

Information Privacy and Other Legislation Amendment Bill 2023

Statement of Compatibility

Prepared in accordance with Part 3 of the *Human Rights Act 2019*

In accordance with section 38 of the *Human Rights Act 2019* (HR Act), I, Yvette D’Ath MP, Attorney-General and Minister for Justice, Minister for the Prevention of Domestic and Family Violence and Leader of the House make this statement of compatibility with respect to the Information Privacy and Other Legislation Amendment Bill 2023 (the Bill).

In my opinion, the Bill is compatible with the human rights protected by the HR Act. I base my opinion on the reasons outlined in this statement.

Overview of the Bill

The Bill will amend the *Information Privacy Act 2009* (the IP Act) and the *Right to Information Act 2009* (the RTI Act) to:

- align the definition of ‘personal information’ in the IP Act with the definition in the *Privacy Act 1988* (Cth) (Commonwealth Privacy Act).
- adopt a single set of privacy principles in the IP Act, based on the Australian Privacy Principles in the Commonwealth Privacy Act and referred to as the Queensland Privacy Principles (QPPs), in place of the National Privacy Principles (NPPs) applying to health agencies and the Information Privacy Principles (IPPs) applying to all other agencies;
- establish a mandatory data breach notification (MDBN) scheme applicable to agencies;
- provide enhanced powers and functions for the Information Commissioner including:
 - a power to investigate, on the Information Commissioner’s own motion, an act, failure to act or practice of an agency which may be a breach of the privacy principles or other stated obligations under the IP Act;
 - new powers and functions in relation to compliance with the new MDBN scheme;
- make improvements to access and amendment applications and the processing of these applications under the RTI Act including:
 - providing for a single right of access to documents, including for personal information, under the RTI Act, with the RTI Act also to cover applications to amend personal information;
 - removing requirements for applications to be in the approved form;
 - omitting requirements for agents to provide evidence of identity in all cases;
 - clarifying the definition of ‘processing period’ for applications, including extending it by five business days if the only address the applicant has given the agency or Minister to be sent notices is a postal address;
 - extending the timeframe for a decision that a document or entity is outside the scope of the RTI Act from 10 business days to 25 business days;
 - removing the mandatory requirements for agencies and Ministers to give an applicant a schedule of relevant documents, and a charges estimate notice

- (CEN) where no charges apply, and clarify that applicants are limited to two CENs and that any narrowing of a second CEN would not require a third CEN to be issued;
- providing a new exemption providing a basis to refuse access to a document under the RTI Act to the extent that disclosure of information is prohibited under the *Ombudsman Act 2001*;
 - modify internal and external review processes under the RTI Act to:
 - remove the right of internal review and external review to the Information Commissioner of a decision by an entity that an application is outside the scope of the Act, because the Act does not apply to an entity in relation to an entity's judicial or quasi-judicial functions;
 - allow agencies to extend the time in which agencies must make internal review decisions, either by agreement with the applicant or where third-party consultation is required;
 - provide clear authority that in undertaking an internal review, agencies may consider whether the original decision maker has taken reasonable steps to identify and locate documents applied for;
 - allow the Information Commissioner to disclose documents during an external review to third parties, to facilitate the resolution of an external review;
 - provide for a new power for the Information Commissioner to refer documents that the Commissioner becomes aware of during external review to an agency or Minister for decision about giving the applicant access;
 - provide a new power for the Information Commissioner to set aside one of a number of stated types of decisions and direct an agency or Minister to decide the application;
 - clarify that an agency or Minister may release documents following an informal resolution of a review;
 - clarify the definition of 'public authority' and provide clearer criteria for when an entity may be declared as a public authority under the RTI Act or IP Act;
 - enhance arrangements for privacy complaints under the IP Act so that:
 - privacy complaints to an agency or bound contracted service provider are required to meet stated requirements, including being made in writing and within 12 months of the complainant becoming aware of the act, failure to act or practice the subject of the complaint;
 - allow respondents to request extensions of timeframes for privacy complaints by agreement with the complainant;
 - allow the Information Commissioner to give the respondent written notice requiring them to give information to a preliminary inquiry;
 - provide that a complainant has 20 business days to ask the Information Commissioner to refer a privacy complaint to the Queensland Civil and Administrative Tribunal (QCAT);
 - require departments and Ministers to be subject to the same requirements as other agencies for disclosure logs under the RTI Act, and remove the requirement to include on a disclosure log an applicant's name and whether an applicant has applied on behalf of another entity;
 - require agencies to maintain publication schemes under the RTI Act which outline stated matters and publish information prescribed by regulation;
 - transfer legislative responsibility for the preparation of annual reports from the responsible Minister to the Information Commissioner; and

- make a number of other additional clarifications and improvements.

The Bill amends the offence of computer hacking and misuse in section 408E of the Criminal Code to improve its operation and clarity, having regard to the underlying issues forming the basis of recommendation 10 of the Crime and Corruption Commission's (CCC) report, *Operation Impala – A report on misuse of confidential information in the Queensland Public Sector* (the Impala report).

The Bill will also make legislative amendments to support the proactive release of Cabinet documents. In particular, amendments will:

- provide clarity for applicants and decision makers under the RTI Act concerning the exempt status of information in Cabinet submissions and Cabinet decisions, and other Cabinet related documents, in view of the official publishing of information by decision of Cabinet under the proactive release scheme;
- provide protection from civil liability for Ministers disclosing information under a publication scheme or other administrative scheme in good faith; and
- ensure that the public interest immunity in proceedings and processes is not altered by the publication of information by Cabinet, or decisions by Cabinet to officially publish Cabinet information.

