

3 November 2023

Our ref: [LP:MC]

Committee Secretary
Education, Employment and Training Committee
Parliament House
George Street
Brisbane Qld 4000

By email: [REDACTED]

Dear Committee Secretary

Information Privacy and Other Legislation Amendment Bill 2023

Thank you for the opportunity to provide feedback on the Information Privacy and Other Legislation Amendment Bill 2023 (**the Bill**).

The Queensland Law Society (**QLS**) appreciates the opportunity to provide a submission on this important legislation.

We note the public hearing on the Bill is to be held on 13 November 2023. On this occasion, due to the availability of our expert committee members, we are unable to appear as a witness at the hearing. We would be pleased to assist the Committee in any way and to engage in further consultation with the department in response to our written submissions below or following the inquiry process as required.

QLS is the peak professional body for the State's legal practitioners. We represent and promote over 14,000 legal professionals, increase community understanding of the law, help protect the rights of individuals and advise the community about the many benefits solicitors can provide. QLS also assists the public by advising government on improvements to laws affecting Queenslanders and working to improve their access to the law.

This response has been compiled by the QLS Privacy, Data, Technology and Intellectual Property Law Committee, whose members have substantial expertise in this area.

Introduction

At the outset, we support steps towards promoting consistency and interoperability between Queensland's privacy framework and the Commonwealth's privacy framework. We agree that a harmonised privacy framework will reduce compliance burdens and costs for individuals and organisations, especially for those operating across multiple jurisdictions.

In this regard, QLS notes that the Australian Government published its response to the Commonwealth's *Privacy Act 1988* (Cth) (**Privacy Act**) review on 28 September 2023 with development of legislative proposals and consultation to occur into 2024.

Our members are concerned that implementing the proposed reforms before the Privacy Act review and reform process has been finalised, will create confusion and perpetuate inconsistencies between the State and Commonwealth privacy frameworks.

This is particularly important in the context of the policy objectives of the Bill which seek to align definitions and aspects of the Privacy Act with the State legislation. We strongly recommend awaiting finalisation of the Privacy Act reforms to ensure that Queensland's privacy and right to information frameworks remains contemporary and fit for purpose.

Our specific comments on the Bill are set out below.

Information Privacy Act 2009 (Qld) (IP Act)

Definition of personal information

Clause 12 of the Bill replaces sections 12 to 14 and includes a new meaning of *personal information* consistent with the current definition in section 6 of the Privacy Act, as follows:

12 *Meaning of personal information*

Personal information means information or an opinion about an identified individual or an individual who is reasonably identifiable from the information or opinion—

(a) whether the information or opinion is true or not; and

(b) whether the information or opinion is recorded in a material form or not.

Privacy Act review proposal

Although QLS generally supports consistency in the definition of 'personal information' in the IP Act and the Privacy Act, there are existing issues with the definition in the Privacy Act which are currently under consideration.

The Privacy Act review has proposed amendment to the definition of 'personal information' in the Act. In particular, proposal 4.1 has recommended changing the word 'about' in the definition to 'relates to'. This is intended to form part of proposals which seek to clarify 'that personal information includes technical information, inferred information and any other information where that information relates to the individual...and the connection is not too tenuous or remote'.¹

¹ Attorney General's Department, *Privacy Act Review Report 2022* (Final Report, 16 February 2023) 25 <https://www.ag.gov.au/sites/default/files/2023-02/privacy-act-review-report_0.pdf>

The Commonwealth Government has agreed in principle to these amendments to ensure that 'personal information is an expansive concept that includes technical and inferred information'.²

We recommend awaiting finalisation of the Privacy Act review process before amending the definition in the IP Act to ensure the stated aim of consistency is achieved.

Adopting a single set of privacy principles

Clauses 22 and 23 of the Bill replace the existing Information Privacy Principles with the Queensland Privacy Principles (QPPs) set out in schedule 3 with the QPPs to apply to all Queensland agencies, other than an Australian Privacy Principle (APP) entity.

Privacy Act review proposal

Whilst QLS generally supports having one set of privacy principles and greater consistency between the Queensland and Commonwealth frameworks, we again note that the Privacy Act review process is considering amendments to the APP scheme. This includes considering extended protections for de-identified information.

