

# **Report on the review of the *Right to Information Act 2009* and *Information Privacy Act 2009***

October 2017



© State of Queensland (Department of Justice and Attorney-General) 2017

## Copyright

© The State of Queensland (Department of Justice and Attorney-General) 2016. **Licence:**  
This issues paper is licensed by the State of Queensland Department of Justice and Attorney-General under a Creative Commons Attribution (CC BY) 3.0 Australia licence.



CC BY Licence Summary Statement:

In essence, you are free to copy, communicate and adapt this issues paper, however, you must keep the copyright notice on anything you reproduce and attribute the State of Queensland Department of Justice and Attorney-General as the source of the original material.

Only copyright material is covered by this CC BY licence. The use of other Queensland Government material, including the Queensland Government logo and trade mark protected material is not governed by this CC BY licence.

To view a copy of this licence, visit <http://creativecommons.org/licenses/by/3.0/au/deed.en>

## Attribution:

Content from this report should be attributed as:

The State of Queensland (Department of Justice and Attorney-General), **Report on the review of the *Right to Information Act 2009* and *Information Privacy Act 2009*.**

## Disclaimer:

The material presented in this publication is distributed by the State of Queensland as an information source only.

The State of Queensland holds no liability for any errors or omissions within this publication. This publication is not intended to provide legal advice and any decisions made by other parties based on this publication are solely the responsibility of those parties. Information contained in this publication is from a number of sources and, as such, does not necessarily represent Government or departmental policy.

The material presented in this publication and the discussion of possible actions or options for reform **do not** represent Queensland Government policy. They are presented for the purposes of promoting discussion only.

The State of Queensland makes no statements, representations or warranties about the accuracy or completeness or reliability of any information contained in this publication. The State of Queensland disclaims all responsibility and all liability (including, without limitation, liability in negligence) for all expenses, losses, damages and costs incurred as a result of the information being inaccurate or incomplete in any way and for any reason.

You should be aware that third party websites referenced in this publication are not under the control of the State of Queensland. Therefore, the State of Queensland can make no representation concerning the content of these sites, nor can the fact that these sites are referenced serve as an endorsement by the State of Queensland of any of these sites. The State of Queensland does not warrant, guarantee or make any representations regarding the correctness, accuracy, reliability, currency, or any other aspect regarding characteristics or use of the information presented on third party websites referenced in this publication.

# Contents

Minister’s foreword .....	4
Executive summary .....	5
List of review recommendations .....	6
Introduction .....	8
The review process .....	8
Issues.....	9
The objects of the Acts .....	9
Access to information .....	15
Reviewing decisions .....	29
The role of the OIC.....	33
Dealing with personal information .....	35
Special provision for law enforcement activities.....	47
Other issues .....	47
Appendix 1 - Terms of reference .....	48
Appendix 2 - Glossary .....	50
Appendix 3 – Operational issues.....	51
Appendix 4 – List of submissions received in 2017.....	55
Appendix 5 – List of submissions received in 2013.....	57

## Minister's foreword



The Palaszczuk Government has a strong and clear commitment to open and accountable government.

The efficient and effective operation of the *Right to Information Act 2009* (RTI Act) and the *Information Privacy Act 2009* (IP Act) is critical to ensuring this commitment is met and are important components of Queensland's integrity framework.

The RTI Act aims to help the community access government information, while the IP Act ensures the appropriate protection of individuals' personal information held within the public sector.

I am pleased to present the findings of the first statutory review of the RTI Act and IP Act. The report delivers on an election commitment to Queenslanders to complete the review.

The review commenced in 2011 and two discussion papers were released for public comment in 2013. A wide range of submissions were received in response.

In December 2016, I released a consultation paper as part of the review to seek further feedback on key issues relevant to the Acts, including whether their primary objectives remain valid and how existing provisions might be improved to better meet those primary functions.

Sixty-nine submissions were received in response to the 2016 consultation paper from government agencies, community organisations, individuals, corporations and media representatives; highlighting the importance of public debate and consultation in relation to right to information and information privacy related issues.

Stakeholder feedback obtained as part of the review indicates that the primary objects of the RTI Act and IP Act remain valid. However, the review has identified a number of opportunities to improve and enhance the operation of the legislation to ensure the Acts continue to provide an effective part of Queensland's integrity framework.

Thank you to all Queenslanders who made a submission to the review.

### **YVETTE D'ATH MP**

Attorney-General and Minister for Justice  
Minister for Training and Skills

# Report on the review of the *Right to Information Act 2009* and the *Information Privacy Act 2009*

## Executive summary

The *Right to Information Act 2009* (RTI Act) and the *Information Privacy Act 2009* (IP Act) commenced on 1 July 2009, repealing the *Freedom of Information Act 1992* (the repealed FOI Act).

The RTI Act provides a right of access to government information unless, on balance, it is contrary to the public interest to release the information. The IP Act regulates how personal information is collected, secured, used and disclosed by Queensland public sector agencies. It also provides a formal mechanism for a person to apply to access or amend their own personal information.

The Office of the Information Commissioner (OIC) is an independent body established under the RTI Act to promote access to government-held information and protect personal information held by the public sector.

The RTI Act and IP Act provide for a review of the Acts to decide whether their primary objects remain valid, whether the Acts are meeting their primary objects and whether the provisions of the Acts are appropriate for meeting their primary objects.

The Department of Justice and Attorney-General conducted a review of the RTI Act and IP Act, which commenced in 2011. The terms of reference for the review (**Appendix 1**) provide the purpose of the review.

A steering committee for the review consisting of relevant government stakeholders was established to provide expert advice to the review team. In addition, two discussion papers were released for public consultation in 2013, followed by a further consultation paper in 2016.

Overall, the review found that the objects of the RTI Act and IP Act are being achieved and remain relevant. However, the review identified a number of opportunities to improve and enhance the operation of the legislation. The review report contains 23 recommendations to:

- provide a single right of access to documents under the RTI Act and move the right of amendment of personal information held by agencies from the IP Act to the RTI Act;
- amend the IP Act to extend privacy obligations to subcontractors;
- reinstate a higher threshold for consultation with third parties;
- make the access application form and amendment application form optional;
- streamline disclosure log and publication scheme requirements;
- clarify privacy complaint processes and make them more efficient;
- give agencies discretion to provide applicants with a schedule of documents, rather than this being a mandatory requirement;

- amend the exemption and exclusion provisions to remove the exemption for investment incentive scheme information and permit the release of child protection information in certain circumstances;
- streamline annual reporting requirements and transfer responsibility for preparing the annual reports to the Information Commissioner;
- provide greater flexibility for agencies transferring personal information outside Australia;
- update a number of definitions in the IP Act; and
- address various operational issues identified as part of the review.

## List of review recommendations

**Recommendation 1:** Amend the IP Act to extend privacy obligations to subcontractors.

**Recommendation 2:** Amend the RTI Act and IP Act to provide for a single right of access under the RTI Act.

**Recommendation 3:** Remove the mandatory nature of the requirement under the RTI Act for applicants to be provided with a schedule of relevant documents, giving agencies a discretion whether to provide one.

**Recommendation 4:** Amend the RTI Act so that the obligation to consult arises where disclosure of the information could reasonably be expected to be of substantial concern to a third party.

**Recommendation 5:** Amend the RTI Act so that schedule 3, section 12 does not prevent information being made available to family members in appropriate circumstances.

**Recommendation 6:** Amend the RTI Act to remove the exemption for investment incentive scheme information.

**Recommendation 7:** Amend the RTI Act to include an express statement that factors other than those listed in Schedule 4 may be considered.

**Recommendation 8:** Amend the RTI Act so that departments and Ministers are subject to the disclosure log requirements that applied before the 2012 amendments.

**Recommendation 9:** Amend the RTI Act to remove the requirement to include on a disclosure log an applicant's name and whether an applicant has applied on behalf of another entity.

**Recommendation 10:** Amend the RTI Act to remove current publication scheme requirements and instead require agencies to routinely publish significant, accurate and appropriate information about the agency on whichever website is most relevant.

**Recommendation 11:** Amend the RTI Act to allow agencies to extend the time in which agencies must make internal review decisions by agreement with the applicant or where third party consultation is required.

**Recommendation 12:** Amend the annual reporting requirements under the *Right to Information Regulation 2009* and the *Information Privacy Regulation 2009* to:

- remove the requirement for agencies to report on the number of refusal provisions used on each page and instead require agencies to report on the total refusal provisions used for an application as a whole;
- require reporting on the numbers of privacy complaints made to agencies, including the outcome of these complaints;
- require reporting on applicant type (for example, member of the public, lawyer/agent, private business, media, community organisation, Member of Parliament);
- remove the requirement for agencies to report on details of external review applications made from their decisions as the OIC is already required to report on external review matters; and
- transfer legislative responsibility for preparing the annual reports from the responsible Minister to the Office of the Information Commissioner.

**Recommendation 13:** conduct further research and consultation to establish whether there is justification for moving towards a single set of privacy principles in Queensland, and whether a mandatory breach notification scheme should be introduced.

**Recommendation 14:** Amend the definition of ‘personal information’ in the IP Act to be consistent with the Commonwealth definition.

**Recommendation 15:** Amend the IP Act to regulate ‘disclosure’ of information outside Australia rather than ‘transfer’.

**Recommendation 16:** Amend the IP Act to specify that privacy complaints are required to be in writing, state the name and address of the complainant, give particulars of the act or practice complained of and be made to the relevant agency within 12 months of the complainant becoming aware of the act or practice the subject of the complaint. Agencies should also be required to give reasonable help to an individual making a privacy complaint to put the complaint in written form.

**Recommendation 17:** Amend the IP Act to allow agencies to request extensions of time for complaints to be resolved if required and to allow a complainant to refer their complaint to the OIC after they receive a written response from an agency in relation to their privacy complaint without having to wait for 45 business days to expire.

**Recommendation 18:** Amend the IP Act to provide that a complainant has 60 days to ask the Information Commissioner to refer a privacy complaint to QCAT for hearing. The 60 days should run from the day the Commissioner gives written notice under section 175 of the IP Act that the Information Commissioner does not believe the complaint can be resolved by mediation, or mediation is attempted but is not successful.

**Recommendation 19:** Amend the IP Act to expressly provide the Information Commissioner with an ‘own motion power’ to investigate an act or practice which may be a breach of the privacy principles, whether or not a complaint has been made.

**Recommendation 20:** Amend the definition of ‘generally available publication’ in the IP Act to be consistent with the Commonwealth definition. The amended definition should also ensure that purely digital communications are captured as appropriate.

**Recommendation 21:** Amend IPP 4 in the IP Act to provide that an agency must take reasonable steps to protect information.

**Recommendation 22:** Amend the IP Act so that the National Privacy Principles (NPPs) apply to health agencies in the same way as the Information Privacy Principles (IPPs) apply to other agencies in relation to certain law enforcement activities.

**Recommendation 23:** Amend the RTI Act and IP Act to make the operational changes listed in Appendix 3.

## Introduction

On 1 July 2009, the RTI Act and the IP Act replaced the FOI Act following an extensive review of Queensland's freedom of information laws by a panel of experts, chaired by Dr David Solomon AM. These Acts are an important part of Queensland's integrity framework and aim to make more information held by the Government available across all sectors of the community and ensure appropriate protection of individual's privacy in the public sector environment.

The RTI Act gives a right to apply for access to documents held by government agencies and Ministers. It also requires government agencies to proactively make information available through publication schemes (which require certain agency documents to be placed on websites) and disclosure logs (which require documents released as a result of right to information applications to be published online). This is known as the 'push' model with greater proactive and routine release of non-personal information.

The IP Act recognises the importance of protecting the personal information of individuals. It provides for a right of access to and amendment of personal information and details privacy principles that govern the way public sector agencies collect, store, use and disclose personal information.

## The review process

Section 183 of the RTI Act and section 192 of the IP Act provide that the Minister must commence a review of the Acts by 1 July 2011.

The review's purpose is set out in section 183(2) of the RTI Act and section 192(2) of the IP Act respectively and is to:

- decide whether the primary objects of the Acts remain valid;
- decide whether the Acts are meeting their primary objects;
- decide whether the provisions of the Act are appropriate for meeting their primary objects; and
- investigate any specific issue recommended by the Minister or the Information Commissioner.

After finishing the review, the Minister must, as soon as practicable, table a report about the outcome of the review in the Legislative Assembly.

The terms of reference for the review are at **Appendix 1** of this report.

The review was conducted by the Department of Justice and Attorney-General (DJAG). The terms of reference for the review were approved in 2011 and consultation was conducted within Government in 2011. This was followed by further public consultation in 2013 with the release of two discussion papers – one relating to the information access provisions in the RTI Act and chapter 3 of the IP Act, and one relating to the privacy provisions of the IP Act. In response to these papers, 64 submissions were received from a variety of individuals, companies, not for profit organisations and government agencies.

A further consultation paper was released for comment in December 2016. It is referred to as ‘the consultation paper’ in this report. The consultation paper asked 34 questions about the RTI and IP Acts. Submissions were due by 3 February 2017. Sixty nine submissions were received in response from agencies, community organisations, individuals, corporations and media representatives. A list of submissions is at **Appendix 4** of this report.

A steering committee was established to assist the review. In 2016-17, it comprised representatives from the Department of Transport and Main Roads, the Department of Communities, Child Safety and Disability Services (DCCSDS), Queensland Health, Queensland Treasury, the Department of the Premier and Cabinet and the OIC. The role of the steering committee was to provide advice on how the RTI Act and IP Act impact on agency operations and provide feedback on possible options for reform. The steering committee met on six occasions between June 2016 and April 2017.

## Issues

### ***The objects of the Acts***

The primary object of the RTI Act is to *give a right of access to information in the government’s possession or under the government’s control unless, on balance, it is contrary to the public interest to give the access.*<sup>1</sup>

The primary object of the IP Act is to *provide for the fair collection and handling in the public sector environment of personal information and to provide for a right of access to, and amendment of, personal information in the government’s possession or under the government’s control unless, on balance, it is contrary to the public interest to give the access or allow the information to be amended.*<sup>2</sup>

The consultation paper sought stakeholders’ views as to whether the objects of the RTI Act and IP Act are being met, whether the ‘push model’ is working, and whether there are ways the objects could be better met. As is to be expected, there was a range of views on this issue.

Overall the review found that the objects of the Acts are being achieved and remain relevant and appropriate. Support for this position was probably stronger in relation to the IP Act than the RTI Act. Most government agencies thought the objects of the RTI Act were being achieved, with several referring to their concerted efforts to ‘push’ information into the public domain’.<sup>3</sup>

---

<sup>1</sup> *Right to Information Act 2009* (Qld) s 3.

<sup>2</sup> *Information Privacy Act 2009* (Qld) s 3.

<sup>3</sup> Submission of Brisbane City Council, 25 January 2017, p 1; Submission of Department of Transport and Main Roads, 30 January 2017, p 1; Submission of University of Sunshine Coast, 3 February 2017, p 1; Submission of Queensland University of Technology, 6 February 2017, p 1; Submission of Department of Health, 15 February 2017, p 1.

The OIC's view is that the RTI Act's primary object is perhaps more relevant in 2017 than it was in 2009.<sup>4</sup> One agency stated:

*the cultural shift over recent years in Queensland towards an open data model and greater proactive release of information has had a positive effect on information held by government now being more open and accessible.*<sup>5</sup>

Some non-government agencies, however, expressed concerns about delays and costs associated with access applications and what one community organisation called 'a reluctance by government agencies and employees to disclose information that it is our right to have'.<sup>6</sup> A number of submissions from environmental organisations argued that documents such as licences to undertake action, permits, authorities and monitoring data should be routinely published on departmental website registers.<sup>7</sup>

In relation to the IP Act, submissions to the review generally agreed that the objects of the IP Act are being met and that the IP Act satisfactorily deals with the handling and management of personal information across the public sector.<sup>8</sup> The OIC observed:

*... most agencies have readily adopted the IP Act's privacy protections. In Queensland, the RTI and IP Acts have had a significant impact on cultural change in relation to information rights and responsibilities for the public sector and the community. Information privacy is now protected under a legislative framework which plays a key role in safeguarding the rights of community members' personal information and provides clear principles and rules to guide appropriate behaviour by public sector agencies.*<sup>9</sup>

**Conclusion:** The objects of the RTI Act and IP Act remain valid and are being met. The push model is working.

## **RTI Act – Government-Owned Corporations (GOCs)**

The RTI Act applies to Ministers, departments, local governments, statutory authorities and certain government-owned corporations (GOCs). There is ongoing debate about which bodies are, and should be, subject to the RTI Act and chapter 3 of the IP Act. For example, Government businesses dealing with energy, water, rail and ports were established because these services are critical to the economy, they provide critical infrastructure to the State and the market place does not support the private establishment of these businesses.

---

<sup>4</sup> Personal communication, 7 August 2017.

<sup>5</sup> Submission of Department of Agriculture and Fisheries, Department of Tourism, Major Events, Small Business and the Commonwealth Games, Department of Natural Resources and Mines, Department of Energy and Water Supply, Department of Environment and Heritage Protection and Department of National Parks, Sport and Racing, 3 February 2017, p 1.

<sup>6</sup> Submission of Environment Council of Central Queensland, 1 February 2017, p 1.

<sup>7</sup> Submission of Gecko Environment Council Association, 2 February 2017, p 2; Submission of North Queensland Conservation Council, 3 February 2017, p 2.

