

SalingerPrivacy

We know privacy inside and out.

Submission in response to the Information Privacy Amendment Bill 2023 (Qld)

Education, Training and Employment Committee

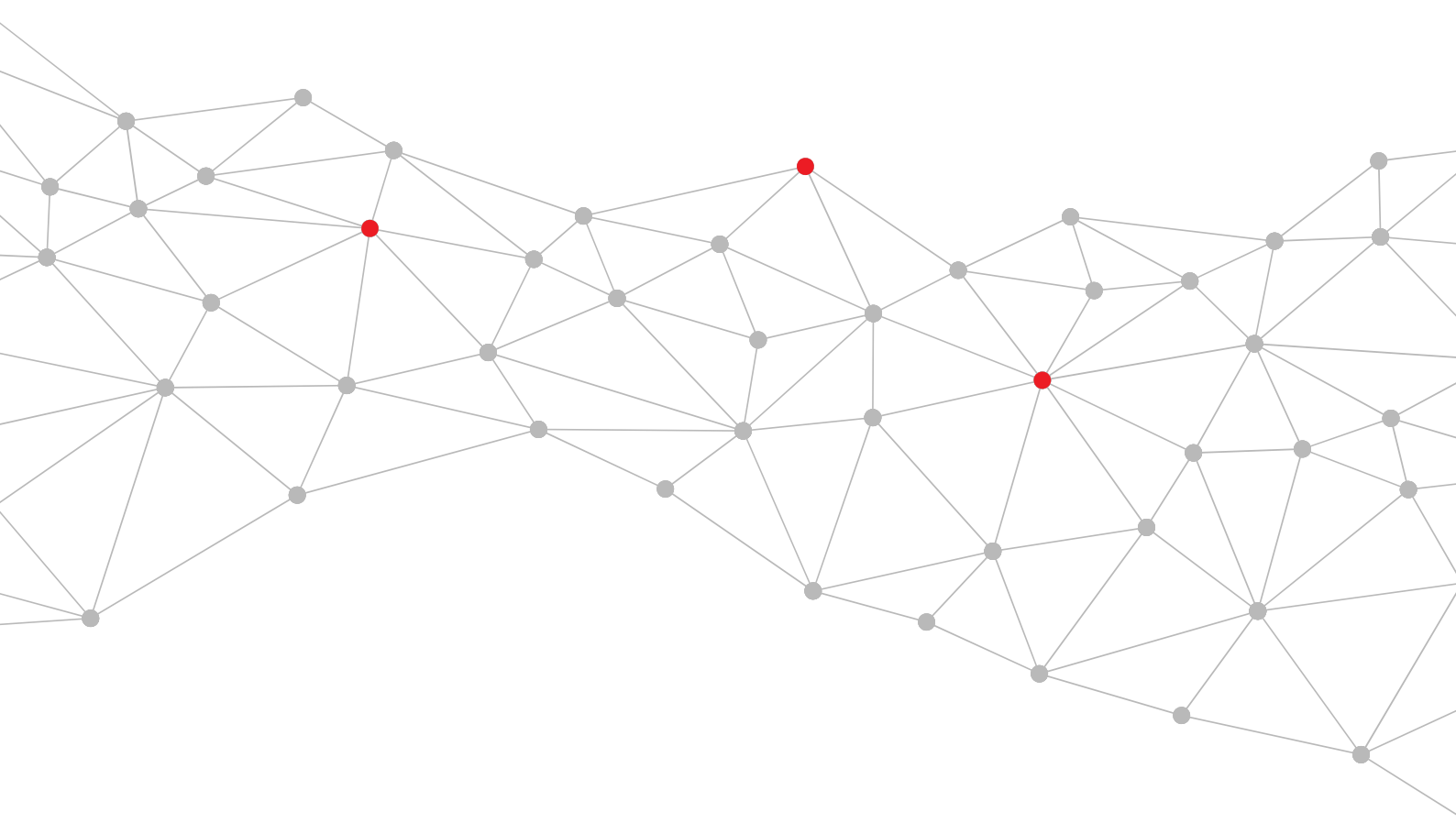
30 October 2023

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Covering letter

30 October 2023

Committee Secretary
Education, Employment and Training Committee
Parliament House
George Street
Brisbane QLD 4000

VIA EMAIL: eetc@parliament.qld.gov.au

Dear Committee Members,

I am writing to submit the attached submission to your Inquiry into the Information Privacy and Other Legislation Amendment Bill 2023.

