Supplementary Submission No 55a

INQUIRY INTO THE OPERATION OF THE FREEDOM OF INFORMATION ACT 1982

Organisation: Office of the Victorian Information Commissioner (OVIC)

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Dr Tim Read
Chair
Integrity and Oversight Committee
Victorian Parliament

By email only: [redacted]

Dear Chair,

Thank you for the opportunity to provide further information to the Integrity and Oversight Committee's (**Committee**) Inquiry into the operation of the *Freedom of Information Act 1982* (Vic) (**FOI Act**).

The Office of the Victorian Information Commissioner (**OVIC**) provided a submission to the Committee in January 2024 (**OVIC's submission**). Since making that submission, OVIC has given further thought to the legislative and regulatory mechanisms that would improve efficient and timely access to health information (Term of Reference 3). This supplementary submission sets out OVIC's recommendations, with supporting information.

OVIC's Recommendations

This section provides OVIC's current views in relation to recommendations 17-20 of OVIC's submission and makes additional recommendations. In summary:

- OVIC **continues to support recommendation 17**. Agencies and Ministers should be enabled to provide access to a person's own personal and health information under an informal release pathway in Victoria's access to information (**ATI**) law.
- OVIC **continues to support recommendation 19**. Victoria's ATI law should permit formal requests for access to personal and health information.
- OVIC makes an **additional recommendation** in relation to OVIC's proposed informal release pathway in Victoria's ATI law. OVIC considers that where an Agency or Minister is considering withholding information from release:
    - There should be a legislative mechanism that enables the Agency or Minister, with agreement from the applicant, to proceed to process the request informally on the understanding it will not give rise to review rights. For example, where it would enable

an Agency to process a request quickly if certain information was removed from a document, and the Applicant agrees with this approach and is satisfied to forego review rights, the parties should be able to process and finalise the request informally. Under this pathway, the information removed from the document need not fall within an exemption under the Act; and

- In situations where an applicant does not agree to the removal of information, there should be a legislative mechanism that moves the request across to the formal pathway. This would then require the Agency or Minister to make a decision under the Act, applying exemptions to redacted information, and granting the same review rights as requests processed formally. This process should be conducted in accordance with Guidelines issued by OVIC and would not be available where the disagreement with the applicant is about whether the request is clear or is voluminous.

    - Under the current FOI Act, where an applicant does not agree to the removal of information, the applicant must resubmit their request "formally" under the Act, to enable an agency to make a decision granting review rights. This procedure is bureaucratic and frustrating for applicants, and in some cohorts can be retraumatising, given the applicant has already made a request to the agency, that the agency has been dealing with informally.

    - OVIC's recommendation would solve this problem, by enabling Agencies and Ministers to process requests informally (allowing for greater flexibility and sensitivity to the needs of the applicant), whilst ensuring that important review rights are retained, where an applicant does not agree to the removal of information. The Department of Families, Fairness and Housing's Care Leaver Records Scheme is an example of an informal release scheme that would benefit from this recommendation.

    - OVIC considers that applicants should have the right to make a complaint to OVIC about an Agency or Minister's handling of requests under the informal release pathway, similar to the complaint rights that presently exist for formal requests made under the FOI Act.

- OVIC **continues to support recommendation 18(c)**. In OVIC's view it would be most efficient if there was one set of principles to govern the handling of personal and health information in Victoria, and one regulator. The Health Privacy Principles (**HPPs**) in the *Health Records Act 2001* (Vic) (**HR Act**) should be consolidated into the Information Privacy Principles (**IPPs**) in the *Privacy and Data Protection Act 2014* (Vic) (**PDP Act**), regulated by OVIC.

- OVIC **continues to support recommendation 20, in part**. In OVIC's view, it would be most efficient to house the amendment and correction of personal and health records in the PDP Act, regulated by OVIC. Victoria's ATI law, and the HR Act, do not need to include mechanisms to amend and correct personal and health information.

