

## **BALANCING THE TREATMENT OF 'PERSONAL INFORMATION' UNDER FOI AND PRIVACY LAWS: A COMPARATIVE AUSTRALIAN ANALYSIS**

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There has been longstanding recognition that there should be some degree of protection provided to privacy of personal information about individuals. Some examples of this include recognition of privacy as a human right worthy of protection as in:

- (a) Article 12 of the Universal Declaration of Human Rights;<sup>1</sup>
- (b) Article 17 of the International Covenant on Civil and Political Rights;<sup>2</sup>
- (c) Section 12(a), *Human Rights Act 2004* (ACT); and<sup>3</sup>
- (d) Section 13(a), *Charter of Human Rights and Responsibilities Act 2006* (Vic).<sup>4</sup>

Although those examples relate to a broader notion of privacy, the justification behind a broader right of privacy applies equally to the need for *information* privacy. When referring to information privacy I mean, at the very least, the interest of a person in controlling information held by others about him or her.

Some would say that information privacy is broader than that and can be read as being about the rights of individuals to exercise some control over the way information about them is collected, the way in which it may be used, to whom it may be disclosed, and about ensuring that the information is securely stored and not misused. It can also extend to the right of an individual to have access to information concerning himself or herself and to ensure that, when information is used or disclosed, it is not incorrect, out-of-date or misleading.

In Australia, however, there has been some tension and inconsistency about how privacy of personal information should be dealt with when it is held by government agencies. What mechanism should be used to provide protection of personal information privacy rights? Should it be considered as part of freedom of information (or related) legislation, or should it be dealt with in separate privacy legislation? Should it be dealt with in legislation at all, or in some other way?

The variety of approaches in Australian jurisdictions may stem from the difference in views as to what the right to information privacy encompasses and where or how it should be addressed. The correctness or desirability of one view over another is a philosophical debate that is beyond the scope of this paper and one which I will leave to more learned commentators.

In Part 1 of this paper, I look briefly at:

- what privacy regime, if any, exists in each Australian jurisdiction, and how it is manifested; and

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- what each privacy regime protects and what falls within the protection offered. For example, does a regime govern a broader concept of 'personal information', or does it exclude certain matters such as 'health information'?

In Part 2, which will be published subsequently, I look at:

- how each Australian jurisdiction deals with protection of personal privacy in relation to applications for access under freedom of information/right to information legislation. I review the nature and scope of each relevant personal privacy related exemption provision or equivalent; and
- how the different jurisdictions manage the balance between privacy and freedom of information regimes in how they treat personal information.

I also refer to some developments in legislation and case law.

### Privacy regimes

All Australian jurisdictions apart from Western Australia and South Australia have specific legislation in place that sets out the general personal information privacy regime for that jurisdiction, at least as it applies to public sector agencies (and in some cases private sector organisations either generally or in specific areas such as the health sector). In most of these jurisdictions, regulations have been made under the relevant legislation and, in New South Wales, there is also a code of practice that appears to be given legislative effect. These arrangements are set out in Table 1 below.

**Table 1**

<b>Jurisdiction</b>	<b>Legislation</b>	<b>Abbreviation</b>
Commonwealth	<i>Privacy Act 1988</i> (Cth)	<i>Cth Privacy Act</i>
	<i>Privacy Regulation 2013</i> (Cth)	<i>Cth Privacy Reg</i>
ACT	<i>Privacy Act 1988</i> (Cth) as amended by the <i>Australian Capital Territory Government Service (Consequential Provisions) Act 1994</i> (Cth)	<i>ACT Privacy Act</i>
	<i>Health Records (Privacy and Access) Act 1997</i> (ACT)	<i>ACT HRAct</i>

<b>Jurisdiction</b>	<b>Legislation</b>	<b>Abbreviation</b>
NSW	<i>Privacy and Personal Information Protection Act 1998 (NSW)</i>  <i>Privacy and Personal Information Protection Regulation 2005 (NSW)</i>  <i>Privacy Code of Practice (General) 2003 (NSW)</i>  <i>Health Records and Information Privacy Act 2002 (NSW)</i>  <i>Health Records and Information Privacy Regulation 2012 (NSW)</i>  <i>Health Records and Information Privacy Code of Practice 2005 (NSW)</i>	<i>NSW PPIPA</i>  <i>NSW PPIP Reg</i>  <i>NSW Privacy Code</i>  <i>NSW HRIPA</i>  <i>NSW HRIP Reg</i>  <i>NSW HRIP Code</i>
NT	<i>Information Act 2002 (NT)</i>  <i>Information Regulations (NT)</i>	<i>NT Information Act</i>  <i>NT Information Regs</i>
Qld	<i>Information Privacy Act 2009 (Qld)</i>  <i>Information Privacy Regulation 2009 (Qld)</i>	<i>Qld Privacy Act</i>  <i>Qld Privacy Reg</i>
SA	N/A	N/A
Tas	<i>Personal Information Protection Act 2004 (Tas)</i>	<i>Tas PIPAct</i>
Vic	<i>Information Privacy Act 2000 (Vic)</i> <sup>5</sup>  <i>Health Records Act 2001 (Vic)</i>  <i>Health Records Regulations 2012 (Vic)</i>	<i>Vic IPAct</i>  <i>Vic HRAct</i>  <i>Vic HR Reg</i>
WA	N/A	N/A

In South Australia, a Cabinet Instruction known as the Information Privacy Principles Instruction (IPPS Instruction)<sup>6</sup> applies to all public sector agencies as defined in the *Public Sector Act 2009* (SA) unless:

- (a) Cabinet otherwise determines; or
- (b) It falls within a schedule to the IPPS Instruction. That schedule lists a handful of agencies including the Independent Commissioner Against Corruption and the Office for Public Integrity.

In July 2004, the South Australian Department of Health published the *Code of Fair Information Handling Practices*,<sup>7</sup> which was intended to apply to all employees who, in the course of their work (whether paid or voluntary), have access to personal information collected, used or stored by or on behalf of the Department of Health and/or funded service providers. Compliance with the Code is mandatory in accordance with a directive issued by the Department in December 2001.<sup>8</sup> This Code is not dealt with in detail in this paper.

In Western Australia, no legislation or any other instrument (such as the SA Cabinet Instruction) deals specifically with privacy. An *Information Privacy Bill 2007* was introduced into Parliament in WA by the then Labor Government. It proposed to amend the WA freedom of information legislation to introduce concepts of personal information privacy and health information privacy. It was introduced in the Legislative Assembly in March 2007, passed through the Legislative Assembly in November 2007, progressed to the Legislative Council where it was read a second time on 4 December 2007, but did not progress further.

At an administrative level, the Commissioner for Public Sector Standards has issued a number of codes of ethics under the *Public Sector Management Act 1994* (WA). For example, on 8 May 2007 the Commissioner issued the *Western Australian Public Sector Code of Ethics (2007)* which provided that, to meet a minimum standard of conduct and integrity, public sector bodies and employees were required to 'protect privacy and confidentiality' and respect the privacy of individuals.

The most recent instrument of which I am aware is *Commissioner's Instruction No 7: Code of Ethics*, which commenced on 3 July 2012. It applies more broadly and requires all public sector bodies and employees to 'treat people with respect, courtesy and sensitivity and recognise their interests, rights, safety and welfare' (emphasis added). In addition there is an obligation on all public sector bodies to develop their own codes of conduct, consistent with the Code of Ethics,<sup>9</sup> and the Commissioner's *Conduct Guide*. The Conduct Guide makes it clear that codes of conduct should address a policy of '[c]ustomer privacy and security of personal information'.<sup>10</sup>

For example, a sample code of ethics for a board or committee prepared by the Western Australian Public Sector Commission requires members to 'respect the confidentiality and privacy of all information as it pertains to individuals'.<sup>11</sup>

### ***Other legislation***

In all jurisdictions, there are also legislative secrecy or confidentiality provisions that apply to specific officers and/or agencies, and which may expressly protect personal privacy using phrases such as 'information relating to the affairs of any person' or 'any natural person' or provide more general secrecy protection. Such provisions tend to have the effect of precluding persons who hold or have held certain positions, or certain specified agencies or offices, from disclosing information they have obtained in the performance of their duties, functions or powers. Although they represent ways in which jurisdictions protect privacy in specific contexts, I do not propose to canvass these as they are too numerous to mention.

