

2016 Consultation on the Review of the *Right to Information Act 2009* and *Information Privacy Act 2009*

Consultation paper

December 2016



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Minister's foreword



In 2009 the *Right to Information Act 2009* (RTI Act) and the *Information Privacy Act 2009* (IP Act) replaced the *Freedom of Information Act 1992* 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).

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.

In 2013 the views of interested people, agencies and organisations were sought on a range of issues relevant to the Acts. Submissions received in 2013 contained valuable insights about the operation of the Acts and how they can be improved. The Palaszczuk Government committed to conducting whatever further consultation is deemed necessary for the review; and then finalising the review. This further consultation will allow new issues that have arisen since 2013 to also be considered; as well as allowing for the possibility that the views of those who previously made submissions may have also changed. Therefore by necessity some of the issues raised in 2013 are included again in this 2016 consultation paper.

It is essential that Queenslanders have confidence in the way government does business. The Palaszczuk Government is committed to ensuring accountability, honesty and transparency in the public sector. Further, there are high community expectations about safeguarding personal information held by government. Privacy, in particular, is an area of increasing complexity and challenge for future years as technology continues to evolve. As such, we need to ensure that our right to information and privacy laws remain appropriate and are achieving their objectives.

All Queenslanders are invited to contribute to this 2016 consultation on the review by making a submission.

YVETTE D'ATH MP

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

Review of the *Right to Information Act 2009* and the *Information Privacy Act 2009*

2016 Consultation Paper

Introduction

Access to information and privacy legislation in Queensland - some background and history

Following the Fitzgerald inquiry,¹ the Electoral and Administrative Review Commission recommended that Freedom of Information laws be introduced in Queensland. The *Freedom of Information Act 1992* (the FOI Act) was an important milestone in Queensland's democratic history. Although the FOI Act was reviewed and amended on a number of occasions (including a review by Parliament's then Legal, Constitutional and Administrative Review Committee), its structure and approach essentially remained the same.

In June 2008 the report on the wide ranging review of the FOI Act by an independent panel chaired by Dr David Solomon AM was delivered (the Solomon Report). The August 2008 government response to the Solomon Report supported most of the 141 recommendations. The Solomon Report recommended a very different approach to FOI:

- The starting point was to be that access was to be given to government documents unless there was a good reason in the public interest not to give access.
- Information was to be 'pushed' into the public domain, rather than 'pulled out' by individuals.
- Publication schemes (requiring agency documents to be placed on websites), disclosure logs (requiring documents released as a result of applications to be published online), and administrative release (release of information without a formal application) would support this new approach.
- Applications under a new Right to Information Act were to be considered a last resort. The new legislation was to have fewer exemptions than the FOI Act. If an application did not fall within new, revised exemptions, access to information was to be provided unless disclosure would, on balance, be contrary to the public interest.
- Personal information was to be accessed (and amended) under a new Information Privacy Act, leaving the Right to Information Act for more complex applications.

The *Right to Information Act 2009* (the RTI Act) and the *Information Privacy Act 2009* (the IP Act) commenced on 1 July 2009. The RTI Act provides a right of access to documents of an agency or Minister; Chapter 3 of the IP Act also provides a right of access to documents of an agency or Minister, *to the extent they contain the individual's personal information*.² Section 44 of the IP Act allows an individual who has had access to a document of an agency or a Minister

¹ The Commission of Inquiry into Possible Illegal Activities and Associated Police Misconduct (1987-89).

² *Information Privacy Act 2009* (Qld) s 40. Although application fees and processing charges are only payable under the RTI Act, grounds to refuse access to information, the timeframes for dealing with applications and all other processes (for example, for consulting with others who may be concerned about release of documents) are the same under both Acts.

to apply to amend their personal information which they claim is inaccurate, incomplete, out of date or misleading.

The IP Act also provides legislative privacy protection for personal information, replacing two administrative Information Standards issued in 2001. The IP Act contains two sets of privacy principles which regulate how agencies in Queensland collect, store, use and disclose personal information – the National Privacy Principles (NPPs) which apply to health agencies (the Department of Health, and Health and Hospital Services) and the Information Privacy Principles (IPPs) which apply to other Queensland agencies.

The RTI Act and IP Act received significant positive attention from commentators after they were introduced, and a 2015 media article stated that the RTI Act ‘was widely seen as Australia’s most open’.³

Shortly after, the Commonwealth *Freedom of Information Act 1982* (Commonwealth FOI Act), the New South Wales (NSW) *Freedom of Information Act 1989* and the Tasmanian *Freedom of Information Act 1991* were reviewed. The Commonwealth FOI Act was extensively amended, and new Acts were passed in NSW and Tasmania to align with the approach reflected in Queensland’s RTI Act.⁴

Other reviews

Other reviews have occurred since that time. A report of the review of the *Freedom of Information Act 1982* and *Australian Information Commissioner Act 2010* by Allan Hawke AC was published in 2013; in 2014 the NSW Government invited submissions on the review of the *Government Information (Public Access) Act 2009* and the *Government Information (Information Commissioner) Act 2009*.

On 22 June 2016 the Freedom of Information Amendment (Office of the Victorian Information Commissioner) Bill 2016 was introduced into the Victorian Parliament. The Bill establishes the Office of the Victorian Information Commissioner and makes enhancements to Victoria’s freedom of information system to improve transparency and accountability. Among other things, the Bill provides the Information Commissioner with the power to conduct own-motion investigations, and new investigative powers when conducting reviews, investigating complaints and conducting own-motion investigations.

Amendments in Queensland

Queensland’s RTI Act and IP Act have both been amended since their introduction. The most significant amendments included those made:

- to the RTI Act in 2010 to exempt certain information brought into existence for the Brisbane City Council Establishment and Coordination Committee to consider, and certain local government budgetary information;⁵

³ Markus Mannheim, ‘ACT government may become one of the world’s most transparent under Greens’ FOI plan’, *Canberra Times* (online), 27 October 2015 <<http://www.canberratimes.com.au/national/public-service/act-government-may-become-one-of-the-worlds-most-transparent-under-greens-foi-plan-20151023-gkggyia.html>>.

⁴ See the *Right to Information Act 2009* (Tas) and the *Government Information (Public Access) Act 2009* (NSW).

⁵ *Right to Information Act 2009* (Qld) sch 3, ss 4A and 4B. Note that under section 47(3)(a) of the RTI Act, access to a document may be refused to the extent the document comprises exempt information. Other classes of exempt information include, for example, information brought into existence for the consideration of Cabinet. The Establishment and Coordination Committee sets strategic direction for Brisbane and Brisbane City Council.

- to the IP Act in 2011 to allow agencies to provide personal information to additional agencies (such as the Australian Federal Police) for law enforcement purposes; and
- to the RTI Act in 2012 to require departments and Ministers to publish more information on disclosure logs.⁶

Review of Acts required

Section 183 of the RTI Act and section 192 of the IP Act require the Minister to review the Acts. As noted in the 2013 Discussion Paper, the objects of the review include:

- deciding whether the primary object of the Act remains valid;
- deciding whether the Acts are meeting their primary object;
- deciding whether the provisions of the Acts are appropriate for meeting their primary object; and
- investigating specific issues recommended by the Minister or the information commissioner.

Previous consultation papers and submissions

In August 2013, the former Government released two Discussion Papers as part of the review of the RTI Act and IP Act. One related to the information access provisions contained in the RTI Act and Chapter 3 of the IP Act; the other concerned the privacy provisions of the IP Act.⁷ Sixty seven submissions were received in response to these papers, from a variety of individuals, companies, not for profit organisations and government agencies.

The individuals, organisations and agencies who provided these submissions invested considerable time and effort in doing so. Their submissions contain valuable insights about the operation of the RTI Act and the IP Act and will therefore be taken into account where relevant during this review. However, the views of those who previously made submissions may have changed and new issues have arisen as time (and technology) have moved on. Accordingly, to ensure that all relevant views are taken into account, this consultation paper seeks further feedback on key issues raised by the Acts.