Human Rights Issues

Human rights relevant to the Bill (Part 2, Division 2 and 3 *Human Rights Act 2019*)

Human rights engaged by the Bill are:

- freedom of expression (section 21 of the HR Act);
- privacy and reputation (section 25 of the HR Act);
- right to liberty and security of person (section 29 of the HR Act); and
- fair hearing (section 31 of the HR Act).

Promoting and enhancing human rights

The vast majority of the proposals would support and promote human rights, in particular, freedom of expression, and privacy and reputation.

The right to privacy and reputation (section 25 of the HR Act) and the right to freedom of expression (section 21 of the HR Act) are indispensable for persons to function in a democratic society. Information privacy is a critical element of this broader right to privacy. Queensland's IP Act provides a comprehensive system to protect individuals' personal information, including by regulating how personal information is collected, stored, used and disclosed.

Ensuring there is a comprehensive and clearly identifiable privacy regime means that individuals are protected from arbitrary or unlawful breaches of an individual's right to privacy. If breaches do occur, the IP Act establishes mechanisms for the resolution of complaints and an avenue for redress through QCAT.

The reforms aim to further promote and enhance the human right to privacy. They address potential regulatory gaps that have been identified, to strengthen the IP Act and allow it to

continue to function in a way that achieves its objects. New technologies and changing social circumstances have led to questions about the adequacy of privacy laws, including the IP Act, and these reforms aim to counter those concerns. The amendments to section 408E of the Criminal Code also have the effect of protecting and promoting the right to privacy and reputation.

The reforms also promote and enhance the right to freedom of expression and the right to take part in public life, in particular, the opportunity to participate in the conduct of public affairs. Justice Bell in *XYZ v Victoria Police*¹ held that, ‘the human right to freedom of expression incorporates a positive right to obtain access to government-held documents’. In providing a comprehensive scheme for access to government-held documents, the RTI Act is used by thousands of Queenslanders every year to exercise this right. The reforms will streamline and clarify the way this occurs. The majority of reforms related to RTI will promote this aspect of the right to freedom of expression, making processes clearer, reducing the administrative impact on agencies and potentially allowing applications to be made and dealt with more quickly. For example, amendments creating a single right of access and removing the requirement for applicants to use an approved form will promote this right.

An increased ability to access documents held by government will in turn provide increased awareness of the operations of government, and therefore a greater opportunity to participate in the conduct of public affairs.

If human rights may be subject to limitation if the Bill is enacted – consideration of whether the limitations are reasonable and demonstrably justifiable (section 13 *Human Rights Act 2019*)

Amendments to section 408E of the Criminal Code

Amendments to section 408E of the Criminal Code in the Bill: amend the section heading to remove reference to ‘hacking’; increase the maximum penalty of the simpliciter offence in subsection (1) to 3 years imprisonment; reclassify this offence as a misdemeanour; and amend the definition of ‘benefit’ to clarify that a benefit need not be pecuniary.

These amendments limit the right to liberty and security of person (section 29 of the HR Act).

(a) the nature of the right

The *right to liberty and security of person* (section 29 of the HR Act) protects personal liberty and requires that due process be followed when state authorities exercise their powers of arrest and detention. The right protects against deprivation of liberty that is arbitrary or unlawful. The right is relevant whenever a person is placed at risk of imprisonment.

The amendments to section 408E of the Criminal Code may place a person at risk of an increased term of imprisonment if successful prosecution action is taken and the person is sentenced to a custodial sentence, therefore limiting the right to liberty and security.

¹ *XYZ v Victoria Police* (General) [2010] VCAT 255.

- (b) the nature of the purpose of the limitation to be imposed by the Bill if enacted, including whether it is consistent with a free and democratic society based on human dignity, equality and freedom

The Impala report noted that misuse of information can cause significant and irreparable harm, including embarrassment, distress, physical harm, reputational damage, financial loss and reduced mental wellbeing. Public servants have access to a range of information and have obligations to manage confidential information in accordance with ethical obligations, security standards and relevant legislation. These responsibilities protect the rights of the people whose information is held and promote community trust. Inappropriate access to information can lead to harm to both individuals and the agency. While the Impala report was focussed on the conduct of public officers, section 408E of the Criminal Code extends more broadly to the misuse of any restricted computer.

The purpose of increasing the maximum penalty for section 408E(1) is to more appropriately reflect the seriousness of the offence and the harm caused by this type of offending. This will send a message to offenders and the community that this conduct is viewed seriously and is not acceptable.

- (c) the relationship between the limitation to be imposed by the Bill if enacted, and its purpose, including whether the limitation helps to achieve the purpose

The maximum sentence for an offence is a reflection of, and a proxy for, its seriousness.² Increasing penalties for an offence is a suitable way of showing that the offence is considered to be more serious.

- (d) whether there are any less restrictive (on human rights) and reasonably available ways to achieve the purpose of the Bill

A less restrictive option to increasing the penalty for breaching requirements relating to misuse of restricted computers would include not increasing the penalty. However, as noted above, maximum sentences are a reflection of the intended seriousness of the offence and it is considered the currently penalty level does not adequately reflect the seriousness of the offence.

- (e) the balance between the importance of the purpose of the Bill, which, if enacted, would impose a limitation on human rights and the importance of preserving the human rights, taking into account the nature and extent of the limitation

On one hand the liberty of the person is important. However, the limitation on the right to liberty and security will only be restricted in the circumstances where an individual breaches the offence provision, is found guilty of a relevant offence after due process in accordance with Queensland's judicial system, and a term of imprisonment is imposed by an independent member of the judiciary.

On the other hand, it is important to reflect the seriousness of this type of offending and the community's denunciation of such conduct. The increase in penalty is in line with other

² *R v Sharma*, 2022 SCC 39.

offences used to prosecute corruption and abuse of office (see Chapter 13 of the Criminal Code).

