Information Privacy and Other Legislation Amendment Bill 2023

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Committee Secretary
Education, Employment and Training Committee
Parliament House
George Street
Brisbane QLD 4000
By email only: eetc@parliament.qld.gov.au

Dear Secretary

Information Privacy and Other Legislation Amendment Bill 2023

The Office of the Information Commissioner (**OIC**) welcomes the progress toward implementation of important information access and privacy reforms represented by the Information Privacy and Other Legislation Amendment Bill 2023 **(**the **Bill**). OIC appreciates the opportunity make a submission to the Education, Employment and Training Committee's (the **Committee**) inquiry regarding the Bill.

About the OIC

OIC is an independent statutory body that reports to the Queensland Parliament. We have a role under each of the key pieces of legislation the subject of the Bill – the *Right to Information Act 2009* (**RTI Act**) and the *Information Privacy Act 2009* (**IP Act**) – to both facilitate greater and easier access to government held information and assist agencies to safeguard personal information.

Our functions include:

- assisting agencies to understand their obligations under the RTI and IP Acts
- conducting external reviews of information access decisions by agencies
- mediating privacy complaints against Queensland government agencies
- issuing guidelines on right to information and privacy best practice
- initiating right to information and privacy education and training; and
- monitoring, auditing and reporting on agency performance and compliance with the RTI Act and the IP Act.

OIC's submissions

We welcome this Bill and, in general terms support it. The Bill addresses recommendations and proposals made over a number of years, and if passed, it will modernise the information privacy protection framework in the Queensland public sector, and implement a range of measures intended to streamline and simplify the right to information access process. We also note that the Bill seeks to address some of the recommendations made in the Coaldrake report on culture and accountability in the Queensland public sector.[1]

OIC's submissions and observations are set out below, grouped as follows:

- IP Act amendments
- RTI Act amendments
- Other matters.

[1] Professor Peter Coaldrake AO, '*Let the sunshine in. Review of culture and accountability in the Queensland public sector*', Final Report, 28 June 2022, (**Coaldrake Report**).

Information Privacy Act 2009

Clause 33 – new Chapter 3A - Mandatory Data Breach Notification scheme

OIC supports the introduction of the Mandatory Data Breach Notification (**MDBN**) scheme set out in clause 33 of the Bill.[2] The proposed scheme – a recommendation of the Coaldrake Report[3] – will oblige agencies to take prompt action in response to suspected data breaches, and to notify affected individuals and the Information Commissioner of breaches assessed as being likely to result in serious harm to the former. The scheme also includes important support functions, and will oblige agencies to, among other things, publish a data breach policy.[4] OIC suggests that the matters canvassed below might further enhance the scheme.

Power to access agency systems remotely/take copies of information

New section 69(b) of the IP Act will confer powers of inspection, including of electronic documents, however only, as we understand, following physical entry under section 67. OIC queries whether, in view of both the widespread contemporary use by agencies of online information management systems and the de-centralised nature of Queensland,[5] a power to access/inspect systems via electronic means should also be contemplated, ie to permit 'remote access' by OIC to a system, without first requiring physical entry under new section 67(1)(a) or (b).

We also note that the power as drafted is limited to inspection only. OIC suggests that investigatory procedures would be assisted by including a power to make a record and/or take copies of information the subject of inspection.

Obligations of agencies in relation to data breaches

OIC notes the obligation in new section 48(2)(a) of the IP Act may overlap with the obligations in new section 48(4)(a). For the purpose of clarity and to emphasise agencies' obligations to contain the breach and mitigate any harm, the requirements in new section 48(4) should be moved into new section 48(2)(a). The obligations to contain and mitigate a data breach are important requirements in the scheme, both where an agency is aware a breach is an eligible data breach, and where an agency suspects a data breach to be an eligible data breach.

