law, the NSW Privacy Commissioner is responsible for assessing, investigating and, at times, conciliating complaints from the public regarding potential breaches of their personal privacy. Complaints under the PPIP Act deal primarily with alleged breaches of the Information Protection Principles (IPPs) by the NSW public sector. Complaints under the HRIP Act deal primarily with alleged breaches of the Health Privacy Principles (HPPs) by NSW public sector agencies or the private sector. Most private sector complaints relate to requests to obtain health records.

### Oversighting of Public Sector Agencies' Complaint Handling

Complaints concerning an alleged breach of an IPP or an HPP may be made to the Privacy Commissioner. In most cases, where the respondent is a public sector agency, the Privacy Commissioner recommends that the individual lodge an internal review application under Part 5 of the PPIP Act with the relevant agency, rather than seek investigation or conciliation by the Privacy Commissioner.

The reason for this approach is that the internal review mechanism provides the complainant with the option of taking their complaint to the NSW Civil and Administrative Tribunal (NCAT), if dissatisfied with the outcome of the internal review. The Privacy Commissioner may decline to investigate a complaint if it is considered frivolous, vexatious, trivial, lacking in substance or not made in good faith.

When an agency reviews the complaint made under privacy law, the Privacy Commissioner has a responsibility to oversight the handling of this complaint.

These matters are known as 'internal reviews'. Sometimes a pattern of breaches is identified across multiple internal reviews. The Privacy Commissioner can seek further information to investigate or draw this systemic issue to the attention of the organisation. Addressing systemic matters identified in the oversighting activity is responsive regulation.

### Direct Complaint Handling

On occasions the Privacy Commissioner deals directly with complaints – these arise when a complainant has decided to request the Privacy Commissioner to undertake an investigation of a complaint under PPIPA although they have been made aware that this investigation will not enable them to gain access to the NCAT if they are unhappy with the outcome. Direct complaint handling is not preferred due to the inability to access the Tribunal.

The decrease in numbers of complaints addressed by the Privacy Commissioner is a positive development.

### Private sector health privacy complaints

The other occasions when the PC does direct complaint handling is under the *Health Records and Information Privacy Act 2002* (HRIP Act) in relation to the private health sector. Specifically:

- Part 4 of the HRIP Act extends the Privacy Commissioner's regulatory powers to private sector entities, who are:
  - Health service providers and hold health information irrespective of the size of their enterprise, and
  - Entities, who are not providing a health service, but hold health information and they are over a certain size.
  - The HRIP Act empowers the Privacy Commissioner to receive and investigate complaints regarding alleged contraventions by these entities of provisions in Part 4 and the Health Privacy Principles.
- The HRIP Act enables a complainant who is dissatisfied with the outcomes of a Privacy Commissioner's report into their complaint to request review of the alleged privacy infringing conduct in the Tribunal. None of the complaints that were subject to a Privacy Commissioner's report during the reporting period became subject to

application in the Tribunal.

### Assisting Agencies Notifying Voluntarily a Privacy Breach

The NSW privacy laws do not include mandatory data breach notification provisions. This limits the information received by the Privacy Commissioner regarding the frequency and severity of breach events. Some NSW public sector agencies have developed governance practices under which they escalate data breach events to senior management and voluntarily notify the Privacy Commissioner. This practice is both commended and encouraged by the Privacy Commissioner. It enables assistance to be provided to both individuals affected and the organisations.

International news and literature indicates an increase in the number of inadvertent and sometimes malicious data breaches in both the private and public sectors.

### Oversighting Public Sector Organisations' Privacy Complaint Handling (Internal Reviews)

During 2015/16, the Privacy Commissioner oversighted 209 internal reviews undertaken by public sector organisations. This is an increase of 30% from 2014/15 where 161 (total) internal reviews were completed.

In response to this increase within the public sector, the Privacy Commissioner commenced action under her general legislated functions to assist affected agencies ensure that they strengthen privacy protection systems and develop more robust privacy awareness training opportunities.

Data breach incidents also raise the prospect of organisational liability and personal professional responsibility risks. In order to provide advice to agencies and employees about their information governance, the Privacy Commissioner commenced the preparation of guidance material that addresses agency obligations to have reasonable safeguards to avoid data breaches and have in place institutional responses to address negligent or intentional privacy violations by employees.

The volume of complaints finalised in 2016 directly reflects the concentrated effort of the Office of the NSW Privacy Commission to improve case management in order to bolster capacity and direct resources to proactive regulatory activities.



## Undertaking privacy complaints handling

In 2015/16 there were no complaints handled under Part 4, Division 3 of the *Privacy and Personal Information Protection Act, 1998*.

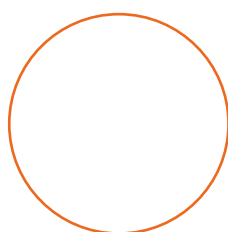
By and large events notified to the Privacy Commissioner can be attributed to three causes; software failure, human error in the dispatch of mail or emails and unforeseen events, such as theft of physical objects that contain personal information. In all matters notified to the Privacy Commissioner, the agencies took immediate action to investigate the cause of the breach, notify affected persons and provide various remedial actions to affected persons.

The Privacy Commissioner's role when notified of data breach events is to assess the gravity of the harm done, the initial responses of the agency to the event, the quality of any investigation and the quality to measures the agency puts in place to learn

from the experience so that similar privacy risks do not arise.

The Privacy Commissioner has also been made aware of incidents where agency employees have unlawfully accessed, used or disclosed information. Such incidents strike at the very heart of public sector data governance and anti-corruption systems and are a significant cause for the community to lose trust in public administration to which they entrust sometimes very intimate information in order to exercise their right to receive public services.

Two recent incidents resulted in criminal convictions in the Local Court, which were not overturned on appeal. The employing agencies were the Ambulance NSW and the Office of the Director of Public Prosecutions.



**30%**

Increase in oversight of Internal Reviews



**135**

Review cases closed in the second half of 2016



**209**

Internal Review Cases were closed in 2015/16

### Alleged Breach of Privacy by the Opal Electronic Ticketing Scheme

In 2014 the Privacy Commissioner commenced an examination of the Opal Electronic Ticketing Scheme developed by Transport for NSW.

This was prompted by the receipt of a public complaint from a Member of the Legislative Council (the Hon. David Shoebridge), a request for a Public Interest Direction from the NSW Universities' Vice Chancellors' Committee and complaints from members of the public.

The examination considered three key areas:

- the right to anonymous travel;
- the disclosure of personal information for law enforcement purposes; and
- the issue of bundled consent.

The student travel Opal matter was addressed by working with Transport for NSW and which has seen the Vice Chancellor's Committee advise that the matter had been satisfactorily addressed. While the report was to be completed during 2015/16, due to resourcing and other issues it has not been completed. A matter on this issue has been lodged with the NSW Civil and Administrative Appeals Tribunal. The report is due for completion in 2016/17.

### NSW Civil and Administrative Tribunal

If an individual is not satisfied with the outcome of a privacy internal review, or if their application is not dealt with by the relevant agency within 60 days for the agency's receipt of their application, they may apply to the NSW Civil and Administrative Tribunal (NCAT) for review of the conduct they complained about in the internal review application.

In NCAT proceedings the Privacy Commissioner can make submissions about matters of statutory interpretation and the operation of the privacy legislation, especially if they raise issues of public interest or importance. Tribunal Members may request the Commissioner's contribution to assist NCAT in its task and have occasionally done so.

During 2015/16 members of the Office of the Privacy Commissioner (under instruction from the Commissioner) attended listings of matters before the NCAT and made oral and written submissions in a number of matters on a variety of important issues.

Examples of issues addressed during the reporting period included:

- The definition of "personal information".
- How other legislation impacts of the operation of the privacy principles and whether or not it modifies their operation.
- The internal review mechanism and how

the Privacy Commissioner's oversight role contributes to quality outcomes in agencies' investigations of privacy complaints.

Discussions with the Tribunal have revealed that of the existing jurisdictions overseen by the Tribunal only that of privacy had seen an increase and this increase was almost a doubling of matters. The details of the privacy cases are available on the NCAT website under the Administrative and Equal Opportunity Division and Appeal Panel indexes.

The following table summarises the number of cases in NCAT proceedings dealt with during 2015/16. Open cases still proceeding are not included.

### 2015/16 Comparative Data for all Complaint Matters

In comparison with 2014/15, with relation to all complaint handling work (including Tribunal matters), the Office of the Privacy Commissioner handled 18% more cases in 2015/16. A total of 312 complaint cases were closed during 2015/16. This comparison comprised of:

- **Oversighting agencies' privacy complaint reviews:** 209 internal review matters were closed, an increase of 30% from 2014/15 where 161<sup>4</sup> matters were closed.
- **Direct complaint handling:** 103 matters were closed, a decrease of 14% from

Table 3: New South Wales Civil & Administrative Tribunal, Matters Received and Closed 2015/16 and 2014/15

| Stream | 2015/16 received | 2015/16 closed | 2014/15 received* | 2014/15 closed |
|--------|------------------|----------------|-------------------|----------------|
| PPIPA  | 35               | 35             | n/a               | n/a            |
| HRIPA  | 9                | 15             | n/a               | n/a            |
| Both   | 5                | 3              | n/a               | n/a            |

\*2014/15 figures unavailable by breakdown of legislation.

2014/15 where 120<sup>5</sup> matters were closed.

- **Voluntary Breach Notifications and Privacy Management Plans:** assistance was provided on 56 occasions to organisations that voluntarily notified the Office regarding a privacy breach and with relation to agency Privacy Management Plans. This was an increase of 80% from 2014/15 where 31<sup>6</sup> cases of assistance were reported. The Privacy Commissioner's function of reviewing agency privacy management plans is discussed further under Objective 7.
- **NSW Civil and Administrative Tribunal:** 53 privacy related cases closed in 2015/16; an increase of 82% from 2014/15 where only 29<sup>7</sup> cases were closed.

