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27 October 2023

Committee Secretary
Community Support and Services Committee
Parliament House
George Street
Brisbane Qld 4000
By email only: CSSC@parliament.qld.gov.au

Dear Secretary

Public Records Bill 2023

The Office of the Information Commissioner (**OIC**) welcomes the opportunity to make a submission to the Community Support and Services Committee's (the **Committee**) inquiry regarding the Public Records Bill 2023 (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 *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 submission

OIC supports the initiative to reform the existing public records regime, which stands to modernise Queensland's public records governance framework, and better harmonise that framework with complementary legislation such as the IP Act and the RTI Act. In this regard, we note particularly the adoption of a 'pro-disclosure' stance in the Bill,¹ which accords with the presumption in the RTI Act that government-held information will be open to the community, unless contrary to the public interest.

We also note and support the Bill's express recognition of the interests of Aboriginal peoples and Torres Strait Islander peoples, including by incorporation of a series of principles concerning public records relating to Aboriginal peoples and Torres Strait Islander peoples,² and provisions requiring the establishment a First Nations Advisory Group.³ These changes may materially address the

¹ The Explanatory Notes accompanying the Bill expressly state that the Bill '*...will strengthen the legislative frameworks governing public authority recordkeeping and public access to records by...adopting a pro-disclosure approach for access to records in the custody of Queensland State Archives through the setting of restricted access periods (where needed) and the requirement for public authorities to advise why they have refused access to these public records*' (pp. 2-3).

² Set out in schedule 1, part 1 of the Bill.

³ Part 4, Division 4 of the Bill.

issues our office has noted regarding the importance of providing Stolen Generations survivors and family members with access to records.⁴

The balance of OIC's submission comprises comments and observations on the following matters:

- Restricted access periods and personal information
- Tiered categories of personal information
- Reasons for a restricted access period at the time of giving a restricted access notice
- The access mechanism provided for in Part 3, Division 3 of the Bill

No minimum restricted access period for restricted information

The Bill provides⁵ that a record given to State Archives by a regulated public authority (**RPA**) is open access unless the RPA gives the archivist a restricted access notice (**RAN**) stating the restricted access period (**RAP**).

For regulated records, the RAP is the number of years stated in the relevant part of schedule 2.⁶ For regulated records containing restricted information, the RPA can, but is not required to, increase the RAP to account for the restricted information.⁷ Under clause 30 of the Bill, the RAP for records which contain restricted information but are not regulated records must only be no longer than the number of years listed in the relevant part of schedule 2.⁸

While OIC supports maximum openness to public records – and understands that this absence of legislated minimum RAPs for restricted information in public records other than regulated records is consistent with the current scheme under the *Public Records Act 2002* – it is critical that openness is balanced with appropriate protections, particularly as regards personal information. This is consistent with the public records principles in schedule 1, part 2, item 7 of the Bill, which recognise that it may be contrary to the public interest or otherwise inappropriate to disclose a particular public record due to the sensitivity of information contained in the record.

Under the current Act, the archivist has issued guidelines on setting appropriate RAPs which include reference to minimum as well as maximum RAPs.⁹ Assuming passage of the Bill, it will be important that the archivist continue to provide RPAs with guidance in setting RAPs proportionate to the sensitivity of the information records may contain and ensure balance between openness and appropriate protections. In this regard, OIC notes and supports provisions in the Bill empowering the archivist to issue such guidance, for example, through the archivist's power in clause 46 to make standards, policies and guidelines,¹⁰ and clause 32, which gives the archivist the power to ask the RPA to review or change the original RAN given by the RPA.

⁴ OIC having been a signatory to a May 2022 joint statement by Australian information access and privacy regulators championing timely and easy access to records for Stolen Generations survivors and families, and host of a forum in June of this year for staff dealing with requests for access to Stolen Generation records focussing on applying the Healing Foundation's Principles for Nationally Consistent approaches to accessing Stolen Generation records. The joint statement can be accessed at <https://www.oaic.gov.au/newsroom/principles-for-nationally-consistent-approaches-to-accessing-stolen-generations-records-joint-statement-by-australian-information-access-commissioners-and-privacy-authorities>, while the June 2023 forum hosted by OIC is further discussed in our 2022/23 Annual Report, pages 26-27 (accessible at https://www.oic.qld.gov.au/__data/assets/pdf_file/0017/60308/OIC-Annual-Report-2022-23.pdf).

⁵ Clause 28.

⁶ Column 2 of schedule 2, part 2 - see clause 29.