### **The regimes**

#### ***Commonwealth***

At the Commonwealth level, the regulation of information privacy is dealt with in the *Privacy Act 1988* (Cth) (*Cth Privacy Act*). It deals with information privacy as it applies to personal information. It defines 'personal information' as follows:

**personal information** means information or an opinion about an identified individual, or an individual who is reasonably identifiable:

- (a) whether the information or opinion is true or not; and
- (b) whether the information or opinion is recorded in a material form or not.<sup>12</sup>

### **Key features**

The *Cth Privacy Act* establishes 13 Australian Privacy Principles (APPs) dealing with the collection, management, use, disclosure, security, access, correction or transfer of personal information.<sup>13</sup>

The *Cth Privacy Act* imposes obligations on APP entities, which are defined to mean an 'agency' or an 'organisation'. An 'agency' includes a minister, department, body established for a public purpose under a Commonwealth enactment, and various other office holders or bodies.<sup>14</sup> An 'organisation' is defined as an individual, body corporate, partnership or trust that is not one of a number of exclusions (eg not a small business operator with a turnover of less than \$3 million).<sup>15</sup> Therefore, to that extent, it extends to the private sector as well as the public sector.

An APP entity must not do an act, or engage in a practice, that breaches an APP – ie is contrary to or inconsistent with an APP.<sup>16</sup>

Some interesting features of the *Cth Privacy Act* include:

- (a) Under APP 12, if a person wishes to obtain access to personal information about themselves, on request to an APP entity that holds that information, access must be given. However, the APP entity is not required to give access if the APP entity may refuse access under the *Freedom of Information Act 1982* (Cth) (*Cth FOI Act*), or under some other Act. The *Cth FOI Act* in this instance takes precedence.<sup>17</sup> APP 12 seems to have a greater role in dealing with access applications to other organisations.
- (b) In contrast, under APP 13, if a person makes a request to an APP entity holding personal information about him/her to correct the information on the basis that it is inaccurate, out of date, incomplete, irrelevant or misleading, the APP entity must take reasonable steps to correct this. The processes and procedures in APP 13 are not a substitute for the procedures contained in Part V of the *Cth FOI Act*, but rather co-exist. Significant differences between them are highlighted in the Guidelines issued by the Information Commissioner.<sup>18</sup>
- (c) The *Cth Privacy Act* deals expressly with the position of contracted service providers under government contracts in various provisions.<sup>19</sup>
- (d) One part of the *Cth Privacy Act* gives the Information Commissioner power to make a public interest determination; this in effect permits an APP entity to engage in an act or practice that breaches or may breach an APP where the public interest in doing so substantially outweighs the public interest in adhering to the APP.<sup>20</sup>
- (e) The Information Commissioner is given various powers and functions, these are referred to in more detail below.

### **How is privacy protected?**

An act or practice of an APP entity is an interference with privacy if it breaches an APP in relation to personal information about an individual.<sup>21</sup> An individual may make a written complaint to the Information Commissioner about an act or practice that may have been an interference with privacy.<sup>22</sup>

Complaints made directly to the APP entity are encouraged, so that it can have an opportunity to address and appropriately deal with the complaint. If that has not occurred, or it has occurred and the complaint is being considered and dealt with by the APP entity, the Information Commissioner may decide not to investigate the complaint, or to not investigate further.<sup>23</sup> The Information Commissioner may decline to investigate a complaint on other grounds as well.<sup>24</sup>

If a complaint has been made about an act or practice that may have been an interference with privacy, and the complainant did complain to the entity before making the complaint to the Information Commissioner, the Information Commissioner shall investigate the act or practice.<sup>25</sup>

Where the Information Commissioner considers it reasonably possible that such a complaint may be successfully conciliated, and no decision has been made not to investigate or not to investigate further, a reasonable attempt to conciliate must be made by the Information Commissioner.<sup>26</sup>

### ***Remedies***

The remedy available to a complainant will depend on the avenue undertaken and the outcome of the process.

Remedies which APP entities might provide to complainants can vary and might include compensation, education of individuals or staff more generally, improvements in processes and procedures, and other similar measures intended to mitigate any harm and minimise the risk of future interference with privacy.

Conciliation of complaints to the Information Commissioner may result in similar outcomes eg compensation for injury to feelings and humiliation.

If an entity engages in a serious interference with privacy, or repeatedly performs an act or engages in a practice that is an interference with privacy, it may be liable to a civil penalty of 2,000 penalty units.<sup>27</sup> The Information Commissioner can apply to the Federal Court or Federal Circuit Court for an order that an entity, that is alleged to have contravened a civil penalty provision, pay the Commonwealth a pecuniary penalty.<sup>28</sup>

Further, if a matter is not conciliated, after investigating a complaint the Information Commissioner can, if the complaint is not dismissed, find the complaint substantiated and make a determination (which must include any findings of fact on which it is based) with one or more declarations including:

- (a) that the agency has engaged in conduct constituting an interference with privacy and must not repeat or continue such conduct;
- (b) that the agency must take specified steps (which must be reasonable and appropriate) to ensure that such conduct is not repeated or continued;
- (c) that the agency must perform any reasonable act or course of conduct to redress any loss or damage for injury to feelings or humiliation suffered by the complainant;
- (d) that the complainant is entitled to a specified amount by way of compensation for loss or damage for injury to feelings or humiliation suffered;
- (e) that the complainant is entitled to a specified amount to reimburse expenses reasonably incurred in connection with the complaint and investigation.<sup>29</sup>

If such a determination is made, the agency must not repeat or continue any conduct covered by a relevant declaration, must take steps specified in the declaration and must

perform any acts or course of conduct covered by a declaration and determination.<sup>30</sup> Any amounts which the complainant is entitled to be paid are recoverable as a debt due from the agency (or the Commonwealth in certain cases).<sup>31</sup> If the agency fails to comply, the complainant or the Information Commissioner may commence proceedings in the Federal Court or Federal Circuit Court for an order directing compliance.<sup>32</sup>

## Victoria

In Victoria, the regulation of information privacy is split between two Acts, the *Information Privacy Act 2000* (Vic) (*Vic IPAct*)<sup>33</sup> and the *Health Records Act 2001* (Vic) (*Vic HRAAct*). The *IPAct* deals with information privacy as it applies to personal information, but expressly excludes health information, which is dealt with separately in the *Vic HRAAct*.<sup>34</sup>

### What is dealt with?

The *Vic IPAct* uses the following definition of ‘personal information’:

**personal information** means information or an opinion (including information or an opinion forming part of a database), that is recorded in any form and whether true or not, about an individual whose identity is apparent, or can reasonably be ascertained, from the information or opinion, but does not include information of a kind to which the **Health Records Act 2001** applies.

Interestingly, this definition is slightly different from the definition of ‘personal information’ in the *Vic HRAAct*:

**personal information** means information or an opinion (including information or an opinion forming part of a database), whether true or not, and whether recorded in a material form or not, about an individual whose identity is apparent, or can reasonably be ascertained, from the information or opinion, but does not include information about an individual who has been dead for more than 30 years.

This differs from the *Vic IPAct* definition in that it only applies to information or opinion that is recorded in a material form (as opposed to in any form), and it does not apply to persons who have been dead for more than 30 years.

### Key features

The *Vic IPAct* establishes 10 Information Privacy Principles (IPPs)<sup>35</sup> dealing with the collection, management, use, disclosure, security or transfer of personal information; one IPP deals specifically with sensitive information.<sup>36</sup>

The *Vic IPAct* imposes obligations on organisations, which are defined to include, among other things, public sector bodies, local councils, various offices or bodies established for public purpose, and certain contracted service providers known as State contractors.<sup>37</sup> By contrast, the *Vic HRAAct* applies to both the public and the private sector in relation to health information collected, held or used.<sup>38</sup>

An organisation must not perform an act, or engage in a practice, that contravenes an IPP in respect of personal information collected, held, managed, used, disclosed or transferred by it. An act carried out or practice engaged in by an organisation that is contrary to, or inconsistent with, an IPP is an interference with the privacy of an individual.<sup>39</sup>

Interesting features of the *Vic IPAct* include:

- (a) If a provision in another Act is inconsistent with a provision in the *Vic IPAct*, the former Act prevails to the extent of any inconsistency and the latter provision has no force or effect.<sup>40</sup>
- (b) If a person wishes to obtain access to or amend personal information about themselves in a document held by an 'agency' under the *Freedom of Information Act 1982* (Vic) (*Vic FOI Act*), any application for access or amendment must be made under the *Vic FOI Act* processes and procedures, and not under the *Vic IPAct*.<sup>41</sup> This means that, in effect, IPP6 relating to access to and amendment of documents held by organisations probably only has a role in relation to State contractors, which can be private sector bodies not otherwise caught by the *Vic FOI Act*.<sup>42</sup>
- (c) The *Vic IPAct* does not apply to personal information in a generally available publication – a publication (whether paper or electronic) that is generally available to members of the public and includes information held on a public register.<sup>43</sup> Despite this, public sector agencies or councils which administer public registers must so far as is reasonably practicable not contravene the IPPs in connection with the administration of the public register if that information is personal information.<sup>44</sup>
- (d) There is a strong incentive for agencies contracting out to State contractors to ensure that the contract makes adequate provision to bind State contractors by the IPPs to the same extent as if they were the agency contracting them. Otherwise, the agency is attributed with the blame for any interference with privacy which may arise from an act or practice of the contractor.<sup>45</sup>
- (e) The Privacy Commissioner is established by the *Vic IPAct*. The role and powers and functions of the Privacy Commissioner are referred to in more detail below.<sup>46</sup>