Some of the issues and questions in the 2013 Discussion Papers are also included in this Consultation Paper. New issues have also been added. Where relevant the Consultation Paper indicates the general nature of the responses received in 2013.

Terms of reference

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

How to have your say

All comments or submissions must be made in writing, and should refer to the relevant question number. You should provide reasons and supporting information.

⁶ Disclosure logs provide for online publication of information released following RTI applications.

⁷ *Review of the Right to Information Act 2009 and Chapter 3 of the Information Privacy Act 2009*; and *Review of the Information Privacy Act 2009: Privacy Provisions*.

Comments on any other issues about the RTI Act and the IP Act which are not raised in this paper are also welcome.

Please provide any comments or submissions by **Friday 3 February 2017**

- by email: FeedbackRTIandprivacy@justice.qld.gov.au
- by post: RTI and Privacy Review
Department of Justice and Attorney-General
GPO Box 149
Brisbane QLD 4001

Privacy statement

Any personal information in your comment or submission will be collected by the Department of Justice and Attorney-General (DJAG) for the purpose of undertaking the review of the RTI Act and IP Act. DJAG may contact you for further consultation on the issues you raise, and your submission and/or comments may be provided to others with an interest in the review, for example, the Parliamentary Legal Affairs and Community Safety Committee.

Submissions provided to DJAG in relation to this Consultation Paper will be treated as public documents. This means that in all but exceptional cases, they may be published on the DJAG website, together with the name and suburb of each person making a submission. If you would like your submission, or any part of it, to be treated as confidential, please indicate this clearly. Please note however that all submissions may be subject to disclosure under the RTI Act, and access applications for submissions, including those marked confidential, will be determined in accordance with that Act. DJAG may however decide not to publish:

- abusive or hurtful comments or material about another person, which may include:
 - inappropriate language (e.g. profanity, racial, ethnic or gender-based language);
 - personal attacks or defamatory statements or comments (e.g. negative personal or untrue comments about a person), instead of properly informed criticism, honest opinion or comment;
- irrelevant and redundant comments (e.g. promotion of events, groups, pages, websites, organisations and programs unrelated to the discussion topic);
- comments that violate the privacy of another person;
- material that may be in breach of copyright law; and
- material or comment that is in any other way in breach of a law.

What will happen next?

All the submissions, including those received in 2013, will be considered. The Attorney-General and Minister for Justice and Minister for Training and Skills will table a report on the review as soon as possible after the review is complete.

Questions asked in this consultation paper⁸

1. Are the objects of the RTI Act being met? Is the push model working? Are there ways in which the objects could be better met?
2. Is the privacy object of the IP Act being met? Is personal information in the public sector environment dealt with fairly? Are there ways that this object could be better met?
3. Should the way the RTI Act and Chapter 3 of the IP Act applies to GOCs, statutory bodies with commercial interests and similar entities be changed? If so, in what way? Is there justification for treating some GOCs differently to others?
4. Should the RTI Act and Chapter 3 of the IP Act apply to the documents of contracted service providers where they are performing functions on behalf of government?
5. Should GOCs in Queensland be subject to the Queensland's IP Act, or should they continue to be bound by the Commonwealth Privacy Act?
6. Does the IP Act deal adequately with obligations for contracted service providers? Should privacy obligations in the IP Act be extended to sub-contractors?
7. Has anything changed since 2013 to suggest there is no longer support for one single point of access under the RTI Act for both personal and non-personal information?
8. Noting the 2013 response, should the requirement to provide a schedule of documents be maintained?
9. Should the threshold for third party consultations be changed so that consultation is required where disclosure of documents would be 'of substantial concern' to a party?
10. Although not raised in 2013, is the current right of review for a party who should have been but was not consulted about an application of any value?
11. Are the exempt information categories satisfactory and appropriate? Are further categories of exemption needed? Should there be fewer exemptions?
12. 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?
13. 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.
14. 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?
15. Are there benefits in departmental disclosure logs having information about who has applied for information, and whether they have applied on behalf of another entity?
16. Have the 2012 disclosure log changes resulted in departments publishing more useful information?
17. Should the disclosure log requirements that apply to departments and Ministers be extended to agencies such as local councils and universities?
18. Is the requirement for information to be published on a disclosure log 'as soon as practicable' after it is accessed a reasonable one?

⁸ Please see text for further explanation of questions

19. Do agency publication schemes still provide useful information? Or are there better ways for agencies to make information available?
20. Should internal review remain optional? Should the OIC be able to require an agency to conduct an internal review after it receives an application for external review?
21. Should applicants have a right to appeal directly to QCAT? If so, should this be restricted to an appeal on a question of law, or should it extend to a full merits review?
22. Should the OIC have additional powers to obtain documents for the purposes of its performance monitoring, auditing and reporting functions?
23. Is the information provided in the Right to Information and Privacy Annual Report useful? Should some of the requirements be removed? Should other information be included? What information is it important to have available?
24. What would be the advantages and disadvantages of aligning the IPPs and/or the NPPs with the APPs, or adopting the APPs in Queensland?
25. Should the definition of 'personal information' in the IP Act be the same as the definition in the Commonwealth Act?
26. Does the IP Act inappropriately restrict the sharing of information? If so, in what ways? Do the exceptions need to be modified? Would adopting a 'use' model within government be beneficial? Are other exceptions required where information is disclosed?
27. Does section 33 create concerns for agencies seeking to transfer personal information, particularly through their use of technology? Are the exceptions in section 33 adequate? Should section 33 refer to the disclosure, rather than the transfer, of information outside Australia?
28. Should the IP Act provide more flexibility about the timeframe for complaints to the OIC to be lodged? How should this be approached?
29. Should there be a time limit on when privacy complaints can be referred to QCAT?
30. Are additional powers necessary for the Information Commissioner to investigate matters potentially subject to a compliance notice under the IP Act?
31. Should the definition of 'generally available publication' be clarified? Is the Commonwealth provision a useful model?
32. Should IPP 4 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?
33. Should the words 'ask for' be replaced with 'collect' for the purposes of IPPs 2 and 3?
34. Are there other ways in which the RTI Act or the IP Act should be amended?

Issues

The objects of the Acts

Responses in 2013 generally supported the objects of the RTI Act and IP Act, and indicated satisfaction with how they were being met.

As noted in the 2013 Discussion Paper, the primary object of the RTI Act, and the access and amendment provisions in the IP Act in Chapter 3, is to:

Give a right of access (and amendment) 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 (or allow the amendment).⁹

The RTI Act's objects are to be realised by adopting a 'push model' of information release, requiring agencies to proactively push information out to the community, with the goal of making formal applications a last resort. Providing administrative access to documents¹⁰ whenever possible is another important part of the push model; as are publication schemes and disclosure logs.

The Office of the Information Commissioner (OIC) monitors and reports on how agencies comply with their obligations under the RTI Act, including in relation to the 'push model'. Its annual report for 2014-15 suggests that agencies are complying well with these requirements, although there is room for improvement,¹¹ and lists a number of resources it has developed to assist agencies in this task, including:

- a checklist to assist agencies in implementing appropriate administrative access schemes;
- an online resource highlighting OIC tools and resources for ensuring agency publication schemes are well managed; and
- a guideline explaining how senior officers can review and measure their agency's progress in implementing right to information and information privacy.

In relation to privacy, **the IP Act's primary object** is to provide for *the fair collection and handling in the public sector environment of personal information*.¹²

⁹ Section 3 RTI Act and section 3, IP Act. As noted below, Chapter 3 of the IP Act provides a right of access to personal information. Where relevant, references to the RTI Act in this consultation paper include references to Chapter 3 of the IP Act.

¹⁰ The word 'document' is not defined in the RTI Act. However, under schedule 1 of the *Acts Interpretation Act 1954* (Qld), it includes any paper or other material on which there is writing, or on which there are marks, figures, symbols or perforations having a meaning for a person qualified to interpret them; and any disc, tape or other article, or any material from which sounds, images, writings or messages are capable of being produced or reproduced (with or without the aid of another article or device).

