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The statutory functions of the OIC under the Information Privacy Act 2009 (Qld) (IP Act) include commenting on the administration of privacy in the Queensland public sector environment.

This submission does not represent the views or opinions of the Queensland Government.

Office of the Information Commissioner Queensland

16 December 2022

Committee Secretary
Legal Affairs and Safety Committee
Parliament House
George Street
Brisbane Qld 4000

By email: lasc@parliament.qld.gov.au

Dear Secretary

Monitoring of Places of Detention (Optional Protocol to the Convention Against Torture) Bill 2022

We refer to the Legal Affairs and Safety Committee's inquiry into the above bill (**the Bill**).

The purpose of this letter is to provide the Office of the Information Commissioner's (OIC) submissions on parts of the Bill, for the Committee's consideration.

OIC notes that the stated purpose of the Bill is to facilitate visits by the United Nations Subcommittee on Prevention of Torture (the **Subcommittee**) to places of detention in Queensland, consistently with Australia's obligations under the Optional Protocol to the Convention Against Torture (OPCAT). OIC acknowledges that this is important legislation, intended to establish a '*standalone legislative framework to facilitate a consistent approach to UN subcommittee visits to places of detention in Queensland*'.¹

In summary, the Bill allows the Subcommittee access to state detention facilities and related information, as well as to conduct interviews. OIC's comments are confined to Part 3, Clauses 13 to 15 of the Bill, concerning access to information and related information privacy issues.²

Information Privacy Act 2009

Queensland's *Information Privacy Act 2009* (IP Act) recognises the importance of protecting the personal information of individuals. It creates a right for individuals to access and amend their own personal information and provides rules or 'privacy principles' that govern how Queensland government agencies collect, store, use and disclose personal information. OIC has regulatory oversight of Queensland Government agencies' compliance with requirements under the IP Act.

Overview of Part 3 of the Bill

Part 3, clauses 13 to 15 of the Bill give the Subcommittee the right to access and retain certain information on request, subject to conditions.

¹ Queensland, Parliamentary Debates, Legislative Assembly, 1 December 2022 (Shannon Fentiman, Attorney-General and Minister for Justice, Minister for Women and Minister for the Prevention of Domestic and Family Violence, Hansard), 3844.

² As noted in the Statement of Compatibility (SoC) accompanying the Bill (as prepared under the *Human Rights Act 2019* (Qld)), by allowing the Subcommittee unrestricted access to detention facilities, the Bill also contains provisions potentially compromising spatial privacy; OIC has limited our consideration to information privacy issues only.

Clauses 13(1) to (3) of the Bill oblige the responsible Minister³/detaining authority for a place of detention⁴ to ensure the Subcommittee is given, on request, unrestricted access to all information⁵ in the possession or under the control of the Minister/authority that is necessary to enable *'evaluation [by the Subcommittee] of any needs or measures that should be adopted to strengthen the protection of people deprived of their liberty against torture and other cruel, inhuman or degrading treatment or punishment'*.⁶ Clause 13(5) of the Bill effectively overrides any inconsistent secrecy or confidentiality provision in any other legislation.

Clause 14 provides, however, that access must not be given to *'identifying information (including confidential information)'* about a person at a place of detention (including a detainee) *'unless the subcommittee visits that place of detention or has visited that place of detention'*.

Clause 15(1) of the Bill entitles the Subcommittee to retain, copy or take notes of any information to which it is given access under clause 13, *'other than identifying information'*. Clause 15(2) goes on to provide, however, that the Subcommittee may retain *'identifying information (including confidential information) about a detainee in a place of detention only if'* the detainee (or a legal guardian) consents to the Subcommittee doing so.

'Identifying information' is defined broadly: *'information that identifies an individual or from which an individual can be reasonably identified'*.⁷ 'Confidential information' is defined⁸ with similar breadth, encompassing various types of information defined in various pieces of legislation,⁹ and *'information generally about a person's affairs'*.¹⁰ Together, these constitute expansive concepts, covering a wide range of information about individuals.

OIC's comments and submissions

OIC generally supports the broad manner in which the concepts of 'identifying information' and 'confidential information' are defined. However, while it is likely that these definitions would cover at the least 'personal information' as governed by the IP Act, and encompass a wide range of potentially sensitive, private information, it may be beneficial to replace the text in the definition of 'confidential information' *'generally, information about a person's affairs'*¹¹ with the definition of 'personal information' prescribed in section 12 of the IP Act:

information or an opinion, including information or an opinion forming part of a database, whether true or not, and whether recorded in a material form or not, about an individual whose identity is apparent, or can reasonably be ascertained, from the information or opinion.

The concept of 'personal information' as defined in the IP Act is one with which agencies and Ministers bound by the Bill are familiar, and adopting it would thus help to minimise potential confusion and/or ambiguity.¹²

³ As defined in schedule 1 to the Bill.