Due to the structure of the Office of the Privacy Commissioner transitioning during 2015/16, an analysis of work has been conducted on cases finalised during each six monthly periods to compare and contrast between operating models. It is noted that there is an overall increase of 86% in the new model. This included analysis of:

- **Voluntary privacy breach notifications:** During the first half of the 2015/16 year, the Office of the Privacy Commissioner responded to 13 cases of voluntary breach notifications. In comparison with the 31 cases closed during the second half of the year this is a 138% increase in productivity.

#### Oversighting agencies' privacy complaint reviews:

- During the first half of the 2015/16 year, the Office of the Privacy Commissioner closed 74 internal review cases. In the second half, 135 cases were closed. This is an 82% increase in productivity.
- The productivity for each half of the year is relatively stable with relation to direct complaint handling noting that the full quantum of privacy complaints is unknown as many, if not most, are handled through agency general complaints mechanisms with no statutory requirement for reporting to the Privacy Commissioner.
- NSW Civil and Administrative Tribunal: 53 privacy related cases closed in 2015/16; in the first half of 2015/16, 18 privacy cases were actioned. In the second half of 2015/16, 35 new cases were actioned; an increase of 94% from the previous six months.

#### What's on in 2016/17

- Respond to requests to assist local councils manage privacy compliance risks during the change arising from local government reforms
- Delivery of guidance materials and ongoing monitoring of functions to ensure information and data protection safeguards and systems improve
- Increase emphasis upon proactive, preventative intervention by developing guidance materials in response to issues identified in investigations
- Continue to assist the NSW Civil and Administrative Appeals Tribunal by attending hearings and providing submissions for particular matters

**Table 4: Privacy Productivity by Organisational Model, Service Completions, % Change, 2015/16**

| Privacy Statutory Function   | No separate OPC<br>July – December 2015 | Separate OPC<br>January –<br>26 June 2016 | % Change | Total 2015/16 |
|--|---|---|----------|---------------|
| Oversight Agencies' complaint handling of Internal Reviews                       | 74                                      | 135                                       | ^ 82%    | 209           |
| Investigate complaints (eg on health information)                                | 51                                      | 52  | 0%       | 103           |
| Provide statutory advice   | 46                                      | 127                                       | ^ 176%   | 173           |
| Review of agencies' privacy management plans, and voluntary breach notifications | 18                                      | 38  | ^ 111%   | 56            |
| NSW Civil and Administrative Tribunal  | 18                                      | 35  | ^ 94%    | 53            |
| TOTALS   | 207                                     | 387                                       | ^ 86%    | 594           |

<sup>4</sup>IPC Annual Report, 2014 - 2015, p27

<sup>5</sup>IPC Annual Report, 2014 - 2015, p27

<sup>6</sup>IPC Annual Report, 2014 - 2015, p30

<sup>7</sup>IPC Annual Report, 2014 - 2015, p33

# CCTV

In recent years, a combination of perceptions and fears of increased street crime and advances in technology has seen an upsurge in the use of closed circuit television (CCTV) as a tool in tackling crime in public places. Many private companies and a number of local government authorities have initiated trials in the use of CCTV, and the technology is also being used in a number of ways in the public transport system.

The power of public authorities to install and operate CCTV systems in public places has previously been subject to a Tribunal decision and subsequent amendment to the clause 9 of the *Privacy and Personal Information Protection Regulation 2013*. The amendment had an effect of making local councils exempt from some obligations in the PPIP Act relating to the collection of personal information by using a CCTV camera installed for the purpose of filming in a public place, and the disclosure to NSW Police of that information by way of live transmission.

In 2014, the NSW Government also updated the applicable policy by issuing the NSW Government Policy Statement and Guidelines for the Establishment and Implementation of Closed Circuit Television (CCTV) in Public Places (the CCTV Guidelines). The CCTV Guidelines

stress that a comprehensive approach is required to properly manage the privacy implications of CCTV, including consideration of issues such as:

- Clear objectives for the installation
- Consultation with affected parties
- Police access
- Location of cameras
- Signage, and
- Complaints.

Importantly the CCTV Guidelines:

- Note the role of the Office of the Privacy Commissioner to receive and investigate complaints and that any information distributed about the CCTV arrangements should advise members of the community that they can lodge a complaint, and
- Stress the desirability of seeking legal advice on the proposed arrangements.



During 2015/16 there has been a surge in community concerns regarding the operation of CCTV by local councils in public places which raises fears of continuous and instant surveillance of members of the public going about their ordinary business. The Privacy Commissioner was contacted by a number of individuals about the use of surveillance devices not just in public places but also in private settings and by other private individuals such as neighbours. Workplace surveillance was a topic also frequently raised by members of the public. Local councils themselves have raised questions around their ability to use surveillance devices, and best practice in doing so.

The Privacy Commissioner considers that the operation of public places CCTV systems raises privacy issues

potentially affecting large sections of the community. The proposals for installation of CCTV raise an issue of significant public interest meriting the exercise of the Commissioner's functions under section 36 of the PPIP Act to provide assistance to the local councils to ensure their compliance with the PPIP Act in order to facilitate that:

- the processes the councils may adopt in considering the installation of the system
- the need for a Code of Practice and if so, the necessary contents of any proposed Codes of Practice, and
- the system's design and operation are compatible with the community's privacy expectations, the NSW government's policy and privacy law.

In addition to the factsheets already available on the privacy pages of the

Commission's website, in the upcoming year the Privacy Commissioner plans to continue the development of guidance material in relation to CCTV in order to promote privacy capability amongst NSW public sector agencies.

# OBJECTIVE 5:

Research and report on emerging issues including from advances in technology

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## Overview of goals of Objective

*The provision of sound privacy advice to the Parliament and the Government with relation to emerging opportunities to position NSW as a leader in privacy and the knowledge economy while ensuring risks to privacy are managed well, relies upon a capacity to research these risks and to consider advances in technology.*

## Highlights for 2015/16

No research projects were undertaken due to lack of resources.

## Nil Response

During 2015/16 the Privacy Commissioner saw a strong need to research the privacy impacts of technological developments which present enormous opportunities as well as immediate risks. No research projects, however, were commenced or concluded during this reporting period.

The lack of capacity to undertake this statutory function has been drawn to the attention of the Parliament and the NSW Government on a number of occasions.

In 2012, the NSW Parliamentary Committee on the Ombudsman, the Police Integrity Commission and the Crime Commission made a reference to the Privacy Commissioner to prepare a report on the impact of surveillance upon the privacy of individuals and the NSW community as a whole. While the process commenced the project failed to progress due to organisational arrangements and a lack of resources.

As advised to the Parliamentary Committee in early 2014 and again in 2015, the Privacy Commissioner views the ongoing inability to conduct research to examine emerging privacy issues as a major impediment to ensuring the appropriate protection of the privacy of NSW citizens and to her ability to assist the Parliament and the Government.

At the administrative level, another barrier to the conduct of research is the inability of the NSW Privacy Commissioner to adequately interrogate our Commission's shared case management systems.

Research is required in key areas of technological advancement including health technology, biometrics, algorithms and predictive service delivery modelling and data analytics.

## What's on in 2016/17

- Review developments in health privacy and the capacity of the health privacy legislation.
- Research advances in technology as requested Committee in 2012 and expand to include biometrics if possible.
- Research on Big Data and any privacy issues arising and necessary actions to address these.

(according to resourcing)

# OBJECTIVE 6:

To develop privacy capability across public and private sectors

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## Overview of goals of Objective

*Building privacy capability within the NSW public and private sectors by ensuring organisations and their staff at all levels have the knowledge and support to protect the privacy rights of NSW citizens.*

*It is important that those covered by NSW privacy legislation have the knowledge and support to ensure the privacy rights of NSW citizens are protected. The development of privacy capability is undertaken by:*

- *Direct training and participation in seminars by request*
- *Provision of resources that fill a knowledge gap*
- *Support for the Practitioners Network and their requests for assistance*
- *Support for students and others seeking internship*

## Highlights for 2015/16

**Guidance material on Consent and Transborder Disclosure were released.**

**Advice on Big Data and the Data Analytics Centre was issued in response to the Data Sharing (Government Sector) Act 2015.**

**During 2015/16 the Office of the NSW Privacy Commissioner updated the Privacy Governance Framework to assist external stakeholders with privacy protection around health privacy and information.**

**Expansion of the Global Privacy Enforcement Network monthly international teleconferences to include public sector privacy practitioners.**



The Office of the NSW Privacy Commissioner undertook a range of strategies to achieve this objective. In particular, the Privacy Commissioner updated the Privacy Governance Framework for health resources, developed a range of guidance materials for agencies and participated in the Right to Know and Privacy Practitioners' Forum and Consultative Group.

## Guidance Material

Many organisations seek assistance with understanding privacy legislation and understanding their responsibilities for managing personal and health information. When an organisation is establishing its privacy management framework and processes, the most efficient way is to recommend a privacy governance approach with planning, risk management and evaluation as the major components. For organisations with advanced personal and health information management capability, governance underpins effective and efficient public sector administration and facilitates policy objectives. Accordingly our Office concentrated upon providing resources to help organisations establish their competency in managing personal and health information and privacy more generally.

The benefits of protecting personal and health information cannot be achieved solely by seeking compliance with regulatory frameworks. The additional element that adds capacity is customer service. The community's attitudes to privacy are changing and there is a growing expectation that in return for the information provided that there will be proper service delivery around privacy management ranging from information being available on request to proactively communicating issues and training staff in the application of customer service to privacy management.

## Privacy Governance Framework

The Privacy Commissioner released in 2014/15 a 'Privacy Governance Framework' that brought together in one online document the legislation, the *Privacy and Personal Information Protection Act 1998* (PIIP Act), regulations and privacy resources as well as other relevant legislation such as the *Annual Reports Act, 1985* which requires reporting of certain privacy matters. In 2015/16 this document was updated to include the requirements contained in the *Health Records and Information Privacy Act, 2002* (HRIP Act).