¹¹ The 2014-15 annual report states that, "These audits found that overall, all agencies provided clear pathways to access information, either administratively through publication of information on the website, or by providing information about the legislative access application processes. Although progress was made, the audits found room for improvement. Publication schemes and disclosure logs could be made more effective by including more information. Agency websites could also be better used to promote administrative access to information, so that formal applications are made only as a last resort".

¹² *Information Privacy Act 2009* (Qld) s 3(1)(a).

The IP Act provides for the collection, storage, use, disclosure and transfer of 'personal information', and allows for privacy complaints - a complaint by an individual about an act or practice of an entity in relation to the individual's personal information that is a breach of the entity's obligation to comply with the privacy principles.¹³ The OIC's 2014-15 Annual Report shows it received 52 privacy complaints under the IP Act in that year.

- 1. Are the objects of the RTI Act being met? Is the push model working? Are there ways in which the objects could be better met?**
- 2. Is the privacy object of the IP Act being met? Is personal information in the public sector environment dealt with fairly? Are there ways that this object could be better met?**

The ambit of the Acts

RTI Act – current ambit

If the RTI Act *does not apply* to an entity, a person cannot apply to that entity for information. The entity does not have to deal with applications or consider whether documents should be released. Part 1 of schedule 2 of the RTI Act sets out the entities to which the RTI Act does not apply (for example, the Governor or a school's parents and citizens association). Part 2 of schedule 2 of the RTI Act provides some entities to which the RTI Act does not apply in relation to a particular function.

Note: if the RTI Act applies to an entity, so it is within the RTI Act's 'scope', the entity's documents may still be exempt, so that access to them may be refused. Access to the entity's documents may also be refused if their disclosure would be contrary to the public interest. Whether exemptions should apply, and whether the public interest balancing test should be changed, is discussed further below.

The object of the RTI Act is to provide a right of access to documents in the possession or under the control of 'the government'.¹⁴ As noted in the 2013 Discussion Paper, the definition in section 14 makes clear that the RTI Act applies to departments, local councils, and statutory bodies. However, which entities are caught by the RTI Act is not always clear as a matter of law, and jurisdictions continue to debate how far the legislation should extend. The RTI Act contains a mechanism by which certain additional bodies may be declared by regulation to be entities subject to the RTI Act,¹⁵ but there has been no declaration to date.

RTI Act – Government-Owned Corporations (GOCs)

In 2013 some supported extending the way the RTI Act applies to GOCs; whilst others suggested that GOCs may be compromised by having to comply with requirements which do not apply to other commercial entities.

The Queensland Government owns and has established a number of commercial businesses dealing with energy, water, rail and ports. They were established because these services were critical to the economy, they provided critical infrastructure to the state, and because the

¹³ *Information Privacy Act 2009* (Qld) s 164.

¹⁴ *Right to Information Act 2009* (Qld) s 3.

¹⁵ *Right to Information Act 2009* (Qld) s 16(1)(c).

marketplace did not support the private establishment of these businesses.¹⁶ Over the years, the Queensland Government has corporatised these commercial businesses to enable them to operate efficiently.

All GOCs are bound by a regulatory framework that includes the *Queensland Government Owned Corporations Act 1993*, the *Commonwealth Corporations Act 2001* and the Code of practice for government-owned corporations' financial arrangements and other guidance documents.¹⁷

Under part 2 of schedule 2 of the RTI Act, some GOCs (for example Ergon Energy) are excluded from the operation of the RTI Act and the IP Act for all their functions, except so far as they relate to community service obligations.¹⁸ This may be because they operate in competitive markets. Others (for example, Gladstone Ports Corporation) are not excluded from the operation of the Acts at all, so there is no limit on information that can be applied for.

Additionally, two statutory bodies with commercial operations (Queensland Rail and Queensland Bulk Water Supply Authority, trading as Seqwater) are subject to the RTI Act and the privacy principles of the IP Act. Queensland Treasury Corporation has commercial operations and is subject to the RTI Act (except in relation to its borrowing, liability and asset management functions) and the IP Act.

The Supreme Court decided in 2011 that City North Infrastructure (CNI), a proprietary limited company registered under the *Corporations Act 2001* (Cth) and established by the state government to help deliver infrastructure projects, was *not* a public authority for the purposes of the RTI Act because it was not established by government under an Act of the Queensland Parliament and therefore not subject to the RTI Act.¹⁹

It could be argued that compliance with the RTI Act places an additional burden on the operations of GOCs, statutory bodies with commercial interests and similar entities, negatively affecting their ability to generate commercial returns.

3. Should the way the RTI Act and Chapter 3 of the IP Act applies to GOCs, statutory bodies with commercial interests and similar entities be changed? If so, in what way? Is there justification for treating some GOCs differently to others?

RTI Act – contracted service providers

Responses from some non-government organisations in 2013 expressed reservations about being subject to the RTI Act. The discussion in the 2013 paper did not mention the option under section 6C of the Commonwealth FOI Act discussed below.

¹⁶ The State of Queensland (Queensland Treasury), *Code of practice for government-owned corporations' financial arrangements* (2009) < <https://www.treasury.qld.gov.au/economy/government-commercial-businesses/index.php>>.

¹⁷ The State of Queensland (Queensland Treasury), *Code of practice for government-owned corporations' financial arrangements* (2009) < <https://www.treasury.qld.gov.au/economy/government-commercial-businesses/index.php>>.

¹⁸ *Right to Information Act 2009* (Qld) sch 2, pt 2, item 14. Section 112 of the *Government Owned Corporations Act 1993* (Qld) defines community service obligations (CSOs). A GOC's CSOs are obligations which are not in its commercial interests to perform and do not arise because of the corporatisation principles. Examples of CSOs are the requirement for electricity authorities to provide services on a uniform pricing basis across the States, and discounted fares provided by Queensland Rail to students and pensioners.

¹⁹ *Davis v City North Infrastructure Pty Ltd* [2011] QSC 285. As all operations have ceased, it is intended that CNI will be deregistered.

Government regularly contracts service providers in areas such as health, housing and community care. As noted in the 2013 Discussion Paper, this trend to contract non-government bodies to provide services to the public on behalf of government may mean a degree of accountability is lost because there is no statutory right of access to documents held by service providers.

If non-government bodies became 'agencies' under the RTI Act, they would be required to process applications, and be subject to other requirements such as those for publication schemes and disclosure logs. As noted in the 2013 Discussion Paper, this may impose an unreasonable cost and administrative burden on those non-government bodies.

An alternative option could be to adopt the approach in section 6C of the Commonwealth FOI Act where if a freedom of information application is made to an agency for documents held by the contracted service provider, the service provider is required to provide the documents to the relevant government agency, which is responsible for processing the application. This allows access to documents without unduly burdening the contracted service provider.

4. Should the RTI Act and Chapter 3 of the IP Act apply to the documents of contracted service providers where they are performing functions on behalf of government?
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IP Act – GOCs

Responses in 2013 generally supported leaving GOCs subject to the Australian Privacy Principles rather than the Information Privacy Principles.

The Information Privacy Principles (IPPs) under the IP Act do not apply to GOCs and their subsidiaries.²⁰ GOCs are subject to the Australian Privacy Principles (APPs) in the Commonwealth *Privacy Act 1988* (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.²¹ The 2013 Discussion Paper also noted that although the Commonwealth Privacy Act allows a State or Territory to request that a particular organisation be excluded from the Act's coverage, no state or territory organisations have been excluded from the Commonwealth Privacy Act.²²

Benefits in requesting that GOCs be excluded from the Commonwealth Privacy Act (and consequentially subject to the IP Act) include that the GOCs would then be subject to only one regulatory regime in this area and it may be easier for those interacting with GOCs to have their rights provided for under state legislation.