I have no objection to the publication of this submission.

Please do not hesitate to contact me if you would like clarification of any of these comments.

Anna Johnston
Principal | [Salinger Privacy](#)

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Our submission

We welcome the opportunity to make a submission to the Inquiry into the Information Privacy and Other Legislation Amendment Bill 2023 (the Bill).

Salinger Privacy's expertise is in privacy law and practice. We have operated as a specialist consultancy in NSW since 2004, and our Principal is a former Deputy Privacy Commissioner of NSW.

Our submission is focussed on the critical threshold definition of 'personal information' in the Bill, and the need to reform it further, to ensure the proposed Bill is fit for purpose in the digital age - and reflects the direction of law reform at the federal level.

In particular, we urge the Committee to recommend amendments to the Bill, to update the definition of 'personal information' to include information where an individual may be singled out from all others and acted upon, *even if their identity is not known*.

Align with the federal Privacy Act of the future, not the past

All privacy rights for individuals, and all obligations on Qld public sector agencies, hinge on the threshold definition of 'personal information'.

Personal information is currently defined at s.12 in the Information Privacy Act 2009 (the IP Act) as:

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

Clause 12 of the Bill would replace this with the following definition:

“information or an opinion about an identified individual or an individual who is reasonably identifiable from the information or opinion—
(a) whether the information or opinion is true or not; and
(b) whether the information or opinion is recorded in a material form or not”.

This would bring the Queensland statute closer in line with the federal Privacy Act, as it exists *today*.

However the federal Privacy Act is about to be amended, to clarify and strengthen this definition further.

The direction of law reform is to respond to a fundamental concern with the current wording of the definition of ‘personal information’ – in both Queensland *and* federal privacy laws - which is that they are no longer fit for purpose in the digital age.

If data does not meet the definition of ‘personal information’, it is unregulated. That means that if a public sector agency (or a supplier or contracted service provider to a public sector agency) can successfully argue that some data is not ‘personal information’, they can collect, use, disclose and trade the data with impunity.

This argument is routinely made by companies utilising AI tools such as facial recognition, including in the context of supply to public sector agencies such as in relation to policing. Recent cases which touch on the definition of ‘personal information’ in the context of AI are the *7-Eleven* case, the *Clearview AI* case, and the *Australian Federal Police* case.¹

However the weakness in the definition of personal information predates these AI cases, with Telstra successfully arguing, for example, that metadata about an individual’s use of their mobile phone was not ‘personal information’ about them.² From data brokers to media companies, organisations are routinely escaping the scrutiny of privacy laws, because the definition of personal information in the Privacy Act today is too vague, or because it allows data to be looked at as if it exists in a contextual vacuum.³

That is why the federal Privacy Act is about to be fixed. In September 2023 the Australian Government announced its intention to introduce a Bill in 2024 to revise the definition of ‘personal information’ in the federal Privacy Act. The report stated: “Importantly, the Government considers that an individual may be reasonably identifiable where they are able to be distinguished from all others, *even if their identity is not known*”.⁴

We submit that the Queensland IP Act should be revised to align with where the federal Privacy Act is *headed*, instead of the version that is about to be left in the past.

We therefore suggest replacing clause 12 in the Bill with the following alternative definition (with the differences highlighted in bold or struck through):

information or an opinion ~~about~~ **that relates to** an identified individual or an individual who is reasonably identifiable: ~~from the information or opinion—~~
(a) whether the information or opinion is true or not; and
(b) whether the information or opinion is recorded in a material form or not.
An individual is ‘reasonably identifiable’ if they are capable of being distinguished from all others, even if their identity is not known.

¹ A summary of these cases and links to the full text is available at <https://www.salingerprivacy.com.au/2022/04/11/oaic-determinations-blog/>

² See an explanation at <https://www.salingerprivacy.com.au/2016/02/23/how-stephanies-broken-down-car-is-undermining-your-privacy/>

³ See further details and examples at <https://www.salingerprivacy.com.au/2023/04/19/one-extra-sentence/>

⁴ See <https://www.ag.gov.au/rights-and-protections/publications/government-response-privacy-act-review-report>

Why the current federal definition is no longer suitable

It is our strong submission that rapid advances in technologies, including artificial intelligence and facial recognition, mean that 'not identifiable by name' is no longer an effective proxy for 'will suffer no privacy harm'.⁵ The Bill should be amended, to also *explicitly* incorporate into the threshold definition of 'personal information' the concept of *individuation*.

