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Office of the President

20 November 2013

RTI and Privacy Review
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Dear Review Team

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

Thank you for providing the Society the opportunity to provide comments to the review of the Right to Information Act 2009 (RTIA) and the Information Privacy Act 2009 (IPA).

The Society is in the unique position of being both an organisation which is subject to the RTIA and also a membership association for legal practitioners who are users of the system.

For the sake of completeness, we attach our submission of 31 March 2009 in response to the initial drafts of the Bills as aspects of that submission remain relevant today.

The remainder of this submission is presented from the perspective of the Society as an entity subject to the RTIA and IPA regimes.

General Comments

The Society has, in previous consultation, indicated that the Society's membership functions (at least) should not be subject to RTIA or the IPA. These aspects of its operations are not publicly funded and should not be a matter for which any person could make an application to obtain access to information. Against this, however, is the fact that revenue and expenses are reported in the annual report.

In relation to the IPA, it is already arguable that the Society is caught by the Commonwealth *Privacy Act* 1988 as it is an organisation with an annual turnover of more than $3 million. The Commonwealth Act catches organisations with a turnover of $3 million or more. Organisations are, relevantly, defined as a body corporate that is not a State authority or a prescribed State authority. A State Authority is, relevantly, defined as a body (whether incorporated or not) established for a public purpose under a law of a State other than a society or association. Arguably the Society is then caught by the Commonwealth Act because, whilst it might be a body established for a public purpose under an Act it is a society

or association and thereby excluded from that definition and is then caught by the definition of organisation.

In this case, the Society is then caught by both the Commonwealth and Queensland legislation and must comply with two different regimes (as the Commonwealth regime differs from the Queensland regime). The amendments to come into effect next year for the Commonwealth Act will then have an impact on the Society.

RTIA Discussion Paper

Part 1 - Objects of the Act - 'Push Model' strategies

The "push model" is not necessarily very relevant to the Society given that access to information that is generally sought relates to complaints against solicitors and is information obtained in the administration of the *Legal Profession Act 2007* (LPA). The LPA contains strict provisions about disclosure of this type of information and generally the information is either not disclosed or disclosed with heavy redactions.

Part 2 - Interaction between the RTIA and IP Acts

The interaction between the Acts creates confusion as it is quite difficult to determine in some cases whether the application should be under the RTIA or the IPA, particularly where a document may contain some personal information and other non-personal information.

Part 3 - Applications not limited to personal information

As with consultation with third parties, the time limits should be extended when consulting with an applicant as to whether the application should have been made under a different Act.

Part 4 - Scope of the Acts

The "documents of an agency" provisions create some difficulty for the Society, particularly with respect to those documents which the Society can view from the professional regulation database administered by the Department of Justice and Attorney-General. That system contains documents which belong to the Society as well as documents which belong to the Legal Services Commissioner (LSC).. The definition of documents of an agency in the RTIA includes documents to which the agency is entitled to access. This will include the documents of the LSC on the database which the Society only has the ability to view and print. When RTI applications are made to the Society with respect to the LSC documents, the Society will have material which is responsive to the application strictly under the terms of the RTIA, but the application should really be transferred to the LSC as the owner of the documents. This then means that the applicant must pay another fee to the LSC for that application.

The Society has template agreements containing provisions for contracted service providers should they be given access to personal information. They do not contain provisions about RTIA. It is sometimes difficult enough to explain to service providers about the provisions regarding personal information (given other considerations in that they might already be subject to the Commonwealth Act if it is a large company) let alone explaining to them that they may need to process an RTIA application.

Part 5 - Publication Schemes

Individual departments find the requirements for publication schemes confusing and it creates an administrative burden on small agencies.

Part 6 - Applying for access or amendments under the Acts

Most first time applicants do not fill out the forms but write in letter or email format. We are uncertain the value contributed to the process by the forms except directing the person's mind to what information they need to include so that the scope of the application is refined.