Requirement to assess suspected data breaches

New section 49 of the IP Act permits an agency to extend the period of assessment under new section 48. Undue delay in assessment and notification can impact the effectiveness of a data breach reporting scheme. OIC recommends that this provision incorporate a limitation that any extension only be for an amount of time reasonably required for the assessment to be conducted.[6]

Notifying particular individuals

New section 53 of the IP Act provides that an agency must, as soon as practicable, notify each individual whose personal information has been accessed, disclosed or lost

[2] New Chapter 3A, sections 46 to 74 of the IP Act.
[3] Page 67.
[4] New section 73 of the IP Act.
[5] Which may constrain OIC's ability to undertake physical inspections, depending on the location of relevant agency premises.
[6] As is the case under the NSW MDBN scheme – see section 59K of the *Privacy and Personal Information Protection Act 1998* (NSW).

if it is reasonably practicable to do so,[7] and if this does not apply, to notify each affected individual.[8] These subsections appear to relate to the same individuals. OIC suggests that new section 53(1)(b) instead refer to individuals *likely* to be affected by the data breach, aligning with the distinction made in new section 51(2)(e)(i), and with other similar breach reporting schemes which extend to individuals '*at risk from the eligible data breach*'.[9]

Role of Information Commissioner

The Information Commissioner will have power under new section 158(3) of the IP Act[10] to issue compliance notices in respect of agency obligations under new Chapter 3A, part 2 or part 3. OIC recommends extending this power to the entirety of Chapter 3A, which will enable the Information Commissioner to rectify serious, flagrant or repeated failures by an agency under the MDBN scheme as a whole (including to require compliance with a direction to give a statement under new section 61 of the IP Act).

Functions of Information Commissioner under the Act

Section 135 of the IP Act lists functions of the Information Commissioner under the Act. Overseeing agency compliance with a MDBN scheme creates new and distinct functions for the Information Commissioner. OIC therefore recommends that the statement of the Commissioner's functions in section 135(b)(i) of the IP Act include a reference to chapter 3A, as it currently only references compliance with the privacy principles.[11]

Including these functions within section 135 would also assist the OIC to exchange information relating to data breaches with other entities under new section 199, as a requirement of such information sharing is that it relates to the performance of Commissioner's functions under the Act.

Clauses 70, 71 – powers to make inquiries, require information/attendance

In our 5 August 2022 submission[12] responding to the Department of Justice and Attorney-General's (**Department**) June 2022 Discussion Paper,[13] OIC recommended amending section 167 of the IP Act to empower the Information Commissioner to make preliminary inquiries of not just the complainant or respondent to a privacy complaint, but any other person, consistently with powers conferred under analogous privacy protection regimes.[14]

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[7] New section 53(1)(a).
[8] New section 53(1)(b).
[9] *Privacy Act 1988* (Cth), s 26WL(2)(b).
[10] Clause 41 of the Bill.
[11] Section 135(1)(b)(i) would therefore read '*promote understanding of and compliance with Chapter 3A and the privacy principle requirements*'
[12] Submission to the Department of Justice and Attorney General on the Consultation Paper – Proposed changes to Queensland's Information Privacy and Right to Information Framework', Office of the Information Commissioner, 5 August 2022 (**OIC August 2022 Submission**). Accessible at https://www.oic.qld.gov.au/__data/assets/pdf_file/0016/53017/submission-public-consultation-paper-RTI-IP-Acts.pdf.
[13] 'Consultation Paper – Proposed Changes to Queensland's Information Privacy and Right to Information Framework', Department of Justice and Attorney-General, June 2022 ('**Consultation Paper**', accessible at https://www.publications.qld.gov.au/ckan-publications-attachments-prod/resources/7326cb08-a3da-451c-8c48-dc08ea9dcc6d/consultation-paper-proposed-changes-qld-ip-rti-framework.pdf?ETag=f9671bcc9b57d55cc316d1c803234761).
[14] See pages 36-37 of OIC August 2022 Submission. Section 42 of the *Privacy Act 1988 (Cth)* confers a power on the federal Privacy Commissioner to make preliminary inquiries of any person. Section 38 of the *Information Privacy Act 2014* (ACT) confers a similar power.

The Bill proposes important new powers enabling the Information Commissioner to make preliminary inquiries of persons in certain circumstances, which OIC welcomes.[15] It does not, however, appear that the Bill contains amendments permitting OIC to make preliminary inquiries regarding privacy complaints of persons who are not the complainant or respondent.