The Privacy Governance Framework aims to educate and increase awareness of NSW privacy requirements and to promote a proactive response to privacy issues experienced by NSW public sector agencies.

The Privacy Governance Framework, which is underpinned by 'Privacy by Design' principles, draws together the extensive guidance published by the Office of the NSW Privacy commissioner to assist agencies in the key phases of project design and operations, including:

- Setting leadership and governance
- Planning and strategy
- Programs and service delivery
- Complaint incident management and
- Evaluation and reporting

The development of the Privacy Governance Framework will be further supported by the development of extensive guidance materials in order to promote privacy capability amongst NSW public sector agencies. By doing so, the NSW Privacy Commissioner aims to address privacy issues faced by agencies before they materialise and promote privacy as a mechanism to assist agencies in policy design and service delivery.

Distributing privacy resources most effectively is best achieved through a variety of means. To this end, the Privacy Commissioner approached the Department

of Premier and Cabinet and the Department of Finance, Services and Innovation to provide the Privacy Governance Framework for inclusion in their governance guidance materials and advice to the NSW government sector.

In 2015/16 the Department of Finance, Services and Innovation released a circular advising agencies of this resource. The provision of advice on privacy management also assists this Department with its objectives of facilitating where allowed, the provision of data and information between agencies and to the broader community.

## Privacy Impact Assessment Guide

As part of the objective to promote privacy capability and awareness within the NSW public sector, the Office has been preparing a guide for agencies on how to develop a Privacy Impact Assessment's (PIA) for project proposals. A PIA is a risk assessment tool specifically for privacy.

The PIA guide will provide a comprehensive assessment of PIA best practices for regulated entities and alerts users to ensure that a PIA is embedded as part of an organisations risk management process. Developing a PIA as a part of developing project proposals can become part of safeguarding security as prescribed under the Information Protection Principles (IPPs) and Health Privacy Principles (HPPs).

The PIA Guide will provide eight core elements for a model PIA, and a step-by-step process which users can follow to develop an effective PIA.

Key phases in this process will include a threshold assessment to determine if a PIA is necessary for the project proposal, establishing a PIA timeframe, describing the information flows, compliance and risk assessment checks and how to implement PIA recommendations.

The PIA Guide will be released for public consultation in the first quarter of 2016/17.

### Reasonably Ascertainable Identity Fact Sheet

Under section 4 of the PPIP Act and section 5 of the HRIPA Act, personal or health information means any information or opinion about an individual whose identity is apparent or can reasonably be ascertained from the information or opinion.

In the Privacy Commissioner's statutory report on the operation of the Health Privacy Principles (HPPs), the development of guidance material clarifying the concept of 'reasonably ascertainable identity' to assist NSW public sector agencies to comply with privacy legislation, was recommended.

During 2015/16, this guidance was developed in the form of the Reasonably Ascertainable Identity Fact Sheet, which addresses the determination of whether information is personal or health information. The Factsheet clarifies:

- That a person's identity still can be reasonably ascertainable even if they are not directly named
- The test that applied is whether identification is possible by any person or machine, other than the subject themselves
- The surrounding context, such as the availability of resources, determines whether identification can be reasonably ascertained; and
- When in doubt, agencies should assume that the data will constitute personal or health information and that privacy protections apply.

The Reasonably Ascertainable Identity Fact Sheet has recently completed its public consultation and a final version of the document will be released early in the 2016/17 financial year.

### Guidance: Consent

The Guidance on Consent was created to offer a check list and guidance on the meaning of 'consent' for use and disclosure of personal or health information. The Privacy Practitioners saw the publication as necessary to assist decision makers within agencies as well as members of the public, to further their understanding of how consent should be obtained and how it should be utilised or may be utilised in practice. The Commissioner also saw the Guidance assisting non-government organisations in the current government

outsourcing of service provision dynamic. A final version of the Guidance: Consent was released on the website during the 2015/16 year.

### Guidance: Transborder Disclosure Principle – the new section 19(2)

With the introduction of the *Privacy and Personal Information Protection (Exemption Consolidation) Act* passed in December 2015, new section 19(2) was inserted into the PPIP Act introducing a set of additional requirements when agencies are disclosing non-health 'personal information' to any person or body in a jurisdiction outside NSW or to a Commonwealth agency. To prevent any uncertainty in interpretation and applicability of the section, the Privacy Commissioner prepared guidance to assist agencies in disclosing personal information across border. The Guidance: Transborder Disclosure was released on the website during the 2015/16 year.

### Statutory Guidelines on Research under the PPIP Act

Section 27B was inserted into the PPIP Act by the *Privacy and Personal Information Protection Amendment (Exemptions Consolidation) Act 2015* (No 69) which commenced on 1 January 2016. Section 27B provides an exemption for collection, use and disclosure of personal information for research, or compilation or analysis of statistics for public sector agencies subject to the PPIP Act. To assist agencies, the Commissioner decided to issue Guidelines on using the exemption provided by section 27B for research and statistical purposes in the public interest. The Commissioner undertook extensive consultation with the relevant stakeholders and the final version of the Statutory Guidelines on Research is due for completion and release early 2016/17.

### Privacy in Employment Context Fact Sheet

Analysing Internal Review reports by agencies as well as conducting research into privacy trends, brought to the Commissioner's attention a growing number of accidental and intentional data breaches, both internationally and domestically. The Commissioner determined it necessary to provide Guidance material to improve the focus of organisation's on data security systems and employee discipline, to ensure that

responses to data breaches strengthen both the measures organisations have in place to minimise the risk of privacy threats materialising and deterrence of intentional and corrupt uses and disclosures of personal and health information by employees. A final version of the Guidance is due for completion and release early 2016/17.

## Right to Know and Privacy Practitioners' Forum and Consultative Group

Throughout 2015/16, the NSW Privacy Commissioner participated in the Right to Know and Privacy Practitioners' Forum, and the smaller Consultative Group an association of public sector privacy officers with the objective to share privacy knowledge and discuss issues that affect the NSW public sector. The Forum and the Consultative Group represent an important source of feedback and means to develop capacity.

The Privacy Commissioner has provided advice to the Forum and Consultative Group regarding the latest Tribunal matters, updates on legislation and other developments. The Forum and the Consultative Group have also been an invaluable source of expertise for the development of guidance material issued by the Privacy Commissioner, such as the Guidelines into trans-border flows of information, consent and the research exemption contained under s 27B of the PPIP Act.

The Privacy Commissioner and Office will continue to work with the Practitioners' Forum and Consultative Group to further identify privacy issues affecting the NSW public sector. We will also distribute further guidance material, including the Privacy Impact Assessment Guide, within the Group for feedback and quality assurance.

## Capability Development

An increased number of educational sessions were able to be provided by the Privacy Commissioner directly, in the second half of the reporting period. These included Master Classes in privacy for the Data Analytics Centre's workshops, State Records Manager Forums and NSW Health Communications officers. The changes

occurring within local government meant that there was reduced demand from this quarter, although in times of change, the risks of breaches are heightened.

The total number of such sessions given by the Privacy Commissioner and staff is 20. Evaluation feedback was very positive with requests for more assistance; especially in the health area.

The NSW Privacy and Information Practitioners' forum is an important avenue to distribute resources and obtain feedback as to the needs identified and draft guidance material provided for comment. These take two forms: the NSW Right to Information & Privacy Practitioners Forum for all practitioners supported by the Commission and the Practitioners Consultative meeting which is available to the Practitioners reference group. Throughout 2015/16 the Privacy Commissioner and officers attended consultative forums and practitioners meetings.

In May 2016 the Privacy Commissioner consulted with the NSW Youth Advisory Council. Participants ranged in age from 12 to 23 years. The consultation was organised by the NSW Advocate for Children and Young People. The consultation revealed that there had been a marked shift in attitudes and behaviour of young people to protecting their identity and security as compared to an earlier consultation in 2012 with the then Youth Advisory Council.

A number of other training sessions and presentations were given by the Commissioner and staff during this financial year to assist in the capability development. These are:

- Data Analytics Centre Masterclass 'Privacy and Data';
- Rotary Club of Sydney presentation 'Privacy – it matters and why';
- Health Practitioners Forum presentation 'Privacy Matters in NSW';
- AIIA NSW Government Information and Privacy briefing;
- Department of Justice workshop 'Privacy Discussion – Justice Cluster';
- Health NSW presentation 'Extraterritorial transfers of information S19(2)'

The Commissioner is committed to continuing the development, and promotion, of privacy in NSW. This occurs through

meetings with, and presentations, to stakeholder groups across all sectors that are regulated by NSW privacy legislation. These meetings and engagements were supported where required with presentations and speaking notes. A selection of presentations are available on the IPC website.

In the latter half of 2015/16 it became apparent that an important area for capability development was the capacity of the public sector in relation to Big Data and specifically how they provide personal and health information under the Data Sharing (Government Sector), 2015. A number of officers and agencies have either reported concerns or requested assistance in interpreting the statutory provisions.

## What's on in 2016/17

- Continue to develop capability and capacity through responding to agency initiated opportunities and the introduction of proactive strategies including:
  - respond to training requests according to resourcing
  - produce further guidance material to increase self-reliance and privacy knowledge of organisations at all levels.
  - assist the development of data privacy capabilities amongst NSW agencies and to educate the sector of privacy responsibilities in relation to open data and data analytics.
  - Continue membership of Program Development Committee for Global Privacy Enforcement Networks' international teleconferences.
- Conduct Big Data Roundtable jointly with the Data Analytics Centre for NSW Government agencies

# Data Analytics Centre and big data

On 3 August 2015, the Hon. Victor Dominello, Minister for Innovation and Better Regulation announced the establishment of a New South Wales Government Data Analytics Centre (DAC) as a unit within the Department of Finance, Services and Innovation. As part of a central agency, the DAC's primary functions are to collect, aggregate and analyse whole-of-government data, including from State Owned Corporations and local councils; coordinate the consistency of definitions and data standards across New South Wales government agencies; establish and maintain a register of data assets in government and provide advice to government on the greater publication of data. The Minister was very conscious of the necessity of protecting personal and health information and consequently the Act adopts NSW privacy legislation as the appropriate compliance framework.



