



Tasmanian Council of Social Service Inc.

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# Review of Privacy Laws in Tasmania

*July 2023*



**INTEGRITY  
COMPASSION  
INFLUENCE**

## About TasCOSS

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TasCOSS's vision is for one Tasmania, free of poverty and inequality where everyone has the same opportunity. Our mission is two-fold: to act as the peak body for the community services industry in Tasmania; and to challenge and change the systems, attitudes and behaviours that create poverty, inequality and exclusion.

Our membership includes individuals and organisations active in the provision of community services to Tasmanians on low incomes or living in vulnerable circumstances. TasCOSS represents the interests of our members and their service users to government, regulators, the media and the public. Through our advocacy and policy development, we draw attention to the causes of poverty and disadvantage, and promote the adoption of effective solutions to address these issues.

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## Introduction

TasCOSS welcomes the opportunity to contribute to the current inquiry of the Tasmanian Law Reform Institute ('the TLRI') into Tasmania's privacy laws. As the peak body for community services in Tasmania, TasCOSS advocates not only for workers within the community services industry (many of whom are grappling with an increasingly complex landscape in relation to laws and policies around privacy, information-gathering and information-sharing), but also for Tasmanians on low incomes, many of whom are interacting with government agencies and departments and are impacted by privacy laws and regulations.

With more and more personal information being collected online and an environment of increased threats of data breaches, it's important our approach to privacy allows for information exchange (including between agencies where appropriate) whilst ensuring the right to information and bodily privacy are promoted and respected.

The TLRI's 'Review of Privacy Laws in Tasmania' ('the Issues Paper')<sup>1</sup> explores the complicated legal framework of privacy laws in Tasmania, including intersecting national and state legislation and key issues for future consideration, which include a series of questions for community consideration. Rather than responding to all questions outlined in the Issues Paper, we have focused our submission on the following issues which we believe are particularly relevant to the Tasmanian community and community service organisations:

- The protection of personal information under Tasmanian law;
- The effectiveness of the current complaints process;
- The introduction of a statutory civil cause of action for interference with privacy;
- Stronger protection against police surveillance and privacy breaches; and
- The need for a strengthened human rights framework in Tasmania.

## Key Issues

### ***The protection of personal and sensitive information under Tasmanian law***

As outlined in the Issues Paper, information privacy in Tasmania is primarily governed by the *Personal Information Protection Act 2004* (Tas) ('the PIPA'), which regulates information held by government agencies and their contractors. The PIPA requires these agencies (and their contractors) to comply with ten Personal Information Protection Principles in relation to the collection and use of personal information,<sup>2</sup> with some exceptions.

'Personal information' is defined in the PIPA to mean:<sup>3</sup>

*any information or opinion in any recorded format about an individual –*

*(a) whose identity is apparent or is reasonably ascertainable from the information or opinion; and*

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<sup>1</sup> Tasmanian Law Reform Institute, 'Review of Privacy Laws in Tasmania – Issues Paper No 32' (March 2023).

<sup>2</sup> *Personal Information Protection Act 2004* (Tas) Schedule 1.

<sup>3</sup> *Personal Information Protection Act 2004* (Tas) s3.

*(b) who is alive or has not been dead for more than 25 years.*

There are also separate categories of personal information given additional protections under the PIPA, classed as ‘sensitive information’:<sup>4</sup>

- (a) personal information or an opinion relating to personal information about an individual’s –*
  - (i) racial or ethnic origin; or*
  - (ii) political opinions; or*
  - (iii) membership of a political association; or*
  - (iv) religious beliefs or affiliations; or*
  - (v) philosophical beliefs; or*
  - (vi) membership of a professional or trade association; or*
  - (vii) membership of a trade union; or*
  - (viii) sexual preferences or practices; or*
  - (ix) criminal record; and*
- (b) health information about an individual.*

As outlined in the Issues Paper, there are key differences between the protection principles applying to personal information and sensitive information in Tasmania and the protections offered under Commonwealth legislation.