Relatedly, new section 196A of the IP Act[16] will, as noted, empower the Information Commissioner to make preliminary inquiries of any person for the purpose of determining whether to commence an investigation, including in relation to the new MDBN scheme. It is important that such a power is, in the context of the MDBN scheme, sufficiently broad so as to enable the Information Commissioner to make inquiries of any person in the course of overseeing administration of the scheme generally,[17] and not only where the Commissioner may be contemplating investigation. OIC suggests that this aspect of the preliminary investigation power in new section 196A be amended, to provide clarity in this regard.

We also query whether consideration could be given to amendments replicating:

- section 106 of the RTI Act,[18] so as to make clear that no legal impediments constrain persons disclosing information to the Information Commissioner for the purposes of the Commissioner's functions under the IP Act;[19] and

- section 96 of the RTI Act, so as to oblige participants to a privacy complaint – including respondent agencies – to respond in a timely way to reasonable OIC requests for information.[20]

Finally, clause 71 of the Bill makes important amendments to section 197 of the IP Act, enabling the Information Commissioner to require information or attendance in relation to a range of functions including audits and investigations,[21] which is welcomed. It is recommended that the power to require information or attendance also extends to compliance with the obligations in new Chapter 3A generally, to enable information gathering in the context of the administration of the MDBN scheme as a whole, and not only in the context of investigations.

Clause 74 - Queensland Privacy Principles

OIC supports the proposal to replace the two sets of privacy principles currently contained in the IP Act with a single set of privacy principles – the 'Queensland Privacy Principles' (**QPPs**) – applicable to all Queensland government agencies.[22] As the proposed QPPs are based on the Australian Privacy Principles (**APPs**)[23] , we consider these principles will not only simplify the local regulatory framework, but better harmonise that framework with the Commonwealth privacy regime, which we have consistently encouraged.

We note that the QPPs do not replicate the APPs in entirety, but have been tailored to reflect the fact that unlike the latter, the former will only apply to public agencies, and to accommodate certain Queensland public sector needs. OIC generally supports these variations. We do, however, note that the Bill omits QPP 8 concerning overseas disclosures of personal

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[15] New section 196A (clause 70), conferring a general power to make preliminary inquiries of any person for the purpose of determining whether to investigate an act or practice on the Commissioner's own initiative or otherwise under section 135(1)(a)(ii) of the IP Act.
[16] Clause 70 of the Bill.
[17] For example, to clarify the details of a section 51 statement to the Commissioner and for other similar purposes.
[18] Which provides that persons are not bound by restrictions in other laws when disclosing information to OIC for the purposes of an external review.
[19] Including wording that would permit entities to share legally privileged information with the Information Commissioner, without waiving the privilege in that information.
[20] A matter canvassed at pages 16-17 of our OIC August 2022 Submission.
[21] New section 197(1)(b) of the IP Act will confer a power on the Information Commissioner to require information or attendance relevant to an investigation of an act or practice that may contravene an agency's obligations, including under new Chapter 3A (ie, the new MDBN scheme).
[22] Which will appear in schedule 3 to the IP Act.
[23] As contained in the Commonwealth *Privacy Act 1988*.

information. We further note that the QPPs will not apply to existing service agreements, giving rise to a transitional issue. These matters are discussed below.

Omission of 'Queensland Privacy Principle 8' concerning cross-border disclosure of personal information

The Bill will enact a modified version of the existing section 33 of the IP Act. OIC notes that the amendment of section 33 in the manner proposed[24] – by replacing the term 'transfer' with 'disclosure' – is an improvement on the current requirements in section 33.[25] However, our view is that QPP 8 would provide a better mechanism for regulating overseas disclosure of personal information, by conferring greater flexibility on agencies and ensuring Queensland's privacy framework is as closely aligned to the Commonwealth scheme as possible. QPP 8, being modelled on APP 8, would be relatively familiar to a number of contracted service providers (**CSPs**) who would already have to comply with APP 8.

