SUBMISSIONS TO REVIEW OF THE *RIGHT TO INFORMATION ACT 2009*
QUEENSLAND POLICE SERVICE

Part 1 - Objects of the Act - 'Push Model' strategies

1.1 Is the Act's primary object still relevant? If not, why not?

1.2 Is the 'push model' appropriate and effective? If not, why not?

The primary objective of the Act remains relevant. The Queensland Police Service continues to support the "push model".

Part 2 - Interaction between the RTI and IP Acts

2.1 Should the right of access for both personal and non-personal information be changed to the RTI Act as a single entry point?

The current system of multiple access points under the *Right to Information Act 2009* and the *IPA* creates difficulties for both applicants and agencies. Where an application is made, agencies are required to make an assessment on the face of the application whether responsive documents would all contain personal information of the applicant (in which case, the application may be dealt with under Chapter 3 of the *IPA*) or whether the documents would include non-personal documents (in which case, the application must be dealt with under the *Right to Information Act 2009*). The RTI and IP Acts set a timeframe of 15 business days in which to consult with the applicant concerning which Act under which the Application is to be dealt. There is a danger that the relevant sections may be read as limiting the consultation period to 15 business days when, in fact, this is not the case. An applicant may, at any time before the decision is made, elect to proceed under either RTI or IPA.

The requirement of agencies and applicants to make an election upfront before the actual documents are located is an administrative step which is critical to determining not only which path an application may proceed but also whether the application in its current form is valid. In practice, however, it can have profound implications for both parties. Where documents located in response to an Information Privacy Act application include non-personal documents, the right of access under section 40 of the IPA would not extend to these documents, notwithstanding the fact that the documents are relevant to the terms of the application and may be the very documents being sought by the applicant. No right of review will exist in respect of a decision to refuse access to such documents – they are simply beyond the right of access under section 40. It is open to an agency to negotiate a change of the application from an IP application to an RTI application. However, the requirements of validity for RTI applications include the payment of an application fee. IP applications do not require a fee to be paid. An application commenced under IPA will be valid without the payment

of the application fee. Where the application is changed to an RTI application, the formerly valid application will no longer be valid because of the non-payment of the application. When the application fee has been paid and documents located in response to an RTI application are all personal documents, an applicant will have paid an application fee to obtain access to documents to which he or she was entitled to access at no charge. There is provision under the RTI Act for the application fee to be refunded where a former RTI application is dealt with under the IPA on the election of the applicant.

A further difficulty arises with respect to the meaning of "document" under the IPA. The discussion paper notes the difficulty concerning the interpretation of "to the extent" within section 40 of the IPA. The paper notes that the section is susceptible to an interpretation that only those parts of a document which contain the personal information of the applicant are subject to the right of access. However, there is a further difficulty. "Document" may be interpreted under the IPA as meaning either a complete document such as a report or a single page within a report. The latter interpretation is consistent with the definition of "document" within Schedule 1 of the *Acts Interpretation Act 1954*. However, from the perspective of the IPA, it creates significant difficulties because the right of access will only extend to those pages which contain the personal information of the applicant. Unless the applicant's information appears on each page, only certain pages of a report, for example, would be subject to the right of access.

The QPS recommends that the current process be revised and a single point of entry for both personal and non-personal applications is under the RTI. The appropriate model is that used under the now repealed *Freedom of Information Act 1992*. The right of access will remain the same regardless of whether the Applicant is seeking access to personal or non-personal documents. However, only applications for access to non-personal documents will attract an application fee. This approach is consistent with that used in other jurisdictions.

Part 3 - Applications not limited to personal information

3.1 Should the processing period be suspended while the agency is consulting with the applicant about whether the application can be dealt with under the IP Act?