Individuation has been used to describe the 'singling out' of a person from a crowd – a threat to privacy, autonomy and dignity.⁶ Call it 'indirect identification', call it 'singling out', call it 'distinguishing from all others', call it 'individuation' - it doesn't matter how you describe the concept. What does matter is that the wording of the definition in the Acts must be clear on the face of it that what is within scope for regulation under the phrase 'personal information' includes information where an individual may be singled out and acted upon, *even if their identity is not known*.

We know the harms that can arise from individuation; and these harms are exacerbated by the use of AI and other automated decision-making systems. These harms can arise from the online tracking, profiling and targeting which forms the basis for online behavioural advertising, but also include surveillance, discrimination, behavioural engineering, and misinformation.⁷

To ensure the IP Act is fit to reflect the realities of the digital ecosystem, as well as to help Qld public sector agencies meet the challenges of the future, it is critical that the definition of 'personal information' is itself fit for purpose. A strengthened statutory definition of 'personal information' will better deliver clarity for public sector agencies, align with the privacy laws of our trading partners, and meet the expectations of the community.

For further details on this point, please see our detailed submission to the Australian Government, Attorney-General's Department on the Privacy Act Review Report, 2023.⁸

⁵ Anna Johnston, 2020, "Individuation: Re-imagining Data Privacy Laws to Protect Against Digital Harms" (electronic). Brussels Privacy Hub. 6 (24); available at <https://brusselsprivacyhub.eu/publications/wp624.html>

⁶ Greenleaf, Graham; Livingston, Scott (2017). "China's Personal Information Standard: The Long March to a Privacy Law". *Privacy Laws & Business International Report* (150): 25–28; available at https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3128593

⁷ For a further discussion on the harms associated with individuation, please refer to our Blog 'Big Tech, Individuation, and why Privacy must become the Law of Everything' at <https://www.salingerprivacy.com.au/2022/03/22/big-tech-blog/>

⁸ See https://www.salingerprivacy.com.au/wp-content/uploads/2023/03/23-03-31_Privacy-Act-Review_Salinger-Privacy-Submission.pdf



About the author

This submission has been prepared by Anna Johnston, Principal at Salinger Privacy.

Anna has served as:

- Deputy Privacy Commissioner of NSW
- Chair of the Australian Privacy Foundation, and member of its International Committee
- a founding member and Board Member of the International Association of Privacy Professionals (IAPP), Australia & New Zealand
- a Visiting Scholar at the Research Group on Law, Science, Technology and Society of the Faculty of Law and Criminology of the Vrije Universiteit Brussel; and a Member of the Asian Privacy Scholars Network, and
- a member of the Australian Law Reform Commission's Advisory Committee for the Inquiry into Serious Invasions of Privacy, and expert advisory group on health privacy.

Anna has been called upon to provide expert testimony to the European Commission as well as various Parliamentary inquiries and the Productivity Commission. In 2022, Anna was honoured for her 'exceptional leadership, knowledge and creativity in privacy' with the IAPP Vanguard Award, one of five privacy professionals recognised globally whose pioneering work is helping to shape the future of privacy and data protection.

Anna holds a first class honours degree in Law, a Masters of Public Policy with honours, a Graduate Certificate in Management, a Graduate Diploma of Legal Practice, and a Bachelor of Arts. She was admitted as a Solicitor of the Supreme Court of NSW in 1996.

About Salinger Privacy

Established in 2004, Salinger Privacy offers privacy consulting services, specialist resources and training.

Our clients come from government, the non-profit sector and businesses across Australia. No matter what sector you are in, we believe that privacy protection is essential for your reputation. In everything we do, we aim to demystify privacy law, and offer pragmatic solutions – to help you ensure regulatory compliance, and maintain the trust of your customers.

Salinger Privacy offers specialist consulting services on privacy and data governance matters, including Privacy Impact Assessments and privacy audits, and the development of privacy-related policies and procedures. Salinger Privacy also offers a range of privacy guidance publications, eLearning and face-to-face compliance training options, and Privacy Tools such as templates and checklists.

Qualifications

The comments in this submission do not constitute legal advice, and should not be construed or relied upon as legal advice by any party. Legal professional privilege does not apply to this submission.

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