Should section 33 remain as the preferred method for regulating overseas disclosures of personal information, we recommend that the wording of the exceptions permitting overseas disclosures in certain circumstances are aligned with the wording of exceptions allowing disclosures in QPP 6. Relevantly:

- section 33(a) allows overseas disclosure where the individual '*agrees*' to the disclosure – QPP 6.1(a) uses the term '*consented*'
- section 33(b) permits overseas disclosure '*authorised or required under a law*'; QPP 6.2 refers to disclosure '*authorised or required under an Australian law or a court or tribunal order*'
- section 33(c) allows overseas disclosures to lessen or prevent a serious threat to the '*welfare*' of an individual. While this wording appears in the privacy principles currently in force,[26] it is not used in QPP 6 – an inconsistency which may inhibit the ability of agencies to make overseas disclosures.

Transitional issue

OIC notes that the QPPs are only proposed to apply to service agreements with CSPs which are entered into after commencement of relevant amendments.[27] This will result in agencies and OIC having to administer three sets of privacy principles, namely the existing privacy principles for 'pre-amendment' service agreements,[28] and the QPPs for agreements entered[29] after commencement. This may lead to complexity, in the context of a legislative proposal intended to achieve simplicity.

While OIC understands that there may be some apprehension as to the impact of applying the new QPPs to agreements negotiated on the basis of the existing regime, many CSPs are likely familiar with obligations imposed by the QPPs, given those obligations largely replicate the APPs which apply to a substantial segment of the private sector under the *Privacy Act 1988.* OIC also understands that there is likely to be a period of at least 12 months after passage of the Bill until the legislation commences to allow agencies and CSP time to negotiate the changes. OIC notes that this issue will progressively resolve as pre-amendment contracts expire,[30] but this may take some time. Accordingly, in the interests of clarity, it may be appropriate to incorporate a sunset clause. Expiry of such a clause would have the effect of bringing

[24] Relevant amendments to section 33 are contained in clause 28 of the Bill.
[25] A view expressed in our OIC August 2022 Submission: page 30.
[26] Eg, IPP 11(1)(c), NPP 2(1)(b).
[27] New section 216 of the IP Act (clause 73 of the Bill).
[28] The National Privacy Principles in schedule 4 of the IP Act, which currently apply to health agencies, and the Information Privacy Principles in schedule 3, applying to all other agencies.
[29] Or varied, in accordance with new section 216(5) of the IP Act (clause 73 of the Bill).
[30] As above.

any remaining pre-amendment service agreements under the QPPs, and ensure all stakeholders have certainty as to the point from which the QPPs only will operate.

No extension to subcontractors

In its 2022 Consultation Paper, the Department proposed amending the IP Act to extend privacy obligations to subcontractors:[31]

> *Contracted service providers would be required to take all reasonable steps to ensure a subcontracted service provider is contractually bound to comply with the privacy principles. Once bound, the subcontractor would assume the privacy obligations as if it were the agency. In the event of a breach, the privacy complaint would be made against the subcontractor. If the contracted service provider does not take all reasonable steps to bind the subcontractor to comply with the privacy principles, the contracted service provider would be liable for any privacy breaches committed by the subcontractor. This may not represent a significant change in practice where agencies already impose contractual obligations on contracted service providers to require any subcontractors to comply with the privacy principles under the IP Act, as recommended in the Guidelines published by the OIC.*

OIC supported the above proposal,[32] and continues to be of the view that an amendment to this effect would have merit. We note, however, that the relevant recommendation has not been carried forward into the Bill.

In a similar vein, OIC notes that the Bill does not address a potential gap in the IP Act concerning CSPs.

Sections 35-37 of the IP Act together oblige agencies entering service arrangements[33] to take all reasonable steps to ensure that the relevant CSP is required to comply with the privacy principles, as if it were the agency, in relation to the discharge of its obligations under the arrangement. Where the contracting agency satisfies this obligation, the CSP will then be bound to comply with the privacy principles as if it were the agency. Where the contracting agency does not take reasonable steps to bind the CSP, then the agency is effectively responsible for any privacy breaches occasioned by the contracted service provider in performing the service agreement.

