

REPORT ON PROCEEDINGS BEFORE

**COMMITTEE ON THE OMBUDSMAN, THE LAW
ENFORCEMENT CONDUCT COMMISSION AND THE
CRIME COMMISSION**

**2017 REVIEW OF THE ANNUAL REPORTS OF OVERSIGHTED
BODIES**

At Macquarie Room, Parliament House, Sydney on Thursday, 1 June 2017

The Committee met at 1:30 pm

PRESENT

Mr L. Evans (Chair)

Legislative Council

The Hon. L. Amato

The Hon. T. Khan

The Hon. A. Searle

Legislative Assembly

Mr S. Bromhead

Mr P. Lynch

Dr H. McDermott

ELIZABETH COOMBS, Acting Privacy Commissioner, Office of the Privacy Commissioner, sworn and examined

NICK YETZOTIS, Acting Senior Advisor, Office of the Privacy Commissioner, affirmed and examined

The CHAIR: I now declare open the Committee's second hearing for the 2017 review of annual reports of oversight bodies. I thank the witnesses who are appearing before the Committee today from the Office of the Privacy Commissioner. Before we proceed, do you have any questions about the hearing process?

Dr COOMBS: No, Chair.

The CHAIR: Would you like to make a short opening statement?

Dr COOMBS: I would, thank you, Chair. I have a written statement which we have copies of if Committee members would like to have them at the same time. I intend to speak to that opening statement. I have timed it at about seven to eight minutes, if that is a good length.

The CHAIR: Perfect.

Dr COOMBS: Thank you Chair and Committee members for the opportunity to assist your review today. There are two key points I wish to make. These are privacy developments since my annual report and my last hearing before you, and how these developments reinforce the need for an articulated vision for privacy in New South Wales and better organisational arrangements for the undertaking of statutory privacy functions.

The relevant developments in privacy are: greater privacy awareness in the public and business communities; increasing attention to privacy in State and Federal parliaments; digital reality—we have seen cyber security risks, artificial intelligence and the "internet of things"; but also regulatory changes being introduced here and overseas, and the international scrutiny which is now coming to bear on Australia.

On those I will speak further, but New South Wales needs to be prepared for international and national changes in privacy regulation. These issues collectively indicate that what we need in New South Wales is a clearly articulated vision of how privacy is regarded and what the approach to privacy is. It has been pleasing to see the notice of intention as well as the introduction in the New South Wales Parliament of privacy positive legislation, and that has been from all sides of politics in recent years. But an overarching statement communicating how the privacy of the New South Wales public will be factored into, for example, strategies such as digital government, online service provision and transactions would be timely and very well received.

I said earlier that New South Wales needs to be prepared for international and national changes in privacy regulation. Specifically, in May of next year the EU General Data Protection Regulation will be introduced. This applies to all who collect data on EU citizens—and that is whether the providers or the citizens are in Europe or overseas—for instance, health services and insurance services and the like. Other relevant laws that are coming into effect are China's cyber security law, with its data localisation provisions, but also court decisions made overseas will also impact upon New South Wales, if not in the short term, in the longer term. Most recently I have received preliminary confirmation from the Australian Privacy Commissioner that the Notifiable Data Breaches scheme will apply to all organisations that collect tax file numbers.

Over the past year, we have been positioning New South Wales in relation to international privacy work, particularly with the United Nations Special Rapporteur on the Right to Privacy, Professor Joseph Cannataci. He is increasingly influencing privacy directions and perceptions, so I was very pleased to recently announce the appointment of Mr Chris Puplick, AM, to the UN health privacy task force reporting to the Special Rapporteur on Privacy. As you will know, Chris was a former Privacy Commissioner and will be a great and effective contributor to that task force.

The mandate for the UN Special Rapporteur on Privacy includes seeking clarification of matters of concern that come to his attention. He most recently wrote to the Australian Prime Minister about a matter that was publicly reported. The correspondence and response will be included in a report to the Human Rights Council. At this stage the contents are confidential, as is the copy of the correspondence, but I was buoyed by the recognition implicit in his letter, which quoted a submission that my office made to the Senate committee on legal and constitutional affairs in late 2016. Also in May this year I was asked by the Rapporteur to be a vice-chair of the task force he is chairing, and this is a personal invitation. Professor Cannataci is planning to visit Australia next year. At his request, I have written to the Committee to see what interest there might be in meeting with him.

My statement is divided into two parts, and I am now moving to the second part. This concerns the ongoing and significant asymmetry in the organisational arrangements for undertaking privacy statutory functions within the commission. This significant asymmetry remains very evident in the following areas: finances and budget; employment conditions of my staff, including seniority; communications to assist the public with their privacy concerns; and corporate services support, particularly systems that assist us to manage cases. This is producing inefficient and ineffective regulation, and difficulties in assisting members of the public.

In my last year's annual report I provided workload statistics that showed greater productivity with resources allocated specifically to privacy, as compared to the previous model where there was little ability for the Privacy Commissioner, the relevant statutory officer, to oversee the commission's privacy work. I want to acknowledge that the Attorney General, the Hon. Mark Speakman, has continued retention of the current arrangements of the specific privacy team and the assistance provided by his office. We have received very fair hearings on issues that go to the protection of privacy.

