

**Review of the Right to Information Act 2009
and chapter 3 of the Information Privacy Act 2009**

**Submission in response to discussion paper
November 2013**

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, that 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, who are often one or two practitioner firms with very limited administrative staff would need to acquire and maintain the very specific skill set required to process RTI and IP applications and also keep abreast of changes in the 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.
- 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 discussion paper on the review of the *Right to Information Act 2009* (RTI) and chapter 3 of the *Information Privacy Act 2009* (IPA).

LAQ provides input to State and Commonwealth policy development and law reform process where these processes assist LAQ to advance its organisational objectives.

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." In pursuance of these statutory objects, LAQ contributes to government policy processes about any proposals that will impact on the cost-effectiveness of LAQ's services, either directly or indirectly through impacts on the efficiency of the provision of legal assistance services across a geographically dispersed state.

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 government will have a negative impact on LAQ's ability to provide legal assistance services. Those concerns are outlined below.

Current Legal Aid Queensland practice

Most requests for information received by LAQ are from clients seeking their own legal files. These requests are governed by the common law and the Australian Solicitors' Conduct Rules 2011, rule 14 which states:

14 Client documents

14.1 A solicitor with designated responsibility for a client's matter must ensure that, upon completion or termination of the law practice's engagement:

14.1.1 the client or former client; or

14.1.2 another person authorised by the client or former client,
is given any client documents, (or if they are electronic documents copies of those documents), as soon as reasonably possible when requested to do so by the client, unless there is an effective lien.

Where an in-house lawyer is acting in a matter, based on these principles, client access to their files and associated documents occurs under LAQ's Administrative Access process. Where a preferred supplier is acting in a matter, LAQ does not hold the legal file and the person is referred to the private law practice which acted for the person to request their file.

Where RTI and IP applications are received by LAQ from third parties, i.e. people who are seeking information or documents that do not relate to their own personal files or matters, LAQ assesses the requests in accordance with the requirements of the RTI and IP Acts.

Documents held by contracted service providers

The discussion paper at page 14. Question 4.6 poses the following question

4.6 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?

The delivery of legal assistance services across Queensland is heavily reliant on private law practices, which deliver more than 75 percent of the legal representation services funded by LAQ, under individual contractual arrangements with LAQ.

Under these contractual arrangements, preferred suppliers are obligated as follows:

11.1 If the preferred supplier collects, or has access to, personal information in order to perform legal aid work or the preferred supplier's obligations under this agreement, the preferred supplier must comply with Parts 1 and 3 of Chapter 2 of the Information Privacy Act 2009 (Qld) as if the preferred supplier was Legal Aid Queensland.

The majority of law practices in LAQ's preferred supplier network are small practices with one or two practitioners and limited administrative staff. Legally aided clients whose work is performed by private law practices can simply access their files and associated documentation under long-established legal principles and practice. The obligations of law practices to comply with these obligations are reinforced by LAQ through our contractual arrangements and the Legal Services Commission.

To LAQ's knowledge there have been no issues identified with clients being able to access their files and associated documents held by firms in LAQ's preferred supplier network.

It is arguable that the proposal outlined in question 4.6 would not apply the RTI Act and IP Act to LAQ's preferred suppliers. LAQ is a statutory body and, under section 73 of the *Legal Aid Queensland Act 1997*, a law firm. Although it is funded by the State and Commonwealth governments, it is not the government and does not represent the state. The services are different from other services provided by service providers contracted by the government.

However, if the proposal in question 4.6 is intended to include LAQ's preferred suppliers, this raises concerns about the additional regulatory burden and red tape that would be imposed on LAQ's preferred suppliers by expansion of the operation of the legislation.

The imposition of an information access regime on small legal practices would introduce significant additional obligations on them, in terms of gaining and maintaining knowledge of the RTI and IP legislation and training staff to assess and process these applications.

If the RTI Act and chapter 3 of the IP Act were extended to apply to preferred suppliers, most applications for information access received by preferred suppliers would continue to be from clients whose files are already available to them under the current principles and practice applying to the release of clients' legal files. As documents on a client's legal file are usually subject to legal professional privilege, an application by a person for access to another person's legal file would ultimately be unsuccessful. However, the application would still need to be dealt with and processed by the preferred supplier. The time involved in acquiring and maintaining this knowledge and assessing and processing applications will be a significant impost on these small businesses.

There would also be an added layer of complexity and concern in the situation where a member of the public and opposing party to a proceeding makes an application to one of LAQ's preferred suppliers for documents held by the firm. For example, where the preferred supplier is a very small firm, there is a risk of a conflict arising where a lawyer is required to deal directly with the RTI/IP applicant.

Finally in regard to the general community interest, it is noted that preferred suppliers, as legal practitioners, are subject to a legislative complaint and compensation process under the *Legal Profession Act 2007*. Clients and other members of the public are able to lodge complaints with the Legal Services Commission. The Legal Services Commission has power under the legislation to demand files from legal practitioners and to investigate the complaints.

LAQ's rates of remuneration for lawyers doing legal aid work are below commercial rates usually charged by private law practices to privately paying clients. LAQ is concerned that the additional regulatory burden that would be imposed on preferred supplier law firms by extension of the RTI Act and chapter 3 of the IP Act to them would discourage them from continuing to be part of LAQ's preferred supplier network. This could result in a loss of legal assistance service capacity and coverage if firms take the view they cannot reasonably meet the requirements of an information access regime in addition to current professional requirements. This outcome would have a detrimental effect on people requiring legal assistance services.

An alternative option would be for the legislation to provide an exemption for documents of this nature held by LAQ's preferred suppliers. Schedule 1 of the RTI Act lists documents to which the RTI Act does not apply. Some examples of documents already captured by this exemption in Schedule 1 are:

- A document created, or received, by the Queensland Integrity Commissioner for the *Integrity Act 2009*, chapter 3
- A document created or received by the Prostitution Licensing Authority for the *Prostitution Act 1999*;
- Particular documents under the *Police Powers and Responsibilities Act 2000*.

Including documents created and controlled by LAQ's preferred suppliers in this list in Schedule 1 of the RTI Act, would mean that any access application for documents classified as such would be outside the scope of the Acts which means that an applicant has no right to formally apply for such

documents. This does not mean that documents falling within this scope may *not* be released administratively. It simply would mean that a formal application may not be made for them under the RTI or IP Acts. Documents may be accessed administratively or through a subpoena process.

Conclusion

Legal aid clients are able to obtain access to information held by LAQ's preferred suppliers because all preferred suppliers are bound as legal practitioners to release client information to them. These obligations can be enforced by LAQ through its contractual arrangements and by the Legal Services Commission. To extend the operation of the RTI and IP Acts to LAQ's preferred suppliers would impose an unnecessary regulatory and red tape burden on these private business operators when there is no identifiable legal or policy problem requiring redress. LAQ is concerned that if the RTI and IP Acts were extended to apply to documents held by preferred suppliers it may discourage them from continuing to be part of LAQ's network of suppliers resulting in a loss of legal assistance service capacity and coverage.

In the circumstances, it is LAQ's submission that any extension of the operation of the RTI and IP Acts to service contractors should specifically exclude 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.

ATTACHMENT 1