privacynsw
Office of the NSW Privacy Commissione

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Our ref: A09/0643

Mr Stephen Palethorpe
Secretary Senate Standing Committee for
Finance and Public Administration
PO Box 6100 Parliament House
CANBERRA ACT 2600

Dear Mr Palethorpe,

I refer to your correspondence via e-mail dated 11 December 2009 concerning the Inquiry into Freedom of Information Amendment (Reform) Bill 2009 and Information Commissioner Bill 2009. Judge Taylor the Privacy Commission is currently on leave and the functions of the Commissioner have been delegated.

The purpose of this letter is to make very brief submissions on the draft Bill.

As the Committee would be aware the NSW Privacy Commissioner's role (and that of Privacy Commissioners generally) essentially concerns data protection rather than the open exchange of information. However in principle we support the intent of the Bill as outlined at issues 1-3 inclusive, and in particular the concept of a culture of open government.

In such a culture, of particular interest to this Office is the intersection between FOI and Privacy where open government would necessarily entail the release (from time to time) of information concerning an individual who is not part of the application. (3rd party personal information). In this regard we are of the view that the NSW legislation currently awaiting proclamation – the *Government Information (Public Access) Act 2009* (NSW) strikes an appropriate balance between privacy and open government considerations.

In respect of Item 4, concerning powers and functions of the proposed Information Commissioner, we note the variations from the exposure draft at subclauses 11 (4) and 12 (4). We support its general approach of bringing privacy functions within the proposed Office of the Information Commissioner.

On 14 October 2009, the Commonwealth Government released its "*First Stage Response to the Australian Law Reform Commission* ["ALRC"] *Report 108 For your Information: Australian Privacy Law and Practice*". In this report, the Government confirmed its intention that the Office of the Information Commissioner will be

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responsible for both privacy and freedom of information laws (see p. 14 of the *First Stage Response*). Further, in accepting the ALRC's recommendations on access and correction rights, the Government stated:

> "The co-location of FOI and Privacy in this new structure will strengthen and elevate the role and importance of privacy laws.
>
> In particular, this co-location will assist in the development of guidance and policy on issues relating to the interaction between the two Acts, and contribute to efforts to ensure individuals are able to obtain access to their own personal information through simple and user-friendly processes." (p. 66)

The Commonwealth Government's intention to co-locate privacy and freedom of information functions is significant. However there are some difficulties which have been addressed by subclauses 11 (4) and 12 (4) (referred to above). There would however appear to be other difficulties with the proposed internal structure, based on shared responsibilities. Having reviewed FOI and privacy laws in comparable common law jurisdictions, there appears to be three basic models of administration.

First, there is the 'separated model', which sees distinct statutory offices established to exercise discrete FOI and privacy functions. This is the approach currently taken in NSW, with the Privacy Commissioner responsible for overseeing privacy laws, separately to the Ombudsman, who has FOI responsibilities. This is also the model used in New Zealand and Canada (federal). In the latter jurisdiction, the Privacy Commissioner and Information Commissioner are expressly required in their enabling statutes to "exclusively" exercise their functions.

Secondly, there is the 'sole authority' model, with a single statutory office conferred responsibility for administering both FOI and information privacy laws: in Queensland and the United Kingdom, there is an Information Commissioner and in the Canadian province of British Columbia, an 'Information and Privacy Commissioner'. Variations are seen in the internal organisation of the Commissioners' offices. In Queensland, a Privacy Commissioner (as well as a Right to Information Commissioner) is statutorily appointed as a member of staff and, as the "deputy", is expressly subject to the Information Commissioner's direction. In the United Kingdom, the Information Commissioner is required to appoint one or two deputies to exercise FOI and privacy functions. There are currently two deputies: the Deputy Commissioner Freedom of Information and Deputy Commissioner Data Protection (the UK's privacy law is the *Data Protection Act 1998*). There are no deputies to the Information and Privacy Commissioner in British Columbia.

Thirdly, there is the 'shared responsibilities' model, which is proposed under the Commonwealth exposure draft of the *Information Commissioner Bill 2009*. It

establishes the Office of the Information Commissioner, comprising an Information Commissioner, FOI Commissioner and Privacy Commissioner. Each commissioner is conferred discrete responsibilities. However, a unique feature of this model is that the Information Commissioner may exercise all the functions of both the FOI and Privacy Commissioners and, further, the FOI Commissioner and Privacy Commissioner may exercise each other's.

This aspect of Commonwealth's proposed model appears open to confusion, as the Commissioners' functions are interchangeable and no provision is made for the finality of decisions. It may be ultimately unworkable in practice, as no commissioner has statutory authority over the others. We note that aspects of this matter have been addressed in part in November 2009 via the Government's changes to the draft Bills after earlier consultation and submissions.

Sole authority model preferable

In our view, a benefit of bringing responsibility for the privacy and public access laws into a single office is the ability for the community and agencies to be given consistent and balanced guidance on the proper handling of government information. Under both privacy and public access laws, the Commissioners have diverse roles. Not only do they perform 'ombudsman' type functions, in investigating complaints, but they crucially provide education, guidance and conciliation. A single Commissioner would be better placed to perform these functions, by fostering cooperation and productive relationships with the general public and government agencies. Some might criticise the sole authority model as combining two inherently incompatible roles, which might lead to an apprehension of bias. We do not share this view. Privacy and public access functions will rarely conflict, if ever. The only point of intersection, being the treatment of third persons' personal information under access applications. In New South Wales such issues are already the subject of statutory guidance under the *GIPA Act*.

Yours sincerely

John McAteer
Principal Privacy Officer
for **Privacy Commissioner**