<sup>8</sup> Submission of former Queensland Integrity Commissioner, 12 January 2017, p 2; Submission of Brisbane City Council, 25 January 2017, p 1; Submission of Department of Transport and Main Roads, 30 January 2017, p 2; Submission of Department of Education and Training, 1 February 2017, p 2; Submission of University of Sunshine Coast, 3 February 2017, p 1; Submission of University of Queensland, 1 February 2017, p 2; Submission of Wide Bay Burnett Environment Council Inc, 3 February 2017; Submission of Department of Agriculture and Fisheries, Department of Tourism, Major Events, Small Business and the Commonwealth Games, Department of Natural Resources and Mines, Department of Energy and Water Supply, Department of Environment and Heritage Protection and Department of National Parks, Sport and Racing, 3 February 2017, p 1.

<sup>9</sup> Submission of Office of the Information Commissioner, 3 February 2016, p 6.

The Government has corporatized these bodies to enable them to operate efficiently. However, not all GOCs are treated equally across Government.

Some GOCs are specifically excluded from the operation of the RTI Act and the IP Act for all of their functions, except so far as they relate to community service obligations (in Part 2 of Schedule 2, which lists entities to which the Acts do not apply in relation to particular functions of that entity). Some GOCs (for example, Gladstone Ports Corporation) are not listed in Part 2 of Schedule 2, so there is no limit on information that can be applied for.

Other entities with a commercial focus have been established by government. For example, Ipswich City Council has established Ipswich City Properties Pty Ltd (ICP) as a separate legal entity which it owns. Ipswich City Council is the sole shareholder of ICP and all of ICP's directors are elected officials or council employees. ICP may or may not be caught by the RTI Act (the Information Commissioner has not made any decision on this issue) but it is arguable whether such entities should fall within its scope. Brisbane City Council argued in its submission that wholly owned corporations of local government established under the *Corporations Act 2001* for commercial, charitable or other purposes should be regarded as exempt entities under the RTI Act.<sup>10</sup>

The consultation paper sought stakeholders' views as to whether the way the RTI Act and chapter 3 of the IP Act applies to GOCs, statutory bodies with commercial interests and similar entities should be changed and if so, in what way.

Some media stakeholders, academics and community groups supported extending the way the RTI Act applies to GOCs in the interests of transparency and accountability.<sup>11</sup> Some agencies supported maintaining the status quo or further exclusions from the RTI Act and chapter 3 of the IP Act on the basis that compliance with the RTI Act places an additional burden on the operation of GOCs, statutory bodies with commercial interests and similar entities and undermines their commercial interests.<sup>12</sup> The OIC submitted that GOCs should not be excluded from the operation of the RTI Act as a matter of course.<sup>13</sup>

Conclusion: The current exclusions generally strike the right balance between the legitimate public interest in protecting the commercial interests of the GOCs concerned and the public interest in ensuring that there is openness and accountability in the operation of GOCs (particularly in relation to their community service obligations). It is therefore not proposed to make any changes in relation to how the RTI Act and chapter 3 of the IP Act applies to GOCs.

In relation to other entities with a commercial focus, there is provision under section 16 of the RTI Act for entities to be prescribed by regulation as a public authority. The entities which can be prescribed include those supported directly or indirectly by government funds or other assistance or over which government is in a position to exercise control.<sup>14</sup>

---

<sup>10</sup> Submission of Brisbane City Council, 25 January 2017, p 1.

<sup>11</sup> Submission of Glass Media Group, 14 December 2016, p 1; Submission of Bruce Baer Arnold, 31 January 2017, p 3; Submission of Queensland Council for Civil Liberties, 3 February 2017, p 1; Submission of Joint Media Organisations, 10 February 2017, p 2; Submission of Bar Association of Queensland, 8 February 2017, pp 1-2.

<sup>12</sup> Submission of CS Energy, 3 January 2017, pp 2-3; Submission of Brisbane City Council, 25 January 2017, p 1; Submission of Department of Transport and Main Roads, 30 January 2017, p 2; Submission of Energy Queensland Limited, 2 February 2017, pp 1-2; Submission of Queensland Urban Utilities, 3 February 2017, p 2; Submission of Queensland Investment Corporation, 3 February 2017, pp 1-2; Submission of University of Queensland, 1 February 2017, p 6.

<sup>13</sup> Submission of Office of the Information Commissioner, 3 February 2016, p 6.

<sup>14</sup> *Right to Information Act 2009* (Qld) s 16(c)(i).

This provision is considered sufficient to allow for entities to be considered on a case by case basis and for government to retain a level of control over which entities are captured by the RTI Act and chapter 3 of the IP Act.

## **RTI Act – contracted service providers**

As noted in the 2016 consultation paper, government is making increased use of contracted service providers in areas such as health, housing and community care. While the RTI Act ensures a right of access to government-held information, where government services have been contracted out to the non-government sector, it is likely that the community will not have the same ability to access information held by service providers which may mean that a degree of accountability is lost. The 2016 consultation paper sought stakeholders' views as to whether the RTI Act and chapter 3 of the IP Act should apply to the documents of contracted service providers where they are performing functions on behalf of government.

Some submissions supported, at least in principle, the RTI Act and chapter 3 of the IP Act applying to the documents of contracted service providers. Of these submissions, there was some support for further investigation of the approach taken by the Commonwealth under section 6C of the Commonwealth *Privacy Act 1988* (Commonwealth Privacy Act) as described in the consultation paper.<sup>15</sup> Megan Carter, for example, noted that:

*This level of coverage has been in place in the Commonwealth and NSW for some years now, without any reports of adverse effect or even of any workload of note. On an international level, it is best practice to extend FOI to outsourced government functions to maintain accountability.*<sup>16</sup>

Responses from other non-government organisations, agencies and councils however did not support the RTI Act and chapter 3 of the IP Act applying to the documents of contracted service providers, with many stakeholders noting potential resource impacts and that existing transparency and accountability measures are sufficient.<sup>17</sup> For example, funding arrangements are often subject to strict reporting requirements, including provision for relevant departments to request certain documents as and when required from contracted service providers to ensure transparency and probity.

It was also noted that in some circumstances documents held by contractors to Queensland Government can be sought from a government agency under the RTI Act if the agency also has possession of the documents or a legal right to retrieve the documents.<sup>18</sup>

**Conclusion:** Given that contracted service providers are already subject to a range of transparency and accountability measures, it is not recommended that RTI Act and chapter 3 of the IP Act be amended to apply to the documents of contracted service providers where they are performing functions on behalf of government.

---

<sup>15</sup> Submission of Office of the Information Commissioner, 3 February 2016, p 9.

<sup>16</sup> Submission of Megan Carter, 30 January 2017, p 2.

<sup>17</sup> Submission of Community Legal Centres Queensland, 18 January 2017, pp 2-4; Submission of Brisbane City Council, 25 January 2017, pp 1-2; Submission of Queensland Health, 15 February 2017, p 3; Submission of Submission of the Department of Education and Training, 1 February 2017, p 2; Submission of Local Government Association of Queensland, 1 February 2017, pp 6-7; Submission of Legal Aid Queensland, 31 January 2017, pp 3-4; Submission of Queensland Urban Utilities, 3 February 2017, pp 2-3.

<sup>18</sup> Submission of Office of the Information Commissioner, 3 February 2016, p 9; Submission of former Queensland Integrity Commissioner, 12 January 2017, p 2; Submission of Megan Carter, 30 January 2017, p 2; Submission of Department of Transport and Main Roads, 30 January 2017, p 2.

## IP Act – GOCs

As noted in the consultation paper, the Information Privacy Principles (IPPs) under the IP Act do not apply to GOCs and their subsidiaries.<sup>19</sup> GOCs are subject to the Australian Privacy Principles (APPs) in the Commonwealth Privacy Act. As noted in the 2013 Discussion Paper, this is because State or Territory organisations that are incorporated companies, societies or associations are deemed to be organisations for the purposes of the Commonwealth Privacy Act and are subject to that Act.<sup>20</sup>

The 2016 consultation paper sought stakeholders' views as to whether GOCs in Queensland should be subject to Queensland's IP Act or whether they should continue to be bound by the Commonwealth Privacy Act.

While one stakeholder saw some merit in GOCs being covered by one set of legislation,<sup>21</sup> most submissions supported leaving GOCs subject to the APPs in the Commonwealth Privacy Act.<sup>22</sup> The OIC, in particular, noted the strong privacy protections for the community in relation to handling and use of personal information in the Commonwealth Privacy Act.<sup>23</sup>

Conclusion: Given the strong privacy protections in the Commonwealth Privacy Act, it is recommended that GOCs remain subject to the APPs rather than be subject to Queensland's IPPs.

## IP Act – contracted service providers

Privacy obligations under the IP Act apply to contracted service providers.

However, subcontractors are not subject to the IP Act. Failure to bind a subcontracted service provider means that an individual, whose personal information is dealt with by that subcontracted provider, will not be afforded any privacy protection. An OIC Guideline recommends agencies consider either prohibiting the use of a subcontractor or requiring any subcontract to comply with the privacy principles.<sup>24</sup> The 2016 consultation paper sought stakeholders' views as to whether the IP Act adequately deals with obligations for contracted service providers and whether privacy obligations in the IP Act should be extended to subcontractors.

---

<sup>19</sup> *Information Privacy Act 2009* (Qld) s 19, sch 2, pt 1.

<sup>20</sup> *Privacy Act 1988* (Cth) s 6.

<sup>21</sup> Submission of Queensland Health, 15 February 2017, p 4.

<sup>22</sup> Submission of the Office of the Information Commissioner, 3 February 2017, p 11; Submission of former Queensland Integrity Commissioner, 12 January 2017, p 2; Submission of Brisbane City Council, 25 January 2017, p 2; Submission of Department of Transport and Main Roads, 30 January 2017, p 2; Submission of Energy Queensland Limited, 2 February 2017, p 2; Submission of Queensland Treasury, 8 February 2017, p 5; Submission of Wide Bay Burnett Environment Council Inc, 3 February 2017.

<sup>23</sup> Submission of the Office of the Information Commissioner, 3 February 2017, p 11.

<sup>24</sup> Office of the Information Commissioner, *Contracted service providers* <<https://www.oic.qld.gov.au/guidelines/for-government/guidelines-privacy-principles/contracted-service-providers>>.

There were mixed views about whether privacy obligations in the IP Act should be extended to subcontractors. A number of submissions did not support privacy obligations extending to subcontractors, on the basis that to do so would impose an administrative burden, and that contractual arrangements already adequately deal with privacy obligations.<sup>25</sup>

Other submissions noted that it has become increasingly common for contracted service providers to engage subcontractors and supported the privacy obligations in the IP Act extending to subcontractors in the interests of ensuring accountability and privacy protection to those individuals whose personal information is dealt with by a subcontractor.<sup>26</sup> For example, the Department of Transport and Main Roads noted:

*The public consider them [subcontractors] to be acting as agents for the State and therefore to be accountable to the same standards as the State. If the provisions do not apply to contractors and subcontractors, there is a risk that engaging contractors may be used to circumvent compliance with the RTI and IP Acts. TMR believes that subcontractors should be required to comply with the IP Act.*<sup>27</sup>

The OIC suggested that section 95B of the Commonwealth Privacy Act, which requires an agency entering into a Commonwealth contract to take contractual measures to ensure that a contracted service provider for the contract, or a subcontractor, does not do an act or engage in a practice that would breach an APP if done or engaged in by the agency, may provide a useful model for extending privacy obligations in the IP Act to subcontractors.<sup>28</sup>

**Conclusion:** Given that contracted service providers are increasingly using subcontractors, it is recommended that the privacy obligations in the IP Act be extended to subcontractors. This will ensure privacy protections for those individuals whose personal information is dealt with by a subcontractor. Contracted service providers should be required to take all reasonable steps to ensure a subcontracted service provider is contractually bound to comply with the privacy principles. Once bound, the subcontractor would assume the privacy obligations as if it were the agency. In the event of a breach, the privacy complaint would be made against the subcontractor. If the contracted service provider does not take all reasonable steps to bind the subcontractor to comply with the privacy principles, the contracted service provider will be liable for any privacy breaches committed by the subcontractor.

This may not represent a significant change in practice where agencies already impose contractual obligations on contracted service providers to require any subcontractors to comply with the privacy principles under the IP Act, as recommended in the OIC Guideline.

**Recommendation 1: Amend the IP Act to extend privacy obligations to subcontractors.**

---

<sup>25</sup> Submission of CS Energy, 3 January 2017, p 3; Submission of Department of Education and Training, 1 February 2017, p 3; Submission of Local Government Association of Queensland, 1 February 2017, p 5; Submission of Queensland Urban Utilities, 3 February 2017, p 3.

<sup>26</sup> Submission of Megan Carter, 30 January 2017, p 2; Submission of Department of Transport and Main Roads, 30 January 2017, p 2; Submission of Queensland Council for Civil Liberties, 3 February 2017, p 2; Submission of Office of the Information Commissioner, 3 February 2016, pp 11-12; Submission of Department of Science, Information Technology and Innovation, 6 February 2017, p 2; Submission of QSuper, 6 February 2017, p 2; Submission of Department of Health, 15 February 2017, p 4; Submission of Wide Bay Burnett Environment Council, 3 February 2017.

<sup>27</sup> Submission of Department of Transport and Main Roads, 30 January 2017, p 2.

<sup>28</sup> Submission of Office of the Information Commissioner, 3 February 2016, pp 11-12.

## ***Access to information***

### **A right of access under both Acts**

Section 23 of the RTI Act creates a general right of access to documents of an agency or Minister, while section 40 of the IP Act provides a more limited right, allowing individuals access to their personal information. The grounds for refusing access to information, the timeframes and all other processes are the same under both Acts.

This legislative framework was implemented following the Solomon Report recommendation that access and amendment rights for personal information be separated into a privacy regime, preferably to a Privacy Act, rather than continued in a Freedom of Information Act. The rationale for this structure was that it would make the application process simpler and quicker for applicants and agencies and permit greater specialisation in privacy matters. However, there is widespread agreement that these benefits have not eventuated.

Having a right of access under both Acts has resulted in:

- legislative duplication, as both Acts set out the same grounds for refusing access, the same processes (for example, how access can be given) and matters such as the powers of the Information Commissioner at external review;
- complicated reasons for decisions, as extensive cross-referencing between Acts is required; and
- possible delays in processing applications and giving access to documents if applications are made under the wrong Act.

Stakeholders have previously expressed the view that the separation between the Acts is confusing to applicants and agencies expend a great deal of time determining under which Act an application should be processed. Replacing the two access rights with a single right of access under the RTI Act has been unanimously supported by stakeholders throughout all stages of the review.<sup>29</sup>

**Conclusion:** To be consistent with the objects of the Acts, the process of applying for information should be as uncomplicated and as efficient as possible. It is therefore recommended that there be a single right of access to information under the RTI Act. This would not affect the right to amend personal information, which should be provided under the RTI Act. Fees will continue to not be payable if applicants only seek their personal information.

---

<sup>29</sup> Submission of former Queensland Integrity Commissioner, 12 January 2017, p 2; Submission of University of Southern Queensland, 20 January 2017, p 1; Submission of Brisbane City Council, 25 January 2017, p 2; Submission of Megan Carter, 30 January 2017, p 2; Submission of Department of Transport and Main Roads, 30 January 2017, p 3; Submission of Local Government Association of Queensland, 1 February 2017, pp 5-6; Submission of Energy Queensland Limited, 2 February 2017, p 2; Submission of Queensland Urban Utilities, 3 February 2017, p 3; Submission of Queensland Ombudsman, 3 February 2017, p 1; Submission of University of Sunshine Coast, 3 February 2017, p 1; Submission of PeakCare, 3 February 2017, p 4; Submission of Office of the Information Commissioner, 3 February 2016, pp 12-14; Submission of Queensland University of Technology, 6 February 2017, pp 1-2; Submission of Queensland Treasury, 8 February 2017, p 6; Submission of Department of Health, 15 February 2017, pp 4-5; Submission of University of Queensland, 1 February 2017, p 3; Submission of Department of Agriculture and Fisheries, Department of Tourism, Major Events, Small Business and the Commonwealth Games, Department of Natural Resources and Mines, Department of Energy and Water Supply, Department of Environment and Heritage Protection and Department of National Parks, Sport and Racing, 3 February 2017, p 3.

**Recommendation 2: Amend the RTI Act and IP Act to provide for a single right of access under the RTI Act.**

## **Schedule of relevant documents**

Under the RTI Act, applicants must be provided with a schedule of relevant documents before the end of the processing period. The schedule of documents is intended to provide a basis for applicants to consider and narrow the scope of documents being sought. It is also intended to cut processing times and the costs of providing material. However, agencies have reported that the schedule of documents is not achieving its intended objectives and it is often not a useful tool for applicants. Agencies submitted that applicants rarely reduce the scope of their application on the basis of the schedule. A more effective way of refining the terms of an application to deliver the best result for the applicant may be for an agency or Minister to consult with them directly.<sup>30</sup>

Conclusion: Given its limited utility in practice, it is recommended that the mandatory nature of the requirement for applicants to be provided with a schedule of documents be removed. Instead, agencies and Ministers should have discretion to decide whether to provide the applicant with a schedule of documents.