⁴ Defined in clauses 4, 5 and 12 of the Bill.

⁵ Other than 'excluded information', defined in clause 13(6) of the Bill and discussed further below.

⁶ Clause 13(1) of the Bill.

⁷ Clause 12 of the Bill.

⁸ As above.

⁹ 'Confidential information' as defined in *Corrective Services Act 2006* (section 341); *Forensic Disability Act 2011* (section 122); *Hospital and Health Boards Act 2011* (section 139); *Youth Justice Act 1992* (section 284); 'personal information' under the *Mental Health Act 2016*, section 776; information that must not be disclosed under the *Police Service Administration Act 1990*, section 10.1.

¹⁰ Clause 12 of the Bill. 'Confidential information' does not, however, include information already publicly disclosed unless further disclosure is prohibited by law, and statistical or other information that could not reasonably be expected to result in the identification of the person to whom the information relates.

¹¹ Clause 12(a)(i) of the Bill.

¹² OIC further notes that incorporating the definition of 'personal information' as prescribed in section 12 of the IP Act is broadly consistent with the approach taken in the analogous Victorian legislation, the *Monitoring of Places of Detention by the United Nations Subcommittee on Prevention of Torture (OPCAT) Act 2022*, which includes as a category of protected information 'personal information' as defined in the *Privacy and Data Protection Act 2014* (Vic).

OIC also notes that the right of the Subcommittee to access identifying/confidential information under clause 13 of the Bill may occur without the consent of individuals to whom it relates. Giving access to personal information of the kinds embodied in the concepts of 'identifying information' and 'confidential information', without the consent of relevant individuals, would amount to a disclosure within the meaning of the IP Act¹³ and, as the Explanatory Notes acknowledge, therefore *'impact upon the privacy of the persons to whom the information relates'*.¹⁴

OIC notes that this privacy impact is mitigated by:

- the Subcommittee's right to access information being limited to information relevant to its evaluative purpose¹⁵
- temporal limits on accessing identifying information imposed by clause 14 of the Bill¹⁶
- the exclusion from the right of access of 'excluded information' – specifically, in this context, information subject to legal professional privilege;¹⁷ and
- Article 16(2) of OPCAT, which according to the Explanatory Notes¹⁸ *'states that the Subcommittee must seek the express consent of a person if it intends to publish this personal data, and the Subcommittee guidelines which provide that members must maintain confidentiality during and after their period of membership'*.

Despite the above protections, it is best practice that personal information only be disclosed by an entity holding that personal information with the consent of the individual to whom it relates. Consent ensures the individual is both fully apprised of potential disclosure and maintains a level of control over the dissemination of their personal information. With that in mind, OIC suggests the general right of access conferred by clause 13 could be further qualified, either by:

- inclusion of a condition precluding Subcommittee access to identifying/confidential information in the absence of a relevant individual's consent; or, at a minimum;
- inclusion of an information sharing principle analogous to that found in section 297C of the *Youth Justice Act 1992* (Qld) (**YJ Act**).

This latter provision, while not preventing disclosure of information, does provide that a person's consent should be obtained before disclosing confidential information whenever possible and practical.

Having said that, OIC does acknowledge that the privacy impact of the general right of access conferred by clause 13 of the Bill as presently drafted is significantly abated by the restriction in clause 15(1) on the Subcommittee retaining, copying or taking notes of 'identifying information'. This restriction affords those whose identifying information may have been accessed by the Subcommittee a considerable degree of 'practical obscurity'.¹⁹ Subcommittee members' knowledge of that information being limited to a passing inspection, reading, or viewing only.

¹³ Under Section 23 of the IP Act, an entity discloses personal information to a second entity where the second entity does not already know the information (or is not in a position to find it out), the disclosing entity gives the personal information to the second entity (or places the latter in a position to find that information out), and the disclosing entity ceases to have control over the second entity in relation to who will know the personal information in the future.

¹⁴ Page 6.

¹⁵ Clauses 13(1) to (3) of the Bill.

¹⁶ That is, accessing only at the time of or after a visit to a detention facility.

¹⁷ OIC assumes here there may otherwise be the potential for access to privileged communications held by detainees).

¹⁸ Page 4. OIC notes that the concept of 'personal data' as used in Article 16(2) and cited below does not appear to be defined within OPCAT, which arguably detracts from the protection intended to be afforded by Article 16(2).

¹⁹ The *'principle that private information in public records is effectively protected from disclosure as the result of practical barriers to access'*: Dictionary of Archives Terminology, <https://dictionary.archivists.org/entry/practical-obscurity.html> (accessed 13 December 2022).