### ***How is privacy protected?***

We saw that any act done or practice engaged in which is contrary to or inconsistent with the IPPs is an interference with privacy. An individual may make a written complaint to the Privacy Commissioner about an act or practice of an organisation that may have been an interference with privacy.<sup>47</sup>

Of course, complaints made directly to the organisation first are to be encouraged, so that it can have an opportunity to address and appropriately deal with the complaint. If that has not occurred, or it has occurred and the organisation is still dealing with the complaint, the Privacy Commissioner may decline to entertain the complaint.<sup>48</sup> The Privacy Commissioner may decline to entertain or may dismiss a complaint on other grounds as well.<sup>49</sup>

If conciliation by the Privacy Commissioner is attempted and fails, or is not considered appropriate by the Privacy Commissioner, or the complaint is not entertained or is dismissed, the complainant may request that the matter be referred to the Victorian Civil and Administrative Tribunal (VCAT).<sup>50</sup> The Privacy Commissioner does not have determinative powers. By contrast, the Health Services Commissioner has powers to investigate a complaint and make a determinative ruling as to whether there has been an interference with privacy and to specify action, if any, to be taken to remedy the complaint. Failure to comply is an offence which is punishable by a monetary penalty.<sup>51</sup>

The VCAT can then hear and determine a matter (although VCAT also has alternative dispute resolution processes, such as compulsory conferences, in which it generally requires the parties to participate).<sup>52</sup>

### ***Remedies***

The remedy available to a complainant will depend on the avenue undertaken and the outcome of the process.



Remedies which organisations may provide to complainants can vary significantly and can include compensation, education of individuals or staff more generally, improvements in processes and procedures, and other similar measures to mitigate any harm and minimise the risk of future interferences with privacy.

With the Privacy Commissioner, there may be conciliation of complaints with similar outcomes eg compensation for injury to feelings and humiliation.<sup>53</sup> For serious, flagrant or repeated breaches, the Privacy Commissioner has power to issue a compliance notice which, if not complied with, gives rise to an indictable offence with potential imprisonment and hefty financial penalties.<sup>54</sup>

At the VCAT, there may be agreed results with the use of the VCAT's alternative dispute resolution processes which are confidential. We are aware from anecdotal evidence and experience in acting for numerous clients that it can result in similar financial and non-financial outcomes for a complainant. If a matter goes to a full hearing, the VCAT has power to make determinations and orders in favour of a complainant including:<sup>55</sup>

- (a) an order that the complainant is entitled to a specified amount to reimburse the complainant for expenses reasonably incurred in connection with the making of the complaint and the proceedings held;
- (b) an order restraining the organisation from repeating or continuing any act or practice the subject of the complaint, which the VCAT found to be an interference with privacy;
- (c) an order requiring the organisation to perform or carry out any reasonable act or course of conduct to redress any loss or damage suffered by the complainant; and
- (d) an order for compensation for up to \$100,000 for any loss or damage suffered by the complainant, including injury to the complainant's feelings or humiliation suffered by the complainant, by reason of the act or practice, the subject of the complaint.<sup>56</sup>

### **Australian Capital Territory**

In the ACT, the position is somewhat complicated. As I understand it, the privacy regime applies the Commonwealth *Privacy Act 1998* as it existed on 1 July 1994, with some amendments made by the *Australian Capital Territory Government Service (Consequential Provisions) Act 1994* (ACT) (*Consequential Provisions Act*). I refer to these together as the *ACT Privacy Act*.

To make things a bit more complicated, health records held by ACT Government agencies, including public hospitals, are covered by the *Health Records (Privacy and Access) Act 1997* (ACT) (*ACT HRAct*).

### **What is dealt with?**

The *ACT Privacy Act* deals with 'personal information' which is defined as:

'personal information' means information or an opinion (including information or an opinion forming part of a database), whether true or not, and whether recorded in a material form or not, about an individual whose identity is apparent, or can reasonably be ascertained, from the information or opinion.

The *ACT HRAct* deals with health records which are defined as:

**health record** means any record, or any part of a record—

- (a) held by a health service provider and containing personal information; or
- (b) containing personal health information.

Relevant to that definition of health record are the concepts of 'personal information' and 'personal health information' of a 'consumer'. These terms are defined as follows:

**personal information**, in relation to a consumer, means any information, recorded or otherwise, about the consumer where the identity of the consumer is apparent, whether the information is—

- (a) fact or opinion; or
- (b) true or false.

**personal health information**, of a consumer, means any personal information, whether or not recorded in a health record—

- (a) relating to the health, an illness or a disability of the consumer; or
- (b) collected by a health service provider in relation to the health, an illness or a disability of the consumer.

**consumer** means an individual who uses, or has used, a health service, or in relation to whom a health record has been created, and includes—

- (a) if the consumer is a young person or legally incompetent person—a guardian of the consumer; and
- (b) if the consumer has died and there is a legal representative of the deceased consumer—a legal representative of the deceased consumer; and
- (c) if the consumer has died and there is no legal representative of the deceased consumer—an immediate family member of the deceased consumer.

### **Key features**

The *ACT Privacy Act* establishes 11 Information Privacy Principles (IPPs) dealing with the collection, management, use, disclosure, security or transfer of personal information.<sup>57</sup>

The *ACT Privacy Act* imposes obligations on ACT agencies, which are defined to have the same meaning as agency in the *Freedom of Information Act 1982* (ACT) (*ACT FOI Act*), with some exceptions.<sup>58</sup> By contrast, the *ACT HRA Act* applies to both the public and the private sector in relation to health records with the emphasis being on health service providers (providing health services in the ACT) and collectors or keepers of personal health information.

An agency must not perform an act, or engage in a practice, that breaches an IPP – ie do something which is contrary to or inconsistent with an IPP<sup>59</sup> If an act done or practice engaged in by an agency breaches an IPP it is an interference with the privacy of an individual.<sup>60</sup>

Interesting features of the *ACT Privacy Act* and *ACT HRA Act* include the following:

- (a) apart from a special exception about health information (dealt with further below), it appears that generally a person seeking access to, or wanting to amend personal information about himself/herself in a document held by an ACT agency should do so under the *ACT FOI Act*. This is so even though IPPs 5, 6 and 7 recognise the general desirability of individuals being able to obtain access to documents containing their personal information and to have it amended if it is deficient in a relevant way;
- (b) by contrast, where health records held by an 'agency' as defined in the *ACT FOI Act* are concerned, it is clear that the preferred approach in the ACT is that access to such records and requests for amendment to them should be dealt with under the *ACT HRA Act* rather than under the *ACT FOI Act*. This is evidenced by the fact that agencies are expressly exempt from the operation of the *ACT FOI Act* in respect of

- health records under the *ACT HRA*.<sup>61</sup> The whole of Part 3 of the *ACT HRA* is about access to health records and IPP7 is about alteration of health records; and
- (c) the role of the Privacy Commissioner is established by the *ACT Privacy Act*. The role and powers and functions of the Privacy Commissioner are referred to in more detail below.<sup>62</sup>

### ***How is privacy protected?***

Any act done or practice engaged in which is contrary to or inconsistent with the IPPs is an interference with privacy. An individual may make a written complaint to the Privacy Commissioner about an act or practice of an organisation that may have been an interference with privacy.<sup>63</sup>

Of course, complaints made directly to the organisation first are to be encouraged so that it can have an opportunity to address and appropriately deal with the complaint. If that has not occurred, or it has occurred and the complaint is being considered and dealt with by the organisation, the Privacy Commissioner may decline to investigate the complaint.<sup>64</sup> The Privacy Commissioner may decline to entertain or to dismiss a complaint on other grounds as well.<sup>65</sup>

If a complaint is made to the Privacy Commissioner in accordance with the *ACT Privacy Act*, there is an obligation to investigate the act or practice, which may be an interference with privacy.<sup>66</sup> The Privacy Commissioner may decide not to investigate on specific bases already mentioned. In order to assist in determining whether or not to investigate, the Privacy Commissioner may make preliminary inquiries.<sup>67</sup> The *ACT Privacy Act* also sets out the powers which the Privacy Commissioner has during the investigation process.

The *ACT Privacy Act* also imposes an obligation on the Privacy Commissioner to conciliate where appropriate to effect a settlement of the matters giving rise to the investigation (ie the complaint).<sup>68</sup>

### ***Remedies***

Remedies which agencies may provide to complainants vary and can include compensation, education of individuals or staff more generally, improvements in processes and procedures, and other similar measures to mitigate any harm and minimise the risk of future interferences with privacy.

The Privacy Commissioner may carry out conciliation of complaints with similar outcomes eg compensation for injury to feelings and humiliation.