There should also be provisions to refund fees should an application not proceed or be transferred to another agency.

The charges estimate notice (CEN) is quite a burden and not easily completed. A great deal of time is consumed in preparing the notice and it is often felt more efficient to have merely processed the application. A similar comment could be made for the schedule of documents. We note that currently s36(1)(b) RTIA requires a CEN to be completed in all cases. This appears burdensome for agencies which deal with small, infrequent applications or applications which largely relate to personal information of the applicant.

To illustrate the "red tape" character of the CEN step in a current matter being considered by the RTI Officer, 5 out of 9 pages contain the applicant's personal information and so cannot attract a processing charge (s59 RTI Act). The remaining 4 pages would not have taken more than 5 hours per Regulation 5(1)(b) (likewise cannot be charged). Photocopying at 20c per page is hardly economical charging (Reg 6(1)(b)) at this volume and likely be waived (s64). Many RTI applications involve an applicant accessing their personal information (and hence processing charge is required to be waived per s59), yet the CEN is a step that is required to be taken regardless. Perhaps consideration could be given to removing the requirement to issue a CEN in the event of no fees, or at the discretion of the agency responsive to the application.

In relation to disclosing the identity of an applicant to a third party, it is often difficult to know whether this should be done. Perhaps if the form is retained there should be a tick box for the applicant to advise whether they object to that disclosure. There is not one at the moment.

The length and complexity of decisions has greatly increased under the new public interest balancing tests contained in the schedule. This places a burden on agencies in their production and also is less accessible for applicants.

Part 7 - Refusing access to documents

In a similar way to the exclusion from breach of the information privacy principles, there should also be an exclusion for RTIA when the Society is undertaking law enforcement functions.

The public interest balancing test is very burdensome. Given the Society's consumer protection functions and the purposes of the LPA, a consumer protection factor may be appropriate.

It may be beneficial to have a protection for information in communications between Ministers and departments and agencies and their portfolio Ministers/departments.

Part 8 - Fees and charges

The processing and determination of fees for the Society is quite burdensome and, in many cases, the cost of performing the task outweighs any return.

Part 9 - Reviews and appeals

Given that the Society does not have dedicated RTI officers, time limits should be flexible and should be able to be extended.

Parts 10 & 11 - Office of the Information Commissioner Monitoring & Annual reporting

Reporting consumes a disproportionate amount of time in terms of the Society, given the Society's size.

Concern has also been raised about the administrative burden imposed by making compulsory returns even when no applications are formally processed, ie they are dealt with as an administrative release or withdrawn. Perhaps the requirement to lodge a return should only apply where applications have been formally processed under the RTIA (as opposed to reporting on "no applications received" or part received or administrative access etc). The RTIA return spreadsheets are lengthy and required to be completed even where there is, in effect, nothing to report.

IPA Discussion Paper

In addition to the general comments already stated, it would be more beneficial if the Queensland legislation mirrored the Commonwealth legislation given that both Acts most likely apply to the Society. It will also give some uniformity. This relates to a number of questions throughout this discussion paper.

Given that the Society (and other "government" bodies) are most likely bound by the Commonwealth Act, it may be that it would be better for those bodies bound by the Commonwealth regime to be excluded from the Queensland one. However, this could lead to the situation where an authority is bound by the Queensland RTIA and the Commonwealth Privacy Act.

The online environment creates a lot of difficulties, particularly with the transfer of information overseas provisions which, generally for the Society, require consent or an agreement with the other party. Given that we cannot guarantee the regimes in other jurisdictions this is quite difficult. The Society does have details about the transfer overseas on its collection notices but, if a person objects to this, there is little the Society can do, particularly if the information goes on to a database that may have servers, etc overseas. The technological advances in servers hosted in the cloud are not addressed in this regard. Whilst the Society does cater for this in the collection notice (to comply with s33 IPA), legislation needs to be updated to recognise that this technology is an increasing reality for businesses.