OIC's concern is that individuals have no right of redress under the IP Act where a contracting agency *does* take reasonable steps to bind a CSP – but nevertheless fails to do so – and the individual suffers a privacy breach as a result of the acts or practices of the contracted service provider. We acknowledge that this is a potentially difficult issue to address, and propose to liaise further with the Department in relation to a possible solution for consideration as part of a future legislative review process.

No amicus curiae/intervenor role

The Consultation Paper canvassed the possibility of giving the Information Commissioner powers to intervene, or appear as friend of the court, in proceedings involving the IP Act – a proposal supported by OIC.[34]

The Bill, however, contains no such provisions.

We remain of the view such a right, versions of which are held by counterpart regulators in NSW and Victoria,[35] could augment the reforms proposed in the Bill.

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[31] Page 48.
[32] Page 27.
[33] Contracts or other arrangements under which CSPs arrange with contracting agencies to provide services on behalf of the agency: section 34 of the IP Act.
[34] OIC August 2022 Submission, page 16.
[35] As above.

Right to Information Act 2009

Clause 86 - No consequence for agency inaction on noncompliant applications

OIC notes the proposal in clause 86 of the Bill to include a new section 18(4) of the RTI Act defining 'valid application day', the effect of which will be to clarify that the processing period for dealing with an access application under the RTI Act only commences once the application is valid.[36]

OIC acknowledges this amendment will provide certainty to RTI administrators. We do note, however, that the Bill makes no provision to address the situation where an agency receives a noncompliant application, but takes no steps in relation to that application, leaving an applicant without an effective remedy. We are of the view that the proposed arrangements unduly prejudice such applicants and could undermine the intent of the legislation.

OIC suggests that one way of addressing this gap may be to introduce some form of deeming provision, such that if a noncompliance decision under section 33(6) of the RTI Act is not made within a given period, the agency is taken to have made a decision refusing access to, or amendment of, relevant documents, enabling[37] an affected applicant to seek review.

Clauses 87, 89: New sections 18A and 22A

We note that the Bill introduces the above as new provisions to the RTI Act. While OIC has no prior knowledge of either provision, it appears to us that the wording of new section 18A of the RTI Act is sufficiently broad so as to extend its operation to the RTI decision-making process, including external review – such that RTI decision-makers, and OIC on external review, will be obliged to 'look through' and disregard the fact some Cabinet information has been pro-actively published in assessing whether disclosure of other potential Cabinet information would be contrary to the public interest.

Clauses 109 and 139 – extending internal review to 'sufficiency of search' cases

Clause 109 of the Bill includes an amendment to section 80 of the RTI Act intended to allow agencies undertaking internal review to consider whether the original decision maker has taken reasonable steps to identify and locate all documents the subject of a given access application – what is known as 'sufficiency of search'. OIC supports this amendment.

OIC is concerned, however, that the related definitional amendment in clause 139 of the Bill may be drawn too narrowly. Clause 139 inserts a new schedule 4A to the RTI Act, setting out a revised definition of what comprises a 'reviewable decision' that may be the subject of, relevantly, internal review. New Schedule 4A section 1 relevantly provides:

> *Each of the following decisions relating to an access application is a reviewable decision –*
> *…*
> *(h) a decision giving access to documents that purports to, but may not, give access to all documents the subject of the application…*

[36] The position proposed in the Bill will make formal the historical interpretation of relevant RTI Act processing periods, ie that the processing period did not commence until an access or amendment application was valid. That interpretation was, however, cast into doubt by comments of the Court of Appeal in *Powell & Anor v Queensland University of Technology & Anor* [2017] QCA 200, where the Court at [152] expressed the view that a submission by OIC '*…that the that the processing period does not begin until an agency is satisfied that it has received a duly made application, cannot be accepted… A non-compliant application is not in this context a nullity: it still requires the action of the agency…to dispose of it.*' OIC adopted these views in *Poyton and Department of Education* [2023] QICmr 13, and found that the proper interpretation of relevant provisions was that the processing period commenced on receipt of an application, whether compliant or otherwise.

[37] By way of appropriate consequential amendments.

The accompanying editorial note states that an example of such a decision is one where '*an agency has not taken reasonable steps to identify and locate documents applied for by an applicant*', ie, sufficiency of search cases.