OIC notes, however, that clause 15 is currently worded to only exclude 'identifying information' from the right otherwise conferred on the Subcommittee by this clause to retain information accessed by it under clause 13. Omitting 'confidential information' potentially limits the protection otherwise afforded by this important exclusion. OIC therefore queries whether this clause 15 exclusion might be expanded, to include 'confidential information' within its ambit.²⁰ This will ensure the exclusion operates optimally to protect privacy and mitigate the privacy impacts effected by clause 13.

OIC further notes that under clause 15(2) of the Bill, the Subcommittee may retain identifying information obtained under clause 13 – to the extent it is about a detainee – provided it has obtained the latter's²¹ consent. This, too, is an important privacy safeguard, and one OIC supports: as canvassed above, consent is the preferred mechanism for the use and disclosure of personal information of this kind. As the Explanatory Notes state,²² the requirement for consent imposed by clause 15 ensures that detainees enjoy '*autonomy to decide if the Subcommittee should be able to retain their identifying information*'.

The consent protection afforded by clause 15(2) of the Bill is, however, presently limited to detainees. It would seem conceivable that the Subcommittee may have access to relatively sensitive identifying/confidential information concerning persons other than detainees – principally, staff and/or visitors to detention facilities (**Non-Detainees**).²³ The exclusion of 'identifying information' within clause 15(1) as currently drafted prohibits the Subcommittee from retaining the information of Non-Detainees which, as noted, acts as an important privacy safeguard. Assuming that there is no intention to allow the Subcommittee to retain such Non-Detainee information,²⁴ then OIC notes that the incursion into the privacy of Non-Detainees otherwise resulting from their information being accessed by the Subcommittee under clause 13 will be significantly ameliorated.²⁵

If, however, it is proposed to allow the Subcommittee to retain Non-Detainee identifying information, then it is OIC's submission that those individuals, too, should also be afforded the same level of protection conferred on detainees by clause 15(2) of the Bill: that is, retention only with their consent.

Further, we note that Subcommittee members are bound by their own rules of procedure²⁶ to maintain confidentiality during and after their Subcommittee membership and appreciate that members may not ordinarily be subject to the laws of Queensland. Nevertheless, OIC queries whether there is merit in including a statutory obligation in the Bill obliging Subcommittee members to keep confidential any identifying/confidential information they may access under clause 13 of the Bill – which would, at the least, add an additional level of privacy protection for the period Subcommittee members were discharging functions within Queensland.

Finally, there does not appear to exist any redress or complaint mechanism, in the event a person's identifying/confidential information is accessed, retained or otherwise misused contrary to the restrictions imposed by the Bill.

²⁰ I.e. by adding the words 'including confidential information' after the words 'other than identifying information'.

²¹ Or a legal guardian's.

²² Page 6.

²³ Including, for example, unsubstantiated allegation about staff conduct, information of a kind the *Right to Information Act 2009* (Qld) (**RTI Act**) recognises may be contrary to the public interest to disclose: schedule 4, part 3, item 6 of the RTI Act.

²⁴ That is, to only allow the Subcommittee to potentially retain detainee identifying information, in circumstances as permitted by clause 15(2) of the Bill.

²⁵ Particularly if augmented by one or more of our earlier suggestions, such as incorporating consent into clause 13, and/or expanding the prohibition in clause 15(1) on retaining identifying information to include 'confidential information'.

²⁶ Rule 14 of the Subcommittee Rules of Procedure, cited in the SoC, page 4.

Summary

In summary, OIC considers the existing privacy protections in the Bill²⁷ could be improved by:

- replacing the definition in clause 12(a)(i) '*generally information about a person's affairs*' with the definition of 'personal information' prescribed in section 12 of the IP Act, and
- introducing a requirement which makes access to identifying/confidential information under clause 13 of the Bill conditional on the consent of all individuals to whom the information relates – or, at the least, inclusion of an information sharing principle that consent be obtained where possible and practicable.

Additionally, the prohibition on retaining identifying information in clause 15 of the Bill could be expanded, to include 'confidential information'.

Further, should it be intended that the Subcommittee enjoy a right to retain information concerning Non-Detainees, then the restriction on retaining identifying information in the absence of consent imposed by clause 15(2) of the Bill should be extended to *any person's 'identifying information (including confidential information)'*.

Consideration might also be given to including a confidentiality provision binding Subcommittee members, in terms as canvassed above, and to possible complaint/redress mechanisms.

OIC remains available to provide any further assistance in its consideration of the Bill.

Yours sincerely



Paxton Booth
Acting Information Commissioner



Susan Shanley
Acting Privacy Commissioner

²⁷ Which, in this context, includes amendment to section 263A of the YJ Act proposed by clause 29 of the Bill, prohibiting recordings of communications between a child detained in a detention centre and Subcommittee personnel.