



Office of the Information Commissioner
Queensland

Submission by the
Office of the Information Commissioner

THE EDUCATION AND CARE SERVICES REGULATION 2010

Queensland Information Commissioner, Julie Kinross
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The Queensland Office of the Information Commissioner is an independent statutory authority. This submission does not represent the views or opinions of the Queensland Government.

In principle, the Office of the Information Commissioner (Queensland) (**Qld OIC**) supports the adoption of the *Freedom of Information Act 1982* (Cth) (**Cth FOI Act**) and the *Privacy Act 1988* (Cth) (**Cth Privacy Act**) to the National Quality Framework for Early Childhood Education and Care (**National Quality Framework**).

However, the Qld OIC wishes to raise the following as issues for consideration regarding the draft *Education and Care Services National Regulations* (**draft Regulations**):

1. *The application of the Cth Privacy and FOI Acts to participating jurisdictions' Regulation Authorities is too broad*

Section 190 of the draft Regulations provides that the Cth Privacy Act applies to the Regulatory Authority of each participating jurisdiction. Similarly, section 199 of the draft Regulations provides that the Cth FOI Act applies to the Regulatory Authority of each participating jurisdiction.

For Victoria, the Regulatory Authority is defined to be the Secretary of that State's Department of Education and Early Childhood Development.¹ Victoria uses the term Secretary for the head of a department,² whereas Queensland uses the term chief executive.

Accordingly, the Qld OIC expects that Queensland's enactment of the *Education and Care Services National Law* (**National Law**) will define Regulatory Authority to be the chief executive of Queensland's Department of Education and Training as Queensland's Regulatory Authority.

Under the draft Regulations, the application of the Cth Privacy and FOI Acts to Regulatory Authorities is without qualification. However, it should be clearly confined to:

- the functions of the Regulatory Authorities set out in the National Law and
- for the purpose of the Cth FOI Act, to documents related to such functions.

Without such qualifications, the current draft of the Regulation appears to apply the Cth Privacy and FOI Acts to all acts and practices of Regulatory Authorities and all documents generated by them. This will mean that the jurisdictional issues mentioned at 3. below will arise more frequently, and the regulatory burdens mentioned at 4. below will be imposed often. As a result, the broad application of the Cth Privacy and FOI Acts will engender unnecessary confusion, delay and, at times, incorrect outcomes in order to give effect to the National Quality Framework.

It is the Qld OIC's view that the unnecessarily broad application of the Cth Privacy and FOI Acts to Regulatory Authorities should be appropriately qualified.

¹ See section 8 of the *Education and Care Services National Law Act 2010* (Vic).

² See Organisation Chart of Victoria's Department of Education and Early Childhood Development at <http://www.education.vic.gov.au/about/structure/default.htm>.

2. *The role of State/Territory Information Commissioners (and equivalents) should not be expanded*

It is noted that:³

Governments are still considering these provisions, including options for the establishment and appointment of the National Education and Care Services Privacy Commissioner, Freedom of Information Commissioner and Ombudsman.

The Qld OIC submits that existing or new Commonwealth entities with suitable skills and experience should be charged with performing the role of the Information Commissioner set out in the Cth Privacy and FOI Acts.

The Qld OIC does not support these functions being passed to and performed by State/Territory Information Commissioners (and equivalents).

3. *Obligations for Regulatory Authorities may arise under relevant State/Territory laws, as well as the Cth Privacy and FOI Acts*

Queensland's *Right to Information Act 2009* (Qld) (**Qld RTI Act**) and *Information Privacy Act 2009* (Qld) (**Qld IP Act**), as well as the Cth Privacy and FOI Acts, are likely to apply to Regulatory Authorities.

The Qld IP and RTI Acts apply to entities including departments.⁴ There is likely to be significant overlap between the acts and practices of Queensland's Department of Education and Training to which the Qld IP Act applies, and Queensland's Regulatory Authority (that is, the chief executive of the Department of Education and Training) to which the Cth Privacy Act will apply.

Further, there is likely to be significant, if not complete, overlap between documents of Queensland's Department of Education and Training to which the Qld IP and RTI Acts apply,⁵ and documents of Queensland's Regulatory Authority (that is, the chief executive of the Department of Education and Training) to which the Cth FOI Act will apply.

The Qld IP and RTI Acts provide for a right of access to "documents of an agency" (including documents of a department). The Qld IP Act also provides for a right of amendment regarding such documents.