OIC notes that 'sufficiency of search' issues do not arise solely from decisions purporting to *'give access to all documents the subject of the application*'. Such issues may arise, for example, in cases where an agency has decided to refuse access to documents. In cases of this latter kind, it may well be that the access applicant accepts the agency's decision to refuse access to those documents the agency has located and dealt with in its decision – and does not seek review of that decision – but is nevertheless concerned that the agency has failed to take reasonable steps to identify and locate all relevant documents. It is not clear that the above definition accommodates decisions of this kind.

OIC suggests broadening the definition slightly - perhaps reframing schedule 4A, section 1(h) to read *'a decision that purports to but may not be a decision on all the documents the subject of the application*' or similar.

Clause 117 – when Information Commissioner can require searches

Clause 117 of the Bill amends section 102 of the RTI Act. OIC appreciates the definition of 'search' now includes 'further searches'. However, on reviewing the Bill, we note that section 102 as amended will specify that the Information Commissioner can only request that agencies or Ministers conduct searches in reviews of certain *'relevant reviewable decisions'* – which are defined as decisions listed in the new schedule 4A, sections 1(e), (h) or (k).[38]

This level of prescription[39] seems to unduly narrow the powers of the Information Commissioner to require searches in appropriate circumstances. For example, OIC may receive an external review of a reviewable decision under new schedule 4A, section 1(a),[40] but determine that the agency decision that a document is outside the scope of the RTI Act is *incorrect*; or we may receive an external review of a reviewable decision under new schedule 4A, section 1(b),[41] but determine that the application *does* comply with relevant application requirements. In these instances, we may ultimately remit some matters under the new section 110A. However, it will not always be appropriate to do so – and in such instances, for the Information Commissioner to conduct the review, it would be necessary for the Commissioner to require the agency or Minister to search for responsive documents. The proposed form of section 102 of the RTI Act does not enable the Information Commissioner to require these searches. Perhaps this could be remedied by omitting the words '*of a relevant reviewable decision*' from section 102(1) and omitting the definition of same at 102(2).

Clauses 119 and 123 – Referral/remittal power

Clauses 119 and 123 of the Bill introduce new sections 105A and 110A into the RTI Act, enabling the Information Commissioner to refer or remit certain decisions back to the agency or Minister for consideration or re-consideration. OIC strongly supports this reform. However, on reviewing the Bill, we suggest that there are a number of ways in which the operation of these provisions may be improved.

Firstly, a number of the decisions specified in new section 110A of the RTI Act can also be made on amendment applications, and we suggest that consideration be given to expanding the power to accommodate the latter. While the volume of amendment applications has

[38] Ie (e) a decision refusing access to all or part of a document under section 47; (h) a decision giving access to documents that purports to, but may not, give access to all documents the subject of the application; and (k) a deemed decision.
[39] Which OIC acknowledges may flow from the current version of section 102 of the RTI Act, which specifies a *'decision to refuse access to a document'*.
[40] Ie (a) a decision that the application or a part of the application is outside the scope of this Act under section 32(1)(b), other than a judicial function decision.
[41] Ie (b) a decision that the application does not comply with all relevant application requirements under section 33(6) of the RTI Act.

historically been smaller than access applications, it may, for the sake of both consistency and 'future proofing' the scope of the proposed power, be prudent to consider extending it in this manner.

OIC queries whether the wording *'it is reasonably likely that the agency or Minister would be able to make a decision* […] *that is satisfactory to the access applicant'* in new sections 105A(1)(c) and 110A(1)(c) of the RTI Act is the most effective approach to advancing a referral or remittal of a review, as it arguably requires subjective consideration of the particular applicant's views regarding the referral/remittal, or assumes applicant agreement. OIC considers that this could at times prevent remittal in appropriate circumstances. OIC notes that, under the existing section 93 of the RTI Act, applicant agreement is not required when an agency requests further time to deal with an application and the Information Commissioner decides whether to grant this further time. Accordingly, OIC suggests that the wording could be replaced with wording such as *'that could reasonably be expected to be consistent with the objects of the Act and the rights of applicants under sections 23 and 78C of the RTI Act'*.[42]