On balance, the measure strikes a fair balance between the need to appropriately reflect the seriousness of conduct involving the misuse of a restricted computer, and the possible limitation of rights of individuals in limited circumstances.

(f) any other relevant factors

Not applicable.

Removal of review rights for a decision that an application for a document relating to the judicial or quasi-judicial functions of a court or tribunal is outside the scope of the RTI Act

Amendments to the RTI Act in the Bill remove the right of external review to the Information Commissioner of a decision by an entity that an application is outside the scope of the Act, because the Act does not apply to an entity in relation to its judicial or quasi-judicial functions.

These amendments limit the right to a fair hearing (section 31 of the HR Act) in that, without Information Commissioner review, there may be a perception that there is reduced (or insufficient) accountability for entities which deny access to documents held by courts and tribunals.

(a) the nature of the right

The *right to a fair hearing* (section 31 of the HR Act) affirms the right of all individuals to procedural fairness when appearing before a court or tribunal. It applies to both criminal and civil proceedings, including administrative decision-making processes, and guarantees that such matters must be heard and decided by a competent, impartial and independent court or tribunal.

What constitutes a ‘fair’ hearing will depend on the facts of the case and will require the weighing of a number of public interest factors including the rights of the accused and the victim (in criminal proceedings) or of all parties (in civil proceedings).

The amendments removing the right to review by the Information Commissioner of a decision that a document relating to the judicial or quasi-judicial functions of a court or tribunal is outside the scope of the RTI Act limits this right.

(b) the nature of the purpose of the limitation to be imposed by the Bill if enacted, including whether it is consistent with a free and democratic society based on human dignity, equality and freedom

The purpose of the limitation is to preserve judicial independence. Removing the right to review by the Information Commissioner helps to achieve this purpose, by ensuring there is no obligation on courts and tribunals to provide documents to the Information Commissioner (who is a member of the Executive) and clarifying that the Information Commissioner’s powers of review under the RTI Act do not apply to judicial documents. Judicial independence is of fundamental importance to the operation of a democratic society. A series of decisions by the QCAT Appeal Tribunal (including *Carmody v Information Commissioner & Ors* [2018]

QCATA 14) have highlighted the importance of the separation of powers and judicial independence when applying the RTI Act.

(c) the relationship between the limitation to be imposed by the Bill if enacted, and its purpose, including whether the limitation helps to achieve the purpose

The limitation will achieve the purpose by removing the ability of the Executive arm of Government - the Information Commissioner – to review decisions made by courts and tribunals that an application is outside the scope of the Act, because the Act does not apply to the entity in relation to its judicial or quasi-judicial functions.

(d) . whether there are any less restrictive (on human rights) and reasonably available ways to achieve the purpose of the Bill

No less restrictive and reasonably available ways have been identified to achieve the purpose, given the vital public interest in maintaining judicial independence. All jurisdictions across Australia exclude the operation of courts and tribunals from the operation of their respective freedom of information/right to information legislation in some way. However, no other jurisdiction expressly provides that there is no external review of such decisions. Accordingly, other jurisdictions are not as effective as Queensland in achieving the purpose of preserving judicial independence.

The right is only limited to the extent an entity decides that an RTI application seeking access to a document relating to the entity's judicial or quasi-judicial functions is outside the scope of the RTI Act. In these circumstances, an applicant is unable to have the decision reviewed by the Information Commissioner.

While a review by the Information Commissioner provides full merits review and is arguably more accessible than an appeal to the QCAT Appeal Tribunal on a question of law, the retention of the right of appeal to the Appeals Tribunal for these types of decisions provides a safeguard for applicants.

(e) the balance between the importance of the purpose of the Bill, which, if enacted, would impose a limitation on human rights and the importance of preserving the human rights, taking into account the nature and extent of the limitation

The amendments, which are intended to achieve the purpose of preserving judicial independence, strike a fair balance with the limitation on the right to fair hearing, taking into account the scope of the limitation and the safeguard in the form of retention of the right of appeal.

On one side of the scales, the right to a fair hearing is limited by amendments which remove the right to review in limited, specified circumstances. The limitation is itself subject to safeguards which retain existing rights to review conducted by a judicial officer.

On the other side of the scales, it is critically important for the independence of the judiciary to be preserved and protected. This independence is fundamental to our system of government and to public perceptions of, and confidence in, the role of the courts.

On balance, having regard to the extent of the limitation on the right to a fair hearing, the importance of achieving the purpose of the limitation outweighs any adverse impact caused to the right to a fair hearing,

(g) any other relevant factors

Not applicable.

Amendments to the definition of ‘public authority’ under the RTI Act and the IP Act

Amendments to the definition of ‘public authority’ in the RTI Act and the IP Act in the Bill include a provision which provides that a public authority does not include an entity established by letters patent. This will mean that an entity established by letters patent will not be subject to the RTI Act or the IP Act. This will preclude access and amendment applications being made to such entities under the RTI Act, and will mean that the privacy protections under the IP Act do not apply to personal information held by such entities.

These amendments limit freedom of expression (section 21 of the HR Act) and the right to privacy and reputation (section 25 of the HR Act).

(a) the nature of the right

The right to *freedom of expression* (section 21 of the HR Act) includes the freedom to seek, receive and impart information and ideas of all kinds. As noted in *XYZ v Victoria Police*³ ‘the human right to freedom of expression incorporates a positive right to obtain access to government-held documents’. The Human Rights Committee states that article 19 of the International Covenant on Civil and Political Rights ‘embraces a right of access to information held by public bodies’⁴.