If conciliation is not undertaken, or fails after investigation, the Privacy Commissioner has power to make findings and determinations that the complaint was substantiated, and to declare that:

- (a) the agency or individual involved should not repeat or continue the conduct;
- (b) the agency should redress any loss or damage suffered by a complainant (including for injury to feelings or humiliation suffered);
- (c) the complainant is entitled to compensation for loss or damage suffered;
- (d) no further action be taken<sup>69</sup>; and
- (e) the complainant is entitled to an amount to reimburse expenses reasonably incurred in connection with the making and investigation of the complaint.<sup>70</sup>

Such determinations are not binding or conclusive between the parties, but they give rise to other legal rights. An agency is obliged not to repeat or continue the conduct in question and must perform any conduct to redress the loss or damage suffered,<sup>71</sup> failing which an application may be made to court by the Privacy Commissioner or the complainant for an order directing the agency to comply.<sup>72</sup> Further, the complainant is entitled to be paid amounts specified for compensation or reimbursement of expenses and those amounts are recoverable as a debt due by the ACT to the complainant.<sup>73</sup>

## **New South Wales**

In New South Wales, the regulation of information privacy is split between the *Privacy and Personal Information Protection Act 1998* (NSW) (*NSW PPIPA*) and the *Health Records and Information Privacy Act 2002* (NSW) (*NSW HRIPA*). The *NSW PPIPA* deals with information privacy as it applies to personal information, but expressly excludes health information which is dealt with separately in the *NSW HRIPA*.<sup>74</sup>

### **What is dealt with?**

The NSW PPIPA uses the following definition of ‘personal information’:<sup>75</sup>

**personal information** means information or an opinion (including information or an opinion forming part of a database and whether or not recorded in a material form) about an individual whose identity is apparent or can reasonably be ascertained from the information or opinion.

The definition provides some inclusions by way of example, and also provides for specific exclusions. Personal information includes things such as an individual’s fingerprints, retina prints, body samples or genetic characteristics. However, it excludes information about a person who has been dead for 30 years, information contained in a publicly available publication, information or opinion about an individual’s suitability for appointment or employment as a public sector official, and identifies other specific exclusions.<sup>76</sup>

The definition of ‘personal information’ provides the basis for defining health information is for the purposes of the *NSW HRIPA*. The *NSW HRIPA* applies to every organisation that is a health service provider that collects, holds or uses health information, whether in the public or private sectors.<sup>77</sup>

### **Key features**

The *NSW PPIPA* sets out numerous Information Protection Principles (IPPs) as separate sections of the Act dealing with the collection, management, access, amendment, use, disclosure, security or transfer of personal information.<sup>78</sup>

The IPPs apply to public sector agencies,<sup>79</sup> these are defined to include government departments, statutory bodies representing the Crown, NSW Police Force, local councils, etc. The definition of ‘public sector agency’ expressly excludes a State owned corporation.<sup>80</sup>

The general rule is that a public sector agency must not do anything, or engage in any practice that contravenes an IPP applying to it.<sup>81</sup> There are a number of specific exemptions from the IPPs.<sup>82</sup>

Interesting features of the *NSW PPIPA* include the following:

- (a) nothing in the *NSW PPIPA* affects the operation of the *Government Information (Public Access) Act 2009 (NSW GIPA)*, or any obligations under that Act upon a public sector agency;<sup>83</sup>
- (b) one of the IPPs emphasises the obligation on public sector agencies to allow individuals to access their personal information on request. However, there is no specific process in the *NSW PPIPA* for this, presumably because an access application can be made under the *NSW GIPA*;<sup>84</sup>
- (c) in relation to amendment of personal information, the *NSW PPIPA* provides that a person may request a public sector agency to make appropriate amendments to ensure the information is accurate, relevant, up to date, complete and not misleading. The procedural aspects of how this is done are left to guidelines issued by the Privacy Commissioner.<sup>85</sup> It is important to note that, unlike some other jurisdictions, in NSW the freedom of information legislation does not deal with amendment, but rather it is dealt with in the privacy legislation;
- (d) as already mentioned, the *NSW PPIPA* excludes information about an individual contained in a publicly available publication from the definition of 'personal information';
- (e) unlike some other privacy related legislation, the privacy principles do not apply to private sector bodies. An exception to this is that a 'public sector agency' can include a person or body that provides data services (collection, processing, disclosure or use of personal information), and which have been prescribed by regulations to be a public sector agency. Of course, that could conceivably include a private sector body. As far as I am aware, no such bodies have been prescribed in the *NSW PPIP Regulation*; and
- (f) the Privacy Commissioner is established by the *NSW PPIPA*. The role and powers and functions of the Privacy Commissioner are referred to in more detail below. The Privacy Commissioner also has a role under the *NSW HRIPA*. The Privacy Commissioner has the function of receiving, investigating and conciliating complaints about privacy related matters, and has power to conduct inquiries and make investigations into privacy related matters.<sup>86</sup>

### ***How is privacy protected?***

A complaint may be made to or by the Privacy Commissioner about the alleged violations of or interference with the privacy of an individual. A complaint can be verbal or in writing, but the Privacy Commissioner may require it be put in writing.<sup>87</sup>

Of course, complaints made directly to the organisation first are to be encouraged so that it can have an opportunity to address and appropriately deal with the complaint. The *NSW PPIPA* refers to this as an internal review by the public sector agency. After making a preliminary assessment of the complaint, the Privacy Commissioner can decide not to deal with it if satisfied that it would be more appropriate for the complainant to apply for an internal review by the public sector agency. The Privacy Commissioner may decide not to deal with a complaint on other grounds as well.<sup>88</sup>

If the Privacy Commissioner decides to deal with a complaint, the Privacy Commissioner must endeavour to resolve the complaint by conciliation, and can make such inquiries and investigations as thought appropriate in dealing with the complaint.<sup>89</sup>

The NSW Civil and Administrative Tribunal (NCAT) can review the conduct of a public sector agency, but only if the matter has first been made the subject of an application directly to the public sector agency for internal review, and the person concerned is not satisfied with the findings on review or on action taken by the public sector agency.

### **Remedies**

The remedy available to a complainant will depend on the avenue undertaken and the outcome of the process.

Where a person applies in writing for internal review by the public sector agency, in reviewing the conduct or alleged conduct and upon completion of the review, the public sector agency may, in addition to taking no further action:

- (a) make a formal apology to the applicant;
- (b) take such remedial action as it thinks appropriate (eg payment of monetary compensation) – but it cannot pay monetary compensation for issues arising from when a person was a convicted inmate;<sup>90</sup>
- (c) undertake that the conduct will not occur again; and
- (d) implement administrative measures to ensure the conduct will not occur again.<sup>91</sup>

The public sector agency must notify the applicant in writing of the findings and reasons for findings, action proposed to be taken and reasons for the action, and the right to seek review by the NCAT of the findings and proposed action. The Privacy Commissioner must also be informed of the findings and proposed action.<sup>92</sup>

If a matter goes to the Privacy Commissioner and is the subject of conciliation, the Privacy Commissioner may make a written report on any findings or recommendations made in relation to the complaint dealt with.<sup>93</sup>

On reviewing the conduct of a public sector agency, the NCAT may make one or more of the following orders:<sup>94</sup>

- (a) an order that the public sector agency pays the applicant damages not exceeding \$40,000 for loss or damage suffered (where satisfied the applicant suffered financial loss or psychological or physical harm because of the conduct). Orders for compensation cannot be made in relation to conduct while the person was a convicted inmate;
- (b) an order that the public sector agency refrain from the contravening conduct;
- (c) an order requiring the performance of an IPP; and
- (d) an order requiring steps be taken to remedy any loss or damage suffered.

### **Queensland**

In Queensland, the regulation of information privacy is by the *Information Privacy Act 2009* (Qld) (*Qld IPAct*). It deals with information privacy as it applies to personal information more generally, and also deals separately with health agencies.

#### **What is dealt with?**

The *Qld IPAct* uses a definition of ‘personal information’ which is:

**Personal information** is information or an opinion, including information or an opinion forming part of a database, whether true or not, and whether recorded in a material form or not, about an individual whose identity is apparent, or can reasonably be ascertained, from the information or opinion.

In relation to health agencies, ‘health information’ about an individual is defined as being personal information about an individual including information:

- (a) about health, disability, expressed wishes about future provision of health services (which are also defined) or a health service provided or to be provided;
- (b) that is collected for or in providing a health service; or
- (c) that is collected in connection with donation or intended donation of body parts, organs or substances.

### **Key features**

The *Qld IPAct* establishes 11 Information Privacy Principles (IPPs) dealing with the collection, management, use, disclosure, security or transfer of personal information.<sup>95</sup> It also establishes 9 National Privacy Principles (NPPs) with which health agencies must comply. Health agencies are the health department, hospitals and health services.<sup>96</sup> Collectively, the IPPs and NPPs are referred to as the 'privacy principles'.<sup>97</sup>

The *Qld IPAct* imposes obligations on agencies, which are defined to mean Ministers, Departments, local councils and public authorities.<sup>98</sup> Interestingly, the privacy principles do not apply to a government owned corporation (or subsidiary of one).<sup>99</sup> Separate obligations are placed on health agencies.