Alternatively, it may be more appropriate for GOCs to remain subject to the APPs, which may provide a higher level of privacy protection to individuals than the IPPs in the IP Act. Providing that state and territory entities which are incorporated companies, societies or associations are subject to the Commonwealth Privacy Act and APPs may avoid inconsistencies and gaps in coverage, particularly as not all states have privacy legislation.

²⁰ *Information Privacy Act 2009* (Qld) s 19, sch 2, pt 1.

²¹ *Privacy Act 1988* (Cth) s 6.

²² *Privacy Act 1988* (Cth) s 6C. Section 6C(1) defines organisation to include a body corporate that is **not**, amongst other things, a State or Territory authority. Section 6C(3)(c) defines State or Territory authority as a body (whether incorporated or not), established or appointed for a public purpose by or under a law of a State or Territory, **other than** an incorporated company, society or association. GOCs are incorporated companies established for a public purpose and therefore **not** a State or Territory authority.

5. Should GOCs in Queensland be subject to the Queensland's IP Act, or should they continue to be bound by the Commonwealth Privacy Act?

IP Act – contracted service providers

This issue was not raised in the 2013 Discussion Paper.

Unlike the RTI Act, privacy obligations under the IP Act apply to contracted service providers. Section 35 of the IP Act provides that agencies must take all reasonable steps to ensure that a contracted service provider is required to comply with the following privacy principles:

- IPPs - if the agency is not a health agency;
- National Privacy Principles - if the agency is a health agency; and
- transfer of personal information.

If the agency does not take steps to bind a contracted service provider and there is a breach of a privacy principle, the agency is itself liable for the breach.²³

The Queensland Government Service Agreement - Standard Terms for Social Services provides an example of how privacy has been addressed in a service arrangement. It sets out the obligations of contracted agencies, including in relation to the use, disclosure and transfer of personal information. It also includes an obligation to ensure subcontractors comply with these obligations.

However, the IP Act itself does not provide for subcontractors to be subject to the IP Act's provisions. An OIC Guideline recommends agencies consider either prohibiting the use of a subcontractor or requiring any subcontractor to comply with the privacy principles.²⁴

6. Does the IP Act deal adequately with obligations for contracted service providers? Should privacy obligations in the IP Act be extended to sub-contractors?

Access to information

A right of access under both Acts

Responses in 2013 unanimously supported providing a single point of access to documents.

Consistent with the Solomon Report recommendations, the IP Act provides that access and amendment rights for personal information are provided in a separate Privacy Act rather than under the RTI Act. The rationale for this division was that having relatively straightforward personal applications processed under privacy legislation would 'free up' agency practitioners to deal with more complex applications under the new RTI Act.

²³ Information Privacy Act 2009 (Qld) s 37.

²⁴ Office of the Information Commissioner, *Part Two: General Guidance on privacy considerations when entering into a service arrangement* <<https://www.oic.qld.gov.au/guidelines/for-government/guidelines-privacy-principles/contracted-service-providers/overview-of-agency-privacy-obligations-when-entering-into-contracts-and-other-agreements/part-two>>.

However, the RTI Act and the IP Act each 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. This means legislative duplication, complicated reasons for decisions because of cross referencing and possible delays in processing if applications are made under the wrong Act.

Amending the legislation to provide a single right of access under the RTI Act would not affect the right to amend personal information, or the fact that fees are not payable if applicants only seek their personal information.

7. Has anything changed since 2013 to suggest there is no longer support for one single point of access under the RTI Act for both personal and non-personal information?

Schedule of relevant documents

Most responses in 2013 suggested the requirement to provide applicants with a written schedule of the classes of documents covered by the application was not very useful, although there was some support for maintaining it.

The reason for the obligation on agencies to provide a written schedule is so that applicants can advise which documents they wish (or do not wish) to seek access to. Producing a meaningful schedule can be time consuming for agencies. Anecdotally agencies report the scope of applications is not reduced by the schedule but rather through direct consultation with applicants.

8. Noting the 2013 response, should the requirement to provide a schedule of documents be maintained?

Consulting with others about applications

Responses in 2013 were almost all in favour of reverting to the higher threshold under the FOI Act requiring consultation with third parties only where disclosure could reasonably be expected to be of 'substantial concern to a third party'. Responses suggested the current requirements - 'reasonably to be expected to be of concern' are administratively burdensome, create delays and do not lead to better decisions.

The current RTI Act and IP Act lower 'threshold' for consultation was not a recommendation of the Solomon Report; and has resulted in a significant increase in the number of third party consultations (including with other agencies). This is more likely to result in relevant views being canvassed, but impacts on the decision-making agency, the agency being consulted, consulted parties and the OIC.

Additionally, and although not raised in 2013, the RTI Act provides a third party with a right of review in relation to a decision to disclose a document, if an agency or Minister should have taken, but has not taken, steps to obtain a third party's views (see the definition of 'reviewable decision' in schedule 6 of the RTI Act). This raises two issues. Firstly, the lower 'threshold' for consultation under the RTI Act means that potentially more people have a right to review on the basis that they should have been, but were not consulted. 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.

In 2013, some submissions indicated that disclosure log provisions also result in a significantly higher number of third parties objecting to the disclosure of routine information, because if it is released, it may be published on a disclosure log.

- 9. Should the threshold for third party consultations be changed so that consultation is required where disclosure of documents would be 'of substantial concern' to a party?**
- 10. Although not raised in 2013, is the current right of review for a party who should have been but was not consulted about an application of any value?**

Exempt information

Responses in 2013 were very varied on the question of whether there should be further exemptions in relation to particular aspects of agencies' work. Some suggested additional exemptions while others considered there should be no expansion of the exemptions, and some exemptions should be repealed.

Although the RTI Act contains a range of exclusions and a public interest balancing test which agencies may consider in deciding whether information should be released, questions are sometimes raised about whether, in addition to existing exemptions and exclusions, specific types of information should have additional protection.

All jurisdictions provide that some information does not have to be released, recognising the need to protect essential public and private interests. In general, they protect similar kinds of material (for example, all Australian jurisdictions provide exemptions for Cabinet material) but there are variations in the detail of provisions and there are also differences between jurisdictions.

In Queensland, there are 14 types of exempt information.²⁵ Some exemptions describe information based on the reason it was created (for example, information for briefing an incoming Minister). Others describe information based on an assessment of the harm which would occur if the information was disclosed (for example, its disclosure *would prejudice the investigation of a contravention ... of the law*).²⁶ The 'legal professional privilege' exemption requires a common law test to be applied.²⁷ Access to exempt information may be refused, but agencies and Ministers have a discretion to release it.²⁸

- 11. Are the exempt information categories satisfactory and appropriate? Are further categories of exemption needed? Should there be fewer exemptions?**

Public interest balancing test

As noted in the 2013 Discussion Paper, most freedom of information legislation uses the expression 'public interest' in some way or another - the 'public interest' generally refers to something common to all members of the community, or a substantial number of people, and for their benefit. For example, schedule 1, section 15 of the South Australian *Freedom of Information Act 1991* provides that certain documents affecting financial or property interests are exempt if their disclosure would be 'contrary to the public interest'. However, there is no

²⁵ *Right to Information Act 2009* (Qld) sch 3.

²⁶ *Right to Information Act 2009* (Qld) sch 3, s 10(1)(a).

²⁷ *Right to Information Act 2009* (Qld) sch 3, s 7.

²⁸ *Right to Information Act 2009* (Qld) s 48(3).

further guidance in the South Australian Act about how to apply that test. As with other provisions, case law and guidelines will provide that information.

In contrast, the RTI Act contains a detailed process setting out how decision makers should apply the 'public interest balancing test' (PIBT) if information is not exempt. Section 49 provides that decision makers must undertake the following steps:

- Step 1: identify factors that are *irrelevant* to deciding whether disclosure of information would be contrary to the public interest, including those listed in schedule 4, part 1 of the RTI Act;

An example of a part 1 factor is that *disclosure of the information could reasonably be expected to cause embarrassment to the Government or to cause a loss of confidence in the Government* (item 1).