**The NSW Privacy Commissioner supports the outcomes that will be achieved through the establishment of the DAC but advocated that safe handling and protection of privacy around personal information remains paramount**

On 28 October 2015 the *Data Sharing (Government Sector) Bill 2015* (Data Sharing Act) was introduced into Parliament. The objective of the Data Sharing Act is to enable public sector agencies to share data with the DAC or other government agencies for certain purposes which include allowing the government to carry out data analytics to identify issues and solutions to better develop government policy, program management and service planning and delivery. The Data Sharing Act came into effect on 24 November 2015.

The Privacy Commissioner was consulted by the Minister and the Steering Committee on the formation of the Data Analytics Centre and the Data Sharing Act. The Commissioner supports the outcomes that will be achieved through the establishment of the DAC but advocated that safe handling and protection of privacy around personal information remains paramount in the design of the Data Sharing Act and the community's confidence in the NSW Government's respect for their privacy.

The Data Sharing Act provides that where data is shared that includes personal information or health information then the relevant privacy legislation (either the PPIP Act or the HRIP Act) continue to apply. The Act also includes important privacy safeguards and requirements, such as:

- a data provider and data recipient must ensure that health information or personal information contained in government sector data to be shared is not collected, used, disclosed, protected, kept, retained or disposed of otherwise than in compliance with the privacy legislation; and
- if a data recipient that is provided with government sector data that contains health information or personal information becomes aware that the privacy legislation has been or is likely to have been contravened in relation to that information while in the recipient's control, the data recipient must, as soon as is practicable after becoming aware of it, inform the data provider of the contravention or likely contravention.

The Data Sharing Act complements the NSW Government's Open Data initiative. The Data Sharing Act's focus is upon sharing between public sector agencies.

The Privacy Commissioner provided recommendations on the NSW Government Open Data Policy and the supporting guidance material on rights and responsibilities of open data users and custodians. In particular, the Privacy Commissioner's addressed the confusion in some quarters that big data and open data are interchangeable terms. They are not – not all big data will be open data. The NSW Government's open data policy excludes personal and health information in addition to other material from 'open data'. The key to managing privacy considerations lies in implementing 'Privacy by Design' principles and best practice in open data initiatives. The Commissioner stressed that appropriate methodologies for data sharing and de-identification of data are required to enable agencies to utilise the sector's data for policy development and service planning while protecting the privacy of individuals whose personal information is being utilised.

Through contributing to the UN Taskforce on Big Data the Privacy Commissioner aims to gain the benefit of international experience and knowledge and to incorporate that in local developments. In the upcoming financial year the Privacy Commissioner will facilitate a roundtable of agencies with the DAC to discuss the ethical, legal and regulatory context surrounding the implementation of the Data Act.

Over the course of the coming year it is anticipated that considerable attention will be given to the management of risks that de-identified data released publicly can be reconstructed to identify individuals.

# OBJECTIVE 7:

## To ensure efficient and effective regulation and operation

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### Overview of goals of Objective

*Accountability for securing Parliament's legislated aims and the expenditure of public funds requires effective and efficient operation of privacy law in NSW to be a key objective.*

*Meeting this Objective entails recommendations to Parliament, the Government and others on regulatory arrangements for the public and private sectors, supporting and reviewing how entities carrying regulatory authority under NSW privacy legislation conduct the carriage of these responsibilities, and the establishment within the Information and Privacy Commission of the best arrangements for the carriage of statutory privacy functions as envisaged by the Parliament and Government policy.*

### Highlights for 2015/16

**Greater consistency with regulation in other jurisdictions was achieved when legislative amendments were made to the *Privacy and Personal Information Protection Act, 1998* to ensure personal information leaving NSW has the same protections as if it was remaining within NSW**

**Incorporation of long standing Public Interest Directions previously requiring annual renewal**

**Provision of advice on 'fit for purpose' effective and efficient regulatory models to the NSW Treasurer's Review on 'Elimination of Duplication'**

**New organisational model within the Commission of specific resourcing for statutory privacy functions increases efficiency and satisfaction amongst stakeholders, and delivers improved productivity on measured indicators of statutory workload**

## Ensuring efficient, effective regulation and operation

During 2015/16, the Privacy Commissioner, pursued the goal of effective regulation. Much of the direction and necessary action had been the subject of the 2015 statutory report on Operation of the *Privacy and Personal Information Protection Act, 1998*. Many of the statutory report's recommendations addressed improvements in legislation that would increase efficiency and effectiveness of privacy protections or reduce administrative double handling.

Some of the major action was in the legislative arena where long sought after amendments to the PPIPA Act were achieved and where new legislation with major significance to the protection of personal and health information – the *Data Sharing (Government Sector) Act, 2015*, adopted the privacy framework contained within NSW privacy legislation. The Minister for Innovation and Better Regulation, the Hon. Victor Dominello, MP introduced this Act into the Parliament and consulted extensively with the Privacy Commissioner on its provisions. For more information on the Data Sharing Act, please see Objective 6.

In the 2015 statutory report the Privacy Commissioner recommended all NSW State Owned Corporations should be covered by privacy legislation whether under NSW law or by the Federal *Privacy Act, 1988*. In 2015/16, a Private Member's Bill, to ensure access to privacy protections for all users of services provided by State Owned Corporations was introduced by the Shadow Attorney General, Paul Lynch, MP. The Bill failed to pass the Legislative Assembly. As a result, customers of certain State Owned Corporations, are without formal privacy protections and means of external redress. This is reflective of a larger issue; that of inconsistent

access by NSW citizens to privacy protection provisions. The advent of other mechanisms to deliver services previously provided by the State Government entities has not always seen clear privacy coverage for service users as part of the change of service auspice.

NSW Government engages non-government organisations (NGOs) to deliver approximately \$4 billion worth of human services contracts each year. The programs, facilities or services are provided to meet the health, welfare and social needs of individuals, families and communities.

Examples include:

- The National Disability Insurance Scheme (NDIS) – all NSW delivered disability support services are carried out by the non-government sector;
- The provision of Surety Bonds to Private Managers appointed by either the Equity Division of the NSW Supreme Court or the NSW Civil & Administrative Tribunal (NCAT) is now managed by a non-government organisation appointed by NSW Trustee and Guardian;
- Rental housing is now provided by not-for-profit, nongovernment or government organisations to assist people who are unable to access suitable accommodation in the private rental market. Social housing includes public, Aboriginal and community housing, as well as other housing assistance products such as bond loans

## Amendments to privacy legislation

After 15 years the personal information of NSW citizens moved out of NSW finally has privacy protection. The Attorney General, the Hon. Gabrielle Upton, MP in late 2015, saw through the NSW Parliament the *Privacy and Personal Information Protection Amendment (Exemptions Consolidation) Act 2015* (the Amendment).

The amendments to section 19 of the PPIPA concerning the disclosure of personal information to persons or bodies outside NSW and to Commonwealth agencies came into effect on 1 April 2016.

The previous wording of section 19(2) provided that a public sector agency must not disclose the personal information that it holds to any individual or body who is in a jurisdiction outside NSW or to a Commonwealth agency unless there is a relevant privacy law in force that applies to the personal information concerned, or the disclosure is permitted under a privacy code of practice (Privacy Code of Practice). Since the first introduction of section 19(2) no Privacy Code of Practice has been made. As such, there was uncertainty as to the section's application, with many agencies adopting a conservative approach of ensuring compliance with the requirements of section 18 which prescribe general limits on disclosure of personal information. Section 19 was also inconsistent with the HRIP Act and equivalent transborder disclosure frameworks in other States, such as Victoria and Queensland.

The amendment of the PPIPA Act addressed this gap by introducing a list of conditions on when NSW government agencies may disclose personal information outside NSW and to Commonwealth agencies. It removed the reference to a Privacy Code of Practice and provided some clarity about when agencies can disclose personal information outside NSW and to

Commonwealth agencies. The amendment ensured that the regime governing the disclosure of personal information outside NSW and to Commonwealth agencies is more closely aligned with the original object of section 19(2) to safeguard and protect personal information whether it is located or used within or outside NSW. It also brought section 19 in line with the HRIPA.

To assist agencies in complying with section 19(2), the Privacy Commissioner published Guidance on Transborder Disclose Principle under s 36(b) of the PPIP Act, which is available on the privacy section of the IPC website.

The Amendment also addressed the inclusion in legislation of the long standing Public Interest Directions, some of which had been in existence for 12 years.

The inclusion of the Directions in either legislation or regulation commenced on 1 January 2016.

Key amendments to the PPIP Act were:

- The meaning of "investigative agency" in section 3 was extended to include additional public sector agencies with investigative functions or that conduct an investigation on behalf of another public sector agency.
- New requirements were introduced in section 19(2) of the PPIPA (which replaced existing subsections 19(2) to (5)) about when public sector agencies may disclose personal information to a recipient who is a Commonwealth agency, or who is outside the NSW jurisdiction.
- The exemptions in the PPIPA relating to investigative agencies and law enforcement agencies were clarified (section 23 -24 and 27A).
- Section 27A was introduced to permit information exchanges between public sector agencies in certain circumstances.
- Section 27B was introduced to permit public sector agencies to collect, use and disclose personal information for research purposes based on existing exemptions applicable to health information under the *Health Records and Information Privacy Act 2002*.
- Section 27C was introduced to permit agencies to collect and disclose credit information in certain circumstances.

Five public interest directions were incorporated that provide exceptions to the Information Protection Principles (see Appendix A).