**Recommendation 3: Remove the mandatory nature of the requirement under the RTI Act for applicants to be provided with a schedule of relevant documents, giving agencies a discretion whether to provide one.**

## **Consulting with others about applications**

### ***Threshold for consultation***

Under the RTI Act and IP Act, agencies and Ministers must consult with third parties (individuals, corporations and government) where the release of information may reasonably be expected to be of concern to the third party. Under the repealed FOI Act, the obligation to consult with third parties only arose where disclosure of the information could reasonably be expected to be of *substantial* concern to a third party. The lower threshold introduced by the RTI Act and IP Act was not recommended by the Solomon Report and did not form part of the Queensland Government Response to the report.

The consultation paper sought stakeholders' views as to whether the threshold for third party consultations should be changed so that consultation is required where disclosure of documents would be of *substantial* concern to a party. A number of stakeholders reported that the lower threshold for consultation in the RTI Act and IP Act has resulted in a significant increase in the number of third party consultations required to be undertaken, creating substantial administrative burden on agencies and delay in the processing of access applications initially and during review as well as additional processing charges for applicants.<sup>31</sup>

---

<sup>30</sup> Submission of Department of Education and Training, 1 February 2017, p 3; Submission of Queensland Urban Utilities, 3 February 2017, p 3; Submission of University of Sunshine Coast, 3 February 2017, p 7; Submission of Department of Health, 15 February 2017, p 5; Submission of University of Queensland, 1 February 2017, p 21.

<sup>31</sup> Submission of the Office of the Information Commissioner, 3 February 2017, p 17; Submission of Brisbane City Council, 25 January 2017, p 3; Submission of Megan Carter, 30 January 2017, p 3; Submission of Reg Lawler, 1 February 2017, p 5; Submission of Department of Education and Training, 1 February 2017, p 3; Submission of Local Government Association of Queensland, 1 February 2017, pp 7-8; Submission of Queensland Urban Utilities, 3 February 2017, p 4; Submission of Development Watch Inc, 3 February 2017, p 3; Submission of Queensland

Some stakeholders also commented that the low nature of the current threshold for consultation sits in conflict with the otherwise pro-disclosure nature of the RTI Act, creating unrealistic expectations in the minds of consulted third parties who are not necessarily aware of the pro disclosure bias and consequent high public interest in releasing information.<sup>32</sup> The OIC explains:

*The pro-disclosure bias of the RTI Act, the starting point that all information is to be disclosed, and the proviso that information can only be withheld from release if disclosing it would be contrary to the public interest creates a high threshold for refusing access to information. The comparatively low threshold for third party consultation creates an imbalance where the threshold at which agencies are required to consult is much lower than the threshold at which agencies are permitted to withhold.*<sup>33</sup>

There was strong support for changing the threshold for consultation from 'concerned' to 'substantially concerned', reinstating the narrower test for required consultation.<sup>34</sup> However, some stakeholders supported maintaining the current threshold for consultation.<sup>35</sup> For example, Queensland Health commented that:

*Health agencies rely on members of the public providing collateral information about others, so that the best treatment can be provided to our patients. There is a concern that if the consultation threshold is raised, at least to the degree of 'significant concern', there may be a risk that collateral information is disclosed without due regard to its potential consequences. In particular, a reluctance or mistrust from members of the community in providing information to Queensland Health.*<sup>36</sup>

The requirement to consult with third parties in Queensland is not restricted to certain types of document.

---

University of Technology, 6 February 2017, p 2; Submission of University of Queensland, 1 February 2017, p 12; Submission of Wide Bay Burnett Environment Council Inc, 3 February 2017; Submission of Department of Agriculture and Fisheries, Department of Tourism, Major Events, Small Business and the Commonwealth Games, Department of Natural Resources and Mines, Department of Energy and Water Supply, Department of Environment and Heritage Protection and Department of National Parks, Sport and Racing, 3 February 2017, p 5; Submission of Mudjimba Residents' Association, 2 February 2017.

<sup>32</sup> Submission of the former Queensland Integrity Commissioner, 12 January 2017, p 3; Submission of the Office of the Information Commissioner, 3 February 2017, p 17.

<sup>33</sup> Submission of the Office of the Information Commissioner, 3 February 2017, p 17.

<sup>34</sup> Submission of the former Queensland Integrity Commissioner, 12 January 2017, p 3; Submission of the Office of the Information Commissioner, 3 February 2017, p 17; Submission of Brisbane City Council, 25 January 2017, p 3; Submission of the Department of Transport and Main Roads, 30 January 2017, p 3; Submission of Council of Civil Liberties, 3 February 2017, p 4; Submission of Megan Carter, 30 January 2017, p 3; Submission of Reg Lawler, 1 February 2017, p 5; Submission of Local Government Association of Queensland, 1 February 2017, pp 7-8; Submission of Energy Queensland Limited, 2 February 2017, p 2; Submission of University of Sunshine Coast, 3 February 2017, p 2; Submission of Development Watch Inc, 3 February 2017, p 3; Submission of Queensland University of Technology, 6 February 2017, p 2; Submission of Queensland Treasury, 8 February 2017, p 6; Submission of Wide Bay Burnett Environment Council Inc, 3 February 2017; Submission of North Queensland Conservation Council, 3 February 2017, p 3; Submission of Mudjimba Residents' Association, 2 February 2017.

<sup>35</sup> Submission of Queensland Nurses' Union, 2 February 2017, p 6; Submission of QIC Limited, 3 February 2017, pp 2-3; Submission of Department of Health, 15 February 2017, pp 5-6.

<sup>36</sup> Submission of the Department of Health, 15 February 2017, p 6.

In comparison, in New South Wales, an agency must consult with third parties if the information is of a kind that requires consultation under the relevant section (for example, the information includes personal information about the person or concerns the person's business, commercial, professional or financial interests); the person may reasonably be expected to have concerns about the disclosure of the information; and those concerns may reasonably be expected to be relevant to the question of whether there is a public interest consideration against disclosure of the information.<sup>37</sup>

Under the Commonwealth *Freedom of Information Act 1982* (Commonwealth FOI Act), an agency or Minister may need to consult a third party where documents subject to a request affect Commonwealth-State relations (section 26A) or Norfolk Island intergovernmental relations (section 26AA), are business documents (section 27) or are documents affecting another person's privacy (section 27A). The threshold for consultation then depends on the type of document. For example, for documents affecting personal privacy, consultation must occur if it appears to the agency or Minister that the person concerned might reasonably wish to make a contention that the document is conditionally exempt and access to the document would, on balance, be contrary to the public interest.<sup>38</sup>

**Conclusion:** It is recommended that section 37 of the RTI Act be amended to reinstate the position under the repealed FOI Act where the obligation to consult with third parties only arose where disclosure of the information could reasonably be expected to be of *substantial* concern to a third party. This position has strong support from stakeholders and is consistent with the presumption of public access. It will also reduce the number of third party consultations required to be undertaken by agencies and simplify the determinative process for agencies. It may also reduce delays in processing time for applicants.

Changing the threshold will not preclude agencies from consulting in additional circumstances if they wish to do so.

**Recommendation 4: Amend the RTI Act so that the obligation to consult arises where disclosure of the information could reasonably be expected to be of *substantial* concern to a third party.**

### ***Review rights for third parties who should have been but were not consulted***

A decision to disclose a document (where an agency or Minister should have taken, but has not taken, steps to obtain the views of a relevant third party under section 37 of the RTI Act) is a reviewable decision. Questions have arisen as to the utility of having such a review right for third parties firstly because the lower threshold for consultation under the RTI Act means that potentially more people have a right of review on the basis that they should have been, but were not consulted and secondly, in such cases, the third party is unlikely to know that the decision has been made. If they hear about the decision after the documents have been disclosed, there may be little practical benefit to a review right.

The consultation paper sought stakeholders' views as to whether the current right of review for a party who should have been but was not consulted about an application is of any value. A number of submissions argued that it is of little value.<sup>39</sup>

---

<sup>37</sup> *Government Information (Public Access) Act 2009* (NSW) s 54.

<sup>38</sup> *Freedom of Information Act 1982* (Cth) s 27A.

<sup>39</sup> Submission of Brisbane City Council, 25 January 2017, p 3; Submission of Wide Bay Burnett Environment Council Inc, 3 February 2017; Submission of Local Government Association of Queensland, 1 February 2017, p 8; Submission of Queensland Urban Utilities, 3 February 2017, p 4; Submission of University of Sunshine Coast, 3 February 2017, p 2; Submission of Department of Health, 15 February 2017, p 6.

The former Queensland Integrity Commissioner and Megan Carter suggested that the remedy for a party who should have been consulted but was not, may lie elsewhere, such as by lodging a complaint.<sup>40</sup>

Despite this, a number of submissions supported maintaining the current review right.<sup>41</sup> The OIC, for example, recommended retaining a right of review for a third party who should have been, but was not consulted about an application, due to its value in some instances. For example, in some instances when a matter comes on external review, documents may not have been released and are able to be retrieved.<sup>42</sup> Having a right of review (even after disclosure has occurred) may also have the practical effect of focussing a decision maker's mind and ensuring that proper consultation occurs in the first place. PeakCare supported this view, adding that review processes are 'a healthy aspect of transparent decision making processes and decisions'.<sup>43</sup>

Conclusion: While it is acknowledged that this review right may be of limited benefit where a third party does not know that a decision has been made, there is not sufficient justification for removing it given its value where documents may not have been released and access can be withheld. Further, if the threshold for third party consultations is changed so that consultation is required where disclosure of documents would be of *substantial* concern to a party (as per recommendation 4), potentially a reduced number of people will have a right of review on the basis that they should have been, but were not consulted.

## Exempt information

Schedule 3 of the RTI Act sets out 14 types of exempt information, including Cabinet information, Executive Council information, information created to brief an incoming Minister, budgetary information for local governments, information subject to legal professional privilege and law enforcement or public safety information.

In addition, schedule 1 of the RTI Act sets out documents to which the RTI Act does not apply, and schedule 2 lists entities to which the RTI Act does not apply, either entirely or in relation to the entities' particular functions. These are referred to as 'excluded' documents and entities.

The consultation paper asked whether the exemption categories were satisfactory and appropriate, whether further categories were needed or whether there should be fewer such categories.

---

<sup>40</sup> Submission of former Queensland Integrity Commissioner, 12 January 2017, p 3; Submission of Megan Carter, 30 January 2017, p 3.

<sup>41</sup> Submission of PeakCare, 3 February 2017, p 4; Submission of the Office of the Information Commissioner, 3 February 2017, p 18; Submission of Queensland Treasury, 8 February 2017, p 6; Submission of University of Queensland, 1 February 2017, p 4; Submission of Department of Agriculture and Fisheries, Department of Tourism, Major Events, Small Business and the Commonwealth Games, Department of Natural Resources and Mines, Department of Energy and Water Supply, Department of Environment and Heritage Protection and Department of National Parks, Sport and Racing, 3 February 2017, p 6.

<sup>42</sup> Submission of the Office of the Information Commissioner, 3 February 2017, p 18.

<sup>43</sup> Submission of PeakCare, 3 February 2017, p 3.

A number of submissions argued that existing categories were sufficient.<sup>44</sup> The former Queensland Integrity Commissioner's submission stated:

*I am not aware of any examples which would suggest that the categories of exemption generally are not appropriate. I believe the RTI Act reflects a reasonable balance in this respect.*<sup>45</sup>

The OIC's submission stated that exempt information provisions have been carefully considered and align to a great extent with those found in other Australian jurisdictions. In the event a new exempt information category is considered, careful consideration and proper consultation with the community would be necessary to ensure it is consistent with the overall objects of the RTI Act.<sup>46</sup>

However, a number of agency submissions argued for additional exemptions or exclusions from the RTI Act. For example, Queensland Treasury argued for an exemption for documents provided to a party pursuant to a discovery process in legal proceedings;<sup>47</sup> Queensland Urban Utilities submitted that draft documents should be exempt;<sup>48</sup> and the University of Queensland suggested an exemption for official deliberations or decisions of a University's closed meeting of a university.<sup>49</sup> None of these submissions argued that information had been inappropriately released, but some submissions cited resource implications as a reason for their exemption or exclusion from the RTI Act.

In contrast, submissions from a number of individuals and organisations argued that existing exemptions should be reduced. The Queensland Council for Civil Liberties stated there are currently too many categories of exemption, and proposed narrowing the exemptions for Cabinet and Executive Council and information subject to legal professional privilege, and removing the exemptions for investment incentive schemes.<sup>50</sup>

The Environmental Defenders Office argued that the Cabinet exemption is unnecessarily and inappropriately broad.<sup>51</sup> The Whistleblowers Action Group Queensland recommended amending the Cabinet, Executive Council and legal professional privilege exemptions so that they did not apply where information aids in the furtherance of a fraud or crime.<sup>52</sup>

Conclusion: The RTI Act already contains sufficient exemptions and exclusions and the flexible public interest balancing test (see below) allows for adequate protection of information where required. To add 'tailored' exemptions or exclusions directed at certain documents or agency functions may suggest that the RTI Act does not adequately protect other types of information. On this basis it is recommended there be no further exemptions or exclusions, however, a number of changes to the exemptions are proposed.

---

<sup>44</sup> Submission of Brisbane City Council, 25 January 2017, p 3; Submission of Department of Health, 15 February 2017, p 6; Submission of Wide Bay Burnett Environment Council Inc, 3 February 2017; Submission of Department of Housing and Public Works, 9 February 2017, p 3.

<sup>45</sup> Submission of former Queensland Integrity Commissioner, 12 January 2017, p 3.

<sup>46</sup> Submission of Office of the Information Commissioner, 3 February 2016, p 18.

<sup>47</sup> Submission of Queensland Treasury, 8 February 2017, p 7.

<sup>48</sup> Submission of Queensland Urban Utilities, 3 February 2017, p 4.

<sup>49</sup> Submission of University of Queensland, 1 February 2017, p 24.

<sup>50</sup> Submission of Queensland Council for Civil Liberties, 3 February 2017, p 3.

<sup>51</sup> Submission of Environmental Defenders Office, 17 February 2017, p 13.

<sup>52</sup> Submission of Whistleblowers Action Group Queensland, 3 February 2017, p 1.

**(a) Amendment to section 12 of schedule 3**

The DCCSDS proposed that an existing exemption should be narrowed so as to benefit applicants who are its clients. It suggested an amendment to schedule 3, section 12 which makes exempt information which is subject to confidentiality provisions in legislation, including sections 186 to 188 of the *Child Protection Act 1999*. DCCSDS argued that following the Information Commissioner's decision in *Hughes and the Department of Communities, Child Safety and Disability Services*, 17 July 2012, (the *Hughes* decision) the effect of section 12 is that families are required to lodge separate applications under the IP Act for each family member, rather than applying under the RTI Act in a single application for all family members. It argued the *Hughes* decision also means that parents of deceased children cannot access child protection related information about those children and people cannot trace information about their family.

A submission from Micah Projects supported the greater availability of such information, recommending, among other things, the provision of information in accordance with the principles of access and best practice guidelines contained in the *Access to Record by Forgotten Australian and Former Child Migrants: Principles for Records Holders and Best Practice Guidelines In Providing Access to Records*. Micah Projects also commented:

*Following the (Hughes decision) the application of the 'solely' concept, we have no longer been able to make successful RTI applications as access to information that isn't 'solely' that of the applicant is denied. In practice Right to Information applications are not able to be made to meet the needs of those we support.*<sup>53</sup>

An amendment which would allow such information to be provided is supported in principle. While there are sound reasons to protect certain information subject to the *Child Protection Act 1999*, there is merit in allowing greater access to family information in the circumstances outlined by DCCSDS.

**Recommendation 5: Amend the RTI Act so that schedule 3, section 12 does not prevent information being made available to family members in appropriate circumstances.**

**(b) Investment incentive scheme information**

Schedule 3, section 11 provides an exemption for information relating to incentives in investment incentive schemes. An investment incentive scheme means a written scheme which promotes projects by giving incentives and is administered by 'the department'. 'Department' is defined as the department administered by the Minister having responsibility for business, industry development, and investment opportunities and attraction as identified in the Administrative Arrangements.

Current Administrative Arrangements refer to no such Ministerial responsibility. Arguably, this means that no schemes are currently protected by the exemption.

The Queensland Competition Authority (QCA) published its Final Report on Industry Assistance in Queensland in August 2015 (the Final Report). In this report, the QCA identified more than \$5 billion per year in assistance to industry. The Final Report found that while some assistance measures are beneficial, many others deliver private benefits to industry at a net cost to the Queensland community.

<sup>53</sup> Submission of Micah Projects, 28 February 2017, p 12.

Recommendation 6.1(d)(ii) of the Final Report was that where industry assistance is appropriate, the costs and benefits of providing assistance should be transparent. The amount of assistance, as well as the evidence base that underpins the Government's decision to provide it, should be publicly available.

The Solomon Review noted that the exemption was introduced to overcome a decision of the Information Commissioner to grant access to documents concerning financial assistance the Government had provided to Berri Ltd and recommended it be removed. It commented in preventing the disclosure of this particular information, the Government enacted a provision exempting the examination of an important facet of its economic activity.<sup>54</sup>

Megan Carter's submission noted the Solomon Review's recommendation, recommending this 'unnecessary exemption' be removed.<sup>55</sup>

**Recommendation 6: Amend the RTI Act to remove the exemption for investment incentive scheme information.**

## Public interest balancing test

The RTI Act introduced a new public interest balancing test (the test) which operates with a presumption in favour of disclosure. The test is a central aspect of the RTI Act and characterises the 'new generation' of RTI/FOI legislation across Australia. The repealed FOI Act had no equivalent test. Instead, it contained exemptions, many of which required decision makers to consider, among other things, the public interest.

