1. THE NSW COMMISSION FOR CHILDREN AND YOUNG PEOPLE

1.1 The NSW Commission for Children and Young People was established in 1998 by the Commission for Children and Young People Act 1998 to promote the safety, welfare and well-being of children in NSW.

1.2 Section 10 of the Commission’s Act lays down three statutory principles which govern the work of the Commission:
   (a) the safety, welfare and well-being of children are the paramount considerations;
   (b) the views of children are to be given serious consideration and taken into account; and
   (c) a co-operative relationship between children and their families and community is important to the safety, welfare and well-being of children.

1.3 Section 12 of the Commission’s Act requires the Commission to give priority to the interests and needs of vulnerable children. Children are defined in the Commission’s Act as all people under the age of 18 years.

1.5 Section 11(d) of the Commission’s Act provides that one of the principal functions of the Commission to make recommendations to government and non-government agencies on legislation, policies, practices and services affecting children.

2. GENERAL COMMENT

2.1 The Commission is pleased to make a submission to the review of the Privacy and Personal Information Protection Act 1998 (‘the Act’).

2.2 The central view of this submission is that the provisions of the Act are overly complex and in need of simplification. The complex nature of the Act, and its interaction with other legislation, makes it difficult for public sector agencies to understand their obligations and to thereby ensure compliance with the provisions of the Act.
2.3 This difficulty is compounded by the fact that individual agencies have formulated differing views about the operation of the Act and their ability to release information to other agencies. Often these positions are formed on the basis of conflicting legal views as to the Act’s operation.

2.4 The numerous exemptions and Codes of Practice provided for under the Act, while allowing for some flexibility in the operation of the Act to individual agencies, further compounds the difficulties in determining agency obligations.

2.5 Notwithstanding these difficulties, the Commission supports the policy objectives underlying the Act and continues to support the need for legislation addressing the manner in which public sector agencies are required to protect the privacy rights of individuals, and particularly children and young people.

2.6 This submission details how the Act has impacted the Commission in exercising its functions under the Commission for Children and Young People Act 1998 and the Child Protection (Prohibited Employment) Act 1998. It also outlines how the provisions of the Act have impacted on children and young people.

3. IMPACT ON CHILDREN AND YOUNG PEOPLE

3.1 The Commission has undertaken a number of projects which have highlighted the importance of privacy to children and young people. The importance these children and young people have attached to their right to privacy stresses the need for clear and easily understandable privacy legislation.

3.2 Children and young people must be able to understand what their privacy rights are in dealing with public sector agencies. This is particularly so where vulnerable children and young people are accessing these agencies.

Report of an Inquiry into the best means of assisting children and young people with no-one to turn to.

3.3 In the Commission’s 2002 Report of an Inquiry into the best means of assisting children and young people with no-one to turn to (‘the Report’),¹ children and young people identified trust and privacy as a quality of a positive relationship.

3.4 The Report identified that some children and young people choose to assure their privacy by talking neither to their parents nor their friends about issues but by approaching workers in professional services for

¹ Report of an Inquiry into the best means of assisting children and young people with no-one to turn to, NSW Commission for Children and Young People, October 2002.
support and advice. These services, often run by public sector agencies subject to the provisions of the Act, are especially important to children and young people who do not have parents or friends to turn to.

3.5 During our consultations, children and young people continually identified 'not being judged' as a key basis for deciding who to approach for help and a major factor in forming positive relationships. When kids fear the judgement of their parents most of all, they look for alternative sources of support.

3.6 But while their fear of being judged by parents and friends is part of what pushes them towards using a service in the first place, it can also keep them away if they doubt the level of confidentiality on offer. For instance, one of the main reasons why young people are unwilling to seek help from school counsellors is that they are concerned that their personal problems will not remain confidential. It may also stop them from visiting community-based service. At the same time, however, some things can’t be kept confidential, such as cases of child abuse or neglect where certain agencies are designated as mandatory reporters.

3.7 The Report identified that children and young people worry, often quite legitimately, that someone they know will see them visiting a service or that the worker may not respect their privacy. This is a vital concern of children and young people in smaller rural communities and may deter them from approaching mental health, drug and alcohol and sexual health services - even the local doctor.

**The Most Vulnerable Children Project**

3.8 The Most Vulnerable Children Project, which is being led by the Department of Juvenile Justice with assistance from the Commission, has identified and seeks to respond to barriers to the provision of services across the human services agencies to vulnerable children and young people. A report produced for the Human Services CEOs in February 2003 found that one of the recurrent barriers to the provisions of services to vulnerable children was a strong concern about breaking privacy provisions and client confidentiality by sharing information across agencies even when clients expect this to occur.

3.9 The Report concluded that conflicting legal opinions and deeply entrenched worker practices were impeding the sharing of client information between human service agencies, even when joint work is mandated between these agencies under child protection legislation such as the *Children and Young Persons (Care and Protection) Act 1998*.

3.10 While the Human Services CEOS have initiated work to address this and other impediments to effective service provision, what is clearly
needed is a clarification of the provisions of the Act and how they apply to the sharing of information between agencies. It is unacceptable that the most vulnerable children and young are being further disadvantaged by a lack of clarity between agencies regarding the sharing of information.

**Child Death Review Team Reports**

3.11 In addition, successive Child Death Review Team reports have identified reluctance by agencies to report matters of child protection and child abuse. This is partly the result of ongoing agency concerns about privacy and liability for releasing personal information to other agencies.

4. **IMPACT ON THE COMMISSION’S OPERATIONS**

4.1 The functions that the Commission exercises in accordance with the *Commission for Children and Young People Act 1998* and the *Child Protection (Prohibited Employment) Act 1998* have the potential to be significantly impacted by the operation of privacy legislation.

4.2 This fact was specifically recognised in the Second Reading Speech of the Act, when the then Attorney General noted that:

“...it should be noted that the data protection principles are generally subject to any specific provision in any law relating to the use or disclosure of information….The screening processes provided for in the [then] Commission for Children and Young People Bill, which has been introduced into Parliament as an exposure draft, will not be affected by this Bill.”

4.3 The resulting *Commission for Children and Young People Act 1998* includes several provisions which clarify that the Commission may operate so as to fulfil certain specified functions without restriction by the provisions of the Act.

4.4 For instance, section 41 of the Commission’s Act provides that anything done in good faith and with reasonable care for the purposes of employment screening or for the purposes of exercising any function under Part 7 of that Act does not subject the person to any action, liability, claim or demand.

4.5 Section 44 provides that employment screening may be conducted, and information disclosed or obtained, in accordance with Part 7 despite any other Act or law to the contrary.

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4.6 In addition to these statutory provisions, the Commission has amended its work practices to address privacy concerns by ensuring that an individual’s consent is obtained in relation to activities that the Commission is carrying out. For instance, the Commission will ensure that appropriate consents are sought in undertaking employment screening processes or in processing requests under the Child Protection (Prohibited Employment) Act 1998. The Commission also ensures that consents are obtained before using individual’s photographs in Commission publications.

4.7 The Commission’s Act also contains specific provisions relating the obtaining and disclosure of information to the Child Death Review Team.

4.8 These statutory provisions and the Commission’s amended work practices have limited the direct impact of the Act on the Commission’s work. However, as noted above, the Commission has experienced some difficulty in relation to the approach other agencies have taken to the Act’s obligations.

5. CONCLUSION

5.1 The Commission welcomes the review of the Act as an opportunity to clarify the obligations imposed on agencies in their dealings with personal information. Most importantly, the review offers an opportunity to clarify how the provisions of the Act regulate the sharing of information between agencies.