TasCOSS supports evidence-based legislative reform in Tasmania to promote consistency (where possible) between jurisdictions and with the national privacy framework. We also support the strengthening of privacy protections for Tasmanians. In particular, we strongly recommend the Tasmanian Government consider reforms to offer greater protections in relation to biometrics and facial recognition.<sup>5</sup> As outlined in the Issues Paper, several concerns have been raised by human rights bodies in relation to the risks associated with the use of biometrics.<sup>6</sup> For example, a recent report from the Australian Human Rights Commission (‘the AHRC’) notes that advancements in artificial intelligence (‘AI’) have allowed for greater and more expansive uses of biometrics, significantly impacting individual privacy.<sup>7</sup> They also note, ‘certain biometric technologies are prone to high error rates, especially for particular racial and other groups...’ and that using this technology in certain instances ‘can increase the risk of injustice and other human rights infringements’.<sup>8</sup>

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<sup>4</sup> *Personal Information Protection Act 2004* (Tas) s3.

<sup>5</sup> The Issues Paper defines biometric information as ‘information relating to the physical characteristics of an individual, such as their face, gait, fingerprints, signature or voice’ – Tasmanian Law Reform Institute, ‘Review of Privacy Laws in Tasmania – Issues Paper No 32’ (March 2023), p16.

<sup>6</sup> Discussion on biometrics in Tasmanian Law Reform Institute, ‘Review of Privacy Laws in Tasmania – Issues Paper No 32’ (March 2023), pp16-18.

<sup>7</sup> Farthing, S, Howell, J, Lecchi, K, Paleologos, Z, Saintilan, P& Santow, E, Australian Human Rights Commission, ‘Human Rights and Technology: Final Report’ (March 2021) p111.

<sup>8</sup> *Ibid.*

Increased use of facial recognition technologies has also raised significant concerns in relation to issues such as the growth in surveillance (particularly in public places), the use of data in police profiling and the disproportionate impact of errors with the technology and its use on certain groups.<sup>9</sup>

We have previously raised concerns in relation to proposed expansions of the use of facial recognition technology in certain settings in Tasmania. For example, we are strongly against the proposed use of facial recognition technology for use in self-exclusion from gaming venues as a harm minimisation tool, due to potential human rights concerns including the lack of clear regulatory frameworks for its use, the potential for privacy violations, the principles of necessity and proportionality, and the potential for the use of this technology to target groups or communities already experiencing marginalisation.<sup>10</sup>

TasCOSS also has significant concerns in relation to the use of personal information (which could include sensitive information) for use in automated decision-making. One such practice is profiling, which can lead to members of racial or ethnic groups being targeted by institutions such as the police and has been raised as an international human rights concern.<sup>11</sup>

We recommend additional legislative protections to regulate the use of AI in Tasmania. Given the rapid development of the use of this technology and the far-reaching impact we believe it could have on groups already experiencing marginalisation, TasCOSS believes the Government should prioritise the recommendations from the AHRC in relation to the use of biometric information,<sup>12</sup> in particular:

- Creating protections where facial recognition technology is used certain types of decision-making, including:
  - Decision-making that impacts a person’s legal or significant rights;
  - In circumstances where the use of the technology could impact human rights; and
- Introducing a moratorium on the use of facial recognition technology until greater protections for its use are in place.

### ***The current complaints process***

The Issues Paper outlines the process for dealing with breaches of the personal information privacy principles in Tasmania.<sup>13</sup> Complaints are handled by the Tasmanian Ombudsman who has a broad range of functions in relation to complaints handlings, including conducting investigations into alleged breaches (both preliminary and formal investigations), referring the complaint to another person or body as appropriate, providing an opinion or recommendations in relation to breaches (which must be provided to the Minister and tabled in Parliament).

There are, however, several key differences between the complaints handling process in Tasmania and other Australian jurisdictions in relation to the Ombudsman’s powers, particularly in relation to enforcement.

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<sup>9</sup> Ibid.

<sup>10</sup> See TasCOSS, Submission to Department of Treasury and Finance, Harm Minimisation Technologies (May 2022).