The *right to privacy and reputation* (section 25 of the HR Act) protects the individual from all interferences and attacks upon their privacy, family, home, correspondence (written and verbal) and reputation. The right to privacy manifests the underlying value of human beings as autonomous individuals with power over their actions. The scope of the right to privacy is very broad. It protects privacy in the sense of personal information, data collection and correspondence, but also extends to an individual’s private life more generally.

The right to privacy imposes a positive obligation on states to ‘adopt legislative and other measures to give effect to the prohibition against such interferences and attacks as well as to the protection of this right.’⁵ Further, the Human Rights Committee has stated that ‘this right is required to be guaranteed against all such interferences and attacks whether they emanate from state authorities or from natural or legal persons’.

³ *XYZ v Victoria Police* (General) [2010] VCAT 255.

⁴ Human Rights Committee, *General Comment No 34: Freedoms of opinion and expression (Article 19 of the International Covenant on Civil and Political Rights)*, 102nd sess, UN Doc CCPR/C/GC/34 (12 September 2011) [18]

⁵ Human Rights Committee, *General Comment No 16: The right to respect of privacy, family, home and correspondence, and protection of honour and reputation* (Article 17 of the International Covenant on Civil and Political Rights), UNHRC 32nd sess (8 April 1988) [1].

The scope of this right is limited by an internal limitation: a person has the right not to have their privacy, family, home or correspondence unlawfully or arbitrarily interfered with. Limitations on the right to privacy must be proportionate and not capricious, unpredictable, unjust and unreasonable.

The amendments limit the right to freedom of expression by precluding access and amendment applications being made to under the RTI Act to entities established by letters patent. The amendments also limit the right to privacy because privacy protections under the IP Act will not apply to personal information held by such entities.

(b) the nature of the purpose of the limitation to be imposed by the Bill if enacted, including whether it is consistent with a free and democratic society based on human dignity, equality and freedom

The RTI Act applies to documents of an agency or Minister. The RTI Act defines an agency to include a ‘public authority’, which is an entity established for a *public purpose by an Act*, or *an entity established by government under an Act for a public purpose* or *an entity created by the Governor in Council or a Minister*, or a prescribed entity.

In *Stanway v Information Commissioner & Anor* [2017] QCATA 30 (Stanway), Judge Horneman-Wren decided that the Frederick Marsden Youth Centre Inc – an entity initially established as an orphanage in 1929 by letters patent issued by the Governor, pursuant to a power conferred by section 1 of the (now repealed) *Religious, Education and Charitable Institutions Act 1861* (the RECI Act) – was an ‘entity established by government under an Act’ for the purposes of the RTI Act and subject to the RTI Act’s obligations.

Entities established by letters patent are generally charitable and religious organisations and include Bible Societies, Churches, Church Trusts, Kindergarten Associations, Welfare Associations and Historical Associations. The information they hold is not properly characterised as *information in the government’s possession or under the Government’s control*.

The purpose of the limitation on the right to freedom of expression is to provide consistency with the purposes of the RTI Act (which is for a right of access to information in the government’s possession or under the government’s control), and to alleviate the administrative burden on entities established by letters patent in complying with RTI Act obligations. These obligations include dealing with access applications, publishing disclosure logs and maintaining publication schemes.

The purpose of the limitation to the right to privacy and reputation is to provide consistency with the purposes of the IP Act (which is to provide for the fair collection and handling in the public sector environment of personal information) and to alleviate the administrative burden on entities established by letters patent in complying with the IP Act. These obligations include complying with the privacy principles under the IP Act and, will, subject to passage of the Bill, include requirements to comply with the MDBN scheme.

- (c) the relationship between the limitation to be imposed by the Bill if enacted, and its purpose, including whether the limitation helps to achieve the purpose

The limitation imposed by the Bill supports the purpose of ensuring the consistency with the purposes of the RTI Act and IP Act by ensuring that rights of access and information privacy protections are limited to government information rather than extending to entities established by letters patent (generally having religious or charitable purposes). The limitation also supports the purpose of alleviating the administrative burden of such entities by excluding them from the scope of requirements in the Acts.

- (d) whether there are any less restrictive (on human rights) and reasonably available ways to achieve the purpose of the Bill

There are no less restrictive reasonably available ways to achieve the purpose of the Bill. Options such as providing that organisations established by letters patent are subject to the RTI Act in relation to specified functions only, would not achieve the purpose of the limitation.

The decision in *Stanway* was based on an interpretation of provisions which occur in most other jurisdictions' freedom of information/right to information laws. Although schedule 4, section 3(2)(a) of the *NSW Government Information (Public Access) Act 2009* excludes incorporated associations (which are not dissimilar to letters patent organisations) from the operation of that Act, it does not appear that these laws have been tested in relation to letters patent organisations in those other jurisdictions.

- (e) the balance between the importance of the purpose of the Bill, which, if enacted, would impose a limitation on human rights and the importance of preserving the human rights, taking into account the nature and extent of the limitation.

On one side of the scales is the fundamental importance of preserving the purpose of the RTI Act, which is to provide access to information in the government's possession or control.

On the other side of the scales is the need to ensure that religious and charitable organisations are not subject to the administrative burden of compliance with obligations under the RTI Act and IP Act...

The proposed amendments strike the right balance between the rights to freedom of expression and privacy and the need for reasonable limitations on the operation of RTI and IP legislation. Clarifying the operation of the RTI Act and IP Act is consistent with a free and democratic society.

- (f) any other relevant factors

It appears that, other than in the *Stanway* case referred to above, applications under the RTI Act and IP Act have not been made to organisations established by letters patent. These rights have therefore rarely been exercised.