The final issue identified by OIC on review of the Bill – relating only to the new section 110A[43] – is that the proposed section only allows remitting a matter *instead of* issuing a formal decision. However, the examples included in our OIC August 2022 Submission[44] also included circumstances where it may be necessary for the Information Commissioner to remit a matter *after* a formal decision. We recommend that this could be achieved by amending the proposed section 110A(1)(a) as follows '*the information commissioner has, or would have other than for this section, decided to set aside the relevant decision and make a decision in substitution for the relevant decision under section 110(1)(c).'*

Clause 141 & schedule 1 – amendment of 'photocopy' in Regulations

OIC has previously canvassed[45] issues arising from the use of the undefined term 'photocopy' in each of the *Right to Information Regulation 2009* (**RTI Regulation**) and *Information Privacy Regulation 2009* (**IP Regulation**). OIC welcomes the amendments in schedule 1 of the Bill which changes the word 'photocopy' to 'copy' in the Regulations' evidence of identity provisions[46] but notes the continued use of the term 'photocopy' in relation to access charges.

The term 'photocopy' does not reflect the digital nature of most agency records and charging $0.25 per page is likely to exceed actual costs. The continuing use of the term 'photocopy' is not only inconsistent with adopting the term 'copy' in relation to evidence of identity – it is also broadly inconsistent with the Public Records Bill 2023,[47] the general intent of which is to modernise Queensland's public records legislation so that it remains relevant to the increasingly digital environment in which we all operate.

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[42] Noting, too, that the phrase '*could reasonably be expected to*' is used elsewhere in the RTI Act, and its interpretation is relatively well-settled and understood, having been the subject of numerous decisions over time.

[43] As inserted by clause 123 of the Bill.

[44] Page 34.

[45] Letter from OIC to Attorney-General dated 17 February 2022 in which OIC noted as follows regarding section 6(1)(b) of the RTI Regulation and section 4(1)(b) of the IP Regulation:

> *… an agency is permitted to charge applicants $0.25 for each A4 black-and-white 'photocopy' of a document. It has been observed that in practice, most documents released under the RTI Act and the IP Act are printed from an electronic file rather than photocopied from a hard copy of the document. This raises a concern that agencies are charging applicants for providing photocopies in instances where they are merely printing the documents, which arguably costs less than $0.25 per page.*
>
> *The term 'photocopy' is not defined in the RTI Regulations, the IP Regulations or the Acts Interpretation Act 1954 (Qld). As such, the interpretation of the term 'photocopy' involves technical arguments which are open to interpretation, leading to uncertainty in the application of the current access charging regime when providing copies of documents.*
>
> *It is recommended reducing the current prescribed amount charged per page to more accurately reflect the cost to agencies when providing printed copies of documents. Prescribing a fixed amount per page is preferred to allowing agencies to charge the actual cost per page, to minimise confusion and ensure consistent access charges are levied across agencies.*

[46] By replacing the term 'photocopy' in section 3(2) of each Regulation, and replacing it with the word 'copy'.

[47] Which has been referred to the Community Support and Service Committee for detailed consideration: https://www.parliament.qld.gov.au/Work-of-Committees/Committees/Committee-Details?cid=165&id=4294.

Other matters

Parliamentary reporting

OIC supports provisions in the Bill intended to transfer reporting responsibilities to OIC from the Department.[48] We note that the exact information required to be reported stands to be prescribed by regulation and look forward to commencing consultation[49] with the Department, agencies and other stakeholders as to information to be prescribed for reporting. As noted in our OIC August 2022 Submission,[50] we believe it is beneficial to ensure that the prescribed information required to be reported aligns with the uniform metrics on public use of freedom of information access rights collated by the Information and Privacy Commission of NSW, pursuant to Commitment 3.2 of Australia's Open Government National Action Plan. We would hope that consultation might be commenced as soon as is reasonably practicable after passage of the Bill.

On a related point, OIC notes the provision in the IP Act that the Information Commissioner must report to the Speaker on a reportable matter.[51] The analogous provision in the RTI Act, however – section 131(2) – requires the Commissioner to report to the parliamentary committee. OIC recommends harmonising these provisions, including the reporting provisions set out in clauses 67[52] and 133[53] related to the operation of the Acts, so that all reporting under each Act is to the Speaker.

