



Australian Government

Office of the Privacy Commissioner

**Exposure drafts of the
Queensland Right to Information
and Information Privacy Bills**

**Submission to the Queensland
Government**

April 2009

Executive Summary

The Office of the Privacy Commissioner (the Office) makes the following comments on the proposed *Right to Information Bill 2009* (the RTI Bill), and the *Information Privacy Bill 2009* (the IP Bill):

- The Office generally supports the inclusion of public interest test factors in the RTI Bill.
- The Office believes that the RTI Bill offers a suitable approach to mixed access applications.
- Further development of the IP Bill may benefit from the forthcoming exposure draft of changes to the *Privacy Act 1988* (Cth) (the Privacy Act) which will include a unified set of privacy principles.

Office of the Privacy Commissioner

The Office is an independent statutory agency responsible for promoting an Australian culture that respects privacy. The Office, established under the *Privacy Act 1988* (Cth) (the Privacy Act), has responsibilities for the protection of individuals' personal information that is handled by Australian and ACT government agencies, and personal information held by all large private sector organisations, health service providers and some small businesses¹.

Background

In June 2008, the Independent Review Panel ('the Panel'), commissioned by the Queensland Government and chaired by Dr David Solomon released *The Right to Information: Reviewing Queensland's Freedom of Information Act 1992* (the Solomon Report).

The Solomon Report made recommendations for a new legislative framework for access to information in Queensland; which includes:

- Freedom of Information legislation, which would provide a right of access to information held by the government unless, on balance, it is contrary to the public interest to provide that information.
- Privacy legislation to provide for access and amendment rights for personal information and to codify the current Information Privacy Principles.

Following the Queensland Government's response to each of the recommendations contained in the Solomon Report, the Queensland Government released exposure drafts of the RTI Bill and the IP Bill for consultation.

The Office welcomes the opportunity to provide comments on the exposure drafts of the RTI and IP Bills. The Office's comments are aimed at assisting the process of achieving consistency in privacy regulation across Australian jurisdictions, in line with the Office's support for that objective outlined in the Australian Law Reform Commission's Report 108; *For Your Information: Australian Privacy and Practice*² (the ALRC Report 108).

¹ Information relating to the operation of the Privacy Act can be found on the Office's website at <http://www.privacy.gov.au/>.

² ALRC Report 108, May 2008, available at: <http://www.austlii.edu.au/au/other/alrc/publications/reports/108/>

The Right to Information Bill

The RTI Bill, which would replace the current *Freedom of Information Act 1992* ('Old FOI Act') provides a legally enforceable right of access to information under the government's control unless there is a public interest in the information not being released.

The RTI Bill would introduce several changes to Queensland's FOI regime. From the Office's viewpoint the two most important changes are:

- The inclusion of a list of factors which need to be considered in determining whether disclosure is contrary to the public interest.
- The RTI Bill being primarily concerned with access to non-personal information except in relation to mixed access applications.

Public Interest Test Factors

The ability to access one's own personal information is an important privacy issue. Therefore, the Office, in general, supports the inclusion of public interest test factors, outlined in Schedule 4 of the RTI Bill, to be considered by the agency or Minister when deciding whether on balance disclosure would be contrary to the public interest³. Factors favouring disclosure include, for example situations where the information is the applicant's personal information⁴.

The Office also supports the inclusion of the factor favouring nondisclosure which refers to disclosure of information that could reasonably be expected to prejudice the protection of an individual's right to privacy⁵. These public interest test factors are consistent with Information Privacy Principle (Cth IPP) 6 in the Privacy Act which entitles individuals to have access to a record containing their personal information except where the agency is required or authorised by law to refuse access.

Mixed Access Applications

The RTI Bill and the IP Bill both regulate the way in which information is handled, but the Bills have different purposes. The RTI Bill is mainly concerned with government transparency by granting access to non-personal information held by Queensland Government agencies. The IP Bill is primarily concerned with the handling of an individuals' personal information including the right to access their own personal information and have it amended.

The RTI Bill is primarily concerned with access to non-personal information except in the case of mixed access applications⁶. This involves information that is a combination of the applicant's personal information and another person's personal information or the applicant's personal information and non-personal information.

The Office believes that the RTI Bill offers a suitable approach to mixed access applications. Access to one's own personal information is an important form of

³ RTI Bill, clause 48

⁴ RTI Bill, Schedule 4, Part 2 – Factors favouring disclosure, Item 7

⁵ RTI Bill, Schedule 4, Part 3 - Factors favouring nondisclosure, Item 3

⁶ RTI Bill, clause 8

privacy protection and where possible individuals should not be subject to complex FOI processes if a simpler process were available under privacy legislation⁷. For this reason the Office supports the proposed distinction whereby the IP Bill would govern access to personal information while still allowing individuals to use the RTI Bill provisions where their information is in a document that also includes non-personal information.

The Information Privacy Bill

Operating parallel to the RTI Bill, the IP Bill would replace and codify Queensland's administrative privacy regime, which consists of the *Information Standards 42: Information Privacy* (IS42) based on the Cth IPPs and *Information Standard 42A: Information Privacy for the Queensland Department of Health* (IS42A) based on the National Privacy Principles in the Privacy Act. The IP Bill would govern access to, and amendment of a person's own personal information held by Queensland public sector agencies and provides legislative safeguards for the handling of personal information held by those agencies.

The IP Bill contains Information Privacy Principles (Qld IPPs) which deal with the collection, use, storage and disclosure of personal information by state government agencies. The IP Bill also retains the application of the National Privacy Principles (Qld NPPs) to Queensland Health.

National Consistency

The Office acknowledges that the IP Bill generally reflects both the current Queensland administrative privacy regime (IS42 and IS42A) and current Commonwealth privacy law. The Office believes this approach is commendable and represents an important development towards promoting national consistency.

However, the Office notes that the ALRC Report 108 suggests that a single set of privacy principles, suitable for covering all sectors including health would be even more effective in promoting national consistency⁸.

The Office also notes that in its submission to the ALRC's review of privacy, the Queensland Government supported the use of 'mirror legislation' including the development of a consistent set of privacy principles binding both public and private sectors to help achieve national consistency.⁹

The Australian Government has already indicated that its response to the ALRC Report 108 will be in two stages¹⁰. The first stage will include a unified set of privacy principles based on those put forward in the ALRC Report 108¹¹. It is likely that an exposure draft of these amendments to the national privacy legislation will be available later this year. The release of that exposure draft may be of great assistance in the further development of the IP Bill.

⁷ Office submission to Issues Paper 31, chapter 7, paragraph 83

⁸ See ALRC Report 108, volume 1, paragraphs 3.104-3.105, Recommendation 3-4

⁹ ALRC Report 108, volume 1, paragraph 3.44 – citing Queensland Government, *Submission PR 242*, 15 March 2007

¹⁰ Speech by Senator, The Hon John Faulkner to launch the Australian Law Reform Commission's Report on Privacy, 11 August 2008 -

http://www.smos.gov.au/speeches/2008/sp_20080811.html

¹¹ The Model UPPs are contained at the beginning of ALRC Report