Time limits for referral of privacy complaints to QCAT

Amendments to the IP Act in the Bill provide that a complainant has 20 business days to ask the Information Commissioner to refer a privacy complaint to QCAT for hearing from the day

the Commissioner gives written notice that the Information Commissioner does not believe the complaint can be resolved by mediation, or mediation is attempted but is not successful. However, the Information Commissioner may extend the period of 20 business days if the Commissioner is satisfied that this is reasonable in the circumstances. Under existing legislation, there is no provision which limits the timeframe for referral to QCAT.

These amendments limit the right to a fair hearing (section 31 of the HR Act)

(a) the nature of the right

The *right to a fair hearing* (section 31 of the HR Act) affirms the right of all individuals to procedural fairness when coming before a court or tribunal. Case law suggests that one of the essential requirements for a fair hearing is the principle of ‘equality of arms’ meaning that each party must be given a reasonable opportunity to present their case⁶. Case law also highlights that the right to a fair hearing has an implied right that there will be no unreasonable delay to a civil proceeding, with the reasonableness of any delay depending on the particular circumstances of the case.⁷

The amendments limit the right to fair hearing by imposing a timeframe, subject to extension by Information Commissioner, for a complainant to seek a referral to QCAT.

(b) the nature of the purpose of the limitation to be imposed by the Bill if enacted, including whether it is consistent with a free and democratic society based on human dignity, equality and freedom

The purpose of the limitation is to prevent an unreasonable delay on the part of a complainant in seeking a referral to QCAT and provide increased certainty for the complainant and respondent for the complaint.

(c) the relationship between the limitation to be imposed by the Bill if enacted, and its purpose, including whether the limitation helps to achieve the purpose

The limitation will achieve the purpose by making it more likely that privacy complaints are referred to QCAT in a timely manner.

(d) whether there are any less restrictive (on human rights) and reasonably available ways to achieve the purpose of the Bill

There are no less restrictive and reasonably available alternatives that would meet the purpose. Providing a longer initial time period than 20 business days would result in the increased certainty for the complainant not being realised, and allow more scope for delay on the part of the complainant. The period of 20 business days is consistent with comparable timeframes (for example, review rights in the RTI Act are subject to specific time limits including section 82, which provides that an internal review must be applied for within 20 business days after the date of the written notice of the decision or within the further time the agency or the Minister allows).

⁶ *Roberts v Harkness* [2018] VSCA 215 [48]

⁷ Human Rights Committee, *General Comment No 32: Right to equality before courts and tribunals and to fair trial*, 90th sess, UN Doc CCPR/C/GC/32 (27 July 2007) [37]

Allowing the Information Commissioner to extend the timeframe where reasonable in the circumstances is sufficiently flexible to ensure applicants are not unreasonably disadvantaged. Applicants who are affected will be advised that their right to seek a referral by the Information Commissioner by QCAT must be exercised within the timeframe.

- (e) the balance between the importance of the purpose of the Bill, which, if enacted, would impose a limitation on human rights and the importance of preserving the human rights, taking into account the nature and extent of the limitation

On one side of the scales, the amendments limit the right to a fair hearing by imposing timeframes on a person's ability to have their privacy complaint referred to QCAT. However, the limitation is not absolute, and the Information Commissioner's ability to extend the timeframes is an important safeguard.

On the other side of the scales, the purpose of the amendments is to prevent unreasonable delays in complainants seeking a referral to QCAT, providing certainty for the complainant, the respondent and QCAT, and supporting greater efficiency in addressing complaints about government action. Providing certainty and clarity for individuals and institutions, such as QCAT, supports our democratic society.

On balance, the importance of the amendments in providing reasonable limitations outweighs any limitations imposed on the right to a fair hearing.

- (f) any other relevant factors

Not applicable.

Collecting, using and disclosing information for notification under the MDBN scheme

The Bill inserts a new provision in the IP Act to enable particular agencies that are the subject of an eligible data breach to collect, disclose and use personal information to other particular agencies where it is reasonably necessary to confirm the name and contact details of a notifiable individual or whether an individual is deceased. Disclosure of personal information in these circumstances is also enabled. This also extends to suspected eligible data breaches where the Information Commissioner has made a recommendation that relevant individuals be notified.

The provision limits the right to privacy (s 25 of the HR Act) by authorising the collection, use and disclosure of personal information, namely names, dates of birth, contact details, identifiers and dates of death, for the purposes of confirming name and contact details the date of death (if applicable).

- (a) the nature of the right

The right to privacy protects the individual from interferences and attacks on their privacy, family, home, correspondence (written and verbal) and reputation. The scope of the right to privacy is very broad. It protects privacy in the sense of personal information, data collection and correspondence, but also extends to an individual's private life more generally.

The right to privacy is engaged by the amendment to the IP Act authorising sharing of information between particular agencies that have been the subject of an eligible data breach with other particular agencies.

The right to privacy is subject to an internal limitation in that it applies only to interferences with privacy that are ‘unlawful’ or ‘arbitrary’. The Bill only allows collection, disclosure or use between particular agencies (including prescribed agencies) regulation, which will allow for privacy considerations to be considered further when any regulations prescribing entities are developed. In addition, the collection, use and disclosure may only occur only if it is reasonably necessary for the purpose of confirming name and contact details or whether an individual is deceased.

- (b) the nature of the purpose of the limitation to be imposed by the Bill if enacted, including whether it is consistent with a free and democratic society based on human dignity, equality and freedom

The purpose of the provision is to enable an agency that is required to notify individuals to do so using correct contact details, and not notify deceased individuals who do not have privacy rights under the IP Act. This is to increase the effectiveness of notification to living individuals, and minimise distress to friends and families of deceased individuals. Notification under the MDBN is intended to allow individuals to promptly take steps to mitigate harm that may arise from a data breach, including potential further interferences with privacy, and this is supported by correct contact details being used. Notification under the scheme in turn supports individuals’ right to privacy.