For the purpose of RTI, in Queensland, "document of an agency" is defined to mean *'a document, other than a document to which this Act does not apply, in the possession, or under the control, of the agency, whether brought into existence or received by the agency, and includes (a) a document to which the agency is entitled to access; and (b) a document in*

³ Commonwealth Department of Education, Employment and Workplace Relations, Early Childhood Development Working Group, *Addendum to Information Paper on the Education and Care Services National Law and the proposed National Regulations* (March 2011), paragraph 66.

⁴ Section 14(1)(a) of the Qld RTI Act and section 18(1)(b) of the Qld IP Act.

⁵ The Qld IP Act deals with access and amendment application regarding personal information, while the Qld RTI Act deals with all other access applications.

the possession, or under the control, of an officer of the agency in the officer's official capacity.⁶

Similar concepts are relevant in terms of privacy. The Qld IP Act requires agencies to comply with privacy principles regarding documents in their control. A document is defined to be under an agency's control if the agency *'has the document in its possession or otherwise has the document under its control'*.⁷

As a result of these definitions, all that is required for an access or amendment application under the Qld IP or RTI Acts, or for the privacy principles to apply to an agency's documents under the Qld IP Act, is that the relevant document be in the physical possession or control of an agency.

Thus it is arguable that the Qld IP and RTI Act, as well as the Cth Privacy and FOI Acts, will apply to the acts, practices and documents of Regulatory Authorities. In such circumstances, jurisdictional issues arise. Further, the jurisdictional issues may in turn raise constitutional issues.

For example, if it is accepted that both Commonwealth and State/Territory privacy and FOI/RTI laws apply, the jurisdictional issues will relate to how those laws coexist. Conflicting requirements regarding statutory timeframes are likely to be problematic. Further, the application of different exemption and public interest test provisions could potentially result in different outcomes. Also, entitlements to reviews and appeals vary. Accordingly, it will be necessary to determine the extent to which the Commonwealth laws take precedence as a result of section 109 of the Constitution (Cth).

Further, it should be noted that jurisdictional issues could be particularly confusing and difficult to deal with in FOI/RTI matters, because the same person in the department/Regulatory Authority already tasked with responding to access and amendment applications under the participating jurisdictions' FOI/RTI laws is likely to be tasked with dealing with such applications under the Cth FOI Act as well.

Even without this added complication, it is the experience of the Qld OIC that jurisdictional issues are complex and resource consuming for both this Office and respondent agencies. For this reason, the Qld OIC is concerned that jurisdictional issues will be similarly resource consuming for the National Education and Care Services Privacy and Freedom of Information Commissioners and the National Authority, as well as the participating jurisdictions' Information Commissioners (or equivalents) and Regulatory Authorities. The twists and turns arising from different scenarios are likely to lead to substantial expenditure of such resources resolving jurisdictional issues on an ongoing basis.

For these reasons, the Qld OIC submits that clarity regarding whether Regulatory Authorities are subject to participating jurisdictions' privacy and FOI/RTI laws, as well as the Cth Privacy and FOI Acts, is required. As the scheme contemplated is a national one, the preferred position is that one national law apply, that being the Cth Privacy and FOI Acts.

If this was the case, the situation will be somewhat simpler. Some jurisdictional issues would still arise (regarding whether acts, practices and documents are those of State/Territory entities that comprise the Regulatory Authorities in their capacities as such—

⁶ Section 12 of the Qld RTI Act and section 14 of the Qld IP Act.

⁷ Section 24 of the Qld IP Act.

or if the acts, practices and documents relate only to other State/Territory departmental matters). However, the scope for jurisdictional issues would be substantially reduced to a more manageable level.

4. *There will be substantial regulatory burden for participating jurisdictions' Regulatory Authorities applying Commonwealth legislation*

While in principle, National Laws are desirable, they can have the unintended effect of increasing regulatory burden. This is the case with the current draft of the Regulation.

As a result of the draft Regulation's application of the Cth Privacy and FOI Acts to Regulatory Authorities, officers in each participating jurisdictions' relevant department will be required to be aware of, comply with and apply additional pieces of legislation.

There are similarities between the Cth Privacy and FOI Act and the privacy and FOI/RTI laws of each participating jurisdiction. This does not mean they are the same and that the ability to apply to latter automatically enables the ability to apply to former.