For example, in the context of cyber security risks, the Privacy Act review has proposed inclusion of 'a set of baseline privacy outcomes under APP11' (security of personal information) and related consultation informed by the development of the Government's 2023-2030 Australian Cyber Security Strategy.³ This recommendation has received agreement in principle by the Federal Government.⁴

It is intended that the list of 'outcomes-based factors' would require entities to consider whether their current practices enable them to meet those outcomes.⁵

QLS again recommends the proposed QPPs be finalised after the review of the Privacy Act is completed to ensure greater consistency and that any reforms adequately respond to current cyber security concerns.

Power to issue guidelines

Clause 38 of the Bill replaces existing section 138 of the IP Act to provide that the Information Commissioner may issue a guideline about the Commissioner's functions and clarifies the relationship with the Information Commissioner's power to make guidelines under the *Right to Information Act 2009* (Qld) (RTI Act).

² Attorney General's Department, *Government response to the Privacy Act Review Report* (Report, 28 September 2023) 5 <<https://www.ag.gov.au/sites/default/files/2023-09/government-response-privacy-act-review-report.PDF>>.

³ Attorney General's Department (n 1) 224.

⁴ Attorney General's Department (n 2) 33.

⁵ Attorney General's Department (n 1) 224.

The Privacy Act review report notes that the approach in [Art 32 of the GDPR](#) and the [ACSC's Cyber Security Principles](#) could be used as a starting point for further consideration.

In particular, section 138(1)(c) of the Bill states that the Information Commissioner may issue guidelines about 'the application of the privacy principle requires, including the factors to be considered in determining whether the QPPs are being complied with'.

To provide legislative clarity and certainty, QLS recommends incorporating a non-exhaustive list of the 'factors to be considered in determining whether the QPPs are being complied with' within the Bill.

Mandatory data breach notification (MDBN) scheme

While QLS generally supports amendments to provide for a MDBN scheme in Queensland, as far as possible, consistency with the Commonwealth's Notifiable data breaches scheme is needed to streamline reporting processes. This is particularly important for Queensland entities with multiple reporting obligations.

For example, Clause 33 of the Bill will require an agency to, as soon as practicable after forming the belief that there has been an eligible data breach of the agency, give a statement containing the required information, to the Information Commissioner.

The Privacy Act review has proposed a new 72 hour deadline within which to report eligible data breaches to the Office of the Australian Information Commissioner (OAIC).⁶ The Government has agreed-in-principle with this recommendation to implement the 72 hour deadline.⁷

QLS supports enhanced notification requirements to ensure the notification process is meaningful. We recommend consideration be given to aligning the requirements for notification under the proposed Queensland scheme with any reform to the Commonwealth scheme.

A data breach may also involve other regulators, such as the Queensland Human Rights Commission. To support agencies in appropriately responding to data breaches, we recommend the Office of the Information Commissioner Queensland (OIC) be resourced to provide guidance to clearly outline the functions and responsibilities of each regulator in the event of a data breach to ensure clarity and avoid regulatory overlap.

Disclosure of personal information to overseas recipients

Clause 28 amends section 33 of the IP Act so that the section refers to 'disclosure' of an individual's personal information to an entity outside Australia, as opposed to 'transfer' of such information.

Privacy Act review proposal

The Privacy Act review includes consideration of whether APP8 (and the related accountability framework in section 16C of the Privacy Act) requires clarification to protect consumers and support entities disclosing information overseas.

⁶ Ibid 15.

⁷ Attorney General's Department (n 2) 9.

Given the issues under section 33 of the IP Act will be similar to those under the Privacy Act, consideration should be given to revisiting this issue, following progress on the Privacy Act reforms, to avoid inconsistency and regulatory uncertainty for agencies.

Contracted service providers

Clause 31 amends section 36 (Bound contracted service provider to comply with privacy principles) to include the terminology 'privacy principle requirements'. The clauses also includes amendments to require a contracted service provider to comply with parts 1 (QPP codes) and 2 (information commissioner guideline/s) and new section 41 (agencies must comply with QPP codes).

In our view, contracted service providers and their subcontractors must be supported to understand their obligations and in complying with the IP Act, something which would require additional resources to the OIC.