These purposes for the collection, disclosure and use of this information, are consistent with a free and democratic society based on human dignity, equality and freedom.

- (c) the relationship between the limitation to be imposed by the Bill if enacted, and its purpose, including whether the limitation helps to achieve the purpose

The limitation will support the purpose by enabling the collection, use and disclosure of personal information and thereby enabling more effective notification of individuals and minimise distress to friends and family of notification about deceased individuals.

- (d) whether there are any less restrictive (on human rights) and reasonably available ways to achieve the purpose of the Bill

There are no reasonably available, less restrictive alternatives to ensure that information can appropriately be shared. The Bill provides limitations by only permitting information sharing between particular agencies, including agencies prescribed by regulation, , meaning that each type of agency and each type of entity to be prescribed must be assessed on its merits, including any human rights impacts specific to that entity from which personal information is to be obtained. The collection, use and disclosure may only occur only if it is reasonably necessary for the purpose of confirming name and contact details or whether an individual is deceased.

- (e) the balance between the importance of the purpose of the Bill, which, if enacted, would impose a limitation on human rights and the importance of preserving the human rights, taking into account the nature and extent of the limitation

On one side of the scales is the limitation on the right to privacy by authorising the collection, use and disclosure of certain types of personal information in specified circumstances. The extent of the limitation is reduced by requirements for entities who collect, disclose or use information to be prescribed by regulation.

On the other side of the scales is the purpose of the limitation, which is both to ensure that agencies are able to effectively and accurately notify individuals affected by a data breach, and to avoid distress to friends and family inadvertently notified of matters relating to people who are deceased. This purpose of the limitation also extends to supporting the effectiveness of the MDBN scheme, which allows individuals to protect their personal information, thereby supporting the right to privacy.

On balance, the minor limitation on the right to privacy by permitting collection, use and disclosure for defined purposes, is reasonable and justified in a democratic society, given the importance of accurate notification of potential breaches to enable corrective action, and the need to minimise any distress caused by this process.

- (f) any other relevant factors

Not applicable.

Authorised disclosure of information by the Information Commissioner and members of staff of the Office of the Information

The IP Act (section 188) and the RTI Act (section 179) currently prevent a person who is or has been the Information Commissioner or a member of staff of the Office of the Information Commissioner from disclosing information that the person obtained in performing functions under the Act, other than for the purposes of the Act. Amendments to these provisions in the Bill create exceptions where the person believes that the disclosure is necessary to lessen or prevent a serious threat to the life, health or safety of an individual or to public health or safety.

To the extent that personal information is disclosed under the amendments, this limits the right to privacy and reputation (section 25 of the HR Act) by providing limited circumstances in which disclosure of private information will not be subject to a criminal offence.

- (a) the nature of the right

The *right to privacy and reputation* (section 25 of the HR Act) is described above – a person has the right not to have their privacy, family, home or correspondence unlawfully or arbitrarily interfered with. Limitations on the right to privacy must be proportionate and not capricious, unpredictable, unjust and unreasonable.

- (b) the nature of the purpose of the limitation to be imposed by the Bill if enacted, including whether it is consistent with a free and democratic society based on human dignity, equality and freedom

The purpose of the limitation, in ensuring that disclosure of information that a person reasonably believes is necessary to lessen or prevent a serious threat to life, health or safety, or to public health or safety, is to allow such serious threats to be responded to appropriately, thereby promoting the right to life. The right to life is protected by section 16 of the HR Act, which provides that every person has the right to life and the right not to be arbitrarily deprived of life. The right imposes substantive and procedural obligations on the State to take appropriate steps and adopt positive measures to protect life.

- (c) the relationship between the limitation to be imposed by the Bill if enacted, and its purpose, including whether the limitation helps to achieve the purpose

The limitation on the right to privacy helps achieve the purpose by removing exposure to criminal penalty and thereby removing the disincentive for persons to respond appropriately to the serious threats.

- (d) whether there are any less restrictive (on human rights) and reasonably available ways to achieve the purpose of the Bill

There are no less restrictive and reasonably available alternatives that would meet the purpose. Legislation such as the IP Act (the object of which includes providing for the fair collection and handling in the public sector environment of personal information) expressly provides for disclosure *where necessary to lessen or prevent a serious threat to life, health, safety or welfare of an individual, or to public health, safety or welfare*. The amendment narrowly defines the circumstances in which disclosure of information may occur without exposing the person to penalty. Defining the circumstances more narrowly would not sufficiently allow serious threats to be responded to without a person being exposed to criminal penalty.

- (e) the balance between the importance of the purpose of the Bill, which, if enacted, would impose a limitation on human rights and the importance of preserving the human rights, taking into account the nature and extent of the limitation

On one side of the scales, there is a limitation on the right to privacy and reputation, a limitation which applies in very limited circumstances and in support of another human right.

On the other side of the scale is the purpose of the amendment, which furthers the obligation on the State to adopt appropriate measures to protect life and supports the purpose of allowing serious threats to be responded to. The importance of the purpose outweighs the minor limitation on human rights. The amendments therefore provide an appropriate balance between these competing considerations.

- (f) any other relevant factors

Not applicable.

Entry and inspection powers in relation to the MDBN scheme

Amendments to the IP Act for the MDBN scheme include a power for an officer authorised by the Information Commissioner to enter a place occupied by the agency to; observe a demonstration of the agency's data handling systems, policies and procedures; and inspect a document that is part of the agency's data handling policies and procedures or another document shown to the authorised officer by the agency. This power will only be able to be used for the purposes of the Information Commissioner's review, investigation, monitoring or audit functions, as they relate to the MDBN scheme. The amendments will also require a person in the place to give the authorised officers reasonable help in exercising the authorised officers' powers.