We support the reasonable steps approach in relation to IPP4 as sensible.

Thank you again for providing us with the opportunity to provide these comments.

Yours faithfully

Annette Bradfield
President

Your Ref:

Quote in reply: Right to Information Bill and Information Privacy Bill:21000590 31 March 2009

Information Policy and Legislation Review
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Dear Sir/Madam

INFORMATION POLICY AND LEGISLATION REVIEW

Thank you for the opportunity to comment on the draft Right to Information Bill (the "RTI Bill"), the Information Privacy Bill (the "IP Bill") and the Right to Information Regulation (the "RTI Regulation").

The Society wishes to take this opportunity to commend the Government's efforts to work towards a more open, transparent and accountable system of government in Queensland, and would like to offer our support for a separate statutory privacy regime governing the handling of personal information.

The Queensland Law Society is in the unique position of being a statutory authority to which the proposed legislation will apply, and also a membership association of legal practitioners who will be utilising the legislation as clients.

Operational Aspects

From the perspective of an agency to which the legislation applies, we have had the benefit of reading and/or discussing the submissions made by Queensland Health, Queensland Transport and Main Roads, and the Department of Justice and Attorney General. In the interests of brevity, the Society simply endorses many aspects of those submissions in respect of the operational constraints the legislation will place upon the relevant agencies and public authorities.

Particularly, the Society would like to reiterate concerns regarding the scheduled commencement date of 1 July 2009. There are a number of different processes and procedures that agencies and public authorities will be required to implement and the imminent commencement date imposes a significant burden on privacy officers within these organisations and the organisations themselves.

From an operational perspective we also have concerns about the efficacy of processing applications relating to personal information under the IP Bill and a mixture of personal and other information under the RTI Bill regimes. In many circumstances inquiries and searching for documents reveal information which was not initially expected and it is highly likely that many applications will be required to be transferred between regimes during their processing. We note each regime has a differing approach to

fees and that there are no comprehensive provisions dealing with mid-processing transfer of regime. We contend that this issue should be addressed.

We also note that the use of approved forms places an extra and additionally unnecessary burden on agencies, particularly given the 1 July 2009 deadline for drafting of such forms. This is particularly highlighted where an application is needed to be transferred between agencies.

The Society recommends that in all cases timeframes for review of decisions align with timeframes for deemed withdrawals, especially in the context of invalid applications.

It is undesirable to incorporate post-application documents into the processing of an application. Searching of documentary resources is time consuming for subject agencies and diverts staff from their core activities. Accordingly, any proposition that searching for documents needs to be undertaken on an ongoing basis is in our view an unnecessary impost on agency resources.

In terms of handling applications for metadata it must, in our view, be recognised that many documents held by smaller agencies, or older documents, may not have any significant metadata attached to them. A mechanism needs to be incorporated into the application process to permit an application for metadata to be refused by an agency which does not either have a recording system for metadata or a means of actively recovering that data without undue effort.

We propose that the reduction in processing times for applications (45 days to 25 days without consultation of third parties and 60 days to 35 days for applications with third party consultation) is unworkable in smaller agencies without significant investments in their Right to Information processing infrastructure. An organisation like the Society, which is small by comparison to most Government agencies, does not have a dedicated full time FOI officer and staff must be diverted from other duties to attend to applications for information. The impost on the organisation of the restricted timeframes, in our view, caters better to larger organisations with significant dedicated resources for processing applications. We contend that timeframes should be set on a sliding scale depending on the relative size and capacity of the agency processing the application.

We note that while a harmful or collateral purpose behind a single application will now be a relevant factor in determining whether a person can be deemed a vexatious applicant, section 40(3) of the RTI Bill provides that an application can not be refused to be processed on this ground. It seems incongruous to us that an agency should be compelled to process an application that it knows to be made for a harmful or collateral purpose while being entitled to apply to the Information Commissioner to have the applicant deemed to be vexatious. This does not appear to remedy the mischief that is contemplated by the extension of the vexatious applicant provisions.