## Provision of advice regarding regulatory models

In early 2016, the Privacy Commissioner and Senior Advisor provided advice to the 'Elimination of Duplication' Review established by the NSW Treasurer. The issues addressed were:

1. Best practice regulatory models
2. Inefficiencies and structural inequities in the Information and Privacy Commission model and operations
3. Factors for consideration in the determining privacy regulatory best practice including community expectations

Supplementary material was provided to the NSW Treasury.

Assisting entities carrying regulatory authority under NSW privacy legislation conduct these responsibilities

As stated in Objective 2 Sections 52 to 57 of the PPIP Act provide the scheme of complaint making to public sector agencies and review of the outcomes of the internal reviews by the Tribunal. The scheme provides agencies the first opportunity via the PPIPA internal review process to investigate privacy complaints, identify systems issues for improvement and provide for appropriate remedies to complaints.

The main oversight responsibility of the Privacy Commissioner is to review draft internal review reports agencies submit before they complete finalise their findings. The provision of the Privacy Commissioner's submissions on the findings of the internal review is meant to assist agencies and ensure complaints about privacy concerns are appropriately addressed according to the legislative provisions.

For more information on the oversight function and the work the NSW Privacy Commissioner has done in this space, please refer to Objective 2 and 7. No statistics are available on the proportion of matters where no submissions are made, or where the recommendations of the Privacy Commissioner are adopted in the final internal review report.

The statutory health guidelines issued by the Privacy Commissioner allowed under the health privacy legislation establish Human Research Ethics Committees as a mechanism to determine whether personal or health information should be used without

consent because the public interest in the research use of this information outweighs the privacy considerations in protecting this information.

A fuller account of the HRECs, their function and operation during 2015/16 is provided further in this chapter.

## Public Interest Directions

Under section 41 of the *Privacy and Personal Information Protection Act 1998* (PPIP Act) and section 62 of the *Health Records Information Privacy Act 2002* (HRIP Act) the Privacy Commissioner, with the approval of the Attorney General, may make public interest directions to modify the application of Information Protection Principles (IPPs) and the Health Privacy Principles (HPPs) in NSW legislation for a specific program or public sector activity, where the Privacy Commissioner considers it is in the public interest to do so.

The legislation, being principle based, and possessing flexibility in the form of mechanisms that enable the application of the privacy principles to be modified, assists in the effective and appropriate regulation of privacy and agency operations.

See Objective 2 (p 24) for a fuller description.

## Public Sector Organisations' Privacy Management Plans

Under the Part 3 Division 2 of the PPIP Act public sector agencies are required to prepare and implement a privacy management plan and provide a copy to the Privacy Commissioner. The Plan is an integral part of public sector agencies' governance frameworks as it documents how privacy obligations are integrated into the functions and activities of the agency. The Plan sets out the agency's policies and procedures for complying with privacy and the principles contained in NSW privacy legislation.

Plans are publicly available and are meant to assist staff in their day-to-day handling of personal and health information, and to be available to clients who wish to understand their privacy protections and how they are managed by the public sector organisations. Privacy Commissioners over the years have developed resources to assist NSW public sector agencies write and review their PMPs. These publications will be reviewed during next financial year and updated as required to ensure agencies are able to adequately draft and update their PMPs.

During 2015/16 the Office of the Privacy



Commissioner received a total of 18 Privacy Management Plans for consideration.

These are reviewed against the checklists and feedback provided to agencies as required. One of the recurring issues in these plans is the absence of consideration of health information and the provisions of the HRIP Act. Of the total Plans received, over half, 55%, of Privacy Management Plans were received from state government organisations with local government providing 28%, Universities providing 12% and other organisations providing 5%.

The number of Privacy Management Plans received for review varies from year to year, depending in the main on whether agencies have new or changed responsibilities that affect their obligations under privacy legislation. It is anticipated the introduction of the *Data Sharing (Government Sector) Act 2015*, agencies will find it necessary to review their Privacy Management Plans to ensure the public is aware of how they undertake to meet the requirements of this new legislation while protecting their privacy and personal or health information.

### Effective and efficient organisational arrangements for undertaking privacy statutory functions within the Information and Privacy Commission

Since early 2016, the Privacy Commissioner has received support to undertake privacy statutory functions. These funds have been provided principally by the Department of Justice to address the budget difficulties identified by the Privacy Commissioner in her 2015 statutory Report on the Operation of the PPIP Act to Parliament and 2013/14 and 2014/15 Annual Reports. The resourcing difficulties have been acknowledged by the overseeing Parliamentary Committee in their June 2016 report.

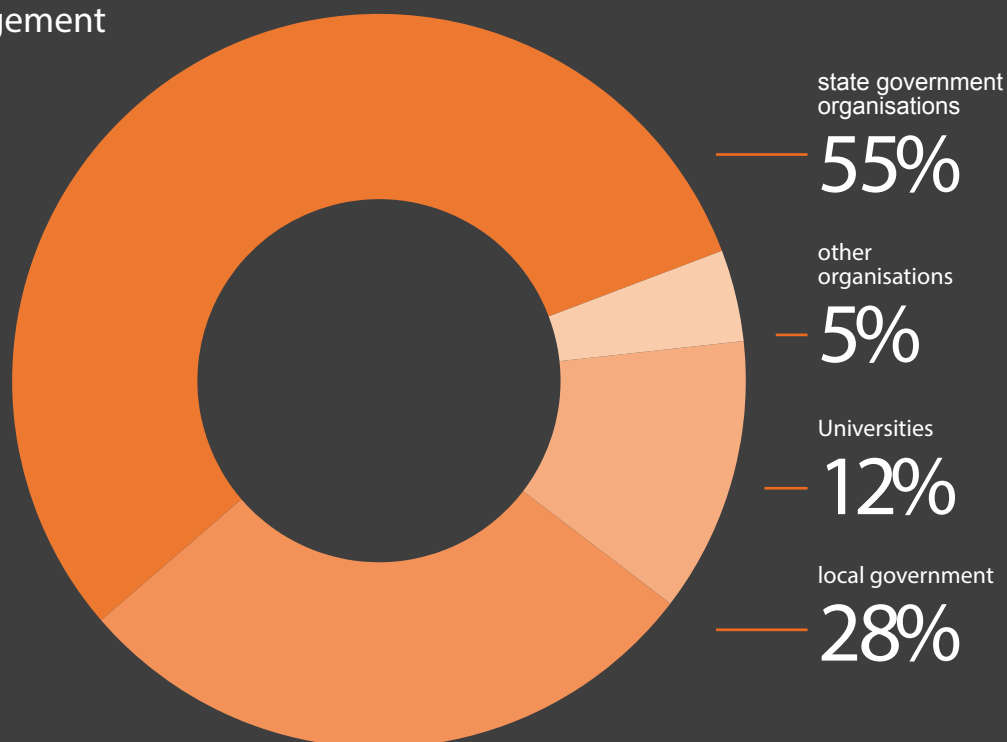
#### Greater Privacy Productivity with identified privacy resources

Analysis has revealed that a separate Office has led to increased productivity. While the IPC does not have data for all of the Privacy Commissioner's statutory functions there is sufficient to show that productivity has increased overall by almost 86% and some increases of over 100%. See the Commissioners' Overview section for an analysis of the breakdown in productivity for each six monthly period by statutory function.

### What's on in 2016/17

- Identify and address issues to increase effectiveness or efficiency of regulation such as consistent coverage for NSW citizens to privacy protections.
- Consider more closely the operations of HRECs to identify any improvements that would increase their effectiveness and efficiency, while protecting the privacy of individuals.
- Develop guidance material that assists organisations to meet privacy legal requirements

### Privacy Management Plans



# Human Research Ethics Committees

## Entities with Regulatory Authority under NSW privacy legislation

Under the *Health Records and Information Privacy Act 2002* (HRIP Act), the Privacy Commissioner has issued legally binding statutory guidelines on the use or disclosure of health information for research purposes, which require Human Research Ethics Committees (HRECs) to provide a compliance report to the Privacy Commissioner after 30 June each year. The compliance report identifies where HRECs have approved research proposals seeking to use or disclose personal or health information without consent, on the basis that the public interest in the research being undertaken substantially outweighs the public interest in maintaining the level of privacy protection provided by the HRIP Act. Please see **Table 5** for a breakdown of requests.

During 2015/16, the Human Research Ethics Committees' reviewed 603 research proposals, a 55% increase 2014/15 to provide approval for the use of personal or health information. Of this total 70.3% were considered to be in the public interest that the personal or health information be provided.

Of the 22 HRECs, 22 submitted compliance reports for 2015/16 covering a total of 603 research proposals, 214 research proposals more than in 2014/15. This year 15 out of 22 HRECs considered research proposals and were required to provide detailed reports to the Commissioner. The majority of these HRECs considered the same or greater number of research proposals than in the year 2014/15. For 2015/16, in 424 (or 70.32%) of the research proposals, HRECs reported that they determined that the public interest in the proposed activity substantially outweighed the public interest in the protection of privacy. This is in contrast to 259 or 66.6% reported last year.

The HREC that considered the greatest number of research proposals was the Northern Sydney Local Health District HREC with 240 research proposals. The Northern Sydney Local Health District HREC also considered the most research proposals in 2015/16, a total of 190. For 2015/16 the Northern Sydney Local Health District HREC approved 71 research proposals on the basis that the public interest in the research being undertaken substantially outweighs the public interest in privacy. By comparison, this number was 64 in 2015/16

Sydney Children's Hospital Network HREC considered the second largest number of research proposals – 103 this year. This is a significant increase from the previous year, where Sydney Children's Hospital Network HREC reported zero considered research proposals.

The information that is collected in HRECs compliance reports relates to the application and requirements of the Statutory Guidelines on Research issues under the HRIP Act including:

- Available expertise and understanding of privacy issues of HRECs members;
- Considerations on the de-identification of information used for research; and
- Considerations on the impracticability of obtaining consent to use or disclose an individual's information.

The following overview of HRECs is drawn from the information provided during the reporting period 2015/16.

When considering the proposals all HRECs applied the Privacy Commissioner's guidelines on research, except in some instances where the research proposal used de-identified information.