These amendments limit the right to a privacy and reputation (section 25 of the HR Act).

(a) the nature of the right

The nature of the right to privacy and reputation (section 25 of the HR Act) is described above. It is further noted that the United Nations Human Rights Committee has given a liberal interpretation to the term 'home', which includes a person's workplace. The Committee states that searches of a person's home should be restricted to those necessary to gather evidence and should not amount to harassment.

(b) the nature of the purpose of the limitation to be imposed by the Bill if enacted, including whether it is consistent with a free and democratic society based on human dignity, equality and freedom

The purpose of the limitation on human rights is to support the Information Commissioner to conduct review, investigation, monitoring or audit functions, as they relate to the MDBN scheme. This will allow the Information Commissioner to perform these functions effectively, noting the functions are directed at fair handling of personal information in the public sector environment and improving public sector privacy administration.

(c) the relationship between the limitation to be imposed by the Bill if enacted, and its purpose, including whether the limitation helps to achieve the purpose

The proposed powers for authorised officers to enter a place occupied by the agency to: observe a demonstration of the agency's data handling systems, policies and procedures; and inspect a document that is part of the agency's data handling policies and procedures or another document shown to the authorised officer by the agency, will support the purpose. It will do this by increasing the opportunities for the Information Commissioner to obtain information about how an agency's systems, policies and procedures work in a practical sense and thereby obtain an understanding of this relevant to its review, investigation, monitoring or audit functions. In the absence of this power, the Information Commissioner would need to either rely on consent being provided by the occupier of the place or issue a notice requiring a person to give information or attend before the Information Commissioner. It is considered that the provision of information may not be sufficient to achieve the purpose, for example, where viewing a demonstration of the operation of a system is relevant to insights and understanding needed for the Information Commissioner to effectively conduct its review, investigation, monitoring or audit functions.

(d) whether there are any less restrictive (on human rights) and reasonably available ways to achieve the purpose of the Bill

It would be possible to rely on consent being provided by the occupier of the place or issue a notice requiring a person to give information or attend before the Information Commissioner. This would be less restrictive, but would not be expected to increase opportunity for the Information Commissioner to obtain practical insights and understanding as contemplated by the proposed powers.

Safeguards are proposed which ameliorate the impact of the limitation on the right to privacy. In particular, the Information Commissioner must give reasonable notice to the principal officer and first request consent. The powers may only be exercised by authorised officers appointed by the Commissioner, and there are supporting requirements around production and display of identity cards to ensure that an individual can have a greater degree of confidence that any interference with their privacy through the entry and inspection powers is duly authorised and subject to oversight by the Information Commissioner. Requirements to provide reasonable help to an authorised officer are subject to a reasonable excuse where there may be self-incrimination, or where it would result in the disclosure of information that is the subject of legal professional privilege or would result in the disclosure of confidential information in contravention of a law. In addition, documents or information obtained by an authorised officer are subject to an immunity so that evidence of these documents or information, or other evidence directly or indirectly derived from the documents or information, is not admissible against the individual in any proceeding to the extent it tends to incriminate the individual or exposes them to penalty.

(e) the balance between the importance of the purpose of the Bill, which, if enacted, would impose a limitation on human rights and the importance of preserving the human rights, taking into account the nature and extent of the limitation

On one side of the scales, the amendments limit the right to privacy and reputation by enabling the Information Commissioner to exercise powers to enter a place, obtain documents and observe an agencies' systems, policies and procedures. This limitation is, however, subject to a series of safeguards, including in relation to notice requirements and the requirement for powers to be exercised by authorised officers.

On the other side of the scales is the purpose of increasing the opportunities for the Information Commissioner to obtain practical insights and understanding relevant to the Commissioner's review, investigation monitoring or audit functions. This will provide the opportunity for the Commissioner to advise and report on systemic improvements at agency level potentially reducing the risk of data breaches. This will in turn promote and protect Queenslanders' right to privacy.

On balance, this is likely to increase public confidence in agencies' management of data breaches, enhancing our democratic system.

(f) any other relevant factors

Not applicable.

Amendments to the RTI Act concerning exempt Cabinet information

Amendments to the RTI Act will provide that Cabinet briefing notes, Cabinet agendas, notes of discussion in Cabinet, Cabinet minutes, and drafts of these things as well as drafts of Cabinet submissions and Cabinet decisions continue to be taken to be comprised exclusively of exempt information despite any publication of a Cabinet submission or Cabinet decision.

An agency or Minister may refuse access to all or part of a document pursuant to an RTI access application to the extent the document comprises exempt information.

The amendments to the RTI Act limit freedom of expression (section 21 of the RTI Act).

(a) the nature of the right

The right to freedom of expression is described above – it includes the right to seek and receive information, this includes a right to access to information held by government, and an obligation on government to disclose such information.

The amendments limit the right to freedom of expression by removing any doubt that despite any publication of a Cabinet submission or Cabinet decision, associated Cabinet briefing notes, Cabinet agendas, notes of discussion in Cabinet, Cabinet minutes, and drafts of these things as well as drafts of Cabinet submissions and Cabinet decisions are exempt information under the RTI Act to which an agency or Minister may refuse access following an access application.

The amendment ensures that the status quo is maintained whereby specified types of documents are taken to be comprised exclusively of exempt information, and this is not affected by any publication of a Cabinet submission or Cabinet decision.

Proactive release of Cabinet documents is a significant step towards increased transparency in government decision-making.

(b) the nature of the purpose of the limitation to be imposed by the Bill if enacted, including whether it is consistent with a free and democratic society based on human dignity, equality and freedom

The purpose of these amendments is to maintain the confidentiality of Cabinet deliberations thereby supporting the principle of collective responsibility of Cabinet as a cornerstone of an effective and efficient Cabinet system.