- Step 2: identify factors favouring *disclosure* in the public interest (including those listed in schedule 4, part 2 of the RTI Act);

An example of a part 2 factor is that *disclosure could reasonably be expected to promote open discussion of public affairs and enhance the Government's accountability* (item 1).

- Step 3: identify factors favouring *nondisclosure* in the public interest (including those listed in schedule 4, parts 3 and 4 of the RTI Act).

Part 3 lists factors favouring nondisclosure in the public interest. An example of a part 3 factor is that *disclosure of the information could reasonably be expected to prejudice the protection of an individual's right to privacy* (item 3).

Part 4 lists factors favouring nondisclosure in the public interest because of public harm in disclosure. An example of a part 4 factor is that: *disclosure of the information could reasonably be expected to cause a public interest harm because disclosure of the information would disclose trade secrets of an agency or another person.*²⁹

Decision-makers must then:

- Step 4: disregard any irrelevant factors;
- Step 5: balance the factors favouring disclosure against the factors favouring nondisclosure;
- Step 6: decide whether, on balance, disclosure would be contrary to the public interest; and
- Step 7: allow access to the information, unless disclosure would be contrary to the public interest.

Both part 3 and part 4 of schedule 4 contain factors favouring nondisclosure. Part 3 lists *factors favouring non-disclosure in the public interest*; part 4 lists factors favouring *non-disclosure in the public interest because of the public interest harm in disclosure*. The part 4 factors are generally called 'harm factors' and are worded to closely resemble the exemptions in the repealed FOI Act. They were included to reflect Parliament's view that if the relevant information was disclosed, harm could reasonably be expected to flow from disclosure.

²⁹ *Right to Information Act 2009* (Qld) sch 4, part 4, s 7(1)(a).

The OIC explains:

For part 3 factors, it is necessary to consider whether disclosure will cause a public interest harm; for part 4 factors, the RTI Act expressly provides that disclosure will cause a public interest harm. However, the significance or extent of the harm that could reasonably be expected to flow from disclosure must be determined in the factual circumstances of the application.³⁰

There is a view that the factors in part 4 have 'greater weight' than the factors in part 3. This is partly because these factors reflect the language of the exemptions in the repealed FOI Act, and partly because, as noted by the OIC, the RTI Act makes clear that disclosure in these circumstances **will cause** a public harm.

Overlap between part 3 and part 4 factors

Some factors only appear in part 3 and some only appear in part 4. However, as the examples above indicate, there is a significant amount of overlap between the part 3 and part 4 factors. For example, a factor favouring non-disclosure in part 3, section 18, states:

Disclosure of the information could reasonably be expected to prejudice the conduct of investigations, audits or reviews by the ombudsman or auditor-general.

The harm factor in part 4, section 2 states:

Disclosure of the information could reasonably be expected to cause a public interest harm if disclosure could prejudice the conduct of
(a) an investigation by the ombudsman; or
(b) an audit by the auditor-general.

Another example is part 3, item 3 which states:

Disclosure of the information could reasonably be expected to prejudice the protection of an individual's right to privacy.

The harm factor in part 4, section 6 then states:

- (1) Disclosure of the information could reasonably be expected to cause a public interest harm if disclosure would disclose personal information of a person, whether living or dead.*
- (2) However, subsection (1) does not apply if what would be disclosed is only personal information of the person by whom, or on whose behalf, an application for access to a document containing the information is being made.*

Letters to applicants explaining decisions about access frequently refer to the factors and the process outlined above. An important feature of the PIBT is that the factors set out are not exhaustive. New factors, or variations of existing ones, may be considered at any time in making a decision about whether to disclose information.

Advantages and disadvantages of the PIBT

Whilst the PIBT makes clear what a decision maker has taken into account in considering whether to release documents, it is sometimes argued that the PIBT is complex and difficult to

³⁰ Office of the Information Commissioner, *Public Interest Balancing Test*
<<https://www.oic.qld.gov.au/guidelines/for-government/access-and-amendment/decision-making/public-interest-balancing-test>>.

apply and to explain to applicants - simplifying it would reduce the time taken in decision making and may improve the level of community understanding and acceptance of the process.

Should the PIBT be simplified?

In 2013, there was strong support for simplifying the PIBT. However, there was no preferred solution for how this should occur.

Should duplicated factors be removed?

One way to simplify the test might be to condense parts 3 and 4 into a single list of factors favouring non-disclosure, removing any duplication. This single list of factors would then be balanced against the factors favouring disclosure in part 2. However, it is not clear which ones should be removed.

If the part 4 factors are 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 are removed, so that the part 2 factors are weighed against the part 4 factors, this may make decision makers less likely to release information, making the RTI Act appear more restrictive.

12. 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?

Amending individual factors in the PIBT

Decision makers are not restricted to the factors listed in the schedule 4 (either in favour of disclosure or non-disclosure) – the factors listed in schedule 4 are not exhaustive and agencies may rely on factors not listed in the RTI Act. This means that changes to wording within the factors are likely to have minimal legal effect. However, there is an argument that factors could be amended to ensure greater consistency and coherency and to make the listed factors useful and relevant for decision-makers. For example:

- *Some factors have high thresholds which are hard to achieve:* as noted in the 2013 Discussion Paper, an example of a public interest factor favouring disclosure reads 'disclosure could reasonably be expected to **ensure** effective oversight of expenditure of public funds'. 'Ensuring effective oversight' is a very high threshold, even though it is qualified by the phrase 'reasonably expected'. This factor could instead be changed to 'reasonably be expected to promote effective oversight'.
- *Some factors have two parts:* some public interest factors require two requirements to be met in order to apply. Again, as noted in the 2013 Discussion Paper, a public interest factor favouring disclosure will apply where disclosure of the information in question could reasonably be expected to contribute to *positive and informed* debate. This means that if disclosure of the relevant information would not contribute to 'positive' as well as 'informed' debate, the public interest factor would not apply.

13. 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.

14. 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?

Disclosure logs

The 2013 discussion paper was published soon after the 2012 amendments referred to below were made. However some responses indicated that the 24 hour minimum period between an applicant accessing documents and the documents being published on the disclosure log that existed before the 2012 amendments was too short, as it did not, for example, allow media to publish stories before documents appeared on disclosure logs.

Disclosure logs contain documents and information published by agencies, generally on their websites, after applications for documents are made. They must comply with any relevant guidelines published by the Minister on the Minister's website.³¹

Prior to 2012 all agencies were subject to the same requirements. Amendments in 2012 required departments and Ministers (but not other agencies, such as statutory bodies and councils) to publish more information on their disclosure logs, including the date of each valid application received and details of the information for which the applicant has applied.³² The amendments also **mandate** inclusion of documents by departments and Ministers (unless the documents fall within the exclusions). Previously, agencies had a discretion as to what to include. Since the amendments, as soon as practicable after the applicant accesses documents that do not contain the applicant's personal information, departments and Ministers³³ must publish the following on a disclosure log:

- a copy of the document (subject to certain deletions including defamatory information or information which is prevented by law from publication);
- the applicant's name; and
- the name of any entity for whose benefit access to the document was sought (if relevant).

This information must be included 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.

Agencies have reported they are required to publish many more documents following the amendments, but they are frequently pages full of deletions.

Other jurisdictions: the Northern Territory, Australian Capital Territory, South Australia, Western Australia and Victoria do not have disclosure log requirements. Tasmania's disclosure log provisions are administrative (not legislated). Section 26 of the NSW *Government Information (Public Access) Act 2009* requires agencies to record the date an application was decided; a description of the information to which access was provided; and a statement as to whether the agency intends to make the information available to members of the public other than the applicant and, if so, how it can be accessed. There is no requirement for a copy of the document or the applicant's name to be published on the disclosure log. Information is only included on the disclosure log if an agency considers that it may be of interest to other members of the public.³⁴

³¹ *Right to Information Act 2009* (Qld) s 78B.

³² *Right to Information and Integrity (Openness and Transparency) Amendment Act 2012*.

³³ Ministers are not required to establish separate disclosure logs and documents released following applications to Ministers are generally included on departmental disclosure logs.

