QUEENSLAND COUNCIL FOR CIVIL LIBERTIES

Protecting Queensland's individual rights and liberties since 1967

Watching Them While They're Watching You

RTI and Privacy Review
Department of Justice and Attorney-General

By email: FeedbackRTIandprivacy@justice.qld.gov.au

Dear Madam/Sir

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

The Queensland Council for Civil Liberties (QCCL) thanks you for the opportunity to make a submission in relation to this review.

QCCL is a voluntary organisation which has worked for the last 50 years to secure the implementation in Queensland of the Universal Declaration of Human Rights (UDHR).

It is QCCL's view that freedom of information is a necessary though not a sufficient condition to enabling the citizens of Queensland to fully enjoy those rights.

In our submission to this review, QCCL wishes to stress the importance of protecting the public right to information. We have responded to a select number of issues raised in the 2016 Consultation below.

3. Should the way the RTI Act and Chapter 3 of the IP Act applies to GOCs (government-owned corporations), statutory bodies with commercial interests and similar entities be changed? If so, in what way? Is there justification for treating some GOCs differently to others?

The main objective of right to information should not be lost. The public right to information should not be outweighed by the fact that 'compliance with the RTI Act places an additional burden on the operations of GOCs, statutory bodies with commercial interests and similar entities, negatively affecting their ability to generate commercial returns'.[1]

[1] Department of Justice and Attorney-General, *2016 Consultation on the Review of the Right to Information Act 2009 and Information Privacy Act 2009*, Consultation Paper (2016) 13 ('*Consultation Paper (2016)*').

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?

Yes. As stated in the Consultation Paper, the trend to contract non-government bodies to provide services to the public on behalf of the government may mean a degree of accountability is lost because there is no statutory right of access to documents held by service providers.'[2] Additionally, the NSW Independent Commission Against Corruption has previously noted that contracting out creates increased or changed opportunities for corruption in the contracting process.[3]

The approach in s 6C of the *Freedom of Information Act 1982* (Cth) addresses the argument that if non-government bodies were to become 'agencies' under the RTI Act, they may be imposed with unreasonable costs and administrative burden.[4] Under s 6C, where an FOI application is made to an agency for documents held by the contracted service provider, the service provider is required to provide the documents to the relevant government agency, which is responsible for processing the application.

Considering that the transfer of public functions to the private sector is agreed by both major parties, and if the Preamble to the *RTI Act* is to be fully recognised, steps need to be taken to ensure that the process of contracting (and indeed sub-contracting) is open for examination.

6. Does the IP Act deal adequately with obligations for contracted service providers? Should privacy obligations in the IP Act be extended to sub-contractors?

Section 35 of the *IP Act* adequately deals with obligations for contracted service providers by providing that agencies must take all reasonable steps to ensure that a contracted service provider is required to comply with IPPs or NPPs (whichever is applicable), and transfer of personal information, as if it were the agency.

However, it is QCCL's submission that the privacy obligations under the *IP Act* should extend to sub-contractors considering that the Office of the Information Commissioner Qld (OIC) already recommends that agencies should consider imposing contractual obligations on contracted service providers such as prohibiting the use of a subcontractor or requiring any subcontractor to comply with the privacy principles.[5] A practice that was standard in the Commonwealth public service 20 years ago.

9. Should the threshold for third party consultations be changed so that consultation is required where disclosure of documents would be 'of substantial concern' to a party"

Yes. QCCL agrees that the lower threshold increases the number of third party consultations which impacts the decision-making agency, the agency being consulted, consulted parties and the OIC.

11. Are the exempt information categories satisfactory and appropriate? Are further categories of exemption needed? Should there be fewer exemptions?

There are currently too many categories of exemption contained in Schedule 3 of the *RTI Act*. QCCL is of the view that the legislation should strongly presume that disclosure is in the public interest and supply a heavy onus that public interest in better served by non-disclosure.

Item 2 Cabinet information brought into existence on or after commencement

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[2] Ibid 14.

[3] New South Wales Independent Commission Against Corruption, *Contracting for Services: A Probity Perspective* (1995) 3-4.

[4] *Consultation Paper (2016)* 14.

[5] Office of the Information Commissioner Queensland, *Interpreting the legislation – Information Privacy Act 2009. Part Two: General Guidance on privacy considerations when entering into a service arrangement* (2015) 3 [3.2].

Para 1(a) should be altered so that if a reader cannot tell, by the basic nature of the information, that it went to Cabinet or was created for it, it cannot be exempt.