Table 5: Proposals considerations by which Human Research Ethics Committee July 2015 - June 2016

| No.   | Date       | Human Research Ethics Committee  | Total Proposals | Declined | Outweighed privacy interests |
|-------|------------|--|-----------------|----------|------------------------------|
| 1     | 26/06/2016 | Hunter New England Human Research Ethics Committee   | 17              | 0        | 17                           |
| 2     | 1/07/2016  | Nepean Blue Mountains Local Health District  | 0               | N/A      | N/A                          |
| 3     | 14/07/2016 | Royal Rehabilitation Centre Sydney   | 0               | N/A      | N/A                          |
| 4     | 30/07/2016 | Albury Wodonga Human Research Ethics Committee   | 0               | N/A      | N/A                          |
| 5     | 1/08/2016  | Greater Western Human Research Ethics Committee  | 14              | 0        | 14                           |
| 6     | 2/08/2016  | St Vincent's Hospital Sydney HREC  | 1               | 0        | 1                            |
| 7     | 3/08/2016  | Northern Sydney Local Health District HREC   | 240             | 169      | 71                           |
| 8     | 3/08/2016  | Population and Health Services Research Ethics Committee (EC00410)                         | 31              | 2        | 29                           |
| 9     | 3/08/2016  | University of Wollongong and Illawarra Shoalhaven LHD Health and Medical HREC (University) | 1               | 0        | 1                            |
| 10    | 3/08/2016  | University of Wollongong and Illawarra Shoalhaven LHD Health and Medical HREC (Hospital)   | 1               | 0        | 1                            |
| 11    | 3/08/2016  | University of Wollongong and Illawarra Shoalhaven LHD Social Sciences HREC (Hospital)      | 0               | N/A      | N/A                          |
| 12    | 3/08/2016  | University of Wollongong and Illawarra Shoalhaven LHD Social Sciences HREC (University)    | 0               | N/A      | N/A                          |
| 13    | 5/08/2016  | Justice Health & Forensic Mental Health Network Human Research Ethics Committee            | 4               | 0        | 4                            |
| 14    | 9/08/2016  | Aboriginal Health & Medical Research Council of NSW HREC                                   | 32              | 0        | 32                           |
| 15    | 9/08/2016  | Sydney Children's Hospital Network HREC (EC00130)  | 103             | 6        | 97                           |
| 16    | 10/08/2016 | North Coast NSW Human Research Ethics Committee  | 2               | 2        | 0                            |
| 17    | 10/08/2016 | Sydney Local Health District Ethics Review Committee (RPAZ Zone)                           | 82              | 0        | 82                           |
| 18    | 15/08/2016 | South Western Sydney Local Health District   | 44              | 0        | 44                           |
| 20    | 16/08/2016 | Cancer Council   | 0               | N/A      | N/A                          |
| 19    | 18/08/2016 | Sydney Local Health District HREC – CRGH (EC00118)   | 26              | 0        | 26                           |
| 21    | 30/08/2016 | Adventist HealthCare Limited   | 2               | 0        | 2                            |
| 22    | 30/08/2016 | South Eastern Sydney Local Health HREC (Northern Sector) (EC00134)                         | 3               | 0        | 3                            |
| TOTAL |            |  | 603             | 179      | 424                          |

HRECs assessed whether they had sufficient information, expertise and understanding available to them of privacy issues to make a decision on a research proposal that takes proper account of privacy. As shown in **Figure 1**, the most common type of expertise that was available to HRECs was related to having a member familiar with the HRIP Act and the Statutory Guidelines on Research and a lawyer or another member with the knowledge of privacy issues, followed by relying on written guidance on privacy.

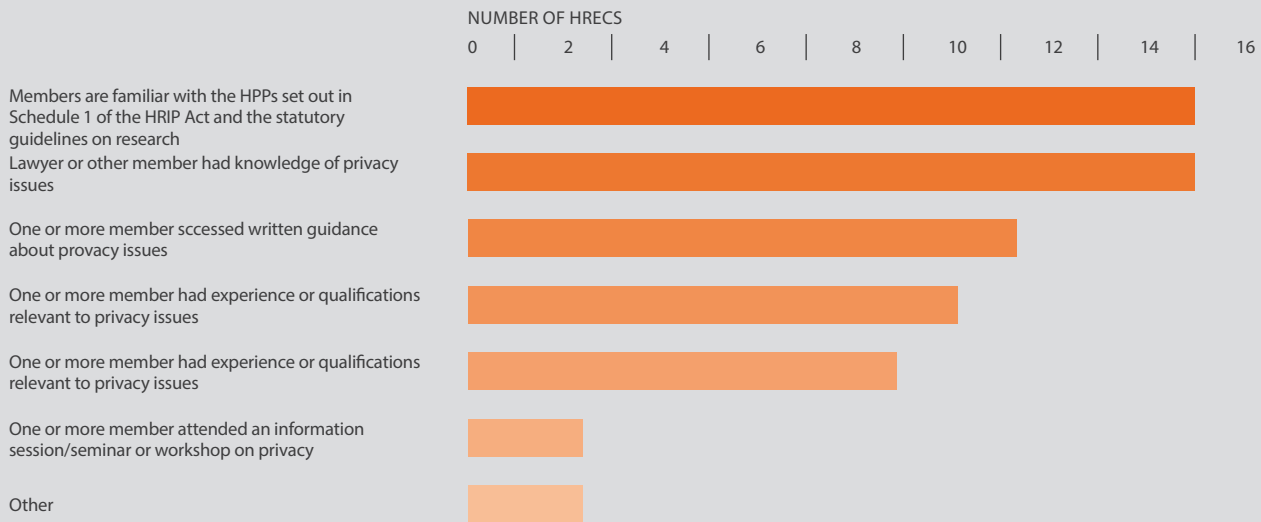
Support is required for HRECs which will rely upon better understanding of their operations including understanding the trends and differences in the data reported by HRECs and facilitating transparent and accurate HREC reporting through the development of a consistent reporting framework.

Two HRECs also reported relying on other considerations, which included relying on

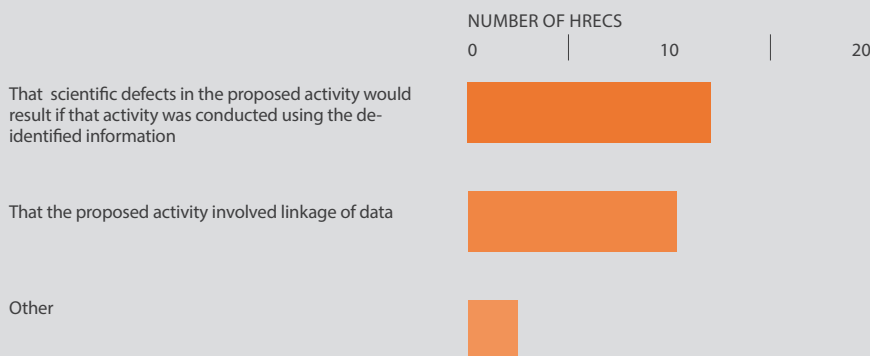
written guidance on HPPs available on the IPC website.

**Figure 2** shows what HRECs considered when deciding whether the purpose of the proposed research activity could be achieved using de-identified information is shown in.

**Figure 1: Information, expertise and understanding of privacy issues available to HRECs**



**Figure 2: De-identification of information in the research activity considerations**



The majority of HRECS gave consideration to any scientific defects in the proposed activity and the linkage of data when considering de-identification. Other considerations included terminally ill and or deceased patient information, possible threat of harm to family members of deceased individuals if the information is not de-identified and whether de-identified data was part of the initial submission for use in the research project.

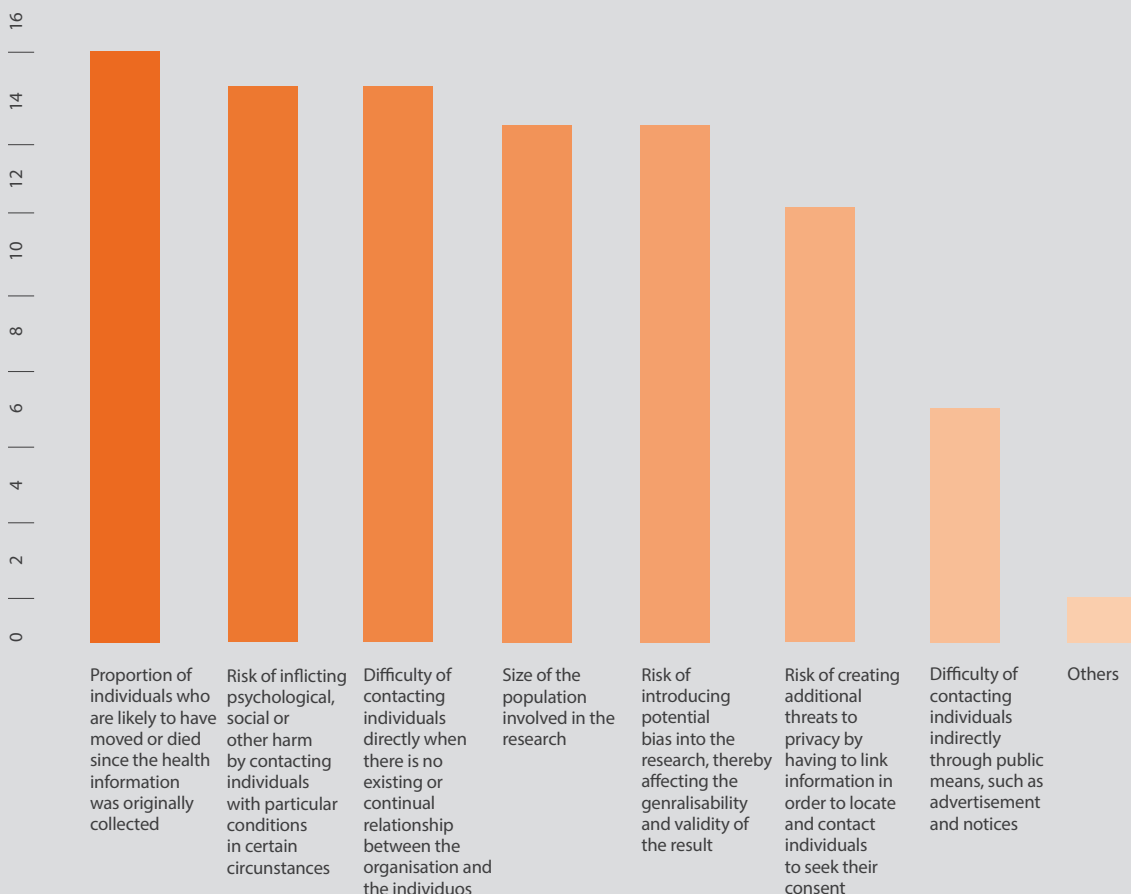
Figure 3 provides information on what HRECs considered when assessing whether it was impracticable to obtain consent to use or disclose an individual's health information for the purpose of research.

