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# Submission: 2016 Consultation on the *Right to Information Act 2009* (Qld) and *Information Privacy Act 2009* (Qld)

This document responds to the call by the Department of Justice and Attorney-General for public comment regarding the *Right to Information Act 2009* (Qld) and *Information Privacy Act 2009* (Qld) as part of the 2016 consultation regarding those statutes.

The following paragraphs centre on the state's privacy regime, specifically that under the *Information Privacy Act 2009*.

## Summary

In summary, the primary objects of the Act are directly relevant to people in Queensland and elsewhere. They will remain relevant in future. They are fundamental for the flourishing of civil society in an era of Big Data, the proliferation of surveillance technologies and meaningful accountability on the part of Ministers, government agencies and service providers.

Movement by the Queensland Government to a coherent public-sector information privacy regime centred on a single set of information privacy principles is highly desirable. Greater coherence is achievable and will address the uncertainties identified in the consultation paper.

The consultation paper has a narrow focus. It is desirable that the Government looks beyond the specific Act and considers the broader privacy regime, engaging for example with questions regarding a statutory cause of action for serious invasion of privacy. Provision of such a statutory cause has been recurrently recommended by a range of law reform commissions and inquiries across Australia. It is consistent with democratic values. It will address concerns regarding public and private practice.

## Basis

The submission is made by Assistant Professor Bruce Baer Arnold of the School of Law & Justice at the University of Canberra.

It reflects publication in Australian and overseas law journals, chapters in the leading privacy law practitioner service and invited submissions to a range of law reform inquiries. It also reflects membership of OECD and other advisory bodies regarding data protection, particularly in relation to health data. The author's analysis of privacy issues and policy responses has been widely cited in reports by the Australian Law Reform Commission, parliamentary inquiries, industry bodies and academics.

The submission does not involve what would be reasonably construed as a conflict of interest. It is not made on behalf of a industry or civil society advocacy organisation.

## The Review

The Act provides that the review is to –

a) decide whether the primary objects of the Acts remain valid;

b) decide whether the Acts are meeting their primary objects;

c) decide whether the provisions of the Act are appropriate for meeting their primary objects; and

d) investigate any specific issue recommended by the Minister or the information commissioner.

As indicated above, the primary objects of the Act remain valid. They have not been rendered irrelevant by new technologies, by a Commonwealth statute or by new social values. In particular, amendments to the *Privacy Act 1988* (Cth) since establishment of the *Information Privacy Act* do not cover Queensland public administration.

It is clear from surveys (noted in for example law reform commission reports), from testimony in parliamentary inquiries and case law that privacy **is** of real concern for most Australians. That concern is ongoing and substantive. It will continue – and indeed is likely to grow – because people are increasingly aware of public/private practice regarding personal information and recurrent controversies over readily avoidable large-scale data breaches in the health, telecommunications, finance and other fields.

Action by the Queensland Government to update the *Information Privacy Act* and more broadly strengthen the state privacy regime is accordingly desirable. It is feasible. It does not involve inappropriate costs. It represents an opportunity for the Government to take a position of leadership, strengthening public administration and respecting the legitimate concerns of people across the state.

The Government might also wish to move beyond reference to 'fairness' and, in the absence of a Bill of Rights such as the *Charter of Rights & Responsibilities Act 2006* (Vic) and *Human Rights Act 2004* (ACT), expressly recognise information privacy as a right for everyone in Queensland. Personal information collected/used/shared by the state government and its service providers is more than a resource; it necessarily impinges on human dignity.

## Coherent Principles

The consultation paper comments that the existence of two sets of privacy principles under the Act, and coexistence of discrete Commonwealth and state regimes, means –

> that governments, and the private and community sectors, may find privacy to be a confusing and complex area of the law. As noted in 2013, organisations operating in more than one jurisdiction may be required to comply with multiple privacy regimes, placing a high compliance burden on these bodies. Consumers may be confused or unsure about who the appropriate privacy regulator is and who will deal with their complaints.

The paper does not provide empirical data regarding confusion, although that is consistent with indications in the case law and decisions by the Queensland Information Commissioner. The ongoing rationale for two discrete information privacy principles under the Information Privacy Act (and the confusing labelling of those Principles) is unclear. There would be benefit for public administrators, the courts, businesses, citizens and others in replacing the two Principles with a single set of Information Privacy Principles covering the Queensland public sector. A model for that enhancement of the Act is provided by the amended *Privacy Act 1988* (Cth), which enshrines a single set of Australian Privacy Principles. The change to the Commonwealth Act has not resulted in substantive litigation.