The relevant consultation provisions in section 34 of the RTI Act and section 54 of the IP Act proceed on the basis that the application is valid under the legislation under which it is made. That is, once the issue of non-compliance with an application requirement has been met, then the decision-maker may turn their attention to the issue of whether the application has been made under the correct Act. In practice, however, both issues will be conflated as the question of whether the application should be dealt with under the IPA or the RTI is integral to determining the relevant application requirements. No issue will arise with respect to the processing period until such time as the application is valid in

terms of the legislation under which it is purportedly made. At this point, however, the assessment, consultation and decision requirements under section 34 of the RTI Act and section 54 of the IPA potentially create difficulties. Both sections provide a period of fifteen business days for an assessment to be made by the agency as to whether an application purportedly made under than one act should be dealt with under the other Act. The sections then require that the agency undertake a "reasonable consultation" with the applicant. The consultation period is not fixed; instead, the agency must give the applicant a reasonable time to respond. The question of reasonableness will depend on the circumstances. Where, for example, an applicant is interstate or overseas, a reasonable consultation may take several weeks. Coupled with the initial assessment period of 15 business days, it is feasible that the processing period, if not suspended during the consultation period, could expire and a deemed decision to refuse made.

The failure of both Acts to suspend the processing period whilst a consultation was being undertaken under section 34 of the RTI or section 54 of the IPA appears to either have been an oversight or proceeded on the erroneous assumption that the processing period would not commence because the application was not valid. There is, in this regard, similarity between the processes used for non-compliant applications and applications made under the wrong Act (e.g. sections 33 and 34 of the RTI). The critical difference between the two processes however, is that whilst the processing period has not commenced with non-compliant applications, it may have commenced with "wrong Act" applications.

As noted above in response to question 2.1, it is the recommendation of the Queensland Police Service that the access scheme be revised and that there be a single point of entry under the RTI. However, in the event that this recommendation is not accepted, it is recommended in the alternative that section 18 of the RTI and section 22 of the IPA be amended to allow the suspension of the processing period where a consultation is undertaken under section 34 of the RTI or section 54 of the IPA. It is further recommended that the period of the suspension include any review period arising under section 54(5)(b) and Schedule 5.

3.2 Should the requirement for an agency to again consider whether the application can be made under the IP Act be retained?

Where a consultation is undertaken under section 54(2) of the IPA, there are three outcomes:

(a) The applicant accepts that the Application should be dealt with under the RTI Act and pays the application fee;

(b) The applicant disputes that the Application should be dealt with under the RTI Act;
(c) The applicant does not respond.

No issue will arise with (a). In the case of (b) and (c), section 54(5)(a) defaults to the application be processed under the IPA. Whilst section 54(5)(b) refers to the agency "reconsidering" the issue of whether the application should be made under the RTI or IPA, it's legal effect is to require the decision-maker to make a decision (rather than merely "consider") on this issue and provide a written notice of decision to the Applicant. A decision under section 54(5)(b) is a reviewable decision under Schedule 5.

As noted above in response to question 2.1, it is the recommendation of the Queensland Police Service that the access scheme be revised and that there be a single point of entry under the Right to Information Act 2009. However, in the event that this recommendation is not accepted, it is recommended that section 54(5)(b) be retained but the section be redrafted to replace "consider" with "decide".

3.3 Should the timeframe for section 54(5)(b) be 10 business days instead of calendar days, to be consistent with the timeframes in the rest of the Act?

Yes.

Part 4 - Scope of the Acts

4. 1 Should the Act specify that agencies may refuse access on the basis that a document is not a document of an agency or a document of a Minister?

4.2 Should a decision that a document is not a 'document of the agency' or a 'document of a Minister' be a reviewable decision?

These issues turn on the question of whether a decision that a document is not a document of an agency is a decision that there is no right of access, or a decision to refuse access. In *Parnell and Prime Minister of Australia (No 2) [2011] AICmr 12* and *Parnell and Minister for Infrastructure and Transport* [2011] AICmr 3, the decisions to refuse access to documents relating to party political activities were treated as access refusal decisions under section 53A of the *Freedom of Information Act 1982* (Cth). There is no specific power in the Commonwealth FOI Act to refuse access to a document on the grounds that it is not a document of an agency. Such as decision is caught within the broad definition of "access refusal decision" under section 53A(a) which means simply a decision to refuse access to a document in accordance with a request. Whilst there is merit in adopting this approach under the RTI and IP Acts, the difficulty arises from the definition of "reviewable decision", in particular, subsection (e)

which defines “reviewable decision” as “a decision refusing access to a document under section 47 of the RTI Act”. Section 47 purports to set out exhaustively the grounds upon which access may be refused. As section 47 limits the power of a decision-maker to refuse access to a document, in the absence of another power within the RTI Act to refuse access, there is simply no power to refuse access to a document which is a not a document of an agency or a documents of a Minister. The issue is thus dealt with as a right of access issue, rather than a refusal of access issue. A decision that a document is not a document of an agency may be judicially reviewable but it is not, on the current drafting of the RTI and IP Acts, susceptible to merits review.

