



**Australian
Privacy
Foundation**

<http://www.privacy.org.au>

Secretary@privacy.org.au

<http://www.privacy.org.au/About/Contacts.html>

19/01/17

Yvette D'ath
Queensland Attorney-General and Minister for Justice
Minister for Training and Skills

RE: Review of the *Information Privacy Act (2009)* (QLD)

Background

The Australian Privacy Foundation (APF) is the country's leading privacy advocacy organisation. A brief backgrounder is attached.

In 2013 the former Queensland government undertook to review the *Right to Information Act (2009)* (QLD) (herein the *RTI Act*) *Information Privacy Act (2009)* (QLD) (herein the *IP Act*) and two consultation papers were released.¹ The current Queensland government has committed to further consultation and finalising the review process, and a further consultation paper has been released.² The purpose of the review is to decide whether the primary objectives of the Acts remain valid and to decide whether the provision of the Acts are appropriate for meeting their primary objectives.³

According to section 3 of the IP Act the primary objectives of the IP Act are:

- a) the fair collection and handling in the public sector environment of personal information; and
- b) a right of access to, and amendment of, personal information in the government's possession or under the government's control unless, on balance, it is contrary to the public interest to give access or allow the information to be amended.

¹ Queensland Government Review of the *Information Privacy Act 2009*: Privacy Provisions discussion paper August 2013; Queensland Government Review of the *Right to Information Act 2009* and Chapter 3 of the *Information Privacy Act 2009* <http://www.justice.qld.gov.au/corporate/community-consultation/community-consultation-activities/current-activities/review-of-the-right-to-information-act-2009-and-information-privacy-act-2009>

² Queensland Government 2016 Consultation on the Review of the *Right to Information Act 2009* and *Information Privacy Act 2009* consultation paper December 2016 retrieved from: <http://www.justice.qld.gov.au/corporate/community-consultation/community-consultation-activities/current-activities/review-of-the-right-to-information-act-2009-and-information-privacy-act-2009>

³ Section 192(1) of the IP Act

While the APF recognises the intertwined nature of the RTI Act and the IP Act, this submission is concerned with matters relevant to privacy policy and the review of the IP Act. It is suggested that separating out the consultation questions between the review of the RTI Act and the IP Act would assist in simplifying future review processes.

Gaps in Privacy Laws and Oversight in General

The APF notes that the discussion papers and invited consultation are limited in scope to feedback on the current QLD legislative framework. This eschews broader policy considerations and the possibility of introduction of new privacy protections to address existing gaps in the legislative framework and oversight at both the federal and state levels. With increased information sharing between Australian states and territories and the Commonwealth it is important that there are strong privacy laws at all levels. It is necessary to enact further privacy protections immediately at both the federal and state levels including:

1. A statutory tort for serious invasions of privacy
2. Mandatory data breach notification
3. Regulators with sufficient resources and power
4. Consistency of Australian privacy laws and principles
5. Strengthening Australian privacy laws to bring them in line with international best practice, in particular the EU GDPR
6. Limit exemptions to / expand scope of IP Act and other Australian privacy legislation

Comments on QLD IP Act / consultation questions

Inconsistency between QLD and Commonwealth privacy laws

The APF notes the current inconsistency between the *QLD IP Act* and the *Privacy Act 1988* (Cth), in particular differences between the QLD Information Privacy Principles (IPPs) and the Australian Privacy Principles (APPs). The Australian Law Reform Commission (ALRC) has recommended harmonised privacy principles across Australian jurisdictions.⁴ The *IP Act* should be amended to reflect the APPs to minimise complexity and confusion and ensure consistency within Australian jurisdictions.

Compliance with international best practice

The APF believes that Australian agencies should have privacy and data protection practices which comply with international best practice, including as regards the transfer of personal information offshore.

Currently, the reforms to European data protection law comprised by the General Data Protection Regulation (GDPR) represent an example of this best practice. The GDPR comes into force in May 2018, and is applicable vis-à-vis entities based outside the European Union (EU) when they process EU residents' personal data. The GDPR provides an overall stronger level of privacy protection than current Australian privacy laws.

Thus, Queensland, and Australian agencies which are in this position of processing EU residents' data should ensure that their practices are compliant with these norms.

⁴ Australian Law Reform Commission 2008 Report For Your Information: Australian Privacy Law and Practice (ALRC Report 108) retrieved from: <http://www.alrc.gov.au/publications/report-108>

But the APF also considers that Australian privacy laws should also reflect this heightened level of personal information protection in all scenarios. APF recommends that stronger privacy protections in line with this international best practice are inserted into domestic legislation and are applicable across the board to all personal information being collected and processed, whether or not it relates to EU residents.

Definition of personal information within the QLD IP Act

The QLD *IP Act* should adopt the definition of personal information as recommended by the ALRC as '*information or an opinion, whether true or not, and whether recorded in a material form or not, about an individual or reasonably identifiable individual.*'⁵

Exemptions to / coverage of the QLD IP Act

The ALRC has argued that exemptions to privacy legislation, particularly those that relate to law enforcement and security agencies (LEAs) and small and medium enterprises (SMEs), are overly broad.⁶ Exemptions to the QLD *IP Act* should therefore be limited / removed.

The scope of the QLD *IP Act* should apply to entities outside of the QLD Public Service, including but not necessarily limited to, contractors and sub-contractors of QLD Public Service and other private sector entities.

Complaint processes

Under the current IP Act individuals must first complain to an agency, before the QLD Privacy Commissioner. Individuals should have the right to take cases directly to QCAT without reliance on the QLD Privacy Commissioner, and a tort of serious invasions of privacy should apply to QLD agencies. At the very least, individuals should be able to complain directly to the QLD Privacy Commissioner and appeal to QCAT without timelimit.

Privacy Commissioner Powers

The Queensland Privacy Commissioner should have own motion / powers to investigate privacy related matters without individual complaint.

The following recommendations are made:

- 1. Extending the scope of the consultation to broader policy considerations and the introduction of new privacy protections**
- 2. Separating out the consultation questions between the review of the RTI Act and the IP Act**
- 3. Enact further privacy protections including a statutory tort for serious invasions of privacy, introduction of mandatory data breach notification and right to compensation for data breaches**
- 4. Ensure the *Information Privacy Act (2009)* (QLD) is aligned with the *Privacy Act (1988)* (Cth)**
- 5. Ensure consistency of *Information Privacy Act (2009)* (QLD) with international best practice with respect to the international transfer of personal information**

⁵ Ibid

⁶ Ibid

- 6. Revise definition of personal information contained within the *Information Privacy Act 2009* (QLD) to align with ALRC recommendations**
- 7. Extend scope of *Information Privacy Act 2009* (QLD) to contractors and sub-contractors of QLD Public Service agencies and other private sector entities**
- 8. Revise the complaints process so individuals may complain directly to the QLD Privacy Commissioner and appeal to QCAT**
- 9. Ensure the QLD Privacy Commissioner has sufficient power and resources, including powers to investigate without individual complaint**

Thank you for your consideration of this submission.

Yours sincerely

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, Chair