Use of Legislation by the Public

Nonetheless, the Society also wishes to raise the following matters as particular concern to the Society's members.

1. Solicitors as Agents

Pursuant to section 23(5) of the RTI Bill and section 44 of the IP Bill, an applicant may engage an agent to make an application for access or amendment of information on their behalf, provided the agent is "duly authorised in law to act for, or in relation to, the applicant in the making of an application".

Who is classified as "duly authorised in law" to act as an agent remains undefined beyond the examples provided in each section.

The Society queries whether it is envisaged that a solicitor making an application, within the bounds of a solicitor client agreement, will be "duly authorised by law" to act as an agent?

The examples provided in the legislation indicate that a solicitor making an application pursuant to an enduring power of attorney would be "duly authorised by law", provided the application falls within the bounds of the power of attorney. However, there are a variety of situations in which it will be necessary for a solicitor to make an application on a client's behalf.

For this reason, it is particularly concerning that section 44(1) of the IP Bill seems to suggest that solicitors will not be in a position to make an application for personal information on behalf of a "living" client.

Solicitors, uniquely, are engaged to undertake matters on behalf of their clients as their fiduciary and agent, i.e. as if the client were themselves undertaking those actions. On this basis, solicitors should be able to make applications on behalf of their clients to enable them to adequately fulfil the terms of their retainer agreements.

Further, given that applicant's family members and friends will not fall within the definition of a duly authorised agent, and that applicants will not be entitled to make an application orally, in the interests of ensuring the legislation remains accessible it is important that solicitors are able to be engaged in this regard. Individuals who have trouble reading and writing, do not speak fluent English or who are blind or infirm, must have an avenue for making access and amendment applications.

Accordingly, it is requested that a solicitor acting within the bounds of a client agreement be included within the listed examples of authorised persons within each section.

As a matter of drafting, given the obvious links between section 44 of the IP Bill and section 48 of the IP Bill, it is our opinion that section 48 would be more appropriately dealt with by of incorporation into section 44 or by placing it in the vicinity of section 44.

2. Identification

Stemming from the above issue is the provision of identification of applicants and/or their agents when making an access or amendment application.

Section 66 of the RTI Bill and section 77 of the IP Bill provide that an applicant must provide "proof of identity" and an applicant's agent must provide "proof of authorisation and identity", prior to access being provided to a document containing personal information.

The RTI Regulation prescribes that applicants making applications under the RTI Bill will be required to provide three forms of identification, one being photographic identification. There is no equivalent provision dictating the requirements for applications being made under the IP Bill. Although one can assume they would be comparable.

However, an indication of the number and forms of identification required by agents making an application on behalf of an applicant is noticeably absent from the Regulation.

If it is envisaged that agents will be required to provide the same number and forms of identification as applicants, presuming that solicitors will authorised to make such applications, the Society is of the opinion that it is overly onerous to require every solicitor lodging an application on behalf of a client to provide three forms of identification for themselves, their client and an authorisation document.

On this note, the RTI Regulation fails to dictate what documents would sufficiently indicate "proof of authorisation" for an agent making such an application. In this respect the Society queries what form of documentation would adequately indicate a solicitor's authorisation? A written client agreement? A letter from the solicitor's client providing authorisation?

Further, based on the current drafting of the legislation, it is problematic as to when the above identification and authorisation must be provided.

Pursuant to Section 66 of the RTI Bill and section 77 of the IP Bill the relevant identification documentation can be provided at any time prior to the agency or minister providing access to an applicant's personal information.

If such identification has not been provided at the time of the application, section 51(2) of the RTI Bill and section 65(2) of the IP Bill dictate that the applicant must be advised in a written notice, containing the access decision, that identification is required prior to access being made available.