There was general support for the test in 2013 and in 2016. The former Queensland Integrity Commissioner stated:

*... the public interest balancing test is one of the real strengths of the RTI Act.*<sup>56</sup>

Although some argued that the factors were being applied wrongly, this is a matter which is fundamentally something to be tested at review. However, submissions in both years stated that it could be complex and difficult to administer.

Community Legal Centres Queensland submitted that:

*many clients find the full gamut of factors and whether all need to be applied and/or referenced confusing. ... the interplay between (the part 3 factors and the part 4 factors) is particularly confusing. The actual balancing exercise itself is similarly difficult to understand for legally unsophisticated clients.*<sup>57</sup>

Megan Carter argued that the public interest test is conceptually excellent but difficult in practice.<sup>58</sup>

---

<sup>54</sup> FOI Independent Review Panel, *The Right to Information: Reviewing Queensland's Freedom of Information Act (2008)* 135.

<sup>55</sup> Submission of Megan Carter, 30 January 2017, p 5.

<sup>56</sup> Submission of former Queensland Integrity Commissioner, 12 January 2017, p 4.

<sup>57</sup> Submission of Community Legal Centres Queensland, 18 January 2017, p 4.

<sup>58</sup> Submission of Megan Carter, 30 January 2017, p 5.

The 2016 consultation paper asked the following questions:

- Given the 2013 responses, should the public interest balancing test be simplified; and if so how? Should duplicated factors be removed or is there another way of simplifying the test?
- Should the public interest factors be reviewed so that (a) the language used in the thresholds is more consistent; (b) the thresholds are not set too high and (c) there are no two part thresholds? If so, please provide details.
- Are there new public interest factors which should be added to schedule 4? If so, what are they? Are there any factors which are no longer relevant, and which should be removed?

### ***How the test operates***

If information is not exempt, agencies must apply the test by balancing relevant public interest factors favouring disclosure and non-disclosure. Agencies must allow access to the information unless, on balance, disclosure would be contrary to the public interest.

Schedule 4 of the RTI Act contains four parts, each of which lists different types of public interest factors. Part 1 lists factors *irrelevant* to deciding the public interest - for example, that disclosure of the information could cause embarrassment to the Government, or the loss of confidence in the Government. Part 2 lists factors *favouring disclosure* in the public interest - for example, that disclosure of the information could reasonably be expected to promote open discussion of public affairs and enhance the Government's accountability. Part 3 lists factors *favouring non-disclosure* in the public interest - for example, that disclosure of the information could reasonably be expected to prejudice the collective responsibility of Cabinet. Finally, part 4 lists factors *favouring nondisclosure in the public interest because of the public interest harm in disclosure* - for example, that disclosure of the information could prejudice the conduct of an investigation by the Ombudsman. Generally speaking, the part 4 harm factors were previously exemptions under the FOI Act.

Section 49 of the RTI Act sets out the steps for deciding, for information that is not exempt, whether disclosure would be contrary to the public interest. The steps are:

- identify and disregard any irrelevant factors (part 1 factors);
- identify any relevant factors favouring disclosure (part 2 factors);
- identify any relevant factors favouring non-disclosure (part 3 and part 4 factors); and
- compare the importance of the factors for and against disclosure taking into account the public interest harm that any of the harm factors (part 4 factors) could reasonably be expected to cause.

The RTI Act allows decision makers to consider additional factors besides those listed in the 4 parts of schedule 4 – it provides that the factors to be considered *include* those listed in schedule 4.<sup>59</sup> Some submissions suggested that this intent could be made clearer by having an express statement in the RTI Act.

**Conclusion:** It is considered beneficial to clarify the factors listed in schedule 4 are a non-exhaustive list – it would provide clarity without changing the way the RTI Act operates.

---

<sup>59</sup> *Right to Information Act 2009* (Qld) s 49(3)(a)-(c).

**Recommendation 7: Amend the RTI Act to include an express statement that factors other than those listed in Schedule 4 may be considered.**

***Simplifying the test***

The 2016 consultation paper suggested that one way of simplifying the test would be to combine the part 3 and part 4 factors into a single list of factors, removing any duplication. There is a significant amount of overlap between some of the parts 3 and 4 factors and, as a result, applying the public interest test can be complex and difficult to explain to applicants. By way of example, the interaction between item 15 of part 3 (disclosure of the information could reasonably be expected to prejudice trade secrets, business affairs or research of an agency or person) and item 7 of part 4 (disclosing trade secrets, business affairs or research) is unclear.

However, although a number of submissions supported the removal of duplication, others cautioned that what appeared to be duplication may not really be duplication – and that there were subtle differences between factors that might appear to be similar. In addition, others argued there would need to be careful consultation to avoid changing the way the test is framed.

If the part 4 factors were removed, it could be argued that a decision maker is no longer able to take important considerations into account, making the RTI Act favour disclosure even more and making a decision maker more likely to release information. However, if the part 3 factors were removed, so that the part 2 factors are weighed against the part 4 factors, this might make decision makers less likely to release information. The different ‘styles’ of factors between parts 3 and 4 also make this task difficult. Overall, this means that removing factors may change the way the test operates.

While it is not proposed to remove ‘duplicated’ factors, other reforms (such as moving the right of access into one Act, and simplifying the requirements to provide reasons) should make the process of decision making easier for decision makers and applicants.

Conclusion: There should be no substantive changes to the public interest balancing test.

***Reviewing the language of the factors/Adding new factors or removing others***

While a few submissions suggested additional factors, there were not many responses on this issue.<sup>60</sup> The OIC was concerned that adding new public interest factors to schedule 4 could reinforce misconceptions that the factors are exhaustive, or discourage decision makers from identifying and applying new factors relevant to their applications. Further, doing so could give rise to the mistaken impression that there were two tiers of public interest factors - those which are listed in schedule 4 and those that are not. This could arguably result in factors listed in schedule 4 being given greater weight than any other additional factors identified by the decision maker simply because they were ‘important enough’ to be listed in the schedule.<sup>61</sup>

The clarification suggested above (that the factors are not exhaustive) may also assist in this process.

Conclusion: The existing factors should remain and no new ones should be added.

---

<sup>60</sup> Submission of Brisbane City Council, 25 January 2017, p 4; Submission of Queensland Nurses Union, date, p 7; Submission of Queensland Urban Utilities, 3 February 2017, p 5.

<sup>61</sup> Submission of Office of the Information Commissioner, 3 February 2016, p 22.

## Disclosure logs

The RTI Act requires departments and Ministers to maintain 'disclosure logs' - online details of applications made to the department or Minister under the RTI Act, and online documents already released under that Act. The rationale for disclosure logs is that if one person has expressed an interest in accessing particular documents, then the same documents might be of interest to the wider community. Disclosure logs also provide an opportunity for the agency to publish documents with associated supporting information, explaining issues of public interest in greater depth. Disclosure logs are part of proactive disclosure of information under the RTI Act.<sup>62</sup>

As noted in the 2016 consultation paper, prior to 2012 all agencies were subject to the same disclosure log requirements. Amendments in 2012 made two significant changes. Firstly, they required departments and Ministers (but not other agencies, such as statutory bodies and councils) to publish on their disclosure logs information about the date of each valid application received and details of the information for which the applicant has applied. In addition, as soon as practicable after the applicant accesses documents that do not contain the applicant's personal information, departments and Ministers must publish the following on a disclosure log:

- the applicant's name; and
- the name of any entity for whose benefit access to the document was sought (if relevant).

Secondly, the amendments make it compulsory for departments and Ministers to publish documents which have been released to an applicant (unless the documents fall within certain exclusions, including being defamatory). The amendments mean that even documents which have been fully redacted must be published.

Previously, agencies had a discretion whether to include the documents on a disclosure log, and, in the interests of space and readability, documents which were heavily redacted were not published. In addition, even if the documents were to be made available, agencies were permitted to include only information identifying the document and information about how the document may be accessed rather than publishing the material in full.

### ***Extending the requirements to agencies other than departments and Ministers***

The 2016 consultation paper sought stakeholders' views as to whether the 2012 amendments (which currently apply to departments and Ministers) should be extended to agencies such as local councils and universities. Other than support from three departments and the Wide Bay Burnett Environment Council Inc,<sup>63</sup> submissions did not support extending the current requirements to other agencies, with many stakeholders noting that to do so would have significant resourcing impacts on agencies with little benefit.<sup>64</sup>

---

<sup>62</sup> Office of the Information Commissioner, *Disclosure logs – departments and Ministers* <<https://www.oic.qld.gov.au/guidelines/for-government/access-and-amendment/disclosure-logs/disclosure-logs>>.

<sup>63</sup> Submission of Department of Education and Training, 1 February 2017, p 8; Department of Science, Information Technology and Innovation, 6 February 2017, p 2; Submission of Department of Health, 15 February 2017, p 7; Submission of Wide Bay Burnett Environment Council Inc, 3 February 2017.

<sup>64</sup> Submission of University of Southern Queensland, 20 January 2017, p 2; Submission of Brisbane City Council, 25 January 2017, p 5; Submission of Local Government Association of Queensland, 1 February 2017, p 11; Submission of Queensland Urban Utilities, 3 February 2017, p 6; Submission of University of Sunshine Coast, 3 February 2017,

Conclusion: Given the potential resource impacts on other agencies, and the responses received to the question about the effectiveness of current disclosure log requirements, it is not recommended that the disclosure log requirements that apply to departments and Ministers be extended to other agencies.

### ***Disclosure logs – departments and Ministers – which documents to publish***

The 2016 consultation paper sought stakeholders' views as to whether the 2012 amendments to disclosure log requirements have resulted in departments publishing more useful information. There were mixed views on this, however the cumbersome nature of the requirements was acknowledged by a number of stakeholders and it was noted by one department that many hours are wasted in publishing information that has no public interest benefit.<sup>65</sup> One practitioner supported this view, commenting that disclosure logs are brimming over with released information of dubious interest or benefit to the public which undermines the very purpose disclosure logs were designed to achieve.<sup>66</sup>

Conclusion: To reduce the administrative burden imposed by current disclosure log requirements on departments and Ministers, and to ensure disclosure logs are accessible and relevant, it is recommended that the RTI Act be amended so that departments and Ministers are subject to the requirements that applied before the 2012 amendments, which are the requirements that currently apply to other agencies. Agencies should have a discretion as to what to include on a disclosure log. The provision would require a copy of a document to be included on a disclosure log if it is reasonably practical, but otherwise, details identifying the document and information about how to access it would be included. Disclosure log requirements should be supported by Information Commissioner Guidelines, providing further assistance and guidance to agencies, including criteria to support agency decision-making about what to include in a disclosure log.

**Recommendation 8: Amend the RTI Act so that departments and Ministers are subject to the disclosure log requirements that applied before the 2012 amendments.**

### ***Disclosure logs – information about applicants***

Following the 2012 amendments, departments and Ministers must also publish on a disclosure log the applicant's name and the name of any entity for whose benefit access to the document was sought (if relevant). The 2016 consultation paper sought stakeholders' views as to whether having information about who has applied for information, and whether they have applied on behalf of another entity, is beneficial.

---

p 2; Submission of Queensland University of Technology, 6 February 2017, p 2; Submission of University of Queensland, 1 February 2017, p 5; Submission of Office of the Information Commissioner, 3 February 2016, p 25.

<sup>65</sup> Submission of Department of Transport and Main Roads, 30 January 2017, p 3; Submission of Department of Health, 15 February 2017, p 7; Submission of Department of Agriculture and Fisheries, Department of Tourism, Major Events, Small Business and the Commonwealth Games, Department of Natural Resources and Mines, Department of Energy and Water Supply, Department of Environment and Heritage Protection and Department of National Parks, Sport and Racing, 3 February 2017, p 8.

<sup>66</sup> Submission of Megan Carter, 30 January 2017, p 7.

Most agencies did not see any substantive benefit in disclosure logs having information about applicants.<sup>67</sup> Several departments commented that the requirement has caused issues with some applicants who are concerned about their details being published.<sup>68</sup> Only one submission from a non-government organisation supported information about applicants being included in disclosure logs for transparency.<sup>69</sup>

**Conclusion:** It is recommended that the RTI Act be amended to remove the requirement to include on a disclosure log an applicant's name and whether an applicant has applied on behalf of another entity. It is the OIC's view that this is consistent with the purposes of a disclosure log.<sup>70</sup> This proposal will reduce some of the cumbersome requirements currently placed on agencies and Ministers in relation to disclosure logs.

**Recommendation 9: Amend the RTI Act to remove the requirement to include on a disclosure log an applicant's name and whether an applicant has applied on behalf of another entity.**

### ***Disclosure logs – timeframes for publication***

For departments and Ministers, information must be included on a disclosure log as soon as practicable after the applicant accesses the document. Before the 2012 amendments, the RTI Act specified that documents should not be placed on the disclosure log until at least 24 hours after the documents were accessed. The rationale for this delay was to give applicants (for example, journalists) exclusive access to the information before it became publicly available.

The 2016 consultation paper sought stakeholders' views as to whether the requirement for information to be published on the disclosure log as soon as practicable is a reasonable one. Submissions to the review generally agreed that the requirement is reasonable and appropriate.<sup>71</sup>

---

<sup>67</sup> Submission of Department of Education and Training, 1 February 2017, p 4; Submission of Department of Health, 15 February 2017, p 7; Submission of Department of Agriculture and Fisheries, Department of Tourism, Major Events, Small Business and the Commonwealth Games, Department of Natural Resources and Mines, Department of Energy and Water Supply, Department of Environment and Heritage Protection and Department of National Parks, Sport and Racing, 3 February 2017, p 23; Submission of James Cook University, 17 February 2017, p 3; Submission of Environmental Defenders Office, 17 February 2017, p 21.

<sup>68</sup> Submission of Department of Transport and Main Roads, 30 January 2017, p 3; Submission of Department of Health, 15 February 2017, p 7; Submission of Department of Agriculture and Fisheries, Department of Tourism, Major Events, Small Business and the Commonwealth Games, Department of Natural Resources and Mines, Department of Energy and Water Supply, Department of Environment and Heritage Protection and Department of National Parks, Sport and Racing, 3 February 2017, p 8.

<sup>69</sup> Submission of PeakCare, 3 February 2017, p 6.

<sup>70</sup> Submission of Office of the Information Commissioner, 3 February 2016, p 23.

<sup>71</sup> Submission of former Queensland Integrity Commissioner, 12 January 2017, p 4; Submission of Brisbane City Council, 25 January 2017, p 5; Submission of Department of Transport and Main Roads, 30 January 2017, p 4; Submission of Department of Education and Training, 1 February 2017, p 5; Submission of Department of Science, Information Technology and Innovation, 6 February 2017, p 3; Submission of Queensland Treasury, 8 February 2017, p 8; Submission of Department of Health, 15 February 2017, p 8; Submission of Wide Bay Burnett Environment Council Inc, 3 February 2017; Submission of Department of Agriculture and Fisheries, Department of Tourism, Major Events, Small Business and the Commonwealth Games, Department of Natural Resources and Mines, Department of Energy and Water Supply, Department of Environment and Heritage Protection and Department of National Parks, Sport and Racing, 3 February 2017, p 9.

One submitter suggested that the requirement to publish as soon as practicable is disadvantageous for investigative journalists as they do not have sufficient opportunity to prepare a story based on information for which they have paid.<sup>72</sup> However, it is understood that the internal processes within agencies mean that documents are rarely published immediately.

Conclusion: It is recommended that there be no changes to the requirement for information to be published on a disclosure log as soon as practicable.

## Publication schemes

Agencies' publication schemes describe and categorise information which they routinely make available, and set out the terms on which they will make the information available, including any charges that apply. The RTI Act requires publication schemes to be established and compliant with any Ministerial Guidelines. The current Ministerial Guidelines set out the classes of documents (such as 'our services' 'our finances' and 'our lists') that must be published, and provide general guidance about publication schemes.<sup>73</sup>

Publication schemes are intended to assist in 'pushing' government information into the public domain. However, since 2009, other government initiatives aimed at pushing government information out have been developed, including the Open Data website ([www.data.qld.gov.au](http://www.data.qld.gov.au)), the government publication portal ([www.publications.qld.gov.au](http://www.publications.qld.gov.au)); the Queensland Government website ([www.qld.gov.au](http://www.qld.gov.au)) and franchise based websites which deal with particular themes, such as 'Your Rights, Crime and the Law' ([www.qld.gov.au/law](http://www.qld.gov.au/law)) or 'Environment, land and water' ([www.qld.gov.au/environment](http://www.qld.gov.au/environment)).

All other Australian jurisdictions have legislated publication scheme requirements which outline the types of information that must be published, except for Tasmania which has guidelines only. Like Queensland, most jurisdictions must publish information about their agency structure and functions, the types of documents held by the agency, any arrangements for members of the public to participate in the formulation of the agency's policy and policy documents of the agency.

Publication scheme requirements under the RTI Act have been criticised as overly prescriptive and redundant, resulting in duplication of information and administrative inefficiency. Stakeholders have suggested that there is little benefit to having publication scheme content published separately at a time when websites have become more easily navigable and more user-friendly. Members of the public are more likely to search for information by subject, rather than via publication scheme headings. Agencies have also reported that publication schemes are often seen as a compliance exercise, rather than an easily locatable and searchable source of information.