An agency other than a health agency is required to comply with the IPPs. It must not carry out an act or engage in a practice that contravenes or is otherwise inconsistent with a requirement of an IPP. In addition, an agency must not fail to do an act or engage in a practice where to do otherwise would contravene or be inconsistent with the requirement of an IPP.<sup>100</sup> There are a number of exceptions or variations which are provided for in the *Qld IPAct*.<sup>101</sup>

Health agencies must comply with the NPPs, and must not carry out an act or engage in a practice that contravenes or is otherwise inconsistent with a requirement of an NPP. In addition, an agency must not fail to do an act or engage in a practice where to do otherwise would contravene or be inconsistent with the requirement of an NPP.<sup>102</sup>

Interesting features of the *Qld IPAct* are that:

- (a) it is not intended to affect the operation of another Act, including the *Right to Information Act 2009* (Qld) (*Qld RTI Act*).<sup>103</sup> If an access application under the *Qld RTI Act* could have been made under the *Qld IPAct* (ie because it sought access to documents containing information about the applicant), the applicant is to be given the opportunity to choose under which Act the application is to be dealt with. If they choose to have it dealt with under the *Qld IPAct*, the application fee is to be refunded. But if they wish to, they can continue have it dealt with under the *Qld RTI Act*.<sup>104</sup>
- (b) a person can apply under the *Qld IPAct* to obtain access to information about them and to have that information amended if it appears inaccurate, incomplete, out of date or misleading;<sup>105</sup>
- (c) the privacy principles do not apply to a generally available publication – a publication that is or is to be made generally available to the public, however it is published;<sup>106</sup>
- (d) there is a strong incentive on agencies that engage in services agreements with contractors (which can, of course, include private sector bodies), to ensure that the contract makes adequate provision to ensure the contractors are bound by the applicable privacy principles. Otherwise, the obligations that would attach to the contracted service provider attach to the contracting agency;<sup>107</sup>
- (e) the Information Commissioner and Privacy Commissioner are established by the *Qld IPAct*. The role and powers and functions of the Information Commissioner in this privacy context are referred to in more detail below; and

- (f) an agency can apply to the Information Commissioner for an approval that waives or modifies the agency's obligations to comply with the privacy principles either temporarily for a fixed period or until it is revoked or amended. An approval can be given where the Information Commissioner is satisfied that the public interest in the agency's compliance with the privacy principles is outweighed by the public interest in waiving or modifying the compliance to the extent stated in the approval.<sup>108</sup>

### ***How is privacy protected?***

The *Qld IPAct* provides for an individual to make a privacy complaint, which is defined to be about an act or practice of a relevant entity in relation to the individual's personal information that is a breach of the relevant entity's obligations to comply with the privacy principles (or an approval given which waived or modified compliance).<sup>109</sup>

An individual whose personal information is or has been held by a relevant entity may make a written privacy complaint to the Information Commissioner.<sup>110</sup>

Of course, complaints made directly to the relevant entity are encouraged so that it can have an opportunity to address and appropriately deal with the complaint. If that has not occurred, or it has occurred and the complaint is being considered and dealt with by the organisation (and less than 45 days have elapsed), the Information Commissioner may decline to entertain the complaint.<sup>111</sup> The Information Commissioner may decline to entertain or to dismiss a complaint on other grounds as well.<sup>112</sup>

The Information Commissioner is required to consider whether resolution of a privacy complaint could be achieved through mediation. If resolution appears reasonably likely, the Information Commissioner must take all reasonable steps to cause the complaint to be mediated.<sup>113</sup>

If a privacy complaint is made to the Information Commissioner and it is not reasonably likely to be resolved by mediation, or mediation is attempted and no resolution is achieved, at the request of the complainant the matter may be referred to the Queensland Civil and Administrative Tribunal (QCAT) which can hear and decide the matter under its original jurisdiction.<sup>114</sup>

### ***Remedies***

The remedy available to a complainant will depend on the avenue undertaken and the outcome of the process.

Remedies which organisations may provide to complainants can vary and could include compensation, education of individuals or staff more generally, improvements in processes and procedures, and other similar measures to mitigate any harm and minimise the risk of future contraventions of the privacy principles.

With the Information Commissioner, there may be a mediated agreement reached with similar outcomes eg compensation for injury to feelings and humiliation. For serious, flagrant or repeated breaches, the Information Commissioner has power to issue a compliance notice which, if not complied with, gives rise to an offence with financial penalties.<sup>115</sup>

If agreement is reached through mediation, either party may request the Information Commissioner to certify a written record of the agreement. That certified agreement can then be filed with QCAT, which can make orders necessary to give effect to the agreement if



it believes implementation is practicable, and consistent with what QCAT could have ordered after a hearing. Such an order is then enforceable as an order of QCAT.<sup>116</sup>

After hearing a privacy complaint referred to it, the QCAT can, if it finds a privacy complaint partly or wholly substantiated, order one or more of the following:<sup>117</sup>

- (a) the act or practice complained of is an interference with privacy and the entity must not repeat or continue it;
- (b) the entity must engage in a stated reasonable act or practice to compensate for loss or damage suffered by the complainant;
- (c) the entity must apologise to the complainant for the interference with privacy;
- (d) the entity pay not more than \$100,000 in compensation for loss or damage suffered by the complainant (including for injury to feelings or humiliation suffered); and
- (e) the complainant be reimbursed expenses reasonably incurred in connection with the making of the complaint.

## Tasmania

In Tasmania, the regulation of information privacy is dealt with by the *Personal Information Protection Act 2004* (Tas) (*Tas PIPAct*). The *Tas PIPAct* is not expressed in terms of privacy as such, but is focussed on personal information protection.

### What is dealt with?

The *Tas PIPAct* defines 'personal information' as follows:

**personal information** means any information or opinion in any recorded format about an individual-

- (a) whose identity is apparent or is reasonably ascertainable from the information or opinion; and
- (b) who is alive or has not been dead for more than 25 years.

### Key features

The *TAS PIPAct* establishes 10 Personal Information Protection Principles (PIPPs) dealing with the collection, management, use, disclosure, security or transfer of personal information and a specific PIPP for sensitive information.<sup>118</sup>

The *Tas PIPAct* imposes obligations on a 'personal information custodian', which is defined to be a public authority<sup>119</sup> or 'any body, organisation or person who has entered into a personal information contract relating to personal information'.<sup>120</sup> A personal information contract is one relating to the collection, use or storage of personal information,<sup>121</sup> this can clearly extend to private sector contractors.

A personal information custodian (PIC) must comply with the PIPPs.<sup>122</sup>

Interesting features of the *Tas PIPAct* include:

- (a) if a provision made by or under any other Act is inconsistent with a provision in the *Tas PIPAct*, the former act prevails and to the extent of any inconsistency the latter provision is of no effect;<sup>123</sup>
- (b) if a person wishes to amend personal information about themselves held by a PIC, a request to do so can be made under Part 3A of the *Tas PIPAct*. There is no right to apply for amendment under the *Right to Information Act 2009* (Tas) (*Tas RTI Act*);

- (c) the *Tas PIPAct* does not apply to public information.<sup>124</sup> This is personal information contained in a publicly available record (in any format) or publication, or that is taken to be public information under any Act; and<sup>125</sup>
- (d) the only connection which the *TAS PIPAct* has to the private sector is to the extent that a PIC is a private sector contractor which has, for example, entered into a contract for the storage of personal information.

### ***How is privacy protected?***

We saw that PICs must comply with the PIPPs. A person can make a written or verbal complaint to the Ombudsman alleging a contravention by a PIC of a PIPP that applies to that person.

However, such a complaint can only be made if the matter is first raised with the relevant PIC and the person is not satisfied with the response from the PIC. Further, if the complaint is verbal, the Ombudsman can require the complaint to be made in writing.<sup>126</sup> Therefore, there is statutory encouragement for complaints to be made directly to the PIC first so that it can have an opportunity to address and appropriately deal with the complaint.

There are grounds on which the Ombudsman may after conducting a preliminary assessment decide not to deal with the complaint - if it is frivolous, vexatious, lacking in substance or not made in good faith, or the subject matter is trivial.<sup>127</sup>

If the Ombudsman decides to deal with a complaint, the Ombudsman is to conduct investigations in relation to the complaint in accordance with provisions of the *Ombudsman Act 1978* (Tas).<sup>128</sup>

### ***Remedies***

The remedy available to a complainant will depend on the avenue undertaken and the outcome of the process. Remedies which PICs may provide to complainants can include compensation, education of individuals or staff more generally, improvements in processes and procedures, and other similar measures to mitigate any harm and minimise the risk of future contraventions of the PIPPs.