<sup>11</sup> Farthing, S, Howell, J, Lecchi, K, Paleologos, Z, Saintilan, P& Santow, E, Australian Human Rights Commission, ‘Human Rights and Technology: Final Report’ (March 2021) p115.

<sup>12</sup> Ibid, p116.

<sup>13</sup> Tasmanian Law Reform Institute, ‘Review of Privacy Laws in Tasmania – Issues Paper No 32’ (March 2023), 39-45.

TasCOSS supports legislative reform to increase the powers of the Tasmanian Ombudsman to effectively investigate complaints and provide remedies to affected persons, including the following:

- Allowing the Tasmanian Ombudsman to conduct own-motion investigations where appropriate;
- Providing avenues to appeal or seek review of a decision by the Ombudsman by an independent tribunal;
- Awarding compensation for privacy breaches where appropriate; and
- Giving the Ombudsman broader enforcement powers, including orders to mitigate potential privacy risks, delete personal information collected unlawfully/inappropriately, seeking an injunction at various stages of a complaints process, and powers to impose penalties where appropriate.

We recognise the expansion of the Ombudsman's functions is likely to put additional pressure on their office, particularly given their multiple functions.<sup>14</sup> We also note recent reports have highlighted the impact of existing funding constraints – for example, there is a significant backlog in relation to requests for external review of right to information decisions<sup>15</sup> and recent reports have also flagged significant resourcing issues which are impacting the role of the Custodial Inspector and their ability to conduct inspections and provide reports within the three-year review cycle.<sup>16</sup> Given the proposed expansion of the Ombudsman's powers in relation to investigating and responding to complaints will likely increase the workload of their office,<sup>17</sup> we strongly recommend the above recommendation is delivered alongside additional funding and resourcing for the Tasmanian Ombudsman.

### ***A statutory civil cause of action for interference with privacy***

The Issues Paper notes there is currently no statutory cause of action in Australia to respond to breaches of privacy, which raises the question as to whether such a cause of action should be introduced in Tasmania.

A cause of action would allow affected individuals to take civil action in response to breaches of privacy. It could also provide greater clarity and certainty around how the law will respond to breaches than the existing common law framework. A cause of action would operate alongside existing legal protections (for example, the Ombudsman's powers to investigate and review potential privacy breaches).

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<sup>14</sup> The functions of the Ombudsman include right to information reviews, public interest disclosures, the role of the Health Complaints Commissioner, the role of Custodial Inspector, the Tasmanian National Preventative Mechanism under OPCAT, and a number of other statutory functions – see Ombudsman Tasmania, 'Annual Report 2021-2022' (November 2022), 5-10.

<sup>15</sup> Ibid, 31.

<sup>16</sup> Office of the Custodial Inspector 'Annual Report 2021-2022' (2002), p21.

<sup>17</sup> For example, there is a significant backlog in relation to requests for external review of right to information decisions (see); recent reports have also flagged significant resourcing issues which are impacting the Office's ability to conduct inspections and provide reports within the three-year review cycle, resulting in a significant backlog.<sup>17</sup>

A cause of action has been considered and recommended by various law reform bodies across Australia, including the Australian Law Reform Commission,<sup>18</sup> the Victorian Law Reform Commission<sup>19</sup> and the NSW Law Reform Commission.<sup>20</sup> Consistent with the recommendations of these inquiries, TasCOSS supports the introduction of a civil cause of action in Tasmanian law to respond to breaches of privacy, and recommends the TLRI review the findings of law reform inquiries from other jurisdictions to determine the appropriate scope and limits of the cause of action and any remedy/ies.