I have the preliminary figures for 2016-17, which demonstrate again the greater productivity achieved through the specific privacy team allocation. That is at the back of the opening statement. I am very happy to answer any questions members may have on those preliminary figures. I need to report that the organisational difficulties outlined in my annual reports since 2013-14 and years following and other statutory reports have not changed. The assistance that can be provided to members of the public and also to the public and private sectors is hindered by these arrangements. For example, consultations do not occur early in the development of initiatives, producing delays and inefficiencies. There is confusion as to who is able to provide definitive statutory advice on privacy. The office is perceived as transitory and its statutory advice as irrelevant. These problems neither serve customer needs nor meet Parliament's intentions for an equal and independent Privacy Commissioner within the Information and Privacy Commission. This is regarded with concern across the community, including amongst legal and academic circles.

This Committee in its 2016 annual review report stated that it was sympathetic to my concerns and would continue to monitor staffing to ensure statutory officers are provided with adequate funding to perform their functions. The resourcing constraints, as I said, recorded in my statutory reports have not eased. I ask you to note the recent parliamentary inquiries that have also recommended increased resourcing for our office and that these recommendations have not been acted upon. I also ask you to make specific and practical recommendations after your consideration, for example, about the allocation of a budget for the Office of the Privacy Commissioner as per the documentation we provided last year.

My priorities, if equitable funding is provided, include the support particularly of non-government organisations in rural and regional New South Wales, as recommended by the inquiry chaired by the Hon. Bronnie Taylor, MLC, amongst other priorities. I thank the Committee for its interest. I also place on the public record my thanks to the dedicated work of the privacy team, small though it is—in particular, Mr Nick Yetzotis, who appears with me, Amy McKenna and those who continued with us despite the ongoing uncertainty around their employment. I am sorry. I am very happy to answer questions.

The CHAIR: Questions from members?

The Hon. ADAM SEARLE: Commissioner, just looking at that useful chart at the back of your written outline, you say your investigations have increased significantly over the last year.

Dr COOMBS: Yes.

The Hon. ADAM SEARLE: And, in particular, your provision of statutory advice has increased by nearly 50 per cent on last year and nearly 150 per cent over the last few years. What do you attribute those trends to?

Dr COOMBS: I think we have a higher profile, such that it is. There are also an increasing number of matters which go to agencies and then come to us. I take you back to my comments about increasing awareness in the community and also the sector about the importance of getting privacy right. That is not just an atypical comment. Research is showing that. There are three recent privacy reports that go to that. There is the Deloitte Australian Privacy Index; the May 2017 report of "Community attitudes to privacy", released by the Federal Privacy Commissioner; and our own unpublished survey work, which was undertaken in May of this year.

My take on what is happening in the community is that people are not only becoming more aware but more likely to raise issues. I do not think it is well known that they have got rights, what those rights mean and where to go for assistance, but it is growing slowly—as the figures demonstrate. We do not include in our statutory advice enquiry figures. Our inquiries are close to 1,400 year-to-date. The media is paying far more

attention to what is happening in Australia, in New South Wales, as well as internationally: the cyber security issue most recently where the National Health Service was attacked with malware; there has been a Service NSW breach; and there has been a health breach. Other matters include the Australian census last year. It has heightened sensitivity to those issues. It is being translated not as "it is over there and it affects other people", it is "what is happening for me".

The Hon. ADAM SEARLE: Last night your office sponsored an interesting discussion about health data privacy. One of the things that emerged was the legislation in New South Wales dealing with health data privacy is nearly two decades old. Do you have a view about whether or not it might be timely to review the efficacy of that legislative framework?

Dr COOMBS: I think that the principal structure of the Privacy and Personal Information Protection Act [PPIPA] 1998 and the Health Records and Information Privacy Act [HRIPA] 2002 are basically good and strong. I think the evolution in technology means specific provisions in the acts need to be revisited and certain things included. There have been changes in regulation at the Federal level. I mentioned the Federal privacy breach notification. In my 2015 report I included a recommendation that if the Commonwealth viewed it that way we should look to including the requirement that breaches be notified.

The surveys I mentioned, including the Federal one, 94 per cent for business and 95 per cent for government, the expectation of the public is that you will be notified if there is a serious breach of privacy. That is very important. People then have an opportunity to check what is happening by looking at their financial transaction statements. With Health it is of particular concern. I did write to the former Minister for Health about the need to undertake a statutory review of the HRIPA because that statutory review had not occurred in the five-year review period. We are now seeing what the response will be. As I understand, there is an intention to undertake the review. There have been other matters occurring that take time.

The Hon. ADAM SEARLE: Have you detected any particular trends in relation to privacy law in New South Wales in the last year or two that are noteworthy or should be drawn to the Committee's attention?

Dr COOMBS: There are a number. I will ask Mr Yetzotis to address that question.