It is the Society's opinion that requiring identification at this stage of the process may lead to inadvertent breaches of privacy. If agencies provide an access decision to the applicant prior to obtaining identification, the written notice has the potential to reveal sensitive personal information simply by alluding to the existence of certain documents. For example, stating that documentation exists regarding a complaint of sexual abuse made against an applicant may potentially be a serious breach of an applicant's privacy.

It is appreciated that, under section 45(3) of the IP Bill, and in line with the legislative objective of accessibility, applicants will be permitted to make access applications online. It is nonetheless recommended that identification be required to be presented to the agency within a certain period of time from the date of the application. If such identification is not provided by this date, agency's should empowered to request that it is provided, independently of providing written notice of the access decision.

However, on this note, it would seem to us that requiring applicant's to physically present identification documentation may defeat the utility of an online application system. This has the potential to specifically disadvantage regional, rural and remote Queenslanders who may not easily be able to access an appropriate agency office. Presumably, people in remote, regional or rural places would be permitted to submit copies of identification documentation by post or other means. However, it would be equally undesirable for the introduction of any requirement that certified copies must be provided in these situations, given issues of accessing appropriately qualified certifiers in regional areas. Accordingly, we contend that the only workable course, which may not be acceptable to Government, is for regional, rural and remote applicants to be able to post simple copies of their identification documents, which of course will provide little guarantee of identity and open new and significant privacy issues.

3. External Review

The Society wishes to make the following suggestions in respect of the external review process:

(a) Section 83 of the RTI Bill dictates that "a person affected by the decision" may have a decision reviewed by the Information Commissioner. It is unclear the extent of the scope of "person affected by the decision" and, further, section 83 would seem to be inconsistent with section 87 of the RTI Bill, which states that a person affected by a decision may apply to participate in a review;

(b) We note that it will be necessary to amend section 78(1) of the RTI Bill and section 88(1) of the IP Bill which state that "subject to subsection (2), any decision made under this chapter is subject to internal review". These provisions have the inadvertent effect of making external review decisions subject to internal review; and

(c) Section 110 of the RTI Bill and section 120 of the IP Bill suggest that costs incurred by a participant to an external review are payable by the participant. It is the Society's opinion that a mechanism should be included to allow successful applicants and participants affected by the decision to apply for costs. It is proposed that such a provision permit the Tribunal to make an order requiring a party to a proceeding, or a participant in a proceeding, to pay all or a stated part of the costs of another party to the proceeding, if the tribunal considers the interests of justice require such an order to be made.

Additionally, the Society wishes to strongly recommend that privacy complaints brought before the Tribunal be heard by a juridical member of QCAT. The relief provisions outlined in section 170 of the IP Bill are akin to injunctions and awards for damages, and as such, should only be determined by legally qualified members.

Further, it is also suggested that appeal mechanisms be explicitly contained within the Bills, providing for appeals from the Tribunal to the Supreme Court on matters of law. With the development of a new statutory privacy regime, it is our opinion that the courts will have an important role to play in establishing precedent. As such, it is our opinion that:

(c) when damages in excess of $20,000 are awarded, appeals should be permitted to be made on matters of law, as of right; and
(d) when damages under $20,000 are awarded, appeals should be permitted to be made on matters of law, with leave.

4. Third Party Consultation

The Society is concerned that the absence of third party consultation and review rights mechanisms in respect of all matters falling under schedule 4 of the RTI Bill will significantly limit the rights of third parties to express their views about release and/or challenge decisions unfavourable to their position.

In accordance with section 37(1) of the RTI Bill and section 55(1) of the IP Bill third parties are only required to be consulted in respect of whether or not the information is exempt information or whether the information is personal information other than to the applicant. As "exempt information" is limited to schedule 3 matters, there are effectively no mechanisms for third party consultation or review rights in respect of schedule 4 matters.

It would seem fundamental that such consultation and review rights exist. Particularly given that without such rights, agencies considering release of information falling under schedule 4 are likely to be overly cautious in decision making in order to avoid prejudicing third parties.