Conclusion: To allow publication scheme requirements to respond more easily to changing policy approaches and developing technology, it is proposed to amend the RTI Act to provide a general requirement for agencies to routinely publish significant, accurate and appropriate information about the agency on the agency website that is easy to navigate and accessible. The requirement could be supported by Information Commissioner Guidelines outlining the types of information that should be made publicly available. The requirement for agencies to publish prescribed classes of information should also be removed.

---

<sup>72</sup> Submission of Megan Carter, 30 January 2017, p 7.

<sup>73</sup> Queensland Government, *Ministerial Guidelines for Publication schemes and disclosure logs* <<http://www.rti.qld.gov.au/right-to-information-act/publication-schemes>>.

While this change could be seen as reducing accountability, it is unlikely to have this result. Instead, it will allow agencies to integrate publication scheme content into more relevant parts of their websites and/or other websites where appropriate, rather than in a standalone publication on websites established in an agency's name. Consistent with the object of the RTI Act, this will ensure that information is more accessible, up to date, searchable and easy to use.

**Recommendation 10: Amend the RTI Act to remove current publication scheme requirements and instead require agencies to routinely publish significant, accurate and appropriate information about the agency on whichever website is most relevant.**

## ***Reviewing decisions***

### **Optional internal review**

Applicants who are dissatisfied with an agency's decision have a right of 'internal review' – a review of the decision by someone within the agency. Under the repealed FOI Act internal review was mandatory before an applicant could apply for an external review by the Information Commissioner. Under the RTI Act, an applicant need not have applied for internal review before applying for external review. The Solomon Report recommended the change to optional internal review in part to provide some flexibility in the review process to take account of the individual circumstances of the application.<sup>74</sup>

The OIC has reported that demand for external review has continued to exceed that experienced prior to the introduction of the RTI Act and IP Act in 2009.<sup>75</sup> The increased volume in external review matters has led to an increase in the OIC's workload which impacts on timeliness. This can have a critical impact on the worth of disclosure for individuals, media or organisations seeking access to important documents relevant to their interactions with government or about decisions taken by government that are important to the community and in the public interest.

Optional internal review has also created complex review rights for documents involving third party information. For example, if a document contains information about a third party who has been consulted, as well as information which is exempt, there could be review rights for both the applicant and the third party. This could mean that one party applies for internal review while the other party applies directly for external review for the same matter.

Applicants in New South Wales, Victoria and the Commonwealth can proceed directly to external review without having gone through an internal review first.<sup>76</sup> In contrast, internal review is mandatory in Tasmania, the Australian Capital Territory, the Northern Territory and South Australia.<sup>77</sup> Internal review is also mandatory in Western Australia, although in certain circumstances, the Information Commissioner may allow a complaint to be made even though internal review has not been applied for.<sup>78</sup>

---

<sup>74</sup> FOI Independent Review Panel, *The Right to Information: Reviewing Queensland's Freedom of Information Act* (2008).

<sup>75</sup> Legal Affairs and Community Safety Committee, Statutory Body Oversight 2017 inquiry, *Public hearing - Office of the Information Commissioner*, 10 May 2017.

<sup>76</sup> *Government Information (Public Access) Act 2009* (NSW) s 89; *Freedom of Information Act 1982* (Vic) s 49A; *Freedom of Information Act 1982* (Cth) pt 7, div 3.

<sup>77</sup> *Right to Information Act 2009* (Tas) s 44; *Freedom of Information Act 1989* (ACT) s 60; *Information Act* (NT) s 103; *Freedom of Information Act 1991* (SA) s 39.

<sup>78</sup> *Freedom of Information Act 1992* (WA) s 66.

The 2016 consultation paper sought stakeholders' views as to whether internal review should remain optional and whether the OIC should be able to require an agency to conduct an internal review after it receives an application for external review.

The vast majority of submissions supported internal review remaining optional, with many stakeholders noting the flexibility it provides for applicants and that internal review is unlikely to be of any value to an applicant where they have lost trust with the agency as part of dealing with the initial access application.<sup>79</sup> Significantly, the OIC also commented that:

*OIC considers that if the RTI Act was amended to make internal review mandatory it may not have a significant impact on demand for external review.*<sup>80</sup>

Some submissions saw value in reinstating mandatory internal review, on the basis that it would reduce the number of external review applications.

*Queensland Urban Utilities believes that an applicant should be required to apply for an internal review prior to seeking an external review from the OIC. By requiring the applicant to go through the internal review process, it gives an agency the opportunity to consider any new information, reassess the initial decision-making process or rectify any errors, in an effort to resolve the issue promptly and efficiently.*<sup>81</sup>

*This would enable the decision to be reviewed by the agency without the need to prematurely and formally engage with the OIC. Agencies could still seek guidance from the OIC for them to consider in the review. While it runs the risk of being an additional step in the process, where successful in satisfying the applicant, it would reduce the administrative burden on agencies.*<sup>82</sup>

*Properly undertaken, internal review is an opportunity for an agency to correct its own errors (if any), search more thoroughly, consider new arguments, reassess its own position, and present a more favourable decision, or a better set of reasons to the applicant. It should also reduce the number of cases proceeding to external review ... I also consider it enhances accountability of the agency and of the original decision-maker, instead of 'letting things go through to the keeper' (the OIC).*<sup>83</sup>

---

<sup>79</sup> Submission of Queensland Health, 15 February 2017, p 9; Submission of Queensland Council for Civil Liberties, 3 February 2017, p 4; Submission of Department of Communities, Child Safety and Disability Services, 16 February 2017, p 19; Submission of Department of Transport and Main Roads, 30 January 2017, p 4; Submission of University of Southern Queensland, 20 January 2017, p 4; Submission of Queensland Police Service, 24 February 2017, p 3; Submission of Joint Media Organisations, 10 February 2017, p 2; Submission of Queensland Treasury, 8 February 2017, p 9; Submission of Department of Housing and Public Works, 9 February 2017, p 2; Submission of Department of Science, Information Technology and Innovation, 6 February 2017, p 2; Submission of Wide Bay Burnett Environmental Council Inc, 3 February 2017; Submission of University of the Sunshine Coast, 3 February 2017, p 2; Submission of Crime and Corruption Commission, 3 February 2017, p 2; Submission of Energy Queensland, 2 February 2017, p 3; Submission of Department of Education and Training, 1 February 2017, p 5; Submission of University of Queensland, 1 February 2017, p 6; Submission of Department of Environment and Heritage Protection (on behalf of Department of Agriculture and Fisheries; Department of Tourism, Major Events, Small Business and the Commonwealth Games; Department of Natural Resources and Mines; Department of Energy and Water Supply; Department of Environment and Heritage Protection; and Department of National Parks, Sport and Racing), 3 February 2018, p 11; Submission of Glass Media Group, 14 December 2016, p 2; Submission of former Queensland Integrity Commissioner, 12 January 2017, p 5; Submission of Brisbane City Council, 25 January 2017, p 5.

<sup>80</sup> Submission of Office of the Information Commissioner, 3 February 2017, p 30.

<sup>81</sup> Submission of Queensland Urban Utilities, 3 February 2017, p 6.

<sup>82</sup> Submission of Lockyer Valley Regional Council, 1 February 2017, p 3.

<sup>83</sup> Submission of Megan Carter, 30 January 2017, p 8.

Other advantages of internal review include that it is a cost effective, relatively quick and accessible form of merits review. A decision on an internal review application must be made as soon as possible, but not later than 20 business days after the internal review application is made. This is much faster than external review – in 2015-16 the median number of days for finalisation of an external review application was 98.<sup>84</sup>

In relation to whether the OIC should be able to require an agency to conduct an internal review after it receives an application for external review, most submissions did not support the OIC having such a power, with some stakeholders noting that there may be legitimate reasons why the applicant has applied for external review after receiving the agency's decision and it is preferable that an applicant retains control over how they want to engage with review mechanisms.<sup>85</sup>

Conclusion: Given the overwhelming support for maintaining optional internal review, it is not recommended to reinstate mandatory internal review, particularly as the OIC considers that mandatory internal review may not have a significant impact on demand for external review. Further, it is not recommended that the OIC be given powers to require an agency to conduct an internal review after it receives an application for external review. To do so would undermine the decision of the applicant to seek external review without a preceding internal review. It may also create even more complex review rights and possible delays.

## **Timeframes for internal review**

Although not raised in the 2016 consultation paper, a number of stakeholders suggested that in some situations it would benefit the applicant for agencies to have additional time to process an internal review application (for example, for complex matters, where additional searches are required to be undertaken or where a significant review of documents is required to be undertaken by the internal review officer and it is impossible for a thorough review to be undertaken within the legislative timeframe).<sup>86</sup> Allowing agencies to extend the time in which the agency must make an internal review decision may also help to reduce the number of matters proceeding to external review.

Conclusion: It is recommended that the RTI Act be amended to allow agencies to extend the time in which agencies must make internal review decisions by agreement with the applicant or where third party consultation is required.

**Recommendation 11: Amend the RTI Act to allow agencies to extend the time in which agencies must make internal review decisions by agreement with the applicant or where third party consultation is required.**

---

<sup>84</sup> Office of the Information Commissioner, *Annual Report 2015-16*, p 9.

<sup>85</sup> Submission of Queensland Treasury, 8 February 2017, p 9; Submission of Department of Communities, Child Safety and Disability Services, 16 February 2017, p 19; Submission of Energy Queensland, 2 February 2017, p 3; Submission of University of Southern Queensland, 20 January 2017, p 2; Submission of Department of Education and Training, 1 February 2017, p 5; Submission of Energy Queensland Limited, 2 February 2017, p 3; Submission of Department of Agriculture and Fisheries, Department of Tourism, Major Events, Small Business and the Commonwealth Games, Department of Natural Resources and Mines, Department of Energy and Water Supply, Department of Environment and Heritage Protection and Department of National Parks, Sport and Racing, 3 February 2017, p 11.

<sup>86</sup> Submission of Brisbane City Council, 25 January 2017, p 6; Submission of Department of Education and Training, 1 February 2017, p 5.

## Right of direct appeal to QCAT

As noted in the 2016 consultation paper, the RTI Act and IP Act provide a right of internal review and an applicant may also apply to the Information Commissioner for an external review, either following an internal review or directly. Under section 119 of the RTI Act an appeal to QCAT is then possible on a question of law only.

In NSW and Victoria there is a right of direct appeal to a tribunal from an agency's decision.<sup>87</sup> In these tribunals, a merits review can be conducted. The Commonwealth Information Commissioner also has the power to decide not to review a decision under the Commonwealth FOI Act in certain circumstances and instead refer the matter to the Administrative Appeals Tribunal.<sup>88</sup>

The 2016 consultation paper sought stakeholders' views as to whether applicants should have a right to appeal directly to QCAT and if so, whether this should be restricted to an appeal on a question of law only or whether it should extend to a full merits review. In 2013 most stakeholders supported the status quo, on the basis that a right to appeal to QCAT directly would overburden QCAT, create delay and expense; and provide less flexibility than is currently available. Similar views were raised in 2016 with stakeholders generally not supporting a right of direct appeal to QCAT, noting that any changes to the current appeal structure are not necessary or desirable and that QCAT's merits review of an agency's initial or deemed decision would be an inefficient use of QCAT's resources.<sup>89</sup> The OIC explains:

*For example, where sufficiency of search was at issue in the review, the applicant would not have had the opportunity to raise these issues with the agency. The sufficiency of an agency's searches is the second most commonly considered issue in OIC decisions. If applicants could appeal directly to QCAT, QCAT would, on a frequent basis, be required to engage with agencies to ensure that searches were sufficient in the same manner as OIC.*<sup>90</sup>

The Brisbane City Council noted that '*Referral of matters to QCAT is expensive for all parties involved and should be minimised*'.<sup>91</sup>

**Conclusion:** Given that the current external review model appears to be working well, it is not recommended that applicants be given a right of direct appeal to QCAT, whether on a question of law only or for merits review.

---

<sup>87</sup> *Government Information (Public Access) Act 2009* (NSW) s 100; *Freedom of Information Act 1982* (Vic) s 50(1)(a); *Freedom of Information Act 1982* (Cth) s 57A(1)(a).

<sup>88</sup> For example, the Information Commissioner may decide not to review a decision if the Information Commissioner decides that it would be in the interests of the administration of the *Freedom of Information Act 1982* for the Administrative Appeals Tribunal to consider the matter. See *Freedom of Information Act 1982* (Cth) ss 54W(b), 57A(1)(b).

<sup>89</sup> Submission of former Queensland Integrity Commissioner, 12 January 2017, p 5; Submission of the Office of the Information Commissioner, 3 February 2017, p 31; Submission of Glass Media Group, 14 December 2016, p 2; Submission of the Department of Transport and Main Roads, 30 January 2017, p 4.

<sup>90</sup> 3 February 2017, p 31.

<sup>91</sup> Submission of Brisbane City Council, 25 January 2017, p 6.

## ***The role of the OIC***

### **Powers to require documents for monitoring and auditing functions**

Under section 131 of the RTI Act, the OIC has a range of performance monitoring functions, including the power to monitor, audit, and report on agencies' compliance with both the RTI Act and Chapter 3 of the IP Act. The 2016 consultation paper sought stakeholders' views as to whether the OIC should have additional powers to obtain documents in undertaking its performance monitoring, auditing and reporting functions.

In response to the 2016 consultation paper, the OIC noted that:

*Since 2009, the OIC has undertaken numerous performance monitoring activities, including Desktop Audits of agency websites, self-assessment activities, and agency specific audits. All of these activities have been reported to Parliament. The OIC has not encountered a situation in conducting its performance monitoring and auditing functions which would have required or benefited from additional powers to obtain documents.<sup>92</sup>*

The OIC also submitted that it does not require additional powers to obtain documents as part of its performance monitoring, auditing or reporting functions and that the RTI Act contains sufficiently broad powers for OIC to carry out its functions under the Act.<sup>93</sup> A number of submissions to the review also supported this view.<sup>94</sup>

**Conclusion:** Given that the OIC has not encountered problems in its performance monitoring and auditing functions, it is not recommended the OIC be given additional powers to obtain documents for the purpose of these functions.

### **Annual Reporting Requirements**

Section 185 of the RTI Act and section 194 of the IP Act provide that the Minister administering the Act must prepare an annual report on the operation of the Act and arrange for it to be tabled in Parliament. Section 8 of the *Right to Information Regulation 2009* and section 6 of the *Information Privacy Regulation 2009* set out the details of what must be included in the annual report. These sections include, for each agency, matters such as numbers of access and amendment applications, refusals to deal with applications, documents included in a disclosure log, and internal and external review applications received.

Preparing the annual report imposes a significant burden on reporting agencies, particularly where agencies do not have efficient systems in place to collect and report on data, and on the agency which collates the information. There are clear interests in having meaningful data available that will provide scrutiny of the effectiveness of the legislation and whether it is achieving its objectives, but the usefulness of the information agencies report on is unclear.

---

<sup>92</sup> 3 February 2017, p 34.

<sup>93</sup> Submission of the Office of the Information Commissioner, 3 February 2017, p 34.

<sup>94</sup> Submission of Brisbane City Council, 25 January 2017, p 6; Submission of Local Government Association of Queensland, 1 February 2017, p 13; Submission of Lockyer Valley Regional Council, 1 February 2017, p 3; Submission of Queensland Urban Utilities, 3 February 2017, p 7; Submission of Department of Health, 15 February 2017, p 9; Submission of Department of Agriculture and Fisheries, Department of Tourism, Major Events, Small Business and the Commonwealth Games, Department of Natural Resources and Mines, Department of Energy and Water Supply, Department of Environment and Heritage Protection and Department of National Parks, Sport and Racing, 3 February 2017, p 11.

As noted in their submission, the OIC is a key user of the data included in the annual reports, primarily in relation to its performance monitoring and reporting functions.<sup>95</sup> The OIC noted, however, that the:

*... currency of available data significantly undermines the utility of such data; for example, OIC's 2015-2016 performance monitoring activities are based on the 2014-15 financial year data from the most recent Annual Report. OIC appreciates the work involved by agencies and the Department of Justice and Attorney-General in producing the Report, however the value of such effort is significantly diminished by the lack of currency of the data.*

*OIC recommends that the information agencies are required to report annually be revised to minimise administrative burden, improve utility of data, and facilitate timeliness of reporting.*<sup>96</sup>

Annual reporting requirements for right to information and freedom of information laws are also being considered more broadly at the Commonwealth level under Australia's First Open Government National Action Plan 2016-18 (Action Plan). Under the Action Plan, Australia will develop uniform metrics to better measure and improve understanding of the public's use of rights under freedom of information laws. The development of consistent metrics is intended to assist in building a more complete picture of freedom of information rights in Australia and could help governments improve processing of information access requests.<sup>97</sup>

**Conclusion:** Given the work occurring at the Commonwealth level, it is not intended to make far reaching changes to the annual reporting requirements at this point in time. However, some changes are recommended (recommendation 12) to minimise administrative burden, improve utility of data, and facilitate timeliness of reporting.