³⁴ *Government Information (Public Access) Act 2009* (NSW) s 25.

Section 11C of the Commonwealth FOI Act provides that agencies must publish information that has been released in response to each freedom of information request, subject to certain exceptions, for example, if the information contains personal information or if it would not be practical to publish it.

- 15. Are there benefits in departmental disclosure logs having information about who has applied for information, and whether they have applied on behalf of another entity?**
- 16. Have the 2012 disclosure log changes resulted in departments publishing more useful information?**
- 17. Should the disclosure log requirements that apply to departments and Ministers be extended to agencies such as local councils and universities?**
- 18. Is the requirement for information to be published on a disclosure log 'as soon as practicable' after it is accessed a reasonable one?**

Publication schemes

This issue was not raised in the 2013 Discussion Paper.

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 requires them to comply with any Ministerial Guidelines.³⁵ The current Ministerial Guidelines set out the classes of documents that must be published and provide general guidance about the schemes.³⁶

Publication schemes (and disclosure logs) 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), the government publication portal (www.publications.qld.gov.au); the Queensland Government website (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) or 'Environment, land and water' (www.qld.gov.au/environment).

- 19. Do agency publication schemes still provide useful information? Or are there better ways for agencies to make information available?**

Reviewing decisions

Optional internal review

In 2013, there was strong support for maintaining optional internal review.

If an applicant does not accept an agency's decision, in most cases, they may apply for 'internal review' of that decision.³⁷ An internal review is then conducted by an officer within the agency who is no less senior than the officer who made the initial decision.

Internal review was mandatory under the FOI Act, so an applicant could not apply for external review unless they had completed this step.

³⁵ *Right to Information Act 2009* (Qld) s 21.

³⁶ Ministerial Guidelines, *Operation of Publication Schemes and Disclosure Logs*.

³⁷ Not all decisions are reviewable and some decisions, such as those made by a Director-General, are not subject to internal review. See *Right to Information Act 2009* (Qld) s 81, sch 6 (definition of 'reviewable decision').

The Solomon Report recommended the change to optional internal review. As noted in the 2013 Discussion Paper, this was in part to provide some flexibility in the review process to take account of the individual circumstances of the application.

Many applicants who apply for internal review do not go on to seek external review, which suggests they may be satisfied with the internal review decision. Internal reviews also give agencies the chance to revisit the decision and reach the correct decision 'in house'. However, there may be cases (for example, complex legal disputes) where only external review provides a satisfactory outcome.

The OIC's annual reports demonstrate a clear and ongoing increase in its external review applications since 2009.

There is no power for the OIC to require an agency to conduct an internal review after it receives an application for external review. In some cases, for example if the agency has discovered further documents, it may be appropriate for this to happen, but in other cases, applicants may wish the Information Commissioner to deal with the review.

20. Should internal review remain optional? Should the OIC be able to require an agency to conduct an internal review after it receives an application for external review?
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Right of direct appeal to QCAT

In 2013 responses 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.

As noted in the 2013 Discussion 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 direct. Under section 119 of the RTI Act an appeal to QCAT is then possible on a question of law only.³⁸ QCAT does not, however, conduct a merits review of the decision. (A merits review is broader than an appeal on a question of law – it considers whether the correct or preferable decision has been made. In NSW, Queensland and the Commonwealth, the Information Commissioner has a merits review function).

In NSW, Victoria and the Commonwealth there is a right of direct appeal to a tribunal from an agency's decision.³⁹ In these tribunals, a merits review can be conducted. In addition, as noted in the 2013 Discussion Paper, the Commonwealth Information Commissioner may decide not to review a decision under the Commonwealth FOI Act in certain circumstances and instead refer the matter to the Administrative Appeals Tribunal.⁴⁰

A right to apply to QCAT directly is unlikely to reduce the time taken for a review to be finalised in Queensland. There would also be a cost to this option for QCAT and, most likely, also for applicants.

³⁸ *Right to Information Act 2009* (Qld) s 118.

³⁹ *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).

⁴⁰ 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).

21. Should applicants have a right to appeal directly to QCAT? If so, should this be restricted to an appeal on a question of law, or should it extend to a full merits review?

The role of the OIC

Powers to require documents for monitoring and auditing functions

In 2013 some believed the OIC's existing powers were adequate; others believed that the OIC having additional powers would provide clarity to agencies concerned about disclosure.

When the OIC conducts external reviews, it has wide powers to obtain information from agencies. As noted in the 2013 Discussion Paper, this power extends to documents which are subject to legal professional privilege.⁴¹ These powers ensure the OIC can access documents which would otherwise be subject to legislative, common law or other obligations requiring agencies to keep documents confidential. In contrast, when the OIC is undertaking its other functions (such as monitoring, reporting, auditing or performance monitoring) there is no equivalent provision.

22. Should the OIC have additional powers to obtain documents for the purposes of its performance monitoring, auditing and reporting functions?

Annual Reporting Requirements

In 2013 a small number of responses stated that the requirements should remain as they are. Some Government agencies commented that completing the annual report was very resource-intensive, and questioned the value of some of the information being provided.

The Attorney-General's Right to Information and Privacy Annual Report is to include, for each agency subject to the Act, 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.⁴² As noted in the 2013 Discussion Paper, it is not clear how useful or interesting the current annual report information is to the community, though it will be of interest to the Information Commissioner and possibly other agencies.

Although jurisdictions are broadly similar in the information reported on, there are differences. For example, in NSW, agencies are required to report on the type of applicants – media, members of Parliament, not for profit organisations, personal. NSW does not require details of the number of documents released by agency, but does require agencies to report on whether applications were granted in full, in part or not at all.⁴³

23. Is the information provided in the Right to Information and Privacy Annual Report useful? Should some of the requirements be removed? Should other information be included? What information is it important to have available?

⁴¹ *Right to Information Act 2009* (Qld) s 100; *Information Privacy Act 2009* (Qld) s 113.

⁴² *Right to Information Regulation 2009* (Qld) s 8; *Information Privacy Regulation 2009* (Qld) s 6.

⁴³ *Government Information (Public Access) Regulation 2009* (NSW) sch 2.

Dealing with personal information

The privacy principles

Queensland's IP Act operates in a similar manner to other privacy legislation across Australia. It governs how Queensland Government agencies collect, store, use and disclose personal information; allows an individual to make a complaint about an agency's breach of the privacy principles; regulates the transfer of personal information outside Australia; and regulates how contractors to government handle personal information.

The Commonwealth and all States and Territories except Western Australia and South Australia have privacy legislation setting out privacy principles. Privacy principles in each Act set out how personal information is to be collected, stored, used and disclosed. However, as noted in the 2013 Discussion Paper, the content of privacy principles, and who they apply to, varies between federal, state and territory jurisdictions. While the legislation of each jurisdiction applies to its respective government agencies, the Commonwealth Privacy Act also applies to some businesses and not-for-profit organisations.⁴⁴

There are two sets of privacy principles under the IP Act. The NPPs in schedule 4 apply to Queensland Health and Hospital and Health Services. The IPPs in schedule 3 apply to all other Queensland agencies. This mix means that governments, and the private and community sectors, may find privacy to be a confusing and complex area of the law. As noted in 2013, organisations operating in more than one jurisdiction may be required to comply with multiple privacy regimes, placing a high compliance burden on these bodies. Consumers may be confused or unsure about who the appropriate privacy regulator is and who will deal with their complaints.

As noted in the 2013 Discussion Paper, in 2008, the Australian Law Reform Commission (ALRC) recommended, among other things:

- a single set of privacy principles to apply to all federal government agencies and the private sector;
- applying these principles to state and territory government through a co-operative scheme, so that 'the same principles and protections apply across Australia, no matter what kind of agency or organisation is handling the information';
- removing certain exemptions in the Commonwealth Privacy Act;
- improving privacy complaint handling processes; and
- a new requirement to notify individuals and the Privacy Commissioner when there is a real risk of serious harm occurring after a data breach.⁴⁵

Amendments to the Commonwealth Privacy Act commenced in March 2014, implementing more than half the recommendations in the 2008 ALRC Report, *For Your Information: Australian*

⁴⁴ The Australian Privacy Principles in schedule 1 of the Commonwealth Privacy Act apply to organisations with an annual turnover of more than \$3 million, and all health service providers regardless of turnover.