Other considerations included the impracticability of seeking consent from critically ill patients or patients with rare diseases where uncertainty exists in regards to their management, and potential impacts on patient care.

An organisation should generally obtain specific consent from an individual for the use of their health information in the proposed research at the time the information is collected, unless it is impracticable to do so.

Figure 3: Practicability of obtaining consent considerations

NUMBER OF HRECS



# OBJECTIVE 8:

To engage and partner with stakeholders to deliver good privacy outcomes

---

## Overview of goals of Objective

*To develop partnerships with and between those organisations who have privacy responsibilities and those who have a right to privacy protection, to secure the benefits for both from responsive management of privacy.*

*The Privacy Commissioner and officers develop and maintain productive relationships with stakeholders including privacy authorities throughout Australia and internationally, civil society and relevant peak bodies.*

## Highlights for 2015/16

**The Privacy Commissioner fostered inter-jurisdictional relationships by advising on a range of issues from big data to child sexual abuse and domestic violence**

**The Privacy Commissioner fostered international relationships by participating in a number of international initiatives such as the UN Taskforce on big data and meeting with the Global Privacy Enforcement Network regularly**

**Continuation of strategic partnership with First State Super to deliver two 'Privacy Matters' lectures from influential public figures – Mr Hugh Mackay Social researcher and commentator, and the Hon. Michael Kirby AC CMG**

**Establishment of more regular consultations with civil society bodies**

## Inter-jurisdictional stakeholder engagement

In a technologically global world, privacy implications arise in many endeavours, at different levels of government and the private sector. Many different stakeholders refer to the Office of the Privacy Commissioner as a source of privacy advice and as a privacy authority. They consist largely of:

- Individual NSW citizens
- Elected representatives
- NSW Government
- NSW public sector agencies
- Private health service sector and health practitioners
- Private sector organisations above a certain size that hold health information
- Privacy authorities nationally and internationally
- Privacy advocacy and civil society groups
- Peak bodies including professional bodies
- Statutory office holders and their offices

It is not possible to engage with all relevant stakeholders. Much of the contact is determined by the issues arising. However, while reactive, they are an opportunity to learn more of the stakeholders' context and sometimes other issues with which the Office can assist.

The network of Australian Privacy Authorities is strong and collaborative sharing of ideas and where possible of resources has worked well during 2015/16.

As in 2014/15 and previous years, the Federal Privacy Commissioner, Mr Timothy Pilgrim, and his office have provided assistance, as well as seeking input on guidance material they have developed, such as guidance on Big Data.

Appropriately protecting privacy requires providing the support stakeholders require, gaining their feedback and assisting them identify privacy risks and opportunities to achieve best practice.

The Privacy Commissioner met with key stakeholders including the Federal Privacy

Commissioner, Mr Timothy Pilgrim, the Victorian Privacy and Data Protection Commissioner and other Commissioners, the NSW Cross Border Commissioner, Mr James McTavish, the NSW Advocate for Children and Young People, Mr Andrew Johnson. The Commissioner liaised with the Cross Border Commissioner on the provision of privacy assistance for service providers to improve service co-ordination in regional and rural NSW for example, particularly in the area of child protection services.

In May 2016 the NSW Advocate for Children and Young People organised a consultation with the NSW Youth Advisory Council, a group of some 15 young people aged between 12 and 23 years. The consultation provided input into the development of resources and positions on emerging issues such as digital identity.

On 28 January 2016 the Victorian Commissioner for Privacy and Data Protection hosted a meeting of the Privacy Authorities Australia (PAA). At this meeting the Commissioner screened a pre-recorded interview with the United Nations Special Rapporteur on Privacy, who spoke about the challenges facing privacy regulators around the world. The meeting covered some of the most important contemporary privacy issues including:

- Information sharing;
- The role of privacy in addressing efforts to combat family violence;
- The growing threat to privacy posed by security breaches; and
- Biometrics.

Members also discussed planning for the upcoming Privacy and Data Protection Week. This PAA meeting highlighted the importance of an ongoing commitment to collaboration between Australia's privacy authorities and the desirability for a national privacy strategy.

The establishment of the United Nations' Special Rapporteur on the Right to Privacy is a catalyst. The Special Rapporteur's five thematic priorities provide a framework

to respond to the challenges of the digital era. A strong working relationship has been established with the Rapporteur and the Privacy Commissioner is contributing to the Big Data Taskforce.

Other consultations concerned various Commonwealth initiatives primarily in the areas of digital identity authentication.

Other key projects the Commissioner has consulted on during 2015/16 were:

- Asia Pacific Privacy Authorities Forum
- Productivity Commission Submission on Inquiry into Data Availability and Use

### What's on in 2016/17

- Continue strategic partnership with First State Super to showcase privacy matters
- Further develop partnership with United Nations Special Rapporteur on Right to Privacy and participate in selected priorities to ensure NSW is aware of international privacy trends and requirements
- Continue joint initiatives with other Privacy Commissioners and seek engagement of civil society bodies
- Learning from international and national consultations and applying, where appropriate, these learnings when championing privacy in NSW.

# Partnerships

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**Partnerships are a critical element of promoting privacy rights generally, but particularly in the knowledge economy where any organisation, regardless of their size, can have a profound and enduring impact upon the privacy of individuals.**

Throughout 2015/16, the Privacy Commissioner, along with the Office, was able to maximise our message through forming partnerships with a number of entities. Some were for time limited period for a specific event; others built upon an ongoing commitment.

One such is our strategic partnership with First State Super who is committed, as a responsible corporate entity, to instilling good privacy management into their governance and operations.

As an entity that is covered by Federal privacy law, First State Super has been an excellent proactive strategic partner. In November 2015, the Privacy Commissioner hosted with the Chief Executive Officer,

Mr Michael Dwyer, the first of our 'Privacy Matters' addresses, a thought leadership session. This address was given by Mr Hugh Mackay, social researcher, commentator and author who spoke to privacy matters in relation to the invasion of privacy in the modern age and how social and cultural changes affect our attitudes to privacy.

In May 2016 to launch 'Privacy Awareness Month' the NSW Privacy Commissioner again hosted with First State Super the second of the 'Privacy Matters' addresses. On this occasion the Hon. Michael Kirby AC CMG spoke to 'Why NSW Should Lead' in response to the NSW Parliament's Inquiry into 'Serious Invasions of Privacy'. This address can be obtained from the privacy pages of the IPC website [www.ipc.nsw.gov.au/privacy](http://www.ipc.nsw.gov.au/privacy).

Key arguments for the establishment of a statutory cause of action for serious invasions of privacy were put forward by the Hon Michael Kirby AC CMG.

Both events were very well patronised and feedback has been extremely positive. In an environment of very constrained resourcing these partnerships are vital.







“Privacy has never been more relevant than during this time of technological development. A society without privacy has lost an essential freedom of the individual...”



Mr Hugh Mckary presenting at the 'Privacy Matters' forum  
November 2015

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# Glossary

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## About this Annual Report

|                   |   |
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| CCTV              | Closed-circuit television   |
| CEO               | Chief Executive Officer   |
| DAC               | Data Analytics Centre   |
| DFSI              | Department of Finance, Services and Innovation                    |
| DJ                | Department of Justice   |
| GIPA Act or GIPA  | <i>Government Information (Public Access) Act 2009</i>            |
| GSE Act           | <i>Government Sector Employment Act 2013</i>                      |
| HPPs              | Health Privacy Principles   |
| HRECs             | Human Research Ethics Committees                                  |
| HRIP Act or HRIPA | <i>Health Records and Information Privacy Act 2002 (NSW)</i>      |
| ICAC              | Independent Commission Against Corruption                         |
| IPAC              | Information and Privacy Advisory Committee                        |
| IPPs              | Information Protection Principles                                 |
| IPC               | Information and Privacy Commission                                |
| LGMA              | Local Government Managers Australia (NSW)                         |
| NBN               | National Broadband Network  |
| NCAT              | NSW Civil and Administrative Tribunal                             |
| OAIC              | Office of the Australian Information Commissioner                 |
| OPC               | Office of the NSW Privacy Commissioner                            |
| PAM               | Privacy Awareness Month   |
| PIA               | Privacy Impact Assessment   |
| PIPA Act or PPIPA | <i>Privacy and Personal Information Protection Act 1998 (NSW)</i> |
| PSEM              | <i>Public Sector Employment and Management Act 2002</i>           |

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## About this Annual Report

The Office of the NSW Privacy Commissioner's Annual Report 2015/16 has been prepared in accordance with the provisions of the *Annual Reports (Departments) Act 1985* and the *Privacy and Personal Information Protection Act 1998*.

This Annual Report sets out our activities, accomplishments and challenges in promoting our responsibilities to the community of NSW. It provides an account of our performance against the key strategic objective areas set for us as a result of reports and submissions NSW Parliament, and provides information to our stakeholders on how we manage our organisation to best deliver on our accountabilities and strategic outcomes.