**Recommendation 12: Amend the annual reporting requirements under the *Right to Information Regulation 2009* and the *Information Privacy Regulation 2009* to:**

- **remove the requirement for agencies to report on the number of refusal provisions used on each page and instead require agencies to report on the total refusal provisions used for an application as a whole;**<sup>98</sup>
- **require reporting on the numbers of privacy complaints made to agencies, including the outcome of these complaints;**<sup>99</sup>
- **require reporting on applicant type (for example, member of the public, lawyer/agent, private business, media, community organisation, Member of Parliament);**
- **remove the requirement for agencies to report on details of external review applications made from their decisions as the OIC is already required to report on external review matters;**<sup>100</sup> and
- **transfer legislative responsibility for preparing the annual reports from the responsible Minister to the Office of the Information Commissioner.**

<sup>95</sup> 3 February 2017, p 34.

<sup>96</sup> Submission of Office of the Information Commissioner, 3 February 2017, p 35.

<sup>97</sup> Commonwealth of Australia, Department of the Prime Minister and Cabinet, Australia's draft Open Government National Action Plan, p 31.

<sup>98</sup> Submission of the Office of the Information Commissioner, 3 February 2017, p 35.

<sup>99</sup> Submission of the Office of the Information Commissioner, 3 February 2017, p 36.

<sup>100</sup> *Right to Information Regulation 2009* (Qld) s 8; *Information Privacy Regulation 2009* (Qld) s 6; Submission of the Office of the Information Commissioner, 3 February 2017, p 36.

## ***Dealing with personal information***

### **The privacy principles**

The IP Act contains two sets of privacy principles which regulate how public sector agencies in Queensland collect, store, use and disclose personal information. There are 11 Information Privacy Principles (IPPs) that apply to Queensland public sector agencies and nine National Privacy Principles (NPPs) that apply to Queensland Health and Queensland's Hospital and Health Services. Similarly, the Commonwealth *Privacy Act 1988* applies to Commonwealth Government agencies and other organisations, including companies with an annual turnover of \$3 million or more. It sets out 13 Australian Privacy Principles (APPs) which set out how the entities it applies to collect, store, use and disclose personal information.

There are similarities and differences between the APPs contained in the Commonwealth *Privacy Act 1988* and the IPPs and NPPs contained in Queensland's IP Act. Because the APPs apply to, amongst other things, businesses with a turnover of more than \$3 million a year, some of them are focussed on commercial issues such as credit reporting.

The 2016 consultation paper sought stakeholders' views as to the advantages and disadvantages of aligning the IPPs and/or the NPPs with the APPs, or adopting the APPs in Queensland.

Alignment of the IPPs and NPPs with, or adoption of, the APPs would mean that a single set of principles would apply to all agencies subject to the IP Act. In 2006, the Australian Law Reform Commission recommended a 'cooperative scheme' to promote national consistency across jurisdictions<sup>101</sup>. National consistency would simplify the '*privacy jigsaw*' that applies across Australia and assist entities which operate across jurisdictions and organisations such as the Queensland Law Society which are subject to both State and Commonwealth privacy principles. It would also assist contracted service providers who have differing obligations, depending on which agency they contract with. The OIC explains:

*Under Chapter 2, part 4 of the IP Act contractors can be bound to comply with the privacy principles. Health agencies bind their contractors to the NPPs; all other agencies bind their contractors to the IPPs. This means different obligations will apply to the contractor depending on which agency with whom they contract.*

*OIC considers that a single set of privacy principles which applied to all Queensland government agencies would eliminate these issues.*<sup>102</sup>

However, agencies in Queensland would be required to undertake significant work, including training, to implement the changes. For example, the APPs distinguish between 'sensitive' information and other personal information and different rules apply to the two types of information. Further, there is no national commitment to adopt the APPs, so any move to adopt the APPs without the likelihood of the other states adopting the same principles would not greatly assist the community in terms of cross jurisdictional issues. Of all the Australian jurisdictions, only the Australian Capital Territory has adopted a modified version of the APPs.

---

<sup>101</sup> Australian Privacy Law and Practice, Report 108, recommendation 3-4.

<sup>102</sup> Submission of the Office of the Information Commissioner, 3 February 2017, p 37.

There was overwhelming support during the review from the OIC, agencies, individuals and community groups for adopting the APPs in Queensland (with appropriate changes). While a number of submissions acknowledged that there may be resource impacts during a transition period, most stakeholders recognised that the benefits in alignment would outweigh the costs in the long term.<sup>103</sup> For example, the OIC submitted that:

*In the short-term, amalgamating the IPPs and the NPPs to align with the APPs is likely to place an increased administrative and financial burden on agencies to implement a revised set of privacy principles across agencies. However, OIC considers harmonised privacy principles are likely to result in reduced compliance costs and administrative burden on agencies in the longer term due to greater national consistency in privacy regulation.<sup>104</sup>*

**Conclusion:** There is strong support for Queensland amalgamating the IPPs and the NPPs to create a single set of privacy principles in Queensland (Queensland Privacy Principles) that align with the APPs to the extent the APPs are relevant to Queensland. Agencies have worked hard to develop a strong familiarity, and corresponding high level of compliance, with their existing privacy obligations.

A move to adopt a single set of privacy principles would nonetheless impose an administrative burden on agencies as they would have to develop a similar familiarity with new principles, and adapt them to their new working practices. However, this additional burden may be warranted. Further research is required to establish whether the level of privacy protection provided by the APPs is higher than that contained in the IPPs and NPPs, and whether the advantages of implementing new principles outweigh the possible resource impacts on agencies.

..

It is proposed that this issue, along with mandatory breach notification, will be examined further (see recommendation 13 below).

## **Mandatory data breach notification**

Although not raised in the 2016 consultation paper, some stakeholders suggested that Queensland should introduce a mandatory data breach notification scheme, modelled on the relevant provisions in the Commonwealth Privacy Act.<sup>105</sup>

---

<sup>103</sup> Submission of former Queensland Integrity Commissioner, 12 January 2017, p 7; Submission of Australian Privacy Foundation, 19 January 2017, p 2; Submission of Brisbane City Council, 25 January 2017, p 7; Submission of Bruce Baer Arnold, 31 January 2017, p 3; Submission of Department of Transport and Main Roads, 30 January 2017, p 4; Submission of Lockyer Valley Regional Council, 1 February 2017, p 3; Submission of University of Sunshine Coast, 3 February 2017, p 2; Submission of Office of the Information Commissioner, 3 February 2016, pp 37 – 39; Submission of Queensland University of Technology, 6 February 2017, p 2; Submission of UnitingCare Queensland, 13 February 2017, p 2; Submission of Department of Health, 15 February 2017, pp 10-11; Submission of University of Queensland, 1 February 2017, p 7; Submission of Wide Bay Burnett Environment Council Inc, 3 February 2017; Submission of Department of Agriculture and Fisheries, Department of Tourism, Major Events, Small Business and the Commonwealth Games, Department of Natural Resources and Mines, Department of Energy and Water Supply, Department of Environment and Heritage Protection and Department of National Parks, Sport and Racing, 3 February 2017, pp 12-13.

<sup>104</sup> Submission of Office of the Information Commissioner, 3 February 2016, p 39.

<sup>105</sup> Submission of Office of the Information Commissioner, 3 February 2016, pp 51-53.

The *Privacy Amendment (Notifiable Data Breaches) Bill 2016* was passed by the Federal Parliament on 13 February 2017. The Bill amends the Commonwealth Privacy Act to require agencies, organisations and certain other entities to provide notice to the Australian Information Commissioner and an affected individual of an eligible data breach. A data breach arises where there has been unauthorised access to, or unauthorised disclosure of, personal information about one or more individuals (the affected individuals), or where such information is lost in circumstances that are likely to give rise to unauthorised access or unauthorised disclosure. A data breach is an eligible data breach where a reasonable person would conclude that there is a likely risk of serious harm to any of the affected individuals as a result of the unauthorised access or unauthorised disclosure (assuming, in the case of loss of information, that the access or disclosure occurred).

The OIC submitted that the introduction of mandatory data breach notification for those entities currently subject to the Commonwealth Privacy Act sets an important precedent for State and Territory privacy legislation. In addition to allowing affected individuals to take remedial steps to lessen the adverse consequences that may arise from a data breach, data breach notification is an important transparency measure for governments. Governments collect and hold vast amounts of personal information on behalf of its citizens and citizens trust that governments will protect this information from unauthorised access, use and disclosure. Increasingly, this information is held digitally posing significant implications for an individual's privacy in the event of a data breach.<sup>106</sup>

Conclusion: Given the limited number of submissions received on this issue, it is not proposed to introduce legislated mandatory data breach notification requirements at this time. However, whether this should occur in the future should be further analysed in the context of the work considering a single set of privacy principles discussed above. In the meantime, agencies should ensure they are complying with the OIC's Guideline on privacy breach management and notification.<sup>107</sup>

**Recommendation 13: further research and consultation be conducted to establish whether there is justification for moving towards a single set of privacy principles in Queensland, and whether a mandatory breach notification scheme should be introduced.**

## Defining 'personal information'

The definition of 'personal information' is central to the effective operation of the IP Act because obligations of agencies arise in relation to 'personal information'. It is therefore important to ensure that the definition captures that information which deserves protection. This term is also used in access provisions of the IP Act as well as the RTI Act. Personal information is defined in section 12 of 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.*

---

<sup>106</sup> Submission of Office of the Information Commissioner, 3 February 2016, pp 51-52.

<sup>107</sup> Office of the Information Commissioner, *Privacy breach management and notification* <<https://www.oic.qld.gov.au/guidelines/for-government/guidelines-privacy-principles/privacy-compliance/privacy-breach-management-and-notification>>.

When the IP Act was drafted, the definition of ‘personal information’ mirrored the definition in the Commonwealth Privacy Act. The definition in the Commonwealth Privacy Act has since been amended to use more modern terminology and remove unnecessary elements. Personal information under the Commonwealth Privacy Act means:

*information or an opinion about an identified individual, or an individual who is reasonably identifiable:*

*(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.*

Submissions to the review strongly supported the definition of ‘personal information’ in the IP Act being the same as the definition in the Commonwealth Privacy Act.<sup>108</sup> The OIC noted that:

*...amending the definition of personal information to replicate the Commonwealth definition would not significantly change the scope of what is considered to be personal information in Queensland for the purposes of the privacy principles.<sup>109</sup>*

**Conclusion:** The definition of ‘personal information’ in the IP Act should be amended to be consistent with the definition in the Commonwealth Privacy Act. The effect of this would be to remove the reference to a ‘database’, which is unnecessary and outdated.

**Recommendation 14: Amend the definition of ‘personal information’ in the IP Act to be consistent with the Commonwealth definition.**

## Sharing information

While members of the public expect the government to respect their personal information, concerns are sometimes raised that the IP Act unreasonably prevents the sharing of information, particularly across government. One possible approach to address these concerns is to regard the sharing of personal information between government agencies (or at least departments) as a ‘use’ of information rather than a ‘disclosure’. Under a ‘use’ model, a department which obtains information for a particular purpose would be able to give that information to another department if it was to be used for the particular purpose for which it was collected or another purpose that was directly related to the purpose for which it was obtained.

The 2016 consultation paper sought stakeholders’ views as to whether the IP Act unduly restricts such disclosure and whether adopting a ‘use’ model within government would be beneficial and whether the exceptions in the IP Act need to be modified. Submissions from a wide variety of agencies suggested that adopting a ‘use’ model within government would be beneficial and improve sharing of information.<sup>110</sup>

---

<sup>108</sup> Submission of the Office of the Information Commissioner, 3 February 2016, p 39; Submission of Australian Privacy Foundation, 19 January 2017, p 3; Submission of University of Southern Queensland, 20 January 2017, p 3; Submission of Brisbane City Council, 25 January 2017, p 7; Submission of the Department of Transport and Main Roads, 30 January 2017, p 4; Submission of former Queensland Integrity Commissioner, 12 January 2017, p 7.

<sup>109</sup> 3 February 2016, p 40.

<sup>110</sup> Submission of former Queensland Integrity Commissioner, 12 January 2017, p 6; Submission of Local Government Association of Queensland, 1 February 2017, p 14; Submission of Lockyer Valley Regional Council, 1 February 2017, p 4; Submission of Queensland Urban Utilities, 3 February 2017, p 7-8; Submission of Department of Science, Information Technology and Innovation, 6 February 2017, p 3; Submission of Queensland University of Technology, 6 February 2017, p 3; Submission of Queensland Treasury, 8 February 2017, p 9; Submission of Department of Health, 15 February 2017, p 11.

Some submissions did not support adoption of a 'use' model and considered the current framework to be appropriate, with the OIC commenting that further exceptions are likely to result in weakening of the privacy regulatory regime in Queensland.<sup>111</sup> One submission suggested that the current exceptions to disclosure are overly broad and should be limited or removed.<sup>112</sup>

**Conclusion:** It is considered that, consistent with the OIC's submission, the IP Act does not act as a barrier to information sharing, rather it provides a framework to facilitate the appropriate sharing of personal information. The IP Act has sufficient flexibility to allow the flow of information for legitimate purposes. The capacity of the OIC to grant applications for waiver and modification caters for exceptional circumstances. A range of factors, other than privacy, often prevent information being shared by government such as risk-aversion, cultural and organisational factors, and legislation confidentiality and secrecy provisions restricting or prohibiting the use or disclosure of personal information.<sup>113</sup> It is not recommended that any changes are made to the provisions of the IP Act dealing with information sharing.

## Transferring personal information outside Australia

Section 33 of the IP Act restricts the circumstances in which agencies may transfer an individual's personal information outside of Australia to where one of the exceptions in that section apply, for example, where the individual agrees to the transfer, where the transfer is authorised or required under a law or where the transfer is necessary to lessen or prevent a serious threat to an individual or to the public. As noted in the 2016 consultation paper, agencies are increasingly using a range of technology, such as smartphones, drones, and tablets as part of their day-to-day business and cloud computing solutions are becoming more popular. The use of such technology may result in the transfer of personal information outside Australia in situations in breach of the IP Act, for example, if the information is stored on an overseas server.

The consultation paper sought stakeholders' views as to whether the exceptions in section 33 are adequate and whether section 33 should refer to disclosure rather than transfer. A number of submissions expressed concern with section 33. Brisbane City Council, for example, stated that:

*... the current legislative provisions do not accurately reflect the conditions of the online environment and the geographical diversity of locations in which work is carried out.*<sup>114</sup>

Similarly, the Department of Education and Training suggested that:

*... the restrictions in section 33 are burdensome, particularly where the transfer of information is low risk. Furthermore, section 33 is of concern in relation to employee personal information that might be transferred overseas in a very routine way in the course of an employee undertaking their duties e.g. ordering an item, completing a work survey.*<sup>115</sup>

The OIC supported this view, commenting that 'the broad meaning of the word 'transfer' creates unnecessary complexity for agencies and leads to outcomes potentially not contemplated by the legislation at the time of enactment of the IP Act.'<sup>116</sup>

---

<sup>111</sup> Submission of Brisbane City Council, 25 January 2017, p 7; Submission of Office of the Information Commissioner, 3 February 2016, pp 40-43.

<sup>112</sup> Submission of Australian Privacy Foundation, 19 January 2017, p 3.

<sup>113</sup> Submission of Office of the Information Commissioner, 3 February 2016, pp 40-41.

<sup>114</sup> Submission of Brisbane City Council, 25 January 2017, p 7.

<sup>115</sup> Submission of the Department of Education and Training, 1 February 2017, pp 7-8.

<sup>116</sup> Submission of Office of the Information Commissioner, 3 February 2017, p 44.

The University of Queensland also noted that APP 8 (cross-border disclosure of personal information) refers to 'disclosure of personal information' rather than 'transfer of personal information'.<sup>117</sup> 'Disclosure' of information is defined in section 23 of the IP Act. Disclosure occurs where one entity gives a second entity personal information, or places the second entity in a position to be able to find it out, and ceases to have control over the second entity in relation to who will know the personal information in the future.

There was strong support for amending section 33 to regulate the 'disclosure' rather than 'transfer' of personal information outside of Australia.<sup>118</sup>

Conclusion: It is recommended that section 33 of the IP Act be amended to regulate 'disclosure' of information outside Australia rather than 'transfer'.

**Recommendation 15: Amend the IP Act to regulate 'disclosure' of information outside Australia rather than 'transfer'.**

## Privacy complaints – legislative requirements

The IP Act does not specify how a privacy complaint must be handled within an agency, meaning that there may be a lack of standardisation across the sector. In particular, the IP Act does not specify:

- requirements for lodgement of a privacy complaint to an agency (for example, written, directed to a particular officer, outlines particular points to be addressed, etc.);
- timeframes for management of the complaint by an agency (including provision for extended timeframes where, for example, a complaint is complex); or
- particular actions that must be undertaken by an agency (for example, acknowledgement of complaint, investigation of circumstances raised by applicant, formal response to complaint).

Similarly, privacy legislation in Victoria and the Commonwealth does not prescribe how agencies are to deal with privacy complaints. However, the New South Wales *Privacy and Personal Information Protection Act 1998* specifies requirements for lodgement of a privacy complaint to an agency, timeframes for management of the complaint by an agency and particular actions that must be undertaken by an agency after reviewing the complaint.

Although not raised in the 2016 consultation paper, a number of stakeholders suggested specifying certain requirements for lodgement of a privacy complaint in the IP Act to ensure some degree of consistency in the way privacy complaints are handled across agencies.<sup>119</sup>

---

<sup>117</sup> Submission of University of Queensland, 1 February 2017, p 36.