### ***Stronger protection against police surveillance and privacy breaches***

Police have significant powers which can, in certain circumstances, directly and significantly impact on the privacy of an individual, family or community. However, there is currently limited oversight in relation to how police exercise their powers, with most complaints dealt with internally within Tasmania Police. Although there is a possibility for external review by either the Tasmanian Ombudsman or the Integrity Commission, we note recent reports have highlighted current issues in relation to the capacity and resourcing of both these entities and their ability to effectively investigate/respond to complaints.<sup>21</sup>

Concerns have been raised recently in relation to potential privacy breaches by Tasmania Police relating to listening devices and surveillance equipment used at Risdon Prison.<sup>22</sup> While a review of this incident is underway, there is also scope for the TLRI to consider how police accountability could be promoted more broadly within Tasmania, to ensure the appropriate exercise of powers as well as enhancing public confidence in the police.

As per previous submissions,<sup>23</sup> TasCOSS believes independent oversight of police complaints is needed to safeguard both the rights of Tasmanians and the integrity of the police force. Independent oversight of police decisions is particularly important in relation to police interactions with marginalised groups, given research which demonstrates that, 'abuse of police power impacts most upon the already vulnerable such as the young, the mentally ill, those from refugee and migrant backgrounds and Indigenous Australians.'<sup>24</sup> For example, various reports have highlighted both the high incidence of police wrongdoing and/or misconduct experienced by Aboriginal Australians, as well as identified failures of internal police complaint mechanisms and the need for independent review processes to enhance public confidence in accountability processes.<sup>25</sup>

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<sup>18</sup> Australian Law Reform Commission, 'For Your Information: Australian Privacy Law and Practice - Report 108 Volume 3' (May 2008) pp 2584-2586.

<sup>19</sup> Victorian Law Reform Commission, 'Surveillance in Public Places: Final Report 18' (May 2010), pp 17-18.

<sup>20</sup> NSW Law Reform Commission, 'Invasion of Privacy: Report 120' (April 2009), 3.

<sup>21</sup> For example, see Aulby, H, The Australia Institute, 'Tasmania's toothless watchdog: A comparison of the Tasmanian and NSW anti-corruption watchdogs' (January 2018), 8; Carr, E and Hay, R, The Australia Institute, 'Still Toothless: Jurisdictional, funding and secrecy issues in the Integrity Commission Tasmania' (March 2022), 14-15.

<sup>22</sup> See, for example, Amber Wilson, 'Concerns raised over review into Tasmania Police's use of covert recording devices', The Mercury (online, 1 September 2022), <https://www.themercury.com.au/truecrimeaustralia/police-courts-tasmania/concerns-raised-over-review-into-tasmania-polices-use-of-covert-recording-devices/news-story>;

<sup>23</sup> TasCOSS, Submission to Department of Justice, Integrity Commission Act 2009 – Legislative Reform (August 2022).

<sup>24</sup> Police Accountability Project, 'Independent Investigation of Complaints against the Police: Policy Briefing Paper' (2017), 3.

<sup>25</sup> See for example, Aboriginal and Torres Strait Islander Legal Service QLD (ATSILS), Submission on the Review of the Crime and Corruption Commission Act 2001 (July 2015), 10; Browne, K, Victorian Aboriginal Legal Service (VALS), Submission to the Inquiry into the External Oversight of Police Corruption and Misconduct in Victoria (September 2017) 8-14; Police Accountability Project, 'Independent Investigation of Complaints against the Police: Policy Briefing Paper' (2017), 9-14.

A number of community organisations in Victoria are calling for the introduction of a specialist police ombudsman, to more effectively and appropriately deal with complaints against the police and work to create systemic change in relation to police accountability. These organisations support the introduction of a specialist mechanism with the following characteristics:<sup>26</sup>

- Institutional independence;
- Adequately resourced to appropriately respond to complaints;
- Complainant-centred and culturally appropriate;
- Fair, accountable and transparent;
- Able to achieve timely and fair outcomes; and
- Promotes systemic change.

TasCOSS would support the introduction of an independent entity with similar characteristics in Tasmania and strongly recommends legislative and other policy mechanisms to enhance police accountability.

### ***A Tasmanian human rights framework***

Alongside reform of the PIPA, TasCOSS believes there is a need for greater awareness and understanding of privacy rights in Tasmania, as well as options for responding to potential breaches of these rights.