- OVIC **no longer supports recommendations 18(a) and (b)**, which relate to enabling access to personal and health information under the PDP Act and HR Act. Instead, OVIC makes a **revised recommendation**, that access to personal and health information be regulated under one legislative instrument, being Victoria's ATI law.
    - In OVIC's view, an ATI law that enables proactive, informal and formal pathways of access would provide the most efficient and timely legislative mechanisms to access personal and health information. If Victoria had an ATI law with these access pathways, access under the PDP Act and HR Act would not be needed.
    - In OVIC's view, containing access mechanisms in one legislative instrument, creates efficiencies in training Agency and Ministerial staff to understand their legislative obligations, efficiencies in implementation, and efficiencies for OVIC in performing its guidance, education and regulatory oversight functions. Access under one legislative instrument may also reduce confusion, making it easier for members of the public to understand and exercise their rights.

More information

This section provides additional information relating to Recommendation 18(c) and OVIC's additional and revised recommendation.

Recommendation 18(c) – To regulate personal and health information under one Act with one regulator

Victoria is the only jurisdiction in Australia that regulates the handling of personal and health information under a dual system, with two sets of principles, two legislative instruments and two regulators. In Victoria:

- Health information is regulated by the Health Complaints Commissioner (**HCC**), administering the HPPs in the HR Act; and
- Personal information is regulated by OVIC, administering the IPPs in the PDP Act.

The IPPs and HPPs impose similar obligations on organisations in relation to personal information, and health information, respectively. They both set out principles, in the same order, relating to the collection, use and disclosure, quality, security and retention, openness, access and correction, use of unique identifiers, rights to anonymity and transborder data flows of personal and health information.[1]

[1] See HR Act, Schedule 1 and PDP Act, Schedule 1.

With respect to other jurisdictions:

- The ACT[2] and NSW[3], have two sets of principles under two legislative instruments, overseen by one regulator.

- Tasmania,[4] the Northern Territory[5] and the Commonwealth[6] have one set of privacy principles, overseen by one regulator.

- Queensland recently passed legislative reform to consolidate its National Privacy Principles (which apply to health agencies) and its Information Privacy Principles (which apply to all other agencies) into one set of privacy principles: the Queensland Privacy Principles (**QPPs**).[7] The QPPs are anticipated to commence in July 2025, regulated by Queensland's Office of the Information Commissioner.[8]

- Western Australia is considering adopting its first legislative framework to protect the privacy of personal and health information. The Privacy and Responsible Information Sharing Bill 2024, proposes to regulate personal and health information under one scheme, administered by the Office of the Information Commissioner WA.[9]

- 'Health information' is defined and included in the definition of 'sensitive information' in the jurisdictions with one set of principles, including WA's proposed framework.[10]

In OVIC's view, Victoria's dual system is unnecessary and creates gaps in regulation and inefficiencies for agencies, members of the public and regulators. For example:

- organisations must consult with two separate regulators for their views on substantially the same principles, and ensure compliance with the two sets of principles;

[2] The *Information Privacy Act 2014* (ACT) (for personal information), and the *Health Records (Privacy and Access) Act 1997* (ACT) (for health information), administered by the ACT Human Rights Commission.
[3] *Privacy and Personal Information Protection Act 1998* (NSW) (for personal information) and the *Health Records and Information Privacy Act* (NSW) (for health information), administered by the NSW Information Privacy Commission.
[4] See the Personal Information Protection Principles in the *Personal Information Protection Act 2004* (Tas), regulated by the Ombudsman Tasmania.
[5] See the Information Privacy Principles in the *Information Privacy Act 2002* (NT), regulated by the Office of the Information Commissioner Northern Territory.
[6] See the Australian Privacy Principles (APPs) in the *Privacy Act 1988* (Cth), regulated by the Office of the Australian Information Commissioner.
[7] *Information Privacy and Other Legislation Amendment Act 2023* (Qld). The reform is based on recommendation 13 of the Report on the review of the Right to Information Act 2009 and Information Privacy Act 2009, tabled in the Legislative Assembly on 12 October 2017; and recommendation 16 of the Crime and Corruption Commission's report, Operation Impala, A report on misuse of confidential information in the Queensland public sector (Impala report), tabled in the Legislative Assembly on 21 February 2020.
[8] See https://www.oic.qld.gov.au/training-and-events/ipola.
[9] See Privacy and Responsible Information Sharing Bill 2024 (WA).
[10] See *Personal Information Protection Act 2004* (Tas), section 3; *Privacy Act 1988* (Cth), section 6; *Information Privacy Act 2002* (NT), section 4; *Privacy and Responsible Information Sharing Bill 2024* (WA), section 4.