Amendment of the Queensland Act is achievable; it does not for example involve constitutional problems and costs associated with introduction of the amendment will be offset by the reduction of uncertainty and complexity inherent in the current double set of Principles.

**The GOCs and Statutory Bodies**

The consultation paper identifies uncertainty regarding personal information collected by Queensland government owned corporations (GOCs) and statutory bodies.

In looking beyond the specific wording there is no substantive rationale for treating GOCs differently to other corporations or to Queensland state agencies. All of those entities deal with personal information. All should respect personal information within a statutory framework that is both transparent and balanced, for example recognizes – as with all privacy law – that on occasion information sharing without the express consent of the individual to whom the information relates is indeed legitimate. The rationale for treating some GOCs and statutory bodies differently to others is unclear.

Accordingly, it is desirable that the Government identify its bodies – those that under constitutional law would be recognized as state entities – as being covered by the unitary Information Principles referred to above. That coverage should be reflected in the administrative practice of the bodies. People within Queensland and outside, given that some GOCs will have operations across borders, should not be of the view that the Government is fostering regulatory arbitrage with particular bodies purportedly covered by neither the Commonwealth or Queensland information privacy statutes.

**Service Providers**

The paper asks whether the Act deals adequately with obligations for contracted service providers and should privacy obligations in the Act be extended to sub-contractors?

It is axiomatic, given the above comments regarding coherence and dignity, that the Government in its dealing with service providers should require them to engage in best practice regarding information privacy and to comply with the objects of the Act. In essence, people in Queensland should be confident that the Government has been respectful and has required that service providers (and by extension subcontractors) meet expectations regarding information collection, processing, storage, sharing and disposal. That requirement should be an express feature of all contracts between government bodies (including GOCs) and service providers. It is not contrary to coverage of many of the service providers by the *Privacy Act 1988* (Cth). A consistent and transparent approach to

contracting does not impose an inappropriate burden on public administration or on commercial activities. It is a reminder that some concerns can be effectively addressed outside statute law and that the Government needs to examine actual practice within the public sector rather than merely enhancing the Act.

**Transparency**

The paper asks –

> Is the information provided in the Right to Information and Privacy Annual Report useful? Should some of the requirements be removed? Should other information be included? What information is it important to have available?

It is tempting to regard annual reporting as an onerous compliance burden, one that involves costs without substantive benefits and is therefore addressed through a 'minimalist' report. The Government is strongly urged to avoid that temptation.

It should in particular ensure that there is appropriate resourcing for the creation and dissemination (particularly online) of a discrete Information Privacy Annual Report that features statistics, provides readers (officials and otherwise) with guidance about decision-making in agencies and the Commissioner's Office, and provides legislators and journalists with the basis for informed critique of the information privacy regime. The latter point is consistent with an underlying objective of both the Right to Information Act and Information Privacy Act, ie accountability of the Government and of public sector agencies.

**Dispute resolution**

The paper asks –

> Should the IP Act provide more flexibility about the timeframe for complaints to the OIC to be lodged? How should this be approached?

There is increasing recognition in technical literature and jurisprudence that disregard of privacy may not be immediately discernable by people whose privacy has been disrespected. It is clear for example that on occasion organisations take more than six months or a year in reporting data breaches to regulators and (directly or through the mass media) to affected individuals. The timeframe for complaints should reflect the reality of information practice.
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The consultation paper notes that both Acts provide a right of internal review, with applicants able to the Information Commissioner for an external review. Disquietingly – and inconsistent with the regimes in the Commonwealth, Victoria and NSW – there is no direct right to appeal to an administrative tribunal, in this instance the Queensland Civil & Administrative Tribunal (QCAT). The paper indicates that the rationale for the restriction – other than on a question of law – is that access would 'overburden QCAT, create delay and expense; and provide less flexibility than is currently available'. Further,

> A right to apply to QCAT directly is unlikely to reduce the time taken for a review to be finalised in Queensland. There would also be a cost to this option for QCAT and, most likely, also for applicants.