TasCOSS is strongly in favour of the introduction of a Tasmanian Charter of Rights or a Human Rights Act and believes the introduction of an Act or a Charter will have a significant and positive impact on all Tasmanians, not only those who are or may be vulnerable to potential privacy breaches.

As noted by the Human Rights Law Centre in a recent report:

*Charters of Human Rights ensure the actions of our governments are guided by values of freedom, equality, compassion and dignity. Charters foster respect for human rights and help everyone, from school children to people who decide to call Australia home, to understand the rights and freedoms that we all share. Charters reflect our values and help to articulate the kind of society we all want to live in. Charters prevent human rights violations by putting human rights at the heart of decision making when governments are developing laws and policies and delivering services. Importantly, they also provide a powerful tool to challenge injustice, enabling people and communities to take action and seek justice if their rights are violated.<sup>27</sup>*

Experience from other jurisdictions indicates human rights legislation could have wide-ranging impacts, including encouraging a cultural change in attitudes and beliefs, improved accountability and transparency, greater community awareness and empowerment, and also be a tool for legal and social advocacy.<sup>28</sup> The Tasmanian Law Reform Institute in its 2007 report, 'A Charter of Rights for Tasmania', also recommended the introduction of a Tasmanian Charter, to 'provide Tasmanians with legal guarantees for rights they desire in a comprehensive and easily accessible format'.<sup>29</sup>

<sup>26</sup> See <https://www.policeombudsmannow.com.au/the-solution/> - a copy of the letter to Premier Daniel Andrews can be accessed at <https://www.policeombudsmannow.com.au/wp-content/uploads/2023/01/221007-Joint-letter-Police-Ombudsman-media.pdf>.

<sup>27</sup> Human Rights Law Centre, 'Charters of Rights Make Our Lives Better: Here are 101 cases that show how' (June 2022), 2.

<sup>28</sup> For a general discussion of the impact of the Victorian charter, see Human Rights Law Centre, 'Victoria's Charter of Human Rights and Responsibilities in Action: Case studies from the first five years of operation' (March 2012).

<sup>29</sup> Tasmanian Law Reform Institute, 'A Charter of Rights for Tasmania' (2007), 1.



We would strongly recommend the Tasmanian Charter of Human Rights contain a statutory right to privacy, with existing legislation from other jurisdictions as an example.

We also believe legislative reform in relation to privacy and other human rights will be greatly supported by a comprehensive public education campaign. We recommend the Government prioritise the development and delivery of public information and awareness raising materials, focused on the rights of all Tasmanians and how best to recognise and respond to potential breaches of these rights. The education and materials should be accessible and provided in a wide variety of formats, including print and web-based information and materials. Additional funding should also be provided to those organisations who are likely to be engaging with community members and providing support and education around these issues.

## Recommendations

1. **The Tasmanian Ombudsman should have broader powers to investigate and respond to reported and suspected breaches of privacy, including the following:**
  - **The power to conduct own-motion investigations;**
  - **The power to award compensation; and**
  - **Broader enforcement powers, including orders to mitigate potential privacy risks, delete personal information collected unlawfully/inappropriately, seeking an injunction at various stages of a complaints process, and the power to impose penalties.**
2. **In relation to decisions by the Ombudsman or the outcome of an investigation, there should also be avenues to appeal or seek review of a decision by an independent tribunal.**
3. **The Tasmanian Ombudsman should receive additional resourcing to enable their office to fulfil their expanded duties in relation to privacy complaints.**
4. **The Tasmanian Government should introduce an independent, specialist, statutory body such as a Police Ombudsman to effectively investigate and respond to police complaints and systemic issues relating to police accountability.**
5. **The Tasmanian Government should introduce a statutory cause of action in relation to breaches of privacy, with consideration given to recommendations from law reform commissions in other Australian jurisdictions in relation to scope, limits and form.**
6. **The Tasmanian Government should introduce a Human Rights Act with a codified right to privacy, supported by a comprehensive public education campaign and funding for community organisations to provide support and guidance in relation to the new legislation.**