Although the Explanatory Notes to the Bill outline that the OIC has been allocated \$11.465 million over four years and \$2.563 million ongoing through the State Budget 2023-24, QLS holds reservations as to whether the OIC will be sufficiently resourced to enforce contracted service provider obligations under the Bill in addition to its current workload demands. We note the increased funding is intended 'for operational implementation, development of an ICT solution and training and awareness activities'.⁸

Given the significance and scope of the OIC's proposed role under the Bill, we recommend that the government consult with the OIC and stakeholders within 12 months of the Bill's assent to ensure that ongoing budgetary allocation is appropriate.

We also support the recommendation of Dominic McGann in his recent 'Strategic review of the Office of the Information Commissioner, 2022', (**the OIC Strategic review**), that whilst the next strategic review would ordinarily be undertaken in 5 years, there would be an advantage to reducing that time period to ensure that any implementation issues are addressed at an earlier stage.⁹

Powers and functions of the Information Commissioner

The Bill includes amendments to the IP Act including:

- a power to investigate an act, failure to act or practice of an agency which may be in breach of the privacy principles or other stated obligations under the IP Act; and
- new functions and regulatory powers in relation to compliance with the new MDBN scheme.

⁸ Explanatory Notes, Information Privacy and Other Legislation Amendment Bill 2023 6.

⁹ Dominic McGann, *How to let more sunshine in – Strategic review of the Office of the Information Commissioner, 2022* (Final Report, 12 December 2022) 30
<<https://documents.parliament.qld.gov.au/tp/2023/5723T23-F601.PDF>>.

The OIC's most recent annual report for the 2022 to 2023 financial year period observed that the existing investigative powers under the IP Act are limited.¹⁰

In the time available, QLS generally supports enhancing the powers and functions of the OIC to respond to privacy breaches but as indicated above, any additional functions must be met with corresponding increase in funding to OIC. This is important to ensuring that agencies and service providers are supported to understand and comply with their obligations under the Bill.

The OIC Strategic review outlined the 'significant resources that will ultimately be required by the OIC to give effect to the changes that have been forecast (in terms of the establishment, training and implementation of what will effectively be a new privacy regime in Queensland)'.¹¹ Correlating funding allocations will be critical to ensure the scheme's efficiency and effectiveness.

Right to Information Act 2009 (Qld)

Modification of internal and external review processes under the RTI Act

The Bill would remove the right of internal review and external review to the Information Commissioner of a decision by a judicial or quasi-judicial entity. We understand the amendment is intended to reflect the reality that in practical terms, such entities can refuse to provide documents to the Information Commissioner to preserve judicial independence. In general terms, QLS strongly supports the fundamental principle of judicial independence and the separation of powers.

Additionally, a fair procedure for decision making and the preservation of accessible review processes are also an important component of the rule of law, particularly where decisions have a material impact on individuals. In this regard we note that the right of appeal to the QCAT Appeals Tribunal on a question of law for these decisions will be retained.

This appears to be appropriate and is consistent with the entities to which the RTI Act does not apply under current Schedule 2 of the Act.

Proactive cabinet release

One of the stated objectives of the Bill is to make legislative amendments to support the operation of the administrative scheme which will provide for the proactive release of Cabinet documents which was recommended in the Coaldrake Report¹².

¹⁰ Office of the Information Commissioner Queensland, *Annual Report 2022-23 – Building trust through transparency* (Report, 18 September 2023) 22

<https://www.oic.qld.gov.au/__data/assets/pdf_file/0017/60308/OIC-Annual-Report-2022-23.pdf>.

¹¹ McGann (n 9)

¹² Professor Peter Coaldrake AO, *Let the sunshine in - Review of culture and accountability in the Queensland public sector* (Final Report, 28 June 2022)

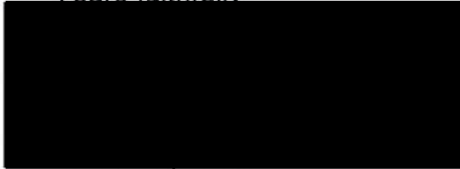
<<https://www.coaldrakereview.qld.gov.au/assets/custom/docs/coaldrake-review-final-report-28-june-2022.pdf>>.

Information Privacy and Other Legislation Amendment Bill 2023

QLS is broadly supportive of the Government implementing this recommendation and the amendments outlined in the Bill. We recommend that the process be reviewed after a period of time to ensure decisions in relation to redactions or exemptions are being used as intended.

If you have any queries regarding the contents of this letter, please do not hesitate to contact our Legal Policy team via [REDACTED] or by phone on [REDACTED]

Yours faithfully



President