Item 3 - Executive Council information

We submit that 'Executive Council' is too wide a category (much wider than the Cabinet) to constitute an exemption. QCCL is of the view that information submitted to the Executive Council should be subject to the same test as Cabinet.

Item 7 Information subject to legal professional privilege

We note the decision by the Grand Chamber of the European Court of Justice in *Sweden and Turco v Council of the European Union & Ors*[6] that legal advice in relation to draft legislation should be disclosed because it 'increases transparency and strengthens the democratic rights of European citizens to scrutinise the information which has formed the basis of a legislative act.' This position does not deny the fact that legal professional privilege is important to a government when it is involved in disputes, drafting contracts or ordinary legal advice.

Item 11 Investment incentive scheme information

We submit that this provision is unjustified and should be removed. If the schemes which Item 11 protects will not withstand public scrutiny, then they should have no place as a function of government.

12. Given the 2013 responses, should the public interest balancing test be simplified; and if so how? Should duplicated factors be removed or is there another way of simplifying the test?

QCCL is concerned about the practical operation of s 48 which provides for a huge number of factors to be considered in the schedules, each to differing degrees. This process is open to abuse by public servants and decision-makers.

The *RTI Act* must be amended to require every decision-maker to clearly identify which factors they have considered and to describe the balancing process that they have undertaken in arriving at their decision to refuse access to a document. But the current provisions have produced decisions which are often both formulaic and confusing.

Additionally, decision-makers should start from a presumption in favour of disclosure – the public interest balancing test must only be used when a decision-maker is thinking about refusing disclosure.

13. Should the public interest factors be reviewed so that (a) the language used in the thresholds is more consistent; (b) the thresholds are not set too high and (c) there are no two part thresholds? If so, please provide details.

Our view is that the factors favouring non-disclosure are too wide.

14. Are there any new public interest factors which should be added to schedule 4? If so, what are they? Are there any factors which are no longer relevant, and which should be removed?

Item 4 Disclosure of deliberative process

This exemption is often claimed as a coverall when there is nothing else to rely upon. If members of the public are to make a meaningful contribution to political debate, they need to have access to the material upon which decisions are made.

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[6] (C-39/05, C-52/05) [2008] ECR 209/02.

20. Should internal review remain optional? Should the OIC be able to require an agency to conduct an internal review after it receives an application for external review?

It is our view that the internal review should remain optional. It allows agencies to correct their own mistakes first and can be quicker than an external review. It also allows for the fact that an individual may not want to continue dealing with an agency and allows them to instead seek review from the OIC.

24. What would be the advantages and disadvantages of aligning the IPPs and/or the NPPs with the APPs, or adopting the APPs in Queensland?

This has been adequately addressed in the Consultation Paper.[7] We reiterate that the ALRC recommended a cooperative scheme applying the principles in the *Privacy Act 1988* (Cth) to state and territory jurisdictions.

We also note that having public and private hospitals subject to the same principles would make it easier for individuals to understand the privacy obligations owed to them and to make a complaint if they thought there had been a breach of these principles.

25. Should the definition of 'personal information' in the IP Act be the same as the definition in the Commonwealth Act?

The current definition of "personal information" follows that recommended by the Australian Law Reform Commission in its report: *For Your Information: Australian Privacy Law and Practice*. However, in its recent decision *Privacy Commissioner vs Telstra Corporation Limited* [2017] FCAFC 4, the Full Court of the Federal Court interpreted this provision in a way which is inconsistent with the intention of the Commission. The Commission intended that the definition would cover a situation where an "individual can be identified from information in possession of an agency or organisation or from that information and other information, the agency or organisation may access, without unreasonable cost or difficulty." see paragraph 6.55 of the report. It is our submission that the definition needs to be altered to achieve that result. One proposal would be to start with the definition of "personal data" contained in the United Kingdom's *Data Protection Act* which is set out in paragraph 6.13 of the Commission's report. However, we would acknowledge that as is the case with the current definition of "personal information" it needs to be recognised that the obligation on the agency or organisation is limited to information which can be created at a "reasonable cost". To put it another way, agencies and organisations need to be required to produce information which would cause them unreasonable expense to produce.

31. 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?

Yes.

This submission is the work of executive member Ameera Mohamed-Ismail with contributions by President Michael Cope.

Yours faithfully [redacted]

[redacted]

Michael Cope
President
For and on behalf of the
Queensland Council for Civil Liberties
3 February 2017

[7] Above n 3, 26.