Ombudsman Tasmania

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To whom it may concern

Public Submission – Review of Privacy Laws in Tasmania

Thank you for the opportunity to make submissions in relation to this issues paper. I have chosen to make no comment on a number of the issues raised as I consider many of the possible changes to the legislation to be a matter of policy for government. Given that the Ombudsman is the statutory officer to whom complaints are made under the *Personal Information Protection Act 2004* (PIP Act) I would like to comment on some aspects of the legislation that have become apparent as a result of applying its provisions for a number of years. In reality, the Act is not effective, outcomes do not satisfy complainants and "remedies" are confined to recommendations to the personal information custodian.

Widening scope/jurisdiction

In practice, the Act is somewhat anomalous as it does not provide a right to privacy as such but rather regulates the collection, maintenance, use, correction and disclosure of personal information relating to individuals. As noted in the issues paper, the personal information caught by the Act is only that which is in the custody of some kind of government body (public authority) and a limited number of contractors.

Whether or not to widen the scope of the legislation to include information held by private organisations is a policy decision for government but I do make comment that, if that decision is made, consideration must be given to appropriately resourcing whatever body is responsible for receiving complaints of breaches of the PIP Principles. A number of Australian jurisdictions have dedicated Privacy and Information Commissioners who have staff that can specialise in privacy and freedom of information matters, whereas the PIP Act is just one of a number of pieces of legislation under which I have a major role. An increase in PIP Act complaints could not be managed by my office with staffing and resourcing as they currently stand.

Right to Information Act 2009

The interaction between the *Right to Information Act 2009* (RTI Act) and PIP Act is referred to in the issues paper at 2.3.30 but in practice, this interaction has proved to be problematic. There are access to information mechanisms in both the RTI and PIP Acts with Sch 1 cl 6(1) of the PIP Act providing that certain requests for personal information made under the Act are to be treated *as if*

the request were an application for assessed disclosure under the Act. The use of the phrase "as if" creates difficulty because it is not a deeming provision; it does not render a request under this provision an application under the RTI Act. A literal interpretation of the provision requires the personal information custodian to determine the matter in the same manner and having regard to the same principles as an application under section 13 of the RTI Act, but does not import the other provisions of the RTI Act. This means there are no review rights nor prescribed timeframes which, in a practical sense, leaves applicants who have gone down the PIP access path with no ability to seek external review of a failure to provide access or redress in respect of delay. I have made submissions to government in relation to amendment of the RTI Act in order to address this issue and anticipate that the PIP Act would be amended also.

Remedies

The absence of remedies or enforcement provisions in the event of a breach is an unusual feature of the Act but is not inconsistent with the approach of various other pieces of legislation for which I am responsible. In practice, I have found it to be ineffective because, although I can make recommendations, I am unable to achieve outcomes that might satisfy a complainant and offer some sort of recompense for damage suffered. There have also been mixed degrees of commitment to improvements by public authorities. I would be in favour of the insertion of penalty and compensation provisions, likewise with making my decisions reviewable by TASCAT. Again though, I must emphasise that with current resourcing of the office, the implementation of such reforms would be impossible, as there are insufficient staff numbers to undertake any increase in investigations or to deal with the increasing complexity of investigations necessary to bring findings to the standard required to make awards.

Amendment and Notation

The process set out in Part 3A of the PIP Act is somewhat curious in that it provides for a person to request the amendment of "information of a person" if any part of the information is incorrect, incomplete, out of date or misleading. If such a request to amend is refused, a person may then require the personal information custodian to add a notation to the information specifying the respects in which the information is claimed by the applicant to be incomplete, incorrect, out of date or misleading and, if the information is claimed to be out of date, setting out the information it is claimed is required to bring it up to date. There is nothing in the Act that allows a personal information custodian to refuse to add a notation nor any qualifiers that might apply to the information that is to be included in the notation thereby allowing some or all of it to be refused. The only limitation on this provision is that it must relate to personal information as defined and that the notation does the things set out in s 17G(a) and (b). Part 3A has proved problematic in practice as it has consumed many officer hours in both my office and in departments when being made use of by persistent and inflexible applicants.

Mandatory notification

As noted in your paper, there is no requirement that the Ombudsman be notified when a personal information custodian becomes aware of a breach of the principles, although in practice some departments voluntarily provide that information to my office. It makes sense that departments should notify my office but again, notification and any required action would necessitate increased resourcing.

Consistency across jurisdictions

I am in favour in principle of consistency between various pieces of legislation across jurisdictions. It makes sense that the schemes in different states and the Commonwealth are in line with each other and provide similar protections and remedies.

Overall, I am of the view that a wholesale review of the legislation would be beneficial with reconsideration of the definition of personal information, rethinking the purpose of the Act and how to enforce it, as well as careful consideration of its interaction with the RTI Act. It is also essential that if government goes down this path that serious consideration is given to whether a discrete body should be established to administer the Act, investigate potential breaches and take enforcement action. My office is not resourced or structured in such a way that an increased role such as this could be absorbed by the office as it currently stands.

I look forward to meeting with you by Teams to discuss on 3 July 2023.

Yours sincerely

Richard Connock
OMBUDSMAN