<sup>118</sup> Submission of Brisbane City Council, 25 January 2017, p 7; Submission of the Department of Education and Training, 1 February 2017, p 8; Submission of Office of the Information Commissioner, 3 February 2017, p 44; Submission of Queensland Urban Utilities, 3 February 2017, p 8; Submission of QSuper, 6 February 2017, p 3; Submission of Queensland University of Technology, 6 February 2017, p 3; Submission of UnitingCare Queensland, 13 February 2017, p 3; Submission of University of Queensland, 1 February 2017, p 36.

<sup>119</sup> Steering committee meeting, 18 April 2017.

Conclusion: The IP Act should specify that privacy complaints are required to be in writing, state the name and address of the complainant, give particulars of the act or practice complained of and be made within 12 months of the complainant becoming aware of the act or practice the subject of the complaint. Agencies should also be required to give reasonable help to an individual making a privacy complaint to put the complaint in written form.

**Recommendation 16: Amend the IP Act to specify that privacy complaints are required to be in writing, state the name and address of the complainant, give particulars of the act or practice complained of and be made to the relevant agency within 12 months of the complainant becoming aware of the act or practice the subject of the complaint. Agencies should also be required to give reasonable help to an individual making a privacy complaint to put the complaint in written form.**

## Privacy complaints – legislative timeframes

The effect of section 166(3) of the IP Act is that an individual must not make a complaint to the Information Commissioner unless they have made a complaint to an agency, the complaint has not been resolved to the individual's satisfaction and at least 45 business days has elapsed since the complaint was initially made to the agency.

Specifying a 45 day timeframe raises two issues: firstly, that it may be difficult for agencies to resolve privacy complaints in this relatively short period, for example, where a privacy complaint is complex to resolve or is part of another grievance process (like a workplace dispute). Secondly, an applicant may receive a response to their complaint quickly, but if they are dissatisfied with the agency's response they cannot take their complaint to the Information Commissioner until the 45 business days have passed.

Both of these scenarios may be frustrating to complainants, hampering the likelihood of informal resolution. Submissions to the review supported providing more flexibility in regards to timeframes for privacy complaints.<sup>120</sup> For example, Brisbane City Council noted that:

*... agencies need to be able to retain an element of flexibility in the approach to complaints to reflect the diversity in size, resources, functions and jurisdictions of agencies, together with the relative complexity of the complaint.*<sup>121</sup>

Conclusion: To allow for greater flexibility and the more efficient resolution of privacy complaints, it is recommended that the provisions affecting timeframes for privacy complaints be amended to allow agencies to request extensions of time if required. Extensions of time would be with the complainant's agreement.

---

<sup>120</sup> Submission of former Queensland Integrity Commissioner, 12 January 2017, p 6; Submission of Brisbane City Council, 25 January 2017, p 8; Submission of Department of Education and Training, 1 February 2017, p 8; Submission of Office of the Information Commissioner, 3 February 2016, p 45; Submission of Queensland Treasury, 8 February 2017, p 9; Submission of Uniting Care Queensland, 13 February 2017, p 3; Submission of University of Queensland, 1 February 2017, p 38; Submission of Department of Agriculture and Fisheries, Department of Tourism, Major Events, Small Business and the Commonwealth Games, Department of Natural Resources and Mines, Department of Energy and Water Supply, Department of Environment and Heritage Protection and Department of National Parks, Sport and Racing, 3 February 2017, p 15.

<sup>121</sup> Submission of Brisbane City Council, 25 January 2017, p 8.

It is also recommended that the IP Act be amended to allow a complainant to refer their complaint to the OIC after they receive a written response from an agency in relation to their privacy complaint without having to wait for the 45 business days to expire. This position was generally supported by stakeholders to the review.<sup>122</sup>

**Recommendation 17: Amend the IP Act to allow agencies to request extensions of time for complaints to be resolved if required and to allow a complainant to refer their complaint to the OIC after they receive a written response from an agency in relation to their privacy complaint without having to wait for 45 business days to expire.**

## Privacy complaints - timeframes for applications to QCAT

If a privacy complaint is made to the Information Commissioner and either the Information Commissioner does not believe the complaint can be resolved by mediation, or mediation is attempted but is not successful, the Information Commissioner must, within 20 business days after being asked to do so, refer the complaint to QCAT. There is no provision which limits the time within which an application may be made to QCAT if the Information Commissioner is unable to mediate a privacy complaint.

The 2016 consultation paper sought stakeholders' views as to whether there should be a time limit on when privacy complaints can be referred to QCAT. Most submissions supported imposing a time limit to ensure certainty around the management of complaints.<sup>123</sup> For example, Queensland Urban Utilities commented that:

*Without a time limit as to when a complaint can be made to QCAT, there is a possibility that a complaint may be referred to QCAT some years later, by which time relevant documents or information may no longer be available, or relevant officers within the agency may be unable to recall the full particulars of the original complaint or may have left the position/organisation.*

*In this event, it may unduly prejudice an agency's ability to respond or defend itself or reduce the agency's ability to take corrective action in order to reduce the potential damage associated with a privacy complaint or breach.<sup>124</sup>*

The OIC noted that:

*The imposition of a time limit will provide for timely resolution of privacy complaints and prevent a situation from arising where a complainant requests OIC refer a privacy complaint to QCAT several years later.<sup>125</sup>*

The former Queensland Integrity Commissioner and Australian Privacy Foundation did not support imposing a time limit for referral of privacy complaints to QCAT.<sup>126</sup>

---

<sup>122</sup> Submission of former Queensland Integrity Commissioner, 12 January 2017, p 6; Submission of Department of Education and Training, 1 February 2017, p 8.

<sup>123</sup> Submission of Department of Transport and Main Roads, 30 January 2017, p 6; Submission of Queensland Urban Utilities, 3 February 2017, p 8; Submission of Office of the Information Commissioner, 3 February 2016, p 46; Submission of Queensland University of Technology, 6 February 2017, p 3; Submission of Department of Health, 15 February 2017, p 12; Submission of University of Queensland, 1 February 2017, p 8.

<sup>124</sup> Submission of Queensland Urban Utilities, 3 February 2017, p 8.

<sup>125</sup> Submission of Office of the Information Commissioner, 3 February 2017, p 46.

<sup>126</sup> Submission of former Queensland Integrity Commissioner, 12 January 2017, p 6; Submission of Australian Privacy Foundation, 19 January 2017, p 3.

In Victoria, applicants must tell the Office of the Commissioner for Privacy and Data Protection in writing within 60 days of receiving the Commissioner's decision if they want their complaint referred to the Victorian Civil and Administrative Tribunal.<sup>127</sup>

**Conclusion:** To ensure certainty of matters, it is proposed to amend the IP Act to provide that a complainant has 60 days to ask the Information Commissioner to refer a privacy complaint to QCAT for hearing. The 60 days should run from the day the Information Commissioner gives written notice under section 175 of the IP Act that the Information Commissioner does not believe the complaint can be resolved by mediation, or mediation is attempted but is not successful.

**Recommendation 18: Amend the IP Act to provide that a complainant has 60 days to ask the Information Commissioner to refer a privacy complaint to QCAT for hearing. The 60 days should run from the day the Commissioner gives written notice under section 175 of the IP Act that the Information Commissioner does not believe the complaint can be resolved by mediation, or mediation is attempted but is not successful.**

## **Powers of the Information Commissioner under the Information Privacy Act**

The 2016 consultation paper sought stakeholders' views as to whether additional powers are necessary for the Information Commissioner to investigate matters potentially subject to a compliance notice under the IP Act.

Under the IP Act, the Information Commissioner may give an agency a 'compliance notice' asking an agency to take certain action, if satisfied that the agency has breached the privacy principles in a serious or flagrant way or has done so on five occasions within the last two years. The Information Commissioner may also require a person to provide documents or to attend and give evidence in relation to the Information Commissioner's decision to give an agency a compliance notice.<sup>128</sup> As noted in the OIC's submission, however, the IP Act sets a high threshold for the issuing of a compliance notice, limiting the circumstances in which the Information Commissioner can investigate an act or practice.<sup>129</sup>

In comparison, under the Commonwealth Privacy Act, the Privacy Commissioner has the power to investigate an act or practice on his or her own motion where the Commissioner considers it desirable that the act or practice be investigated.<sup>130</sup> This allows the Commissioner to conduct an investigation without any prior complaints being made.

A number of submissions to the review supported the Information Commissioner having an 'own motion power' to investigate an act or practice, whether or not a complaint has been made as a means of addressing systemic issues.<sup>131</sup>

---

<sup>127</sup> *Freedom of Information Act 1982 (Vic)* s 52.

<sup>128</sup> *Information Privacy Act 2009 (Qld)* s 197.

<sup>129</sup> Submission of the Office of the Information Commissioner, 3 February 2017, p 54.

<sup>130</sup> *Privacy Act 1988 (Cth)* s 40(2).

<sup>131</sup> Submission of the Office of the Information Commissioner, 3 February 2017, p 54; Submission of Australian Privacy Foundation, 19 January 2017, p 3; Submission of former Queensland Integrity Commissioner, 12 January 2017, p 6; Submission of Brisbane City Council, 25 January 2017, p 8; Submission of Department of Transport and Main Roads, 30 January 2017, p 6; Submission of UnitingCare Queensland, 13 February 2017, p 3.

The OIC, for example, noted that:

*Amending the IP Act to provide the Privacy Commissioner with an ‘own motion power’ to investigate an act or practice, whether or not a complaint has been made, will strengthen the existing powers in the IP Act to identify and dress any systemic issues arising out an act or practice of an agency.*<sup>132</sup>

The Department of Education and Training and Queensland Health did not agree the Information Commissioner requires additional powers.<sup>133</sup>

Relevantly, section 125 of the RTI Act provides a general power for the Information Commissioner to do all things necessary or convenient for the performance of the Commissioner’s functions under an Act. Section 135 of the IP Act provides that the functions of the Information Commissioner include, on the commissioner’s own initiative or otherwise, conducting reviews into personal information handling practices of relevant entities, including technologies, programs, policies and procedures, to identify privacy related issues of a systemic nature generally or to identify particular grounds for the issue of compliance notices. Arguably, therefore, there are appropriate powers available to the Information Commissioner to investigate matters potentially subject to a compliance notice under the IP Act.

Conclusion: Despite the above powers, there are benefits in amending the IP Act to expressly provide the Information Commissioner with an ‘own motion power’ to investigate an act or practice, whether or not a complaint has been made. This will strengthen the existing powers in the IP Act to identify and address any systemic issues arising out of an act or practice of an agency.

**Recommendation 19: Amend the IP Act to expressly provide the Information Commissioner with an ‘own motion power’ to investigate an act or practice, which may be a breach of the privacy principles whether or not a complaint has been made.**

## Generally available publications

Under schedule 1 of the IP Act the privacy principles do not apply to a document that is a ‘generally available publication’. Schedule 5 defines a ‘generally available publication’ to be:

*...a publication that is, or is to be made, generally available to the public, however it is published.*

The definition does not provide clear guidance about what constitutes a generally available publication. In particular, it is not clear that generally available publications include publications which are available for a fee. By contrast, the definitions in the Commonwealth and Victorian Privacy Acts are more specific. For example, the Commonwealth Privacy Act states:

*generally available publication means a magazine, book, article, newspaper or other publication that is, or will be, generally available to members of the public:*  
*(a) whether or not it is published in print, electronically or in any other form; and*  
*(b) whether or not it is available on the payment of a fee.*<sup>134</sup>

<sup>132</sup> Submission of the Office of the Information Commissioner, 3 February 2017, p 54.

<sup>133</sup> Submission of Department of Education and Training, 1 February 2017, p 8; Submission of Department of Health, 15 February 2017, p 12.

<sup>134</sup> *Privacy Act 1988* (Cth) s 6.

During the review there was strong support for clarifying the definition of 'generally available publication'.<sup>135</sup> Stakeholders generally agreed that the Commonwealth definition provides a useful model. For example:

*OIC supports providing greater clarification of the definition of 'generally available publication in Schedule 5 of the IP Act ... The definition in the Commonwealth Privacy Act is technology neutral and explicitly states that a publication is a generally available publication where (sic) or not payment of a fee is required to access it.*<sup>136</sup>

The DCCSDS suggested that the definition of 'generally available publication' should include purely digital publications such as web pages, Twitter feeds, blogs and Facebook posts which are generally available.<sup>137</sup>

**Conclusion:** It is recommended that the definition of 'generally available publication' in the IP Act be amended to be consistent with the definition of 'generally available publication' in the Commonwealth Privacy Act. The amended definition should also ensure that purely digital communications, such as those noted by the DCCSDS, are captured where appropriate.

**Recommendation 20: Amend the definition of 'generally available publication' in the IP Act to be consistent with the Commonwealth definition. The amended definition should also ensure that purely digital communications are captured as appropriate.**

#### **IPP 4 - element of reasonableness**

IPP 4 provides that an agency having control of a document containing personal information *must ensure* that the information is protected against loss, unauthorised access, use, modification or disclosure and any other misuse. The strict requirement in IPP4 means that there is no element of reasonableness or a requirement to take reasonable steps as is the case in other IPPs (for example, IPP 2, which only requires an agency to 'take all reasonable steps' to ensure certain consequences occur).

IPP 4 could result in an agency being responsible for a breach of IPP 4 even when it had taken all reasonable measures to keep information secure. For example, in their submission to the review the Brisbane City Council noted that:

*Many instances of loss or misuse may be outside the reasonable control of an agency, for example loss of a data centre during a natural disaster event or misuse of information by a former employee who is no longer under the supervision or control of an agency.*<sup>138</sup>

This obligation is also not consistent with the obligation on health agencies in NPP 4, which requires a health agency to take reasonable steps to protect personal information.

Stakeholder submissions to the review generally agreed that IPP4 should be amended to provide, in line with other IPPs, that an agency must take reasonable steps to ensure information is protected against loss and misuse.<sup>139</sup>

---

<sup>135</sup> Submission of former Queensland Integrity Commissioner, 12 January 2017, p 5; Submission of Brisbane City Council, 25 January 2017, p 8; Submission of the Department of Transport and Main Roads, 30 January 2017, p 6; Submission of the Office of the Information Commissioner, 3 February 2016, pp 47-48.

<sup>136</sup> 3 February 2016, pp 47-48.

<sup>137</sup> Submission of Department of Communities, Child Safety and Disability Services, 16 February 2017, pp 56-58.

<sup>138</sup> 25 January 2017, p 8.

Conclusion: It is recommended that IPP 4 be amended to provide that an agency must take reasonable steps to protect information.

**Recommendation 21: Amend IPP 4 in the IP Act to provide that an agency must take reasonable steps to protect information.**

## **IPP 2 and IPP 3 – ‘collect’ information or ‘ask for’ information?**

IPP 2 and IPP 3 deal with the collection of personal information, but they only apply ‘if the agency asks ... for the personal information’. Conversely, NPP 1 requires health agencies to provide certain information to an individual when it collects personal information about the individual from the individual. Other jurisdictions (for example, the Commonwealth, Victoria and New South Wales) also refer to agencies ‘collecting personal information’.

The OIC reports that the use of the word ‘asks’ in IPP 2(2) has created confusion amongst agencies about when the requirements in IPP 2 apply:

*One interpretation is that IPP 2 applies only when an agency actively obtains information on a personal level. Another interpretation is that it also includes indirect collection, for example through an online agency forms. A broader interpretation is that IPP 2 applies to any collection of information from the individual, including purely passive collections such as CCTV recording.<sup>140</sup>*

The OIC suggested that it does not appear to be consistent with the objects of the IP Act that personal information would be covered by IPP 2 if an officer hands an individual a form and asks them to fill it out, but would not apply to the same form discovered online and completed by the individual.<sup>141</sup>

Some agencies raised concerns about potential administrative burden if the words ‘ask for’ are replaced with ‘collect’ for IPP 2 and IPP 3.<sup>142</sup> Brisbane City Council, for example, stated that:

*... replacing the words ‘ask for’ with ‘collect’ for the purposes of IPPs 2 and 3 would place an unreasonable administrative burden on agencies to provide a collection notice to individuals in circumstances where it is not reasonably possible for the agency to do so. For example, it is impractical for Council officers to provide a collection notice before every communication with an individual, particularly when an individual volunteers personal information without being asked to.<sup>143</sup>*

Conclusion: Given that there is some uncertainty about the meaning of ‘collect’ and the potential obligations it may impose on agencies, it is not recommended that the words ‘ask for’ are replaced with ‘collect’ for IPP 2 and IPP 3.

---

<sup>139</sup> Submission of former Queensland Integrity Commissioner, 12 January 2017, p 5; Submission of Brisbane City Council, 25 January 2017, p 8; Submission of the Department of Transport and Main Roads, 30 January 2017, p 6; Submission of the Information Commissioner, 3 February 2017, p 48.

<sup>140</sup> Submission of the Information Commissioner, 3 February 2017, p 49.

<sup>141</sup> Submission of the Information Commissioner, 3 February 2017, p 49.

<sup>142</sup> Submission of Brisbane City Council, 25 January 2017, p 9; Submission of the Department of Transport and Main Roads, 30 January 2017, p 6; Submission of Department of Communities, Child Safety and Disability Services, 16 February 2017, p 58.

