

Review of the *Right to Information Act 2009* and *Information Privacy Act 2009*

Submission in response to consultation paper

Executive Summary

Legal Aid Queensland (LAQ) is concerned that if the *Right to Information Act 2009* (RTI Act) and Chapter 3 of the *Information Privacy Act 2009* (IPA) are applied to documents held by contracted service providers where they are performing functions on behalf of government, this may result in the legal files held by private law firms being subject to the RTI and IP Acts. There may be significant detrimental impacts on the delivery of legal assistance services to financially disadvantaged Queenslanders for the following reasons:

- Law practices forming part of LAQ's preferred supplier network may be required to accept and process Right to Information (RTI) and Information Privacy (IP) applications;
- Law practices are often one or two practitioner firms with limited administrative resources and would need to recruit for or acquire and maintain the very specific skill set required to process RTI and IP applications and also keep abreast of changes in the relevant legislation;
- Additional requirements to accept and process formal access applications will also create a potentially difficult situation where the opposing party in a legal matter may apply to a preferred supplier for access to documents held by the firm. The mere fact that the lawyer would have contact with such a party creates conflict issues for the preferred supplier.

If LAQ were required to process access applications relating to preferred supplier files the following issues would arise:

- Legal professional privilege attaching to documents on file may be compromised by the need to send the file to LAQ;
- Ownership of documents in a legal file is established in case law whereby documents are considered to be owned by either the client or by the legal practitioner;
- If a matter is currently being prepared for litigation, firms would likely not be able to release the file;
- There will be administrative costs for the firm to organise transportation for the file to a Legal Aid office and to respond to any queries or consultations under the RTI or IP Acts.

These additional burdens may deter law practices from applying to be a part of LAQ's preferred supplier network, potentially reducing the number of law practices willing to undertake legal aid work and negatively impacting legal aid service delivery to financially disadvantaged Queenslanders.

Introduction

LAQ welcomes the opportunity to make a submission in response to the 2016 Consultation paper on the Review of the *Right to Information Act 2009* (RTI Act) and *Information Privacy Act 2009* (IP Act).

LAQ is established for the purpose of "giving legal assistance to financially disadvantaged persons in the most effective, efficient and economical way" and "giving legal assistance at a reasonable cost to the community and on an equitable basis throughout the State". To achieve these purposes, LAQ has developed partnerships with private law firms throughout the state (known as "preferred suppliers") and enters into agreements with those firms to meet its obligations under a legal assistance arrangement pursuant to section 46 of the *Legal Aid Queensland Act 1997* (LAQ

Act). Clients who are provided a grant of legal aid by LAQ may be referred to one of these private law firms to conduct their legal matter.

LAQ is concerned that the proposal to extend the operation of the RTI Act and IP Act to the documents of contracted service providers where they are performing functions on behalf of the Government may result in clients' legal files held by law firms being subject to access applications. This may result in reluctance by legal firms to accept legal aid referrals resulting in a negative impact on LAQ's ability to provide legal assistance services. These concerns are addressed below.

Documents held by contracted service providers

Question 4 on page 14 of the consultation paper poses the following question:

4. Should the RTI Act and Chapter 3 of the IP Act apply to the documents of contracted service providers where they are performing functions on behalf of government?

LAQ considers the extension of the RTI Act and Chapter 3 of the IP Act would negatively impact on our ability to provide legal assistance services for the reasons detailed in our 2013 submission. This submission was in response to the Review of the RTI Act and Chapter 3 of the IP Act started in August 2013 by the former Government.

Alternative option proposed by consultation paper (page 14)

The consultation paper proposes the adoption of a provision in terms similar to section 6C of the Commonwealth FOI Act, where if a freedom of information application is made to an agency for documents held by a contracted service provider, the service provider is required to provide the documents to the relevant government agency, which is responsible for processing the application. This allows access to documents without unduly burdening the contracted service provider.

The requirement for legal firms to send client files to LAQ in response to applications under the RTI Act or Chapter 3 of the IP Act would raise the issue of legal professional privilege. Many of the documents held by preferred suppliers would be legally privileged, given they have been prepared in the course of a lawyer-client relationship. Requiring the preferred supplier firm to provide the file to LAQ for the purposes of responding to an application under the RTI or IP Acts would be problematic in terms of maintaining the confidentiality required to retain legal professional privilege.

When a solicitor creates a file, documents on the file may belong to the solicitor, the client or a third party. Case law has established that some documents held on a legal file belong to the solicitor and so some law practices may be reluctant to provide those documents to LAQ.

In matters where there are current legal proceedings, the requirement upon a preferred supplier to provide their file to LAQ for the purposes of processing an access application, would be unreasonable. Firms would not be able to proceed without access to their original file, and this could have a significant impact on legal proceedings. As applications may be received from the other party in matters such as domestic violence hearings, the RTI process could result in additional stress to victims and delays in finalising matters.

Even if LAQ bears the costs of transporting the legal file to an LAQ office for processing under the RTI or IP Acts, there will remain administrative costs to the preferred supplier firm in the preparation of the file for transportation and in responding to any consultation or communication relating to the access application. Many LAQ preferred suppliers are small law firms (particularly in regional areas) with limited administrative resources. Requiring these small firms to coordinate and

process access requests would likely impose additional costs resulting in firms refusing to take on legal aid work.

Conclusion

As discussed in LAQ's 2013 submission, it is unlikely that the extension of the RTI Act and Chapter 3 of the IP Act to incorporate solicitor firms undertaking legal work for legally aided clients would result in improved accountability. LAQ clients are already able to access documents held on their legal file in accordance with section 14 of the Australian Solicitor Conduct Rules 2012. The Legal Services Commission provides a mechanism for investigation of any client complaints, including as they relate to the provision of documents from legal files. Requests for access to documents by persons other than the client are likely to ultimately be unsuccessful, given the nature of the documents held on the file.

LAQ is of the view that the extension of the RTI and IP Acts to LAQ's preferred suppliers would likely result in LAQ experiencing difficulty in retaining firms who will undertake legal aid work. This will severely impact LAQ's ability to provide quality legal services across the state.

It is therefore LAQ's submission that any extension of the operation of the RTI and IP Acts to service contractors should specifically exclude law firms which are LAQ preferred suppliers or include documents held by them in the list of exempt documents in Schedule 1 to the RTI Act.

LAQ would seek to be consulted in the development of any amendments to the RTI and IP Acts, to ensure that legal assistance services provided by preferred suppliers are not inadvertently adversely impacted by any changes to the legislation.