From jurisdiction to jurisdiction:

- Privacy laws are based on similar principles, but have differing rules regarding what can and cannot be done with personal information, about the base level of privacy protection required, the grounds on which the privacy principles can be overridden, different approaches to compliance, to education and to complaint handling.
- FOI/RTI laws have different administrative requirements, timeframes, review mechanisms, and approaches to exempt material and to balancing public interest considerations.
- There is a significant body of precedent material in relation to privacy and FOI/RTI in each jurisdiction which guides the decision makers and administrators of that jurisdiction in the application of their respective legislation.

Three examples of significant differences between the Commonwealth and Queensland jurisdictions are as follows:

- Queensland's equivalent of part VI (sections 71 to 80D) of the Cth Privacy Act is contained in one section—section 157—of the Qld IP Act. Both relate to waiver or modification of the requirement that an agency comply with the privacy principles. The Commonwealth scheme is more detailed and enables parliamentary scrutiny and disallowance of determinations,⁸ whereas the Queensland provision simply requires gazettal of the approval.
- Queensland has no equivalent of part VIIB of the Cth FOI Act, which enables the Commonwealth Information Commissioner to undertake an investigation regarding an action taken by an agency in the performance of functions or the exercise of powers under the Cth FOI Act (on a complaint from a person, or on the Information Commissioner's initiative).

⁸ See section 191 of the draft Regulations, sections 80 and 80C of the Cth Privacy Act and sections 303 and 304 of the *Education and Care Services National Law Act 2010* (Vic).

- Section 192(m) of the draft Regulations modifies the Cth Privacy Act ‘so that the Commissioner’s power to authorise persons to enter premises occupied by an agency and inspect documents extends to a power to authorise any person the Commissioner considered appropriate’. There is no equivalent modification of the Cth FOI Act in section 200 of the draft Regulations. However, section 77 of the Cth FOI Act (which appears in the abovementioned part VIIB of that Act) contains a provision which authorises entering premises in similar circumstances. That provision applies in the current context, by virtue of sections 190 and 199 of the draft Regulation. Accordingly, both the Education and Care Services Privacy Commissioner and the Education and Care Services Freedom of Information Commissioner will be able to authorise entry of the premises of Regulatory Authorities. There is no Queensland equivalent to this power.

If the Regulatory Authorities are to comply with and, where appropriate, apply the Cth Privacy and FOI Act, participating jurisdictions will need to:

- identify similarities and differences between their laws and the Cth Acts
- train officers in two additional bodies of law and their precedents
- alter existing administrative systems in order to accommodate different time frames, section numbers, record keeping requirements and statistical obligations
- develop new policies and procedures and train officers regarding them.

In short, requiring each participating jurisdictions’ Regulatory Authority to administer new bodies of law represents a significant regulatory burden.

Although the Commonwealth and Queensland have both recently adopted ‘push models’ for their FOI/RTI laws, and both have privacy laws and regulators, the regulatory burden is concerning for Queensland. However, in other jurisdictions with older, less similar FOI laws and (in some instances) no privacy laws or regulators, the regulatory burden will be highest.

5. *There will be regulatory burden for participating jurisdictions’ relevant administrative tribunals, Magistrates/Local Courts and Supreme Courts*

Further to the above discussion of the increased regulatory burden on relevant State/Territory departments, I note that each participating jurisdictions’ administrative tribunals, Magistrates/Local Courts and Supreme Courts are also likely experience an increase in work. This is because the draft Regulations require that they assume the appeal or enforcement functions of the Administrative Appeal Tribunal, Federal Magistrates Court and Federal Court⁹ respectively, regarding decisions and determinations of the National Education and Care Services Privacy and Freedom of Information Commissioners related to their jurisdictions’ Regulatory Authority.

It is not yet clear how much of an increase in work each participating jurisdictions’ administrative tribunals, Magistrates/Local Courts and Supreme Courts will experience.

⁹ By virtue of sections 192(e), (f) and (g), 193, 200(d) and (e) and 201 in combination with sections 187 and 196 of the draft Regulations.

However, it is noted that each may experience inconvenience and delay as a result of being required to intermittently apply Commonwealth legislation with which they have no familiarity.

6. *There are difficulties associated with invoking QCAT's jurisdiction*

Sections 192(e) and 200(e) of the draft Regulations modify the Cth Privacy and FOI Acts so that references to the Commonwealth's Administrative Appeals Tribunal are taken to be references to the "relevant administrative tribunal".