The emphasis in the *Tas PIPAct* is not so much on conciliation, rather it focuses on what can happen on the completion of an investigation by the Ombudsman and if the Ombudsman is of the opinion that a PIPP has been contravened by a PIC. In such a situation, the Ombudsman is to advise the complainant and the PIC in writing of the opinion reached and reasons for it. The Ombudsman may also make recommendations considered appropriate about the subject matter of the complaint. A copy the opinion and any recommendations are to be given to the relevant Minister, who is required to table the advice and recommendations in both Houses of Parliament within 5 sitting days. Therefore, there is a strong incentive for PICs to avoid such a public outcome.<sup>129</sup>

### ***Northern Territory***

In the Northern Territory, the regulation of information privacy is contained within the *Information Act 2002* (NT) (*NT Information Act*).

### ***What is dealt with?***

The *NT Information Act* deals with information privacy as it applies to 'personal information', defined as:

**personal information** means government information from which a person's identity is apparent or is reasonably able to be ascertained.

**government information** means a record held by or on behalf of a public sector organisation and includes personal information.

**record** means recorded information in any form (including data in a computer system) that is required to be kept by a public sector organisation as evidence of the activities or operations of the organisation, and includes part of a record and a copy of a record.

**person** means an individual and includes a deceased individual within the first 5 years after death.

### ***Key features***

The *NT Information Act* establishes 10 Information Privacy Principles (IPPs) dealing with the collection, management, use, disclosure, security or transfer of personal information and a specific IPP for sensitive information.<sup>130</sup>

The *NT Information Act* imposes obligations on public sector organisations (PSOs), which include agencies, local councils, various offices or bodies, statutory corporations, government owned corporations, and defined contract service providers,<sup>131</sup> as well as others who provide services to the organisation under contract between the organisation and NT to the extent of the services provided.<sup>132</sup>

A PSO interferes with a person's privacy if it contravenes an IPP.<sup>133</sup>

Features of the *NT Information Act* include the following:

- (a) if another provision in the *NT Information Act* is inconsistent with an IPP, the other provision applies and the IPP does not, to the extent of the inconsistency;<sup>134</sup>
- (b) if a person wishes to obtain access to government information (including personal information about himself/herself), or amend the personal information held by a PSO, that is also done under the *NT Information Act*. It is a bit of a one stop shop for records and archives creation and management, access, amendment and privacy;
- (c) only two of the IPPs apply to personal information in publications that are generally available to members of the public, public registers (except for one limitation), and public archives.<sup>135</sup> The limitation in relation to public registers is that public registers are to be kept in compliance with the IPPs to the extent it is reasonably practicable to do so;<sup>136</sup>
- (d) there is a strong incentive on a PSO to ensure that service contracts provide that contract service providers must comply with IPPs in the same way as the PSO contracting them. Otherwise, the PSO is attributed with the blame for any interference with privacy that may arise from an act or practice of the contractor;<sup>137</sup>
- (e) the role of the Information Commissioner is established by the *NT Information Act*; and
- (f) on the application of a PSO, the Information Commissioner can authorise a PSO in writing to collect, use or disclose personal information in a way that would otherwise contravene or be inconsistent with the IPPs dealing with collection and use/disclosure of personal information including sensitive information. An authorisation can be granted where the public interest in collecting, using or disclosing the information

outweighs to a substantial degree the interference with privacy that would otherwise arise.<sup>138</sup>

### ***How is privacy protected?***

A PSO interferes with a person's privacy if it contravenes an IPP.<sup>139</sup>

An individual may make a *written* complaint to the Information Commissioner about a PSO on the basis that it obtained or handled his or her personal information in a manner that contravened an IPP (or authorisation) or was otherwise an interference with the person's privacy.<sup>140</sup>

Of course, complaints made directly to the PSO first are encouraged so that it can have an opportunity to address and appropriately deal with the complaint. The *NT Information Act* makes it a statutory pre-condition that before a person can make a complaint to the Information Commissioner, he or she must have first requested the PSO to resolve or rectify the matter complained of and has not received a response or is not satisfied with the response received.<sup>141</sup> The complaint to the Information Commissioner must set out details of the attempts made by the complainant to have the PSO resolve or rectify the matter, and the responses to those attempts.<sup>142</sup> There are other grounds on which the Information Commissioner may accept or reject a complaint; these include that the complainant has not requested that the respondent PSO resolve or rectify the matter (or has made such a request, but it is being dealt with or has been dealt with adequately).<sup>143</sup>

If a complaint is accepted, the Information Commissioner must investigate and decide whether there is sufficient *prima facie* evidence to substantiate the matter complained of. If not the complaint is dismissed. If there is sufficient evidence, the matter must be referred to mediation.<sup>144</sup>

If the matter is not resolved by mediation or other agreement, the Information Commissioner must *hold a hearing in relation to the complaint in accordance with the procedures set out in the NT Information Act*.<sup>145</sup> After conducting a hearing, the Information Commissioner must make findings as to whether the matter complained of has been proved (either wholly or partly).<sup>146</sup>

### ***Remedies***

The remedy available to a complainant will depend on the avenue undertaken and the outcome of the process.

Remedies which PSOs may provide to complainants can vary and can include compensation, education of individuals or staff more generally, improvements in processes and procedures, and other similar measures to mitigate any harm and minimise the risk of future interferences with privacy.

Of course, with the Information Commissioner, the mediation process referred to may give rise to similar outcomes eg compensation for injury to feelings and humiliation. If the matter is so resolved, the parties can jointly apply to the Information Commissioner for orders to give effect to the resolution.

For serious, flagrant or repeated contraventions of an IPP, the Information Commissioner has power to issue a compliance notice which, if not complied with, gives rise to an offence with a penalty of up to 300 penalty units.<sup>147</sup>

Determinations after a hearing that the matter complained of is proved can result in orders including that:<sup>148</sup>

- (a) the PSO refrains from repeating or continuing the act complained of; and
- (b) the PSO redress any loss or damage suffered by the complainant (including injury to feelings or humiliation suffered) including compensation not exceeding \$60,000.

Further, any orders made by the Information Commissioner that the matter complained of has been proved must be given to the minister responsible for the PSO and may be accompanied by recommendations about the collection and handling of personal information by the PSO.<sup>149</sup>

Finally, a person aggrieved by a decision of the Information Commissioner can appeal it to the Supreme Court on a question of law only.<sup>150</sup>

## **South Australia**

### ***What is dealt with?***

In South Australia, the Cabinet IPPS Instruction applies to 'personal information' which is defined as:

'personal information' means information or an opinion, whether true or not, relating to a natural person or the affairs of a natural person whose identity is apparent, or can reasonably be ascertained, from the information or opinion.

### ***Key features***

The IPPS Instruction places an obligation on the principal officer of agencies to ensure that various Information Privacy Principles (Principles) are implemented, maintained and observed for and in respect of all personal information for which the agency is responsible. The Principles deal with collection, storage, access, correction, use and disclosure of personal information.<sup>151</sup>

An agency<sup>152</sup> must not carry out an act or engage in a practice in breach or contravention of the Principles.<sup>153</sup>

An interesting feature of the IPPS Instruction is that where a contract for service necessitates the disclosure of personal information to a contracted service provider, the contract must include conditions to ensure that the Principles are complied with as if the contracted service provider was part of the agency.<sup>154</sup>

The Privacy Committee of South Australia (Committee) was established by Proclamation to advise the Minister and the Government generally about privacy related matters.<sup>155</sup> The Committee can on its own initiative investigate the nature and extent of compliance by an agency with the Principles.<sup>156</sup> It can also exempt a person or body from one or more of the Principles on such conditions as it thinks fit.

### ***How is privacy protected?***

Apart from requiring agencies to comply with the Principles, the IPPS Instruction does not provide for how privacy is protected more generally. The Committee has developed a facilitative role to help with the resolution of complaints about privacy.<sup>157</sup>

The Committee suggests that any complaints should, in the first instance, be raised directly with the agency that is believed may have breached the complainant's privacy. If the agency is unable to help, or the complainant is dissatisfied with the response, it is suggested that a complaint is lodged with the Committee.

### **Remedies**

The IPPS Instruction gives the Committee the function of referring written complaints concerning violations of individual privacy received by it to 'the appropriate authority'. Consistent with that approach, the Committee web site explains how the complaint will be handled.

In the first instance, the Privacy Committee will forward your complaint to the agency concerned and seek a response as to whether they consider a breach of the Information Privacy Principles has occurred and, if so, what action has been or might be taken to resolve the matter. The Privacy Committee will assess the response and, if necessary, make a recommendation to the agency to amend their practices or to adopt other measures to resolve the complaint. The Committee will acknowledge receipt of your complaint in writing and provide you with updates throughout the complaint resolution process as necessary.