<sup>143</sup> Submission of Brisbane City Council, 25 January 2017, p 9.

## ***Special provision for law enforcement activities***

Section 29 of the IP Act provides that a law enforcement agency is not subject to IPP 2 or 3 (collection of personal information), IPP 9 (use of information for relevant purposes) or IPP 10 (limits on use of information), if the law enforcement agency is satisfied on reasonable grounds that noncompliance is necessary for specified law enforcement activities.

However, there is no equivalent provision for health agencies in the NPPs. As health agencies also have law enforcement functions (for example, under the *Tobacco and Other Smoking Products Act 1998*, it is reasonable that the IP Act contain a similar provision in relation to the NPPs. It is therefore proposed to apply to health agencies the provisions that apply to other agencies.

**Recommendation 22: Amend the IP Act so that the NPPs apply to health agencies in the same way as the IPPs apply to other agencies in relation to law enforcement activities.**

## ***Other issues***

A number of the other issues identified during the review were operational in nature and require legislative change. These issues and recommended changes are discussed further at **Appendix 3**

## **Appendix 1 - Terms of reference**

### **REVIEW OF THE RIGHT TO INFORMATION ACT 2009 AND INFORMATION PRIVACY ACT 2009**

#### **Background**

The introduction of the *Right to Information Act 2009* (RTI Act) and the *Information Privacy Act 2009* (IP Act) followed an extensive overhaul of the State's freedom of information laws by a panel of experts chaired by Dr David Solomon.

The legislation includes provisions that require a review of the Acts. These reviews are to examine the practical application of the legislation and identify and resolve issues arising during implementation. While focussing on operational issues, the review will consider issues of efficiency and effectiveness, and whether there are opportunities to reduce the regulatory burden on agencies without compromising the objects of the Acts.

#### **Purpose of the review**

Section 183(1) of the RTI Act and section 192(1) of the IP Act provide for a review of the two Acts. The purpose of the review is set out in section 183(2) of the RTI Act and section 192(2) of the IP Act respectively and is to:

- (a) decide whether the primary objects of the Acts remain valid;
- (b) decide whether the Acts are meeting their primary objects;
- (c) decide whether the provisions of the Act are appropriate for meeting their primary objects; and
- (d) investigate any specific issue recommended by the Minister or the information commissioner.

The Minister must table a report about the outcome of the review in Parliament.

#### **Objects of the Acts**

Section 3 of the RTI Act states its primary object as:

*... to give a right of access to information in the government's possession or under the government's control unless, on balance, it is contrary to the public interest to give the access.*

Section 3 of the IP Act sets out the objects of that Act, to provide for:

- (a) the fair collection and handling in the public sector environment of personal information; and*
- (b) a right of access to, and amendment of, personal information in the government's possession or under the government's control unless, on balance, it is contrary to the public interest to give the access or allow the information to be amended.*

## **Conduct of the review**

The review is being conducted by the Department of Justice and Attorney-General (DJAG), as agency with administrative responsibility for the legislation, with oversight by a steering committee of senior representatives from relevant departments. As required by section 183(2)(d) of the RTI Act and section 192(2)(d) of the IP Act, the Information Commissioner will be consulted throughout the review.

## Appendix 2 - Glossary

*Australian Privacy Principles (APPs)* - the APPs are contained in schedule 1 of the Commonwealth *Privacy Act 1988*. The APPs outline how most Australian and Norfolk Island Government agencies, all private sector and not-for-profit organisations with an annual turnover of more than \$3 million, all private health service providers and some small businesses (collectively called 'APP entities') must collect, store, use and disclose personal information.

*Disclosure log* - a list of documents (and sometimes the documents themselves) released following a decision about an application for access under the RTI Act, which is published on an agency's website.

*Information Privacy Principles (IPPs)* - the IPPs are set out in the *Information Privacy Act 2009* and regulate how agencies collect, store, use and disclose personal information. The privacy principles also include specific rules about the transfer of information outside Australia and how contractors to government handle personal information.

*National Privacy Principles (NPPs)* - separate rules apply for health agencies and their contracted service providers under the National Privacy Principles (NPPs) in the *Information Privacy Act 2009*. These rules set out how personal information must be collected and managed in the public health sector environment in Queensland.

*Personal information* - is defined in the *Information Privacy Act 2009* 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.

*Pro-disclosure bias* - where an access application is made under the *Right to Information Act 2009* or the *Information Privacy Act 2009*, it is Parliament's intention that when deciding whether giving access to documents would be contrary to the public interest, agencies should employ a pro-disclosure bias. When deciding applications under the *Right to Information Act 2009* or the *Information Privacy Act 2009*, the starting position is to release documents the subject of the application.

*Public interest test* - the process under section 49 of the *Right to Information Act 2009* that requires competing public interest considerations to be compared and considered so a decision can be reached about whether disclosure would, on balance, be contrary to the public interest.

*Publication scheme* - sets out the kinds of information that an agency has available and the terms on which it will make the information available to the public, including any charges that may be necessary.

*Push model* - refers to government maximising access to government information by proactively making information available, and releasing requested information administratively where possible. Publication schemes and disclosure logs are 'push model' strategies regulated by the *Right to Information Act 2009*.

## **Appendix 3 – Operational issues**

### **Definition of ‘processing period’**

Section 18 of the RTI Act and section 55 of the IP Act set out the ‘*processing period*’ for an application - initially 25 business days but this may be extended in some circumstances. At any time before the end of the processing period an agency or Minister may ask the applicant for more time to process the application (a further specified period).

It is recommended that sections 18 and 35 of the RTI Act be amended to simplify the timeframes by providing for a single period of time for processing applications which is increased to include any further period in which the agency is entitled to continue working on the application. The processing period would be defined to include any additional time granted to an agency to make a considered decision under section 35. Any further specified periods granted by an applicant, or time in which an agency is permitted to continue processing an application because the applicant has not refused the extension, would form part of the processing period.

### **Applications outside the scope of the Act**

The timeframe for making a decision that a document or entity is outside the scope of the Act is 10 business days which is a very short timeframe for what can be a complex decision. For example, determining whether documents were created or received as part of the community service obligations of a GOC.

It is recommended that section 32(2) of the RTI Act be amended to extend the timeframe for making a decision that a document or entity is outside the scope of the Act from 10 business days to 25 business days.

### **Access application forms**

For an access application to be valid it must be in the approved form, provide sufficient information concerning the document sought to enable the agency to identify it and state an address to which notices may be sent. RTI applications must also be accompanied by the application fee. The requirement to apply on a form (rather than by letter, as in other jurisdictions) imposes an additional step for applicants who need to locate and download or submit a form. This has been criticised as unnecessarily bureaucratic. No other Australian jurisdiction requires an approved form to make an application.

It is recommended that section 24(2)(a) of the RTI Act be amended so that applications may be in the approved form. An access application would need to be in writing, provide sufficient information concerning the document sought to enable the agency to identify it and state an address to which notices may be sent and *may* be in the approved form. The power under section 192 of the RTI Act for the chief executive to approve forms for use under the RTI Act should be retained. A standard form could continue to be used for online applications and by agencies if desired.

## **Amendment application forms**

Like access applications, an application for amendment of personal information must be in the approved form. Similar arguments apply in relation to this form.

It is recommended that section 44(4)(a) the IP Act be amended so that amendment applications may be in the approved form, but would need to:

- be in writing;
- provide sufficient information concerning the document to enable the agency to identify it;
- state an address to which notices may be sent;
- state the information the applicant claims is inaccurate, incomplete, out of date or misleading;
- state the way in which the applicant claims the information is inaccurate, incomplete, out of date or misleading;
- if the applicant claims the information is inaccurate or misleading, state the amendments the applicants claims are necessary; and
- if the applicant claims the information to be incomplete or outdated, state the other information the applicant claims is necessary.

## **Evidence of identity (applicants)**

A person who applies for access to, or amendment of, personal information must provide evidence of their identity. Copies of identification documents must be certified by a qualified witness. It can be difficult for applicants seeking access to documents to access qualified witnesses, particularly in rural or remote areas.

It is recommended that the list of qualified witnesses who can certify evidence of identity documents under the *Right to Information Regulation 2009* be expanded to include police officers, medical practitioners, registered nurses and registered teachers.

## **Evidence of identity (agents)**

Where someone applies for personal information on behalf of another person (as an agent), the agent must provide both evidence of their authority to act on the applicant's behalf and evidence of their own identity. This requirement extends to all agents and may be seen as burdensome, particularly for legal practitioners, who may make frequent applications to the same agency.

It is recommended that section 24(3)(b) of the RTI Act be amended to remove the requirement that agents must provide evidence of identity in all cases. Instead, an agency *may* require evidence of identity for the agent. In some cases agencies may not require evidence of identity where they are satisfied of the agent's identity because of, for example, their previous dealings with the agent.

## **Charges estimates notices (CENs)**

Agencies must provide applicants with an estimate of the amount of charges likely to be payable for an application (a CEN) and a schedule of relevant documents before the end of the processing period. An applicant can agree to waive the requirement for a schedule of relevant documents, but the requirement to provide a CEN cannot be waived, even if an agency decides that charges are not payable, for example, where it spends less than five hours processing the application.

It is recommended that the RTI Act be amended to provide that a CEN is not required where there are no charges.

There appears to be an inconsistency between section 36(5) of the RTI Act (which provides that only two CENs may be issued) and section 36(7) of the RTI Act (which requires applicants to be given advice with both the first and second CEN that they may confirm, narrow or withdraw their application). Narrowing the second CEN would require a third CEN to be issued.

It is recommended that section 36(7) of the RTI Act be amended to clarify that applicants are limited to two charges estimates. Any narrowing of the second CEN will not require a third CEN to be issued.

## **Written notice timeframes**

Section 46 of the RTI Act provides that, where an applicant has not been given written notice of a considered decision by the last day of the processing period, the agency or Minister is taken to have refused the application. There was general support during the review for amending the RTI Act so that written notice is required to be sent (as opposed to be given) by the end of the processing period, particularly given Australia Post's longer delivery times which have impacted on agencies' processing time.

It is recommended that section 46 of the RTI Act be amended so that written notice is required to be sent (as opposed to given) by the end of the processing period.

## **Disclosure of documents during external review**

Under chapter 3, part 9, division 5 of the RTI Act, the Information Commissioner has certain powers on external review including the ability to disclose documents to other parties as necessary to facilitate the resolution of an external review. Agencies expressed concern that this is not occurring in practice and suggested there may be benefit in clarifying that the Information Commissioner may disclose documents to other parties as necessary to facilitate the resolution of an external review.

It is recommended that the RTI Act be amended to clarify that the Information Commissioner may disclose documents to other parties as necessary to facilitate the resolution of an external review.

## **Release of documents following informal resolution settlement**

The Information Commissioner must identify opportunities and processes for early resolution of external review applications. The Information Commissioner must also promote settlement of external review applications.

The term 'information resolution' is used to describe the methods used by the Information Commissioner to resolve applications, or particular issues raised in applications on an informal basis.

Agencies may however be reluctant to release documents, or parts of documents, during the early resolution process. If there is no written decision, they may be unsure about their protection under the RTI Act. Some agencies are subject to other legislation which contains confidentiality provisions which may apply to the information to be released as part of the informal resolution.

It is recommended that section 90 of the RTI Act be amended to clarify that an agency may release documents following an informal resolution of a review. While one view is that the RTI Act already allows for the release of documents by an agency as a result of an informal resolution settlement, it is preferable to expressly provide that documents may be released by an agency as a result of an informal resolution settlement to give agencies comfort and confidence. This will also assist agencies who have legislative provisions prohibiting disclosure as the release of documents will be in accordance with legal authority.

## **Reports to the Speaker**

Section 125 of the RTI Act provides a general power for the Information Commissioner to do all things necessary or convenient for the performance of the Commissioner's functions. The Information Commissioner's support functions include monitoring the way the public interest test is applied by agencies. In contrast, section 135 of the IP Act is more explicit about the Information Commissioner's ability to report to the Speaker. Agencies have suggested that the Acts should be consistent. It is recommended that section 184 of the RTI Act be amended to clarify that the Information Commissioner can report to the Speaker on systemic issues.

## **Definition of 'health agency' under the IP Act**

Under the IP Act, Queensland Health (QH) and the sixteen Hospital and Health Services (HHSs) are all separate entities. This means that there is a 'disclosure' of information whenever one shares personal information with another. For this to occur one of the exceptions in NPP2 must apply. However QH and the HHSs share various patient information systems and were a single entity before the HHSs were created. It is not always practical to require that disclosures fit within the NPP2 exception.

It is recommended that the definition of 'health agency' be changed so that QH and the HHSs are regarded as a single entity for the purposes of the IP Act.

<b>Recommendation 23: Amend the RTI Act and IP Act to make the operational changes listed in Appendix 3.</b>
--

## Appendix 4 – List of submissions received in 2017

There were 69 written responses to the 2016 consultation paper from:

- Australian Privacy Foundation
- Bar Association Queensland
- Brisbane City Council
- Brisbane Residents United
- Bruce Baer Arnold
- Caxton Legal Centre Inc.
- Community Legal Centres Queensland Inc.
- Coolum Residents Association
- Crime and Corruption Commission
- CS Energy Ltd
- Department of Agriculture and Fisheries, Department of Tourism, Major Events, Small Business and the Commonwealth Games, Department of Natural Resources and Mines, Department of Energy and Water Supply, Department of Environment and Heritage Protection and Department of National Parks, Sport and Racing
- Department of Communities, Child Safety and Disability Services
- Department of Education and Training
- Department of Health
- Department of Housing and Public Works
- Department of Science Information Technology and Innovation
- Department of Transport and Main Roads
- Dereka Ogden
- Development Watch Inc.
- Energy Queensland Limited
- Environment Council of Central Queensland
- Environmental Defenders Office
- Gecko Environment Council Association Inc.
- Glass Media Group Pty Ltd
- Greg and Joan Darlington
- Helen Underwood
- Inspector-General Emergency Management
- James Cook University
- Jeremy Tager
- Johnathan Peter
- Joint Media Organisation
- Kenneth Park
- Legal Aid Queensland
- Local Government Association of Queensland
- Lockyer Valley Regional Council
- Mackay Conservation Group
- Megan Carter
- Micah Projects
- Mudjimba Residents' Association
- Nathan Laurent
- North Queensland Conservation Council
- Office of the Information Commissioner
- PeakCare Queensland Inc.

- QSuper
- Queensland Audit Office
- Queensland Council of Civil Liberties
- (former) Queensland Integrity Commissioner
- Queensland Investment Corporation
- Queensland Nurses' Union
- Queensland Ombudsman
- Queensland Police service
- Queensland Treasury
- Queensland University of Technology
- Queensland Urban Utilities
- Reg Lawler
- Residents for Responsible Development
- Sam McRorie (Sunshine Coast Hospital and Health Service)
- Samantha Rose
- Sean Kelly
- Stephen Keim
- SunWater
- UnitingCare Queensland
- University of Queensland
- University of Southern Queensland
- University of the Sunshine Coast
- Whistleblowers Action Group Queensland Inc.
- Wide Bay Burnett Environment Council Inc.
- William Forgan-Smith
- Group of individuals - confidential submission

## Appendix 5 – List of submissions received in 2013

There were 64 written responses to the 2013 discussion papers from:

- Aaron Munsie
- Attorney-General's Department
- Brisbane City Council
- Commission for Children and Young People and Child Guardian
- Courier Mail
- Crime and Misconduct Commission
- CS Energy Limited
- Department of Agriculture, Fisheries and Forestry, Department of Energy and Water Supply, Department of Environment and Heritage Protection, Department of National Parks, Recreation, Sport and Racing, Department of Natural Resources and Mines and Department of Tourism, Major Events, Small Business and the Commonwealth Games
- Department of Communities, Child Safety and Disability Services
- Department of Education, Training and Employment
- Department of Health
- Department of Justice and Attorney-General Right to Information and Privacy Unit
- Department of Natural Resources and Mines – Mines, Safety and Health
- Department of Science, Information Technology, Innovation and the Arts
- Department of State Development, Infrastructure and Planning
- Department of Transport and Main Roads
- Desley Peters
- Don Willis
- Energex
- Gerry Cottle
- Helen Underwood
- Jennifer Stewart
- John Sleigh
- Joseph Maurirere
- Kalinga Woolloowin Residents' Association Inc
- Legal Aid Queensland
- Lisa Seddon
- Liz McGuire
- Lucio Piccoli
- Mackay Regional Council
- Megan Carter
- Metro North Hospital and Health Service
- Microsoft Australia
- Nine Network
- Office of the Australian Information Commissioner
- Office of the Information Commissioner
- Port of Townsville Limited
- Powerlink
- QIC Limited
- Queensland Association of Independent Legal Services
- Queensland Government Chief Information Office
- Queensland Law Society
- Queensland Ombudsman

- Queensland Police Service
- Queensland Ports Association Inc.
- Queensland Public Interest Law Clearing House
- Queensland Rail
- Queensland Treasury and Trade
- Queensland Urban Utilities
- Redland City Council
- Robert Bowles
- Rockhampton Regional Council
- Scenic Rim Regional Council
- SEQ Water
- Seven Network
- Stadiums Queensland
- Steven Wheeler
- Sunshine Coast Regional Council
- Sunwater
- The Public Trustee
- Tourism and Events Queensland
- UnitingCare Community and Blue Care
- University of Queensland
- Confidential submission - individual