⁷ Up to a maximum period, in accordance with the formula prescribed in clause 29(2).

⁸ Column 2 of schedule 2, part 3.

⁹ Accessible at https://www.forgov.qld.gov.au/__data/assets/pdf_file/0021/184170/setting-a-rap-practical-guide.pdf (accessed 23 October 2023).

¹⁰ With which an RPA, under clause 12, must comply, must have regard to, and may have regard to, respectively.

Tiers of personal information

OIC notes that the Bill will establish tiers of personal information (high sensitivity, medium sensitivity) to which varying maximum RAPs apply. These tiers and maximum RAPs reflect the current archivist guidelines for setting RAPs.

OIC suggests that any guidance issued by the archivist on setting appropriate RAPs would be bolstered by the inclusion of guidance on interpreting and applying these tiers of personal information. Assuming passage of the Bill, OIC would be happy to liaise with the archivist in the future as to the form and content of any such guidance.

Reasons for the RAP set in the Restricted Access Notice

As noted above, the RPA can give the archivist a RAN which sets the RAP for a record. It would contribute to the transparent management of public records and assist the archivist in assessing whether a RAP is appropriate if the RPA was required to include in – or with – the RAN, the RPA's reasons for nominating a particular RAP. The provision of such reasons at the time of giving custody might also help to expedite the Public Records Review Committee (the **PRR Committee**) review process provided for in clause 38 (itself discussed further below).

OIC suggests that such a requirement could be included in clause 28(1) or addressed in a standard issued by the archivist under clause 46.

Access to restricted records

The access mechanism in Part 3, Division 3 of the Bill empowers RPAs to approve access or conditional access to restricted records on request by an applicant, and provides a mechanism for the archivist or RPA to request review by the PRR Committee. By providing a means of access outside of the formal RTI process, relevant provisions will help to strengthen Queensland's pro-disclosure information access architecture, thereby fostering open and transparent government.

No application to Ministerial records

OIC notes, however, that the above provisions do not apply to Ministerial records¹¹ for which the restricted access period has not ended.¹² This exception effectively requires anyone who seeks access to these records to make a request for them under the RTI Act. OIC suggests that it would be consistent with the openness and transparency aims of the Bill, and the intent of Parliament under the RTI Act to make government information available, to include Ministerial records within the Bill's access mechanism.

No right for applicant to obtain reasons/request review

OIC supports the review mechanism proposed in clause 38 of the Bill, and welcomes the requirement in clause 38(4) for RPAs to provide reasons to the archivist as to why RPAs have refused or imposed conditions on an access request.

OIC notes, however, that this mechanism does not appear to accommodate the interests of the applicant requesting access to a given restricted record. Relevantly, the Bill contains no provision for an applicant to:

- seek a review if the RPA refuses access or imposes conditions
- be provided with the RPA's reasons for refusal or imposition of conditions
- be provided with the archivist's reasons for disagreeing with an RPA's giving of access

¹¹ Defined in clause 10.

¹² Clause 35(1) of the Bill.

- be consulted before, or provide input to, any referral to the PRR Committee¹³
- be provided with the PRR Committee's reasons for its decision.¹⁴

OIC notes that if access is not given to a restricted record, or is given conditionally, the applicant is not precluded from seeking access under the RTI Act.¹⁵ Applicants may, however, be less likely to resort to the formal RTI application process if afforded the means under the Bill to both understand why they have been refused¹⁶ access to a particular public record, and to challenge that refusal.

Conclusion

OIC again appreciates the opportunity to make a submission on the Bill and does not consider it necessary to be heard at the Committee's public hearing scheduled for 13 November 2023.

However, if the Committee does require our appearance, I wish to draw your attention to the fact that we may be required to appear at the Employment, Education and Training Committee's public hearing into the Information Privacy and Other Legislation Amendment Bill 2023, which is also scheduled for 13 November 2023. Our availability on 13 November 2023 may therefore be limited.

If the Committee otherwise has any queries or requires further information in relation to this submission, please do not hesitate to contact OIC via administration@oic.qld.gov.au, or telephone 3234 7373.

Yours sincerely



Stephanie Winson
Acting Information Commissioner

¹³ Which may cause an applicant to query the fairness of the process.

¹⁴ While the regulations referenced in clause 40 may prescribe the circumstances in which the archivist may refuse a person access to a public record, it is not clear that this encompasses procedures for, or obligations when, refusing access.

¹⁵ Which process requires reasons, and confers rights of review.

¹⁶ Or given conditional access.