Mr YETZOTIS: In February the Commissioner did publish a report that discussed a couple of very particular gaps in New South Wales privacy law, which particular gaps do not inhibit the exercise of privacy rights elsewhere. Importantly, the recommendations that the Commissioner made in that report, if I can use a common phrase, are nothing new. They are nothing new because if implemented by Parliament it would merely bring New South Wales privacy laws to par with other privacy laws and, importantly, with other New South Wales law. For example, the Anti Discrimination Act does not labour under these gaps. If those recommendations become law then our tribunal will already have the expertise, because of its anti-discrimination work, to apply similar approaches to apportion responsibilities to employers and employees where a breach of privacy arises out of clearly intentional conduct by employees. That is at the centre of interest of the Commissioner's report.

Dr COOMBS: That is this report.

The Hon. ADAM SEARLE: In the last year, what has been your office's experience regarding the sensitivity for privacy issues across the public sector? Is there a growing awareness on the part of public sector management around these issues?

Dr COOMBS: Yes and no. I was saying to Mr Yetzotis as we walked up to Parliament House, "If I am asked that question I will have to say a lot depends upon the particular unit inside the clusters". Because the clusters are so large and made up of such composite parts and there are various responses to certain functions that we administer. The request for statutory advice in some parts of a cluster might be done extremely promptly and with a view to privacy by design, so it's done early; whereas the complaints section may not actually comply with some of the provisions or how the process is set down. The reverse occurs in other organisations. We see that when people change, you get differences in the sector as well. The Public Service Commission has been one of the agencies that has seen consistent performance and are very conscious of privacy. Mr Yetzotis deals more with the interface with agencies on a day-to-day basis.

Mr YETZOTIS: Sometimes restructuring clusters causes some delay in picking up the speed that previous personnel may have had. That is always to be expected. At other times compliance with privacy principles may falter for some while and at other times, compliance with agency obligations towards the Commissioner may falter from time to time. In both of those circumstances it is the role of the Office to issue reminders. It is the role of the Office to make submissions to them to achieve better quality in their privacy investigation reports so that avoiding litigation is achieved. Litigation in the tribunal may well give everyone

their day at court but it costs a lot of money and sometimes may cost money unnecessarily. We do have good months in the year and we have some less than perfect months in the year in terms of both those levels of compliance with privacy law, that is, substantive compliance and procedural compliance in so far as obligations to the Commissioner are concerned.

The Hon. ADAM SEARLE: Last year the Committee asked you some questions about how the separate operation of your office from the Information Commissioner was going. You gave an initial report that notwithstanding the short timeframe the productivity of your office had increased. How has that progressed in the last 12 months?

Dr COOMBS: That has been both maintained and grown. Agencies are becoming more familiar and there is greater clarity around who to speak to, and they get less confused about the various processes and provisions under the Government Information (Public Access) Act and the privacy legislation. In these figures we have shown the comparisons to 2014, which is the last full year of when the Privacy Commissioner did not have direct oversight of the privacy work and there was not a privacy dedicated team, and then in 2015 to our current year, which is the first full year of operation with a specific allocation for privacy. My experience is that it actually works far better. It is more efficient, you learn as you go, but also agencies are finding that there is a consolidation of knowledge not only in our office but also for them.

Mr PAUL LYNCH: Commissioner, you mentioned the Federal regime of management and notification of breaches of privacy. Has that come into effect yet?

Dr COOMBS: No, Mr Lynch. That will come into effect on 22 February 2018.

Mr PAUL LYNCH: Do you think the design of that system is a useful model for New South Wales to follow if we were to go down that path?

Dr COOMBS: I hesitate because I am not across all of the detail as yet. I look to do that now that we know that we need to be paying that much more attention because of the application or the preliminary confirmation that scheme applies to all organisations who are recipients of tax file numbers. The principle of knowing when personal data or personal information has been breached is a very important principle. To my mind, it is also akin to a very important privacy right, which is the knowledge of knowing what records are kept about you by either business—in the case of the Feds' legislation—or government in the public sector regime. I think what the data and research are showing is that members of the community want to have their privacy respected, which goes to actually including them in these arrangements around privacy. "So if we have lost your data, we will let you know", and I think that would do a lot to build trust.

Mr PAUL LYNCH: Are other States moving in that direction as well?

Dr COOMBS: Not that we are aware of. I would like to say that inside New South Wales, under the Data Sharing (Government Sector) Act 2015 introduced by Minister Dominello, there is under provision 12(2) mandatory provision to notify the Privacy Commissioner and the provider of data if there has been a breach or if there could well be an anticipated breach. There were three things that I wanted to get into that legislation. I got two out of three, and that was one of them.

The CHAIR: Thank you very much for appearing today before the Committee. We may send you some additional questions in writing. Your replies will form part of the evidence and be made public. Would you be happy to provide a written reply to any further questions?

Dr COOMBS: Yes, Chair.

The CHAIR: Thank you.

Dr COOMBS: Thank you, Chair. Thank you, members.

The witnesses withdrew.

The Committee adjourned at 14:03.