(c) the relationship between the limitation to be imposed by the Bill if enacted, and its purpose, including whether the limitation helps to achieve the purpose

To the extent that information has been officially published by decision of Cabinet, including under the proactive release scheme, it will be available under the RTI Act, but other information in the same document (including information redacted under the proactive release scheme) will not be available. The amendments provide that the entirety of any Cabinet briefing notes, Cabinet agendas, notes of discussion in Cabinet, Cabinet minutes, and drafts of these things as well as drafts of Cabinet submissions and Cabinet decisions will be exempt information despite any information being officially published by decision of Cabinet. Continuing the exempt status of the entirety of these documents under the RTI Act will help to ensure that confidentiality of deliberations of Cabinet.

(d) whether there are any less restrictive (on human rights) and reasonably available ways to achieve the purpose of the Bill

There are no less restrictive means of achieving the purpose of maintaining Cabinet confidentiality.

(e) the balance between the importance of the purpose of the Bill, which, if enacted, would impose a limitation on human rights and the importance of preserving the human rights, taking into account the nature and extent of the limitation

On balance, the fundamental importance of maintaining the confidentiality of Cabinet deliberations and supporting the principle of collective responsibility of Cabinet means the minor limitation on the right to freedom of expression is justified. The amendments will also support efficiencies for decision-makers under the RTI Act. The documents referred to that will continue to be exempt in their entirety will remove any need for decision-makers to consider whether information within them should be released.

(f) any other relevant factors

Not applicable.

Amendments to the RTI Act concerning public interest immunity

Amendments to the RTI Act will provide that the publication by Cabinet of any information or a decision to officially publish Cabinet information on a regular basis must be disregarded when a decision is being made in a proceeding or process about whether a common law or statutory rule prevents the production or disclosure of information in connection with Cabinet because the production or disclosure would be contrary to the public interest.

The amendment arises from observations on the operation of New Zealand's proactive release scheme, where the existence of a proactive release scheme has led courts to place less weight on Cabinet confidentiality in considering public interest immunity. The amendment requires courts, tribunals or other bodies conducting extra-curial, inquisitorial or investigative proceedings or processes to ignore the existence of the proactive release scheme when considering such applications.

The amendment does not seek to create a restriction per se. Rather, it seeks to maintain the status quo in terms of how the public interest immunity operated prior to the introduction of the proactive release scheme.

The amendment does not materially affect the operation of the courts, nor does it impinge on the independence of the judicial process.

The amendments to the RTI Act limit freedom of expression (section 21 of the HR Act) and right to fair hearing (section 31 of the HR Act).

a) the nature of the right

The right to freedom of expression is described above – it includes the right to seek and receive information, which includes a right of access to information held by government, and an obligation on government to disclose such information.

The right to fair hearing is also described above – it affirms the right of all individuals to procedural fairness when coming before a court or tribunal. It provides a right for parties to be heard and to respond to allegations made against them.

The amendments limit the right to fair hearing and the right to freedom of expression by limiting what can be taken into account when assessing whether production or disclosure would be contrary to the public interest. This may in turn increase the possibility that disclosure in a proceeding or process may be considered contrary to the public interest. This would operate to limit the disclosure of information in the context of proceedings and processes, and result in such information being withheld on the ground that the public interest in its disclosure is outweighed by a competing public interest in its suppression. This information may also be material in a party responding to allegations made against them.

- b) the nature of the purpose of the limitation to be imposed by the Bill if enacted, including whether it is consistent with a free and democratic society based on human dignity, equality and freedom

The purpose of the limitation is to ensure that the publication of Cabinet information does not lead to courts, tribunals and other entities placing less weight on the considerations underpinning the convention of Cabinet confidentiality when assessing a claim for public interest immunity in processes or proceedings. It is intended to clarify that the publication of information by Cabinet does not derogate from the public interest privilege that previously attached to the Cabinet documents.

- c) the relationship between the limitation to be imposed by the Bill if enacted, and its purpose, including whether the limitation helps to achieve the purpose

The limitation will assist in achieving the purpose of the Bill, by expressly disregarding information officially published by Cabinet where claims of public interest immunity arise.

- d) whether there are any less restrictive (on human rights) and reasonably available ways to achieve the purpose of the Bill

There are no less restrictive means of achieving the purpose.

- e) the balance between the importance of the purpose of the Bill, which, if enacted, would impose a limitation on human rights and the importance of preserving the human rights, taking into account the nature and extent of the limitation

On balance, the measure strikes a fair balance between the benefits arising from preserving public interest immunity of information, and the possible limitation of rights of individuals in limited circumstances. That is, the limit imposed on these rights is outweighed by the importance of preserving public interest immunity.

- f) any other relevant factors

Not applicable.

Amendments to the RTI Act concerning Ministers' protection from civil liability

Amendments to the RTI Act insert new section 22A which provides that a Minister does not incur civil liability for disclosing information under a publication scheme or other

administrative scheme in good faith. If section 22A(1) prevents liability attaching to a Minister, the liability attaches instead to the State.

This amendment may engage the right to a fair hearing in section 31 of the HR Act which contains an implied right of access to the courts.

Overseas authorities indicate that statutory immunity from liability will limit a right of access to the courts in order to vindicate existing rights. However, it is considered that this right is not limited because a person will still be able to pursue their cause of action against the State. Liability will instead attach to the State and an associated cause of action could be pursued against the State. The amendment will ensure that Ministers are not inhibited from disclosing information to the public in good faith.

Conclusion

In my opinion, the Bill is compatible with human rights under the HR Act because it limits human rights only to the extent that is reasonable and demonstrably justifiable in a free and democratic society based on human dignity, equality and freedom.

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