⁴⁵ Australian Law Reform Commission, *For Your Information: Australian Privacy Law and Practice*, Report No 108 (2008).

Privacy Law and Practice. As noted in the 2013 Discussion Paper, key changes made by the amendments include:

- applying new APPs to both the private sector and Commonwealth government agencies – replacing the National Privacy Principles that applied to private sector bodies and the Information Privacy Principles that applied to government agencies under the Commonwealth Privacy Act;
- including a privacy principle for direct marketing;
- providing stronger protections for consumers when companies disclose personal information overseas;
- extending privacy protections to unsolicited information;
- providing stronger and clearer rules about data quality and data protection;
- requiring organisations and companies to develop detailed, clear and easily accessible privacy policies;
- imposing stricter rules about sending personal information outside Australia; and
- applying a higher standard of protection to 'sensitive information' including health related information and biometric data.

The Australian Privacy Principles (APPs) in Queensland

In 2013, a number of submissions supported having a single set of privacy principles, based on the APPs applying in Queensland. This support was based on lessening the compliance burden, reducing complexity, and providing greater efficiency and simpler communication.

The ALRC also recommended a co-operative scheme applying the principles in the Commonwealth Privacy Act to state and territory jurisdictions.

The APPs, NPPs and the IPPs all deal with collection, storage, use and disclosure of personal information. While there are some similarities between them all, there are also significant differences. As noted in the 2013 Discussion Paper, differences between the APPs in the Commonwealth Privacy Act and Queensland's IPPs include:

- the APPs have a privacy principle addressing direct marketing;
- the APPs require that all entities under the Act have a privacy policy; and
- the APPs require 'sensitive information' (defined to include personal information about an individual's race or ethnic origin, political opinion, and health information) to be distinguished from other personal information, and given a higher level of protection.

Queensland could replace either the IPPs, the NPPs, or both, with principles which mirror the APPs. This would increase consistency between the Commonwealth *Privacy Act* and Queensland's IP Act. For Queensland health agencies in particular, there could ultimately be significant benefits if the APPs replaced the NPPs, including a reduced compliance burden for health agencies if Queensland's private and public hospitals were subject to the same principles as each other.

Aligning Queensland's privacy principles with the APPs would also benefit agencies who must comply with both sets of privacy principles as it would reduce complexity, achieve consistency across all levels of government and make it easier for service users to understand their rights. It would also mean that there would be consistency between Queensland agencies and Queensland's GOCs, which are currently subject to the Commonwealth Privacy Act.

24. What would be the advantages and disadvantages of aligning the IPPs and/or the NPPs with the APPs, or adopting the APPs in Queensland?

Defining 'personal information'

Submissions in 2013 supported the definition of 'personal information' in the IP Act being the same as the definition in the Commonwealth Act.

Section 12 of the IP Act defines 'personal information' 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.

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. 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.*

The Commonwealth definition therefore uses more modern terminology, and there may be benefits in having consistency between this definition and the definition in the IP Act.

25. Should the definition of 'personal information' in the IP Act be the same as the definition in the Commonwealth Act?

Sharing information

In 2008, the ALRC report noted that 'inconsistent, fragmented and multi-layered privacy laws' had impacted adversely on how information was shared between different government agencies at all level of government, particularly in relation to areas such as child protection and medical research.⁴⁶

Since the ALRC report was published however, there have been significant changes to laws governing information sharing. Many Queensland agencies have reviewed their confidentiality provisions, and their capacity to share information, and Queensland's IP Act was amended to enable personal information to be shared with a greater number of law enforcement agencies. An OIC Information Sheet states:

⁴⁶ Australian Law Reform Commission, *For Your Information: Australian Privacy Law and Practice*, Report No 108 (2008) vol 1, 487 [13.10].

The reality is that the privacy principles in the Information Privacy Act 2009 (IP Act) are about balance: allowing necessary information flow to enable the delivery of government services while protecting personal information from misuse or abuse.⁴⁷

‘Using’ and ‘disclosing’ personal information

In 2013, a number of submissions supported greater information sharing within government. Some stated the current framework is adequate, and others noted that reluctance to share information may be based on a misunderstanding of the IP Act.

Personal information may be required to ‘flow’ either between different agencies, or between different parts of a single agency. The IPPs accordingly contain separate principles regulating the ‘use’ and the ‘disclosure’ of information (IPP 10 and IPP 11 respectively).⁴⁸ Section 23 of the IP Act sets out what ‘use’ and ‘disclose’ mean in applying the privacy principles.⁴⁹ ‘Use’ includes, manipulating, searching or dealing with the information, taking it into account in making a decision and transferring a record from one part of an agency to another part with a different function. ‘Disclosure’ means giving information to a different entity and ceasing to have control over the information.

In many cases where information cannot be shared with another agency, the prohibition is contained in confidentiality provisions in other legislation, rather than the IP Act. In addition, the IP Act recognises that there are circumstances in which it is appropriate for information to be shared, or the obligations in the IP Act not to apply.

As noted in the 2013 Discussion Paper:

- IPP 11 allows information to be disclosed (from one agency to another) in circumstances that include where the individual has expressly or impliedly agreed to the disclosure; disclosure is necessary to lessen a threat to life, health, or safety; disclosure is authorised or required by law; or disclosure is necessary for law enforcement reasons;
- IPP 10 allows information to be used for a purpose other than the purpose for which it was collected where the individual has agreed to that use; its use is necessary to lessen or prevent a serious threat to life, health, safety or welfare; the other use is authorised or required under a law; the agency is satisfied that use is necessary for law enforcement purposes; the other purpose is directly related the first purpose; or the use is necessary for research in the public interest;
- The privacy principles do not apply to certain documents (for example, certain documents relating to covert activity);⁵⁰

⁴⁷ Office of the Information Commissioner, *Top Ten Privacy Myths – Busted!*

<<https://www.oic.qld.gov.au/guidelines/for-government/guidelines-privacy-principles/applying-the-privacy-principles/top-ten-privacy-myths-busted!>>.

⁴⁸ In contrast, the NPPs and the APPs deal with use and disclosure in a single privacy principle.

⁴⁹ Under section 23 of the IP Act, an entity (the **first entity**) **discloses** personal information to another entity (the **second entity**) if: the second entity does not know the personal information, and is not in a position to be able to find it out; the first entity gives the second entity the personal information, or places it in a position to be able to find it out; and the first entity ceases to have control over the second entity in relation to who will know the personal information in the future. An entity **uses** personal information if it: manipulates, searches or otherwise deals with the information; takes the information into account in the making of a decision; or transfers the information from a part of the entity having particular functions to a part of the entity having different functions.

⁵⁰ *Information Privacy Act 2009* (Qld) sch 1.

- The privacy principles do not apply to certain entities (for example, parents and citizens associations or the Legislative Assembly);⁵¹
- The Information Commissioner may give an approval that waives or modifies an agency's obligation to comply with the privacy principles;⁵² and
- Law enforcement agencies are not subject to some of the IPPs in some circumstances (for example, the Crime and Corruption Commission is not subject to some IPPs for the performance of its activities related to law enforcement and its intelligence functions).⁵³

Although members of the public expect the Government to respect their personal information, there are times when they also expect, or prefer, that their information is shared between agencies rather than have to repeat the information to a number of agencies. Partly in response to this concern, the Queensland Government is trialling a new service whereby people can update their address across multiple Queensland Government Services by completing their details once online. Services included in this initial pilot include driver and marine licences, Seniors Cards and the Justice of the Peace and Commissioner for Declarations Register.

The 2013 Discussion Paper also noted that despite these exceptions, concerns are sometimes raised that the IP Act unreasonably prevents the sharing of information, particularly across government.