In terms of accountability that rationale is unpersuasive. There would be a cost to the

government in the form of funding QCAT. That cost is appropriate and is consistent with the cost of funding the overall civil justice system. As a society we should recognize that access to justice is fundamental rather than a financial burden. The claim that QCAT would be overburdened appears at odds with the small number of decisions made by the Information Commissioner regarding information privacy. More broadly, the burden is likely to be small if the Government fosters best practice across the private sector, a matter of systemic process improvement regarding information handling rather than treating appropriate information technology system specification, design, testing, maintenance and review as a cost.

**Powers**

The paper asks –

> Are additional powers necessary for the Information Commissioner to investigate matters potentially subject to a compliance notice under the IP Act?

It is traditional for Governments to approach their responsibilities in terms of granting additional powers to regulatory bodies or reducing 'red tape' by reducing the powers of such bodies and otherwise weakening compliance requirements. In considering responses to the consultation paper the Government may however look beyond the statute and examine the resourcing of the Information Commissioner's Office. Strong powers are highly likely to be ineffective if a regulatory and educative body such as the Office is inadequately staffed in terms of sufficient personnel to undertake its functions and (just as importantly) in-house expertise. That is particularly the case if the regulator is perceived as lacking autonomy and a willingness to effectively engage, including through public disclosure, with powerful public sector agencies and private sector bodies.

Privacy specialists have viewed with disquiet the pattern over the past decade to cut staffing for privacy regulators, reduce the certainty of employment (most egregiously with short term funding of the Office of the Australian Information Commissioner while Commonwealth Attorney-General Brandis unsuccessfully sought to abolish that agency) and amalgamate Privacy commissioners with FOI commissioners.

If the Government is committed to accountability in carrying forward the Solomon recommendations a key action is to provide stronger resourcing at the agency level and within the Information Commissioner's Office for administration of the privacy function.

I have referred to the 'educative' function because informing policymakers and decision-makers across the public sector (and by extension service providers) serves to increase efficiencies, minimize uncertainty and reduce the incidence/severity of disputes. The Information Commissioner should be involved on a timely and authoritative basis in the development of whole-of-government and agency-specific information strategy and operational guidelines rather than being regarded by agencies as an inconvenient solution when a privacy harm has arisen.

**Agency Practice**

The paper asks –

> Should IPP 4 be amended to provide, in line with other IPPs, that an agency must take reasonable steps to ensure information is protected against loss and misuse?

The consultation paper notes "strong support" in 2013 for amending IPP to require agencies to only take 'reasonable steps' to protect information, given that that agencies are currently required to ensure protection against loss and misuse. The requirement may be considered by agencies to be inappropriately onerous. However in the absence of timely mandatory reporting and meaningful remedies where there is loss/misuse it is sensible to require bodies to be conscious of potential harms and to accordingly avoid construing 'reasonable' as **more** than a lowest common denominator approach to personal data collection, storage, processing, disposal and dissemination.

In essence, given that much of the personal information dealt with by government must be provided by individuals (in contrast to that dealt with in the private sector), Queensland agencies and service providers should emphasise global best practice rather than what is ordinary.

Underlying that emphasis should be a mindset in which agencies are data custodians rather than owners.

## Collection

The paper asks –

> Should the words 'ask for' be replaced with 'collect' for the purposes of IPPs 2 and 3?

Given the above comments the Act should be concerned with personal information that is collected rather than the narrower subset of information requested.

That scope is consistent with the European data protection regime, where there is express and effective engagement with questions about consent.

## A regime for the Age of Big Data and Pervasive Surveillance

Ideally, the consultation would have untied review of the Information Privacy Act from the review of the Right to Information Act and instead considered the broader Queensland privacy regime.

That consideration would for example have explored questions about the shape of privacy protection in Queensland following the problematical District Court decisions in *Grose v Purvis* [2003] QDC 151 and *Doe v Yahoo!7 Pty Ltd*; *Wright v Pagett* [2013] QDC 181 alongside the emergence of new technologies/practices highlighted by the Australian Law Reform Commission's 2014 *Serious Invasions of Privacy In the Digital Era* (ALRC Report 123).

From that perspective the consultation is a lost opportunity. It is desirable that the Government considers establishment of

- a statutory cause of action for serious invasions of privacy,
- mandatory data breach notification relating to Queensland public sector agencies
- a right to compensation for data breaches relating to Queensland public sector agencies.
- alignment with international best practice, especially regarding the international transfer of personal information

- misuse of digital surveillances tools in what is becoming a '24/7' workplace.

Yours sincerely

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