Further to these provisions, sections 193(f) and 201(f) define the "relevant administrative tribunal" to be the Queensland Civil and Administrative Tribunal (**QCAT**) for the purpose of Queensland's jurisdiction.

Section 6 of the *Queensland Civil and Administrative Tribunal Act 2009* (Qld) (**QCAT Act**) is a lengthy provision which sets out how "enabling Acts" confer jurisdiction on QCAT. There are three types of jurisdiction that may be conferred: original, review and appeal.

According to section 6 of the *Acts Interpretation Act 1954* (Qld) (**Qld AI Act**), the word "Act" in section 6 of the QCAT Act relates only to Acts of the Queensland Parliament. When Queensland passes an Act to enact the National Law, Queensland regulations made under that Act¹⁰ will comprise an Act for the purpose of section 6 of the QCAT Act.

In this regard, section 6(2) of the QCAT Act provides that an "enabling Act" includes subordinate legislation that confers *review* jurisdiction on QCAT. In contrast, an Act that confers *original, review or appeal* jurisdiction on QCAT is also an "enabling Act" under section 6(2).

As the Regulations, when passed, will be subordinate legislation, the only type of QCAT jurisdiction that they will be able to invoke is QCAT's *review* jurisdiction.

In contrast, under the Qld IP and RTI Acts:

- in relation to access and amendment applications:
 - references of questions of law by the Information Commissioner to QCAT are dealt with in QCAT's *original* jurisdiction constituted by one judicial member¹¹
 - appeals to QCAT on questions of law are dealt with in QCAT's *appeal* jurisdiction constituted by one judicial member¹²
 - reviews regarding vexatious applicant declarations¹³ and financial hardship status¹⁴ are dealt with by QCAT's *review* jurisdiction
- in relation to compliance notices, reviews are dealt with by QCAT's *review* jurisdiction¹⁵
- in relation to privacy complaints, the Information Commissioner must refer to QCAT at the complainant's request, and these are dealt with by QCAT's *original* jurisdiction.¹⁶

¹⁰ Section 7 of the Qld AI Act provides that an Act include statutory instruments made under the Act. Section 7 of the *Statutory Instruments Act 1992* (Qld) provides that a regulation is a statutory instrument.

¹¹ Section 118 of the RTI Act and section 131 of the IP Act.

¹² Section 119 of the RTI Act and section 132 of the IP Act.

¹³ Section 121 of the RTI Act and section 133 of the IP Act.

¹⁴ Section 120 of the RTI Act.

¹⁵ Section 161 of the IP Act.

¹⁶ Section 176 of the IP Act.

Given these differences, inconsistencies appear inevitable. The jurisdiction exercised by QCAT regarding the same kinds of matters will vary depending on whether those matters are being dealt with under Commonwealth or Queensland legislation.

This outcome does not accord with the National Law's aim of simplifying and harmonising laws.

7. *Multi-jurisdictional application of the Cth Privacy and FOI Acts may vary*

Given the nature of the Cth Privacy Act, Regulatory Authorities will not be required to apply provisions of that Act in order to make findings or determinations. This role is left to the National Education and Care Services Privacy Commissioner.

However, Regulatory Authorities will be required to apply provisions of the Cth FOI Act to make initial decisions and (when requested)¹⁷ internal review decisions regarding applications for access to or amendment of documents.

Further, each participating jurisdictions' administrative tribunals, Magistrates/Local Courts and Supreme Courts will be required to apply provisions of the Cth Privacy and FOI Acts.

Differences in approach, in the exercise of discretion, competing priorities, differing capacities and varying levels of available resources will inevitably result in different outcomes between jurisdictions.

This is particularly the case for privacy and FOI/RTI laws, as they are largely principles based legislation, which involve significant exercise of independent discretion by decisions makers. Decisions made by one Regulatory Authority's decision maker, tribunal or court may not necessarily be the same as others.

Accordingly, there is potential for tribunal and court material relied on as precedent for the Cth Privacy and FOI Acts to vary from participating jurisdiction to participating jurisdiction—creating confusion for applicants and complainants as well as Regulatory Authorities.

This position is contrary to the National Law's reforms generally and the application of privacy and FOI/RTI specifically.

¹⁷ An internal review decision is not required in order to make an external review application under the Cth FOI—see section 54L(2)(a).