First Nations public interest factors for disclosure

OIC encourages government to consider inclusion in the RTI Act of First Nations public interest factors favouring disclosure. While it is currently open to RTI decision makers to take public interest considerations of this kind into account,[54] dedicated public interest factors of the kind suggested would explicitly recognise the particular value government-held records can have to Aboriginal peoples and Torres Strait Islander peoples, given, as was noted in the August 2022 Public Records Act Review Panel's Review of the *Public Records Act 2002*,[55] '*the special interests and needs of First Nations peoples in relation to Queensland's public records*.'[56]

Such an amendment would be consistent with The Healing Foundation's *Principles for nationally consistent approaches to accessing Stolen Generation records*,[57] which are supported by all Information Access and Privacy Commissioners, Archivists and Birth, Death and Marriages Registrars in Australia. It would also align with provisions in the Public Records Bill 2023[58] currently before Parliament, including those incorporating a series of principles concerning public records relating to Aboriginal peoples and Torres Strait Islander peoples,[59] and provisions requiring the establishment a First Nations Advisory Group[60] to advise the State Archivist about public records relating to Aboriginal peoples and Torres Strait Islander peoples.

Clarification of proceedings regarding offences

Clause 83 of the Public Records Bill 2023 currently being considered by the Community Support and Services Committee provides that, for proceedings regarding offences under that

[48] Clause 67, replacing the existing section 194 of the IP Act; Clause 133, replacing section 185 of the RTI Act.
[49] Assuming the Bill is passed.
[50] Page 32.
[51] Section 135(1)(a)(ii) of the IP Act (to become new section 135(1)(e) under the Bill).
[52] Replacing section 194 of the IP Act.
[53] Replacing section 185 of the RTI Act.
[54] The lists of public interest factors prescr bed in schedule 4 of the RTI Act being non-exhaustive.
[55] Accessible at https://yoursay.chde.qld.gov.au/83346/widgets/397089/documents/252139 (accessed 18 October 2023).
[56] Page 8.
[57] https://healingfoundation.org.au/historical-records-taskforce/.
[58] Specifically, Part 4, Division 4 of that Bill.
[59] Set out in schedule 1, part 1 of the Public Records Bill 2023.
[60] Part 4, Division 4 of the Public Records Bill 2023.

Bill, the proceedings are heard and determined summarily.[61] The Explanatory Notes for that Bill also observe that the proceedings may be tried and heard summarily before a Magistrate under the *Justices Act 1886* (Qld).[62]

OIC considers that the above provision provides welcome procedural clarity. Given the existence of offence provisions in each of the RTI and IP Acts, we suggest that each of those latter Acts would also benefit from inclusion of a similar provision.[63]

Ongoing review of the Commonwealth Privacy Act 1988

Finally, we also note the continuing review of the Commonwealth *Privacy Act 1988*. As stated in earlier submissions and reiterated above, it is highly desirable that there exists consistency in national privacy regulation. Given this, we would urge the Government to carefully monitor the Commonwealth's privacy reforms – and be prepared to make appropriate amendments to Queensland's IP Act as a result of any such reforms – to ensure the Queensland and Commonwealth privacy regimes are harmonised as far as is possible.

Conclusion

We again thank the Committee for the opportunity to provide comment on the Bill. We would be pleased to attend the public hearing on the Bill on 13 November 2023 to discuss our submission in more detail and respond to any questions the Committee may have about the submission.

Should you otherwise have any questions or require further information, please do not hesitate to contact OIC on 3234 7373 or via email: [redacted]

Yours sincerely

[redacted]

Stephanie Winson
Acting Information Commissioner

[redacted]

Paxton Booth
Privacy Commissioner

[61] https://www.legislation.qld.gov.au/view/pdf/bill.first/bill-2023-005.
[62] https://www.legislation.qld.gov.au/view/pdf/bill.first.exp/bill-2023-005, page 24.
[63] To be added to Chapter 5, Part 2 of the RTI Act, and Chapter 6, Part 2 of the IP Act.