- complainants must deal with two separate regulatory bodies, to make a complaint and seek redress about the same privacy incident, involving personal and health information. Complaints about the IPPs are heard by OVIC, while complaints about the HPPs are heard by the HCC. A single incident that involves both personal and health information can result in complaints to either, or both, bodies. However, neither body can consider the issue arising under the other set of principles. This situation causes confusion for complainants and respondents, makes it more difficult for people to exercise their information privacy rights, and increases the time and resources spent by organisations in handling two identical complaints; and

- organisations can only seek to modify or depart from the IPPs, not the HPPs, which causes difficulties for agencies to implement information sharing schemes in the public interest, involving both personal and health information.[11]

To overcome these issues, OVIC strongly recommends that Victoria follow other jurisdictions, by moving to one set of principles under one Act, with one regulator, to protect the handling of personal and health information by Victorian public sector organisations. In OVIC's view this would be best achieved by consolidating the HPPs into the IPPs, with OVIC as the regulator.

If OVIC were to regulate the handling of personal and health information, it would require additional resources to absorb the increase in complaints and to provide education and guidance to organisations and the community. OVIC reiterates the importance of protecting and enhancing OVIC's independence, as set out in Recommendation 73 of OVIC's submission. In particular, to ensure greater financial stability as an independent regulator:

- OVIC should receive its annual funding through the Victorian Parliament;

- OVIC should submit its budget bids for additional funding, once endorsed by the Committee, directly to the Treasurer (through the Department of Treasury and Finance); and

- salaries of the Information Commissioner, Public Access Deputy Commissioner and Privacy and Data Protection Deputy Commissioner should be reviewed and set by the Remuneration Tribunal.

[11] The PDP Act contains three flexibility mechanisms– information usage arrangements, public interest determinations and temporary public interest determinations – that enable organisations to modify or depart from complying with one or more IPPs for a specified act or practice, where there is a substantial public interest in doing so. The HR Act contains no commensurate mechanisms. This gap in regulation is generally overcome through piecemeal amendments to various legislation. For example, the Child Information Sharing Scheme, Family Violence Information Sharing Scheme, and new Part 8A, Division 7 of the Public, Health and Wellbeing Act, to enable information sharing during pandemics. If OVIC had jurisdiction over personal and health information, the flexibility mechanisms in the PDP Act could be better utilised by agencies.

OVIC's additional and revised recommendation – To regulate access to personal and health information under Victoria's ATI law only, granting review rights to requests processed informally and formally

In Victoria, an individual can request access to personal and health information under the *Freedom of Information Act 1982* (FOI Act). The access mechanisms in the PDP Act and HR Act are not operative.[12]

The key reason why access under the FOI Act is problematic is because it does not contain flexible and simple pathways to provide access to information. If Victoria had a new ATI law that contained proactive and informal release mechanisms, it would grant the necessary flexibility to Agencies and Ministers, to provide access to personal and health information in a simple, timely and efficient manner. There would then be no need to provide additional access mechanisms under the PDP Act and HR Act.

OVIC is concerned to avoid a situation where legislative reform leads to the creation of multiple legislative and administrative access schemes, each with different mechanisms and rules for processing requests, determining what is to be released and withheld, and varying access to review rights. This situation would be confusing for members of the public to navigate, and complex to regulate.

To avoid these issues, OVIC strongly recommends that access to personal and health information is regulated under one legislative instrument that provides for:

- proactive, informal and formal release of information;
- the ability for an Agency and applicant to agree to a request being dealt with informally without review rights, where information is withheld; and
- the ability for an Agency or Minister to commence processing a request informally, and for it to be moved across to the formal pathway for a decision, granting review rights, where the applicant does not agree to the removal of information.

If you would like to discuss this supplementary submission, or if OVIC can be of further assistance to the Committee, please contact me directly [redacted] or Emma Stephens, Principal Policy Officer [redacted]

Yours Sincerely

[redacted]

Sean Morrison
Information Commissioner

[12] See section 14 of the *Privacy and Data Protection Act 2014* (Vic). This section means that individuals cannot request access to personal information under the Access Principle in IPP 6; See section 16 of the *Health Records Act 2001* (Vic). This section means that individuals cannot request access to health information under HPP 6 and Part 5 of the HR Act.