If the complaint relates to privacy breaches in the delivery of Government health services, the Committee may refer the complaint to the Health and Community Services Complaints Commissioner. If the complaint relates to privacy breaches in relation to the South Australian Police, the Committee may refer the complaint to the Office of the Police Ombudsman.

The Committee will also accept complaints in relation to South Australian universities and Local Government. While there is no legislated or administrative privacy regime that applies to these organisations, the Committee has worked with them in the past to resolve complaints and improve their practices when handling personal information.<sup>158</sup>

### **Western Australia**

As mentioned earlier, there is no general legislative handling of personal information privacy, but rather there is the administrative protection offered by public sector codes of ethics.

### **Conclusion**

This concludes my brief survey of the privacy regime in each Australian jurisdiction. In Part 2, to be published subsequently, I will consider how each Australian jurisdiction deals with applications for access under their freedom of information/right to information legislation, the nature and scope of each relevant personal privacy related exemption provision, and how the different jurisdictions manage the balance between privacy and freedom of information regimes.

### **Endnotes**

- 1 United Nations General Assembly, 10 December 1948.  
No one shall be subjected to arbitrary interference with his privacy, family, home or correspondence, nor to attacks upon his honour and reputation. Everyone has the right to the protection of the law against such interference or attacks.
- 2 The Covenant entered into force for Australia 13 November 1980.  
No one shall be subjected to arbitrary or unlawful interference with his privacy, family, home or correspondence, nor to unlawful attacks on his honour and reputation.
- 3 'Everyone has the right— (a) not to have his or her privacy, family, home or correspondence interfered with unlawfully or arbitrarily...'
- 4 'A person has the right— (a) not to have his or her privacy, family, home or correspondence unlawfully or arbitrarily interfered with'.

- 5 Note that at the time of writing, there was a bill before the Victorian Parliament which would repeal and substitute the *Vic IPAct*, the Privacy and Data Protection Bill 2014 (Vic PDP Bill). That bill was enacted as the *Privacy and Data Protection Act 2014* (Vic PDPAct).
- 6 *Cabinet Administrative Instruction No 1 of 1989* (as amended). Available at [http://dpc.sa.gov.au/sites/default/files/pubimages/Circulars/PC012\\_Privacy\\_0.pdf](http://dpc.sa.gov.au/sites/default/files/pubimages/Circulars/PC012_Privacy_0.pdf)
- 7 Available at <http://www.health.sa.gov.au/Portals/0/Health-Code-July04.pdf> (as at 7 July 2014).
- 8 Directive D0067. This is no doubt supported by the *Code of Ethics for the South Australian Public Sector* which was introduced as a public sector code of conduct under the *Public Sector Act 2009* (SA). It places an obligation on public sector employees to maintain the integrity and security of official information for which they are responsible. Employees are required to ensure that the privacy of individuals is maintained and may only release information in accordance with relevant legislation, industrial instruments, policy or lawful and reasonable direction. Section 6 of the *Public Sector Act 2009* (SA) requires public sector employees to comply with such codes of conduct.
- 9 See Commissioner's Instruction No. 8: *Codes of conduct and integrity training*, available at [http://www.publicsector.wa.gov.au/sites/default/files/documents/commissioners\\_instruction\\_08\\_codes\\_of\\_conduct\\_and\\_integrity\\_training.pdf](http://www.publicsector.wa.gov.au/sites/default/files/documents/commissioners_instruction_08_codes_of_conduct_and_integrity_training.pdf) as at 7 July 2014.
- 10 Public Sector Commission, *Conduct guide*, p9. Available at [http://www.publicsector.wa.gov.au/sites/default/files/documents/conduct\\_guide\\_5.pdf](http://www.publicsector.wa.gov.au/sites/default/files/documents/conduct_guide_5.pdf) at July 2014.
- 11 Available on a link at <http://www.publicsector.wa.gov.au/document/sample-code-conduct-boards-and-committees> as at 7 July 2014.
- 12 Definition in s 6, *Cth Privacy Act*. The *Cth Privacy Act* also deals with health information for research and similar purposes and will not be considered further in this paper.
- 13 Section 14(1) and Schedule 1, *Cth Privacy Act*.
- 14 See definition of 'agency' in s 6, *Cth Privacy Act*.
- 15 See s 6C, *Cth Privacy Act*.
- 16 Sections 6A and 15, *Cth Privacy Act*.
- 17 APP 12, *Cth Privacy Act*.
- 18 *Chapter 13: Australian Privacy Principle 13 – Correction of personal information*, February 2014 available at: <http://www.oaic.gov.au/images/documents/privacy/applying-privacy-law/app-guidelines/chapter-13-app-guidelines-v1.pdf> at 21 July 2014.
- 19 See for example s 13(3), *Cth Privacy Act*.
- 20 Part VI, *Cth Privacy Act*. See also Part VIA in relation to dealing with personal information in emergencies.
- 21 Section 13, *Cth Privacy Act*.
- 22 Section 36, *Cth Privacy Act*.
- 23 Section 40(1A) and 41(2), *Cth Privacy Act*. The Information Commissioner retains a discretion to decide to investigate if he or she considers that it was not appropriate for the complainant to complain directly to the respondent entity.
- 24 See s 41, *Cth Privacy Act* generally.
- 25 Section 40, *Cth Privacy Act*.
- 26 Section 40A, *Cth Privacy Act*.
- 27 Section 13G, *Cth Privacy Act*.
- 28 Section 80W, *Cth Privacy Act*.
- 29 Section 52, *Cth Privacy Act*.
- 30 Section 58, *Cth Privacy Act*.
- 31 Section 60, *Cth Privacy Act*.
- 32 Section 62, *Cth Privacy Act*. Note however that an application may be made to the Administrative Appeals Tribunal (AAT) for review of the decision of the Information Commissioner to make a determination under s 52: s 96, *Cth Privacy Act*.
- 33 Since this paper was presented, the *Vic IPAct* has been repealed and replaced by the *Vic PDPAct*.
- 34 I will not refer to the provisions of the *Vic HRAAct* other than to point out some similarities or differences between the *Vic IPAct* and the *Vic HRAAct*.
- 35 Under the *Vic HRAAct* there are 12 Health Privacy Principles (HPPs).
- 36 Section 14(1) and Schedule 1, *Vic IPAct*. Now see s 18(1) and Schedule 1, *Vic PDPAct*.
- 37 Section 9(1), *Vic IPAct*. Now see s 13(1), *Vic PDPAct*. A State contract is defined as meaning: a contract between an organisation and another person or body (whether an organisation for the purposes of this Act or not) under which services are to be provided to one (the outsourcing organisation) by the other (the contracted service provider) in connection with the performance of functions of the outsourcing organisation, including services that the outsourcing organisation is to provide to other persons or bodies.
- 38 Section 11, *Vic HRAAct*.
- 39 Sections 14(3) and 16(1), *Vic IPAct*. (See also now ss 16 and 20, *Vic PDPAct*.) Sections 18 and 21, *Vic HRAAct*.
- 40 Section 6(1), *Vic IPAct*. (See also now s 6(1), *Vic PDPAct*) Section 7(1), *Vic HRAAct*.
- 41 Section 12, *Vic IPAct*. (See now s 14, *Vic PDPAct*) See also s 16, HPP6 and Part 5, *Vic HRAAct* for access to and amendment of health information.
- 42 There are specific provisions in Part 5 of the *Vic HPAAct* for access to health information because that Act extends to the private sector as well as the public sector.