One possible approach is to regard the sharing of personal information between government agencies (or at least departments) as a 'use' of information rather than a 'disclosure'. This would assist with business between agencies, provide greater certainty in times of change and assist in delivering services.

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. This approach maintains a 'purpose-related' focus, still restricting uses to the original purpose and safeguarding information from use for totally unrelated purposes, which would uphold the purpose of these particular protections; to prevent the unauthorised use of information in particular, in ways and for purposes which the individual would not expect.

26. Does the IP Act inappropriately restrict the sharing of information? If so, in what ways? Do the exceptions need to be modified? Would adopting a 'use' model within government be beneficial? Are other exceptions required where information is disclosed?

Transferring personal information outside Australia

While submissions in 2013 acknowledged the importance of protecting personal information, a number of submission argued that the restrictions in section 33 were too onerous, particularly where the transfer of information was 'low risk'.

State and local government now routinely use technology to provide better services and to provide efficiencies.⁵⁴ Camera surveillance, through closed-circuit television (CCTV), use of

⁵¹ *Information Privacy Act 2009* (Qld) sch 2, pt 1.

⁵² *Information Privacy Act 2009* (Qld) s 157.

⁵³ *Information Privacy Act 2009* (Qld) s 29.

⁵⁴ The 2014-15 OIC Annual Report indicated that the use of surveillance technology, cloud computing services and information sharing between agencies were significant trends in that year.

mobile phone and facial recognition technology, use of body worn cameras, drones, tablets and smartphones is becoming more prevalent, and cloud computing solutions are increasingly being adopted.⁵⁵ Further, Government regularly engages with the community via Facebook, Twitter and other social media. Messages may be relayed to overseas locations in the course of using such technology, resulting in personal information being transferred outside Australia.

However, because the privacy principles contained in the IP Act only apply to Queensland state and local government agencies, the protections in the IP Act will not apply when personal information is transferred outside the State. The jurisdiction which receives the information may have its own privacy protections, but there is a risk that personal information of Queenslanders will no longer be protected.

Section 33 of the IP Act restricts the circumstances in which agencies may transfer personal information outside of Australia. Exceptions include where the individual agrees to the transfer, the transfer is authorised or required by law or the agency is satisfied on reasonable grounds that the transfer is necessary to lessen or prevent a serious threat to an individual's life, health, safety or welfare.

As noted in the 2013 Discussion Paper, the OIC's view is that if personal information is merely routed through another country and immediately directed back to Australia, it has not been transferred overseas.⁵⁶ However, if personal information is stored on overseas servers, section 33 of the IP Act will apply.

27. Does section 33 create concerns for agencies seeking to transfer personal information, particularly through their use of technology? Are the exceptions in section 33 adequate? Should section 33 refer to the disclosure, rather than the transfer, of information outside Australia?

Privacy complaints – legislative timeframes

In 2013 there was strong support for greater flexibility in the IP Act's complaints timeframes.

As noted in the 2013 Discussion Paper, the effect of section 166(3) of the IP Act is that an individual must not make a complaint to the Privacy Commissioner (a deputy of the Information Commissioner with particular responsibility for privacy) 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 given other requirements. Secondly, an applicant may receive a response to a complaint quickly, but they cannot take their complaint to the Information Commissioner until the 45 business days have passed.

⁵⁵ The phrase 'cloud computing' is simply a shorthand term for moving functions from a computer and agency-owned server to an online environment, for example, employees accessing word processing programs through a webpage interface instead of from the programs menu on their computer. See Office of the Information Commissioner, *Cloud computing and the privacy principles* <<https://www.oic.qld.gov.au/guidelines/for-government/guidelines-privacy-principles/applying-the-privacy-principles/cloud-computing-and-the-privacy-principles>>.

⁵⁶ Office of the Information Commissioner, *Sending personal information out of Australia* <<https://www.oic.qld.gov.au/guidelines/for-government/guidelines-privacy-principles/transferring-personal-information-out-of-australia/sending-personal-information-out-of-australia>>.

There may be merit in the OIC having a discretion to accept privacy complaints, without a time period being specified.

28. Should the IP Act provide more flexibility about the timeframe for complaints to the OIC to be lodged? How should this be approached?

Privacy complaints - timeframes for applications to QCAT

This question was not asked in 2013.

If a privacy complaint is made to the OIC and either the OIC does not believe the complaint can be resolved by mediation, or mediation is attempted but is not successful, the OIC must refer the complaint to QCAT if asked by the complainant to do so.⁵⁷

After QCAT hears the complaint, it may make an order that the complaint has been substantiated. It may also order that a respondent:

- not repeat or continue a particular act or practice;
- compensate the complainant for loss or damage;
- apologise to the complainant.

In addition, QCAT can order that the complainant is entitled to compensation of up to \$100,000.⁵⁸

There is no provision which limits the time within which an application may be made to QCAT if the OIC is unable to mediate a privacy complaint.

29. Should there be a time limit on when privacy complaints can be referred to QCAT?

Powers of the Information Commissioner under the Information Privacy Act

In 2013 most submissions supported the Information Commissioner having additional powers in this regard.

As noted in the 2013 Discussion Paper, 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.⁵⁹ The Information Commissioner may also require a person to provide documents or to attend and give evidence in relation to privacy complaints or compliance notices.

The Information Commissioner's investigative powers for its external review functions permit the Information Commissioner to obtain access to all documents of an agency or Minister, require agencies or Ministers to conduct searches, examine witnesses, and require information, documents and attendance.⁶⁰ However, the same kinds of powers are not available for the

⁵⁷ *Information Privacy Act 2009* (Qld) ss 174, 176.

⁵⁸ *Information Privacy Act 2009* (Qld) s 178.

⁵⁹ *Information Privacy Act 2009* (Qld) s 158.

⁶⁰ *Information Privacy Act* (Qld) ss 113, 115, 116, 117.

performance of privacy related functions – for example to investigate a compliance issue under the IP Act.

30. Are additional powers necessary for the Information Commissioner to investigate matters potentially subject to a compliance notice under the IP Act?

Generally available publications

There was strong support in 2013 for amendment to clarify ‘generally available publication’.

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.⁶¹

As noted in the 2013 Discussion Paper, 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.

31. Should the definition of ‘generally available publication’ be clarified? Is the Commonwealth provision a useful model?

IPP 4 - element of reasonableness

In 2013 there was strong support for amending IPP 4 to require agencies to only take ‘reasonable steps’ to protect information.

Under IPP 4, an agency has to *ensure* that information in a document is protected against loss and misuse. This is a strict requirement which contrasts with 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.

32. Should IPP 4 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?

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

In 2013, there was strong support for having IPP 2 and IPP 3 apply when information is ‘collected’.

IPP 2 and IPP 3 deal with the collection of personal information, but they only apply ‘if the agency *asks ... for* the personal information’.⁶² This may suggest that an active request by the agency is required. If so, the principles may not apply, where personal information is collected without an active request - for example, where CCTV is used, or forms are completed on

⁶¹ *Information Privacy Act 2009* (Qld) sch 1, s 7.

⁶² *Information Privacy Act 2009* (Qld) sch 3, IPP 2(2), IPP 3(2).

agency websites. Other jurisdictions (for example, the Commonwealth, Victoria and NSW) and NPP 1, refer to agencies 'collecting personal information'.⁶³

33. Should the words 'ask for' be replaced with 'collect' for the purposes of IPPs 2 and 3?

Other issues about the RTI Act and IP Act

The RTI Act and the IP Act involve balancing a number of competing interests. There will always be debate about the best ways to deal with these interests.

34. Are there other ways in which the RTI Act or the IP Act should be amended?

⁶³ See for example *Privacy Act 1988* (Cth) sch 1, Privacy Principle 3; *Information Privacy Act 2000* (Vic) sch 1, Privacy Principle 1.3; *Privacy and Personal Information Protection Act 1998* (NSW) ss 10, 11.

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*.