It is the Society's opinion that section 37(1) of the RTI Bill and section 55(1) of the IP Bill should be amended so as to state that agencies must take all reasonable steps to consult with third parties about whether or not the information is exempt, whether the information is personal information other than to the applicant, or whether there is a public interest in its disclosure or non disclosure.

In the interests of completeness, we also wish to ensure that consultation of third parties is not limited to "government, agencies or person's concerned". There is no reason why businesses and not for profit organisations should be excluded from the consultation process.

5. Public Interest Test

The Society is of the opinion that the proposed operation of the consideration of public interest factors is overly complex and does not appropriately take into account the fundamental nature of the information to be released.

In our view the nature of information is the appropriate point at which to commence the balancing of the public interest factors. Information that is harmful, private or sensitive should be protected against unduly being introduced into the public domain. We contend that nature of the information should set a threshold to be met by other public interest factors supporting release.

6. Drafting

a) Legislative Objective

As mentioned earlier, the Society strongly supports the Government's move towards a more open and accountable system of government. However, the expansion of agencies to which access applications can not be made under section 24 of the RTI Bill, and the extension of prescribed information that an agency is not required to disclose the existence or non-existence of under section 52 of the RTI Bill, seems contrary to such an objective.

The Society is particularly concerned that the inclusion of personal information in the definition of prescribed information in section 52 of the RTI Bill has the potential to greatly increase the range of material that an agency or minister may decline to disclose the existence or non-existence of.

b) Accessibility of the Legislation

Additionally, in order for the legislation to achieve its objectives it must be accessible to the public. In this regard, the Society is of the opinion that unnecessarily splitting the access and amendment provisions between two statutory regimes will make the legislation particularly confusing and frustrating for both applicants and practitioners to use.

Pursuant to section 64 of the IP Bill, applicants making an application for personal information are required to navigate both pieces of legislation in order to determine whether such an application will be

refused. Further, under the information privacy principles applicants are also required to consider other "laws of the State" when considering whether access will be granted.

As both pieces of legislation essentially provide the same access and amendment rights, the Society proposes the access provisions under the RTI Bill be included within the IP Bill, allowing the Bills to function as independent statutory regimes.

c) Definitional concerns and inconsistency of terms

Similarly, there is a number of inadequate definitions and inconsistencies, both within each Bill separately and together, as a legislative scheme, which will hinder the legislation's accessibility.

For the sake of brevity, the Society simply endorses the submissions of Queensland Health, Main Road and Transports and the Department of Justice and Attorney General in respect of their specific concerns regarding:

i. the inadequate definitions of terms e.g. the circular definition of "control" in section 12 of the IP Bill;
ii. the inadequate application of definitions. Often a term outlined in the dictionary will refer the applicant to another provision, many of which are section, part or chapter specific. Often the definition is limited to that section, part or chapter, but is referred to in provisions outside the scope of the definition;
iii. the inconsistency of terms and time frames used within each Bill e.g. the phrase "concerned third party" is used interchangeably with the term "concerned entity" in section 37 of the RTI Bill; and
iv. the inconsistency in terms used between the Bills e.g. when defining "public authorities" section 16(1)(c) of the RTI Bill refers to "entities", while section 21(1)(c) of the IP Bill refers to "bodies".

d) Additional Provisions

We note that Schedule 1, section 1 of the IP Bill should include personal information obtained under a warrant issued under the *Telecommunications Interception Act 2009* (provided the Telecommunications Interception Bill 2008 will be passed in the coming months).

Finally, it is the Society's opinion that, given the significant changes contemplated by the Bills, and the uncertainty surrounding their practical application, the Government should commit to a review of their operation after a certain period of time. Such reviews provide useful forums for valuable feedback regarding the drafting of the legislation and problems identified upon its introduction.

We thank you for the opportunity to comment on these proposals and look forward to contributing to further drafts of the legislation in the future.

Yours faithfully

Ian Berry
President