- 43 Section 11(1), *Vic IPAct*. (See now s 12(1), *Vic PDPAct*) See s 15, *Vic HRAAct* for publicly available health information.
- 44 Section 16(4), *Vic IPAct*. See now s 20(2), *Vic PDPAct*.
- 45 Section 17, *Vic IPAct*. (See now s 17, *Vic PDPAct*) See also s 12, *Vic HRAAct* for health information.
- 46 Under the *Vic HRAAct*, matters are dealt with by the Health Services Commissioner. Under the *Vic PDPAct*, matters are now dealt with by the Commissioner for Privacy and Data Protection.
- 47 Section 25, *Vic IPAct*. See now s 57, *Vic PDPAct*. A complaint about health information is to the Health Services Commissioner under s 45, *Vic HRAAct*.
- 48 Section 29(1)(c) and (h), *Vic IPAct*. (See now s 62(1)(c) and (h), *Vic PDPAct*) See s 51, *Vic HRAAct* for health information complaints.
- 49 See s 29, *IPAct* generally. See now s 62, *Vic PDPAct*.
- 50 Sections 29, 32, 37, *Vic IPAct*. (See now ss 62, 66 and 71, *Vic PDPAct*.) See s 54, *Vic HRAAct*.
- 51 Section 64, *Vic HRAAct*.
- 52 See s 83, *Victorian Civil and Administrative Tribunal Act 1998* (Vic) (*VCAT Act*).
- 53 See for example, *AY v Public Sector Employer* [2013] VPrivCmr 2 viewed on 19 July 2013 at: [https://www.privacy.vic.gov.au/domino/privacyvic/web2.nsf/files/complainant-ay-v-public-sector-employer-2013/\\$file/case\\_note\\_02\\_13.pdf](https://www.privacy.vic.gov.au/domino/privacyvic/web2.nsf/files/complainant-ay-v-public-sector-employer-2013/$file/case_note_02_13.pdf).
- 54 Sections 44, 48, *Vic IPAct*. (See now ss 78 and 81, *Vic PDPAct*) See ss 66 and 71, *Vic HRAAct*.
- 55 Section 43, *Vic IP Act*. (See now s 77, *Vic PDPAct*) See s 78, *Vic HRAAct* in relation to health information.
- 56 As far as we are able to ascertain, the VCAT has never imposed a compensation order when a finding of interference with privacy has been made.
- 57 Section 14, *ACT Privacy Act*. The *ACT HRAAct* establishes 12 privacy principles (there are also some sub-principles (PPs)).
- 58 See Schedule 3, *Consequential Provisions Act*.
- 59 Sections 6(2) and 16, *ACT Privacy Act*.
- 60 Section 13, *ACT Privacy Act*. A person can make a complaint to the ACT Human Rights Commission about an act or omission which contravenes the privacy principles: s 18(1), *ACT HRAAct*.
- 61 Section 6(2), *ACT FOI Act*.
- 62 Under the *ACT HRAAct* complaints are dealt with by the ACT Human Rights Commission.
- 63 Section 36, *ACT Privacy Act*. A complaint about health records is made to the ACT Human Rights Commission under s 18, *ACT HRAAct*.
- 64 Section 41, *ACT Privacy Act*.
- 65 See s 41, *ACT Privacy Act* generally.
- 66 Section 40, *ACT Privacy Act*.
- 67 Section 42, *ACT Privacy Act*.
- 68 Section 27(1)(a), *ACT Privacy Act*.
- 69 Section 52, *ACT Privacy Act*.
- 70 Section 52(3), *ACT Privacy Act*.
- 71 Section 58, *ACT Privacy Act*.
- 72 Section 62, *ACT Privacy Act*.
- 73 Section 60(2) and (2A), *ACT Privacy Act*.
- 74 See s 4A, *NSW PPIPA*. I will not refer to the provisions of the *NSW HRIPA* other than by way of contradistinction or illustration to point out some similarities or differences between it and the *NSW PPIPA*.
- 75 Section 4(1), *NSW PPIPA*. The definition in the *NSW HRIPA* is identical, with the exception of the exclusions: s 5, *NSW HRIPA*.
- 76 See s 4(2) and (3), *NSW PPIPA*.
- 77 Section 11, *NSW HRIPA*. There are some public sector specific provisions in Part 3 of *NSW HRIPA* and some private sector specific provisions in Part 4 of the *NSW HRIPA* – particularly in relation to access and amendment, as well as in Part 6 in relation to making complaints against private sector persons for contraventions of Health Privacy Principles: Part 6, *NSW HRIPA*.
- 78 Sections 8-19, *NSW PPIPA*. The *NSW PPIPA* sets out numerous Health Privacy Principles (HPPs).
- 79 Section 20, *NSW PPIPA*.
- 80 Section 3, *NSW PPIPA*.
- 81 Sections 21, *NSW PPIPA*.
- 82 See ss 22-28, *NSW PPIPA*.
- 83 Section 5, *NSW PPIPA*.
- 84 Section 14, *NSW PPIPA*.
- 85 Section 15, *NSW PPIPA*.
- 86 Section 36, *NSW PPIPA*.
- 87 Section 45, *NSW PPIPA*.
- 88 See s 46, *NSW PPIPA*.
- 89 Sections 48 and 49, *NSW PPIPA*.
- 90 Section 43(7A), *NSW PPIPA*.
- 91 Section 53, *NSW PPIPA*.
- 92 Sections 53 and 54, *NSW PPIPA*.
- 93 Section 50, *NSW PPIPA*.
- 94 As well as any ancillary orders thought appropriate: s 55, *NSW PPIPA*.



- 95 Section 26 and Sch 3, *Qld IPAct*.
- 96 Sections 30, 31 and Sch 4, *Qld IPAct*. See definitions in Sch 5, *Qld IPAct*. These are understood to be limited to public hospitals and health services and do not extend to the private sector.
- 97 The 'privacy principles' are the requirements applying to an entity under Chapter 2 (which includes all agencies and health agencies): see definitions in Schedule 5, *Qld IPAct*.
- 98 Section 18, *Qld IPAct*. 'Public authority' is defined in s 21, *Qld IPAct*.
- 99 Schedule 2, Part 1, cl 6, *Qld IPAct*.
- 100 Section 27, *Qld IPAct*.
- 101 See eg ss 28 and 29, *Qld IPAct*.
- 102 Section 31, *Qld IPAct*.
- 103 Sections 4-9, *Qld IPAct*.
- 104 Section 9, *Qld IPAct* and s 34, *Qld RTI*.
- 105 See generally Chapter 3, *Qld IPAct*.
- 106 Section 16, cl 7(a) of Schedule 1, and definition of 'generally available publication' in Sch 5, *Qld IPAct*.
- 107 See ss 34-37, *Qld IPAct*.
- 108 Section 157, *Qld IPAct*.
- 109 That is, an agency or a bound contracted service provider: s 164, *Qld IPAct*.
- 110 Section 165, *Qld IPAct*.
- 111 Sections 166(3), 168(1)9b), (d).
- 112 See s 168, *Qld IPAct* generally.
- 113 Section 171, *Qld IPAct*.
- 114 Sections 174 – 177, *Qld IPAct*.
- 115 Sections 158 – 160, *Qld IPAct*.
- 116 Sections 172 and 173, *Qld IPAct*.
- 117 Section 178 *Qld IPAct*.
- 118 Section 16) and Schedule 1, *Tas PIPAct*.
- 119 As defined in the *TAS RTI Act* to include an agency under the *State Services Act 2000* (Tas), the University of Tasmania, the police, councils, statutory authorities, bodies established for public purposes, GBE's etc.
- 120 See definition of 'personal information custodian' in s 3, *Tas PIPAct*.
- 121 See definition of 'personal information contract' in s 3, *Tas PIPAct*.
- 122 Section 17(1), *Tas PIPAct*.
- 123 Section 4, *Tas PIPAct*.
- 124 Section 8, *Tas PIPAct*.
- 125 Definition of 'public information' in s 3, *Tas PIPAct*.
- 126 Section 18, *Tas PIPAct*.
- 127 Section 19, *Tas PIP Act*.
- 128 Section 21, *Tas PIP Act*.
- 129 Section 22, *Tas PIPAct*.
- 130 Section 65 and Schedule 2, *NT Information Act*.
- 131 Persons or bodies collecting or handling personal information for or on behalf of a PSO under a service contract: definitions in s 4, *NT Information Act*.
- 132 Section 5, *NT Information Act*.
- 133 Section 67, *NT Information Act*. This also applies to a contravention of any code of practice or an authorisation given by the NT Information Commissioner.
- 134 Section 65(2), *NT Information Act*.
- 135 Section 68, *NT Information Act*. See also s 12.
- 136 Section 68(2), *NT Information Act*.
- 137 Section 149, *NT Information Act*.
- 138 Section 81, *NT Information Act*.
- 139 Or code of practice or authorisation.
- 140 Section 104(1), *NT Information Act*.
- 141 Section 104(2), *NT Information Act*.
- 142 Section 105(e), *NT Information Act*.
- 143 Section 106(3)(c), *NT Information Act*.
- 144 Section 110, *NT Information Act*.
- 145 Sections 113, 121-128.
- 146 Section 115, *NT Information Act*.
- 147 Section 84, *NT Information Act*.
- 148 Section 115, *NT Information Act*.
- 149 Section 116(2), *NT Information Act*.
- 150 Section 129, *NT Information Act*.
- 151 Clause 4, IPPS Instruction.
- 152 That is, public sector agencies as defined in s 3(1) of the *Public Sector Act 2009* (SA).
- 153 Clause 6, IPPS Instruction.
- 154 Clause 5A, IPPS Instruction.
- 155 See generally, Government of South Australia, *Privacy Committee Members Handbook*, March 2014.
- 156 Clause 8, IPPS Instruction.

- 157 See generally the web site of the Committee at: <http://www.archives.sa.gov.au/privacy/committee.html>.
- 158 See at <http://www.archives.sa.gov.au/privacy/complaint.html> . Further information is available from the annual reports of the Committee (eg 2012/13 Annual Report at: [http://www.archives.sa.gov.au/files/privacy\\_annualreport\\_12-13.pdf](http://www.archives.sa.gov.au/files/privacy_annualreport_12-13.pdf)).