This Annual Report was first published in October 2016. There were no external costs recorded for producing this report to comply with NSW Treasury requirements.

The attestations required for financial and information security matters are included elsewhere in the 2015/16 Information and Privacy Commission Annual Report.

# Tables and Figures

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# Appendices

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## **Appendix 1: Publications List**

All publications listed below are available on the IPC website.

### **Case Notes:**

Privacy Case Note -The Tribunal's powers to make orders concerning the systemic nature of an information practice/system [BKMv Sydney Local Health District [2015] NSWCATAD 87]

Privacy Case Note - Statements on which organisations rely should be sufficient for an ordinary member of the community to ascertain the answers to the matters listed in HPP 6 [2015] NSWCATAP 138

Privacy Case Note - The law relating to the use of McKenzie friends and agents in proceedings and implied non-compliance with the PPIP Act [2015] NSWCATAD 112

### **Guides, Forms and General Resources:**

Privacy and people with decision making disabilities guide

Privacy complaint - Internal review application form

Privacy Governance Framework Resources: Element 4

### **Codes of Practice:**

NBN Code of Practice

Privacy codes of practice page updated and PIDs updated (violent extremism and Health PIDs)

### **Privacy Awareness Month Specific:**

Agency Event Poster

Email Banner

Privacy and you: online checklist

Screensaver

Privacy Manners Poster

Privacy Awareness Month Info Sheet

Privacy For the Future Info Sheet

Privacy Manners Web Banner

Privacy Awareness Month Web Banner

Privacy For the Future Web Banner

Privacy and You Web Banner

Suggested News copy for Agencies

Suggested Email to staff for Agencies

Media Pack

Privacy Awareness Month poster

Privacy Manners Poster

Privacy for the Future Poster

Privacy and You poster

### **Animation:**

Privacy and You: Animation

Privacy Manners: Animation

Privacy Awareness Month: Animation

Privacy for the Future: Animation

**Appendix 2:****Table 2: Statutory advice requests by year and source 2014/15 to 2015/16**

| Source of request for Advice | 2015/16 |                   | 2014 /15 |
|------------------------------|---------|-------------------|----------|
|                              |         |                   |          |
| TOTALS                       | 146     | 27 <sup>(a)</sup> | 101      |
| State government             | 94      | 25                | 61       |
| Private individual           | 14      | 0                 | 7        |
| Private organisation(b)      | 11      | 0                 | 5        |
| Other government             | 10      | 0                 | 3        |
| Other <sup>(c)</sup>         | 9       | 0                 | 11       |
| Local government             | 7       | 0                 | 9        |
| Parliamentary inquiry        | 1       | 2                 | 5        |
| Advocate/lawyer              | 0       | 0                 | 0        |

**Notes:**

a. Statutory advice files are held in two systems, the latter and smaller group under more secure arrangements. The combined total of statutory advice work is 173 matters.

b. Private organisation includes private business, non-government organisations and peak bodies

c. Other includes universities, Members of Parliament, Parliamentary Committees, and unknown.

**Appendix 3:****Table 6: Privacy cases closed by Principle for 2015/16**

| Type              | PPIPA | HRIPA | Both |
|-------------------|-------|-------|------|
| Access            | 6     | 9     | 4    |
| Accuracy          | 17    | 9     | 9    |
| All IPPs/HPPs     | 2     | 5     | 0    |
| Collection        | 28    | 7     | 5    |
| Disclosure        | 93    | 33    | 35   |
| Physical privacy  | 2     | 0     | 0    |
| Retention storage | 69    | 20    | 18   |
| Unknown/none      | 2     | 0     | 0    |
| Use               | 30    | 20    | 27   |



**Appendix 4:****Information Protection Principles (IPPs)**

The 12 Information Protection Principles (IPPs) are your key to the Privacy and Personal Information Protection Act 1998 (PPIP Act).

These are legal obligations which NSW public sector agencies, statutory bodies, universities and local councils must abide by when they collect, store, use or disclose personal information. As exemptions may apply in some instances, it is therefore suggested you contact the Privacy Contact Officer at the agency or the Information and Privacy Commission NSW (IPC) for further advice.

**Collection**

1. **Lawful**  
An agency must only collect personal information for a lawful purpose. It must be directly related to the agency's function or activities and necessary for that purpose.
2. **Direct**  
An agency must only collect personal information directly from you, unless you have authorised collection from someone else, or if you are under the age of 16 and the information has been provided by a parent or guardian.
3. **Open**  
An agency must inform you that the information is being collected, why it is being collected, and who will be storing and using it. You must also be told how you can access and correct your personal information, if the information is required by law or is voluntary, and any consequences that may apply if you decide not to provide it.
4. **Relevant**  
An agency must ensure that your personal information is relevant, accurate, complete, up-to-date and not excessive. The collection should not unreasonably intrude into your personal affairs

**Storage**

5. **Secure**  
An agency must store personal information securely, keep it no longer than necessary and dispose of it appropriately. It should also be protected from unauthorised access, use, modification or disclosure.

**Access and accuracy**

6. **Transparent**  
An agency must provide you with details regarding the personal information they are storing, why they are storing it and what rights you have to access it.
7. **Accessible**  
An agency must allow you to access your personal information

without excessive delay or expense.

8. **Correct**  
An agency must allow you to update, correct or amend your personal information where necessary.

**Use**

9. **Accurate**  
An agency must ensure that your personal information is relevant, accurate, up to date and complete before using it.
10. **Limited**  
An agency can only use your personal information for the purpose for which it was collected unless you have given consent, or the use is directly related to a purpose that you would expect, or to prevent or lessen a serious or imminent threat to any person's health or safety.

**Disclosure**

11. **Restricted**  
An agency can only disclose your information in limited circumstances if you have consented or if you were told at the time they collected it that they would do so. An agency can also disclose your information if it is for a directly related purpose and it can be reasonably assumed that you would not object, if you have been made aware that information of that kind is usually disclosed, or if disclosure is necessary to prevent a serious and imminent threat to any person's health or safety.
12. **Safeguarded**  
An agency cannot disclose your sensitive personal information without your consent, for example, information about ethnic or racial origin, political opinions, religious or philosophical beliefs, sexual activities or trade union membership. It can only disclose sensitive information without consent in order to deal with a serious and imminent threat to any person's health or safety.

**For more information**

Contact the Office of the Privacy Commission NSW:

Freecall: 1800 472 679

Email: [privacy@ipc.nsw.gov.au](mailto:privacy@ipc.nsw.gov.au)

Website: [www.ipc.nsw.gov.au/privacy](http://www.ipc.nsw.gov.au/privacy)

**Appendix 5:****Health Privacy Principles (HPPs)**

The 15 Health Privacy Principles (HPPs) are the key to the Health Records and Information Privacy Act 2002 (HRIP Act).

These are legal obligations which NSW public sector agencies and private sector organisations must abide by when they collect, hold, use and disclose a person's health information. Exemptions may apply, therefore it is suggested you seek further advice from the Privacy Contact Officer or the Health Information Manager in your agency or organisation in the first instance. Or contact the Information and Privacy Commission NSW (IPC) for further advice.

**Collection**

13. Lawful  
Only collect health information for a lawful purpose that is directly related to the agency or organisation's activities and necessary for that purpose.
14. Relevant  
Ensure health information is relevant, accurate, up-to-date and not excessive, and that the collection does not unreasonably intrude into the personal affairs of a person.
15. Direct  
Only collect health information from the person concerned, unless it is unreasonable or impracticable to do so. See the Handbook to Health Privacy for an explanation of "unreasonable" and "impracticable". Available at [www.ipc.nsw.gov.au](http://www.ipc.nsw.gov.au).
16. Open  
Inform a person as to why you are collecting health information, what you will do with it, and who else may see it. Tell the person how they can view and correct their health information and any consequences that will occur if they decide not to provide their information to you.

If you collect health information about a person from a third party you must still take reasonable steps to notify the person that this has occurred.

**Storage**

17. Secure
18. Ensure the health information is stored securely, not kept any longer than necessary, and disposed of appropriately. Health information should be protected from unauthorised access, use or disclosure. (Note: private sector organisations should also refer to section 25 of the HRIP Act for further provisions relating to retention).

**Access and accuracy**

19. Transparent  
Explain to the person what health information is being stored, the reasons it is being used and any rights they have to access it.

20. Accessible  
Allow a person to access their health information without unreasonable delay or expense. (Note: private sector organisations should also refer to sections 26-32 of the HRIP Act for further provisions relating to access).

21. Correct  
Allow a person to update, correct or amend their personal information where necessary. (Note: private sector organisations should also refer to sections 33-37 of the HRIP Act for further provisions relating to amendment).

22. Accurate  
Ensure that the health information is relevant and accurate before using it.

**Use**

23. Limited  
Only use health information for the purpose for which it was collected or for a directly related purpose, which a person would expect. Otherwise, you would generally need their consent to use the health information for a secondary purpose.

**Disclosure**

24. Limited  
Only disclose health information for the purpose for which it was collected, or for a directly related purpose that a person would expect. Otherwise, you would generally need their consent. (Note: see HPP 10).

**Identifiers and anonymity**

25. Not identified
26. Only identify people by using unique identifiers if it is reasonably necessary to carry out your functions efficiently.
27. Anonymous  
Give the person the option of receiving services from you anonymously, where this is lawful and practicable.

**Transferrals and linkage**

28. Controlled  
Only transfer health information outside New South Wales in accordance with HPP 14.
29. Authorised  
Only use health records linkage systems if the person has provided or expressed their consent.

**For more information**

Contact the Office of the Privacy Commission NSW:

Freecall: 1800 472 679

Email: [privacy@ipc.nsw.gov.au](mailto:privacy@ipc.nsw.gov.au)

Website: [www.ipc.nsw.gov.au/privacy](http://www.ipc.nsw.gov.au/privacy)



The Office of the NSW Privacy Commissioner is located at:

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