The Queensland Police Service recommends that either:

- Section 47 RTI be amended to include a decision to refuse access to a document because it is not a document of an agency or an official document of a Minister; or
- The definition of “reviewable decision” in the RTI and IP Acts be amended to expressly include a decision that a document is not a document of an agency or an official document of a Minister.

4.3 Should the timeframe for making a decision that a document or entity is outside the scope of the Act be extended?

There is no obvious reason why a decision under section 32 of the RTI Act or section 52 of the IPA must be made within ten business days, whilst a considered decision must be made within 25 business days. For the sake of consistency, it is recommended that the processing period for section 32 RTI and section 52 IPA decisions be increased to 25 business days.

However, there is a side issue with respect to section 32(1)(b)(i) of the RTI and section 52(1)(b)(i) IPA in relation to documents which fall outside the scope of the respective Acts. The RTI and IP Acts proceeds on the basis that documents are either subject to the Act or they are not. They does not cater for a situation where, in an application, some documents may be subject to the Act and some may not. This creates particular difficulties with multi-part applications in which some parts refer to out of scope documents and some refer to ‘in-scope’ documents. The effect of sections 32(1)(b)(i) RTI and IPA appears to be that an application may be refused as out of scope if even one of the documents sought is a document to which the Act does not apply under Schedule 2. A better approach may be to amend section 47 RTI to include a decision to refuse access to a document because it is not a document to which the Act applies. However, it is recognized that this will create difficulties in respect of section 67 IPA which effectively imports section 47 of the RTI Act into the IPA. If section 47 were amended to refer to documents outside the scope of the Act under Schedule 2, it would mean documents outside the scope of the RTI Act, rather than outside the scope of the IPA. In practice, this is unlikely to create serious

difficulties because Schedule 2 of the RTI Act and Schedule 2 of the IPA are identical; if a document is a documents to which the RTI Act does not apply, there is no right of access to the document under section 40 of the IPA.

This will enable the issue of out of scope documents to be addressed as part of the considered decision. Accordingly, the Queensland Police Service recommends:

- Sections 32(1)(b)(i) RTI and 52(1)(b)(i) of the IPAbe repealed; and
- Either:
    - Section 47 RTI be amended to include a decision to refuse access to a document because it is a document to which the Act does not apply; or
    - The definition of "reviewable decision" under the RTI and IPA be amended to include a decision that a document is not a document to which the (respective) Act applies. .

4.4 Should the way the RTI Act and Chapter 3 of the IP Act applies to GOCs be changed? If so, in what way?

Nil Submission

4.5 Should corporations established by the Queensland Government under the Corporations Act 2001 be subject to the RTI Act and Chapter 3 of the IP Act?

Nil Submission

4.6 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?

An important distinction should be drawn between entities which are subject to the RTI Act and Chapter 3 of the IP Act and documents which are subject to the Acts. Contracted service providers are not "agencies" within the meaning of the RTI and IP Acts and, prima facie, are not subject to the Act. However, documents in the physical possession of a contracted service provider may be subject to the Act if the documents are considered to be within the control of the contracting agency. "Control" or constructive possession refers to a situation where documents are not in the physical possession of an agency but the agency has a legal right of immediate possession. As a result, those documents in the possession of a contracted service provider to which the agency has a right of possession (whether arising under contract or otherwise) would be subject to the right of access on the basis that they are documents of the contracting agency. The extension of the right of access to contracted service

providers (rather than merely to documents in the possession of contracted service providers) would seem to go beyond the objectives of the Act because it would extend its operation to private sector entities. Further, the extension of the Acts to private sector entities which enter into contracts for service with government entities creates a further business risk for such entities which would they would need to factor into the tender process, thereby making the delivery of the contracted services less attractive and potentially more expensive.

The Queensland Police Service does not support the application of the RTI and Chapter 3 of the IP Acts to contracted service providers.

Part 5 - Publication schemes

5.1 Should agencies with websites be required to publish publication schemes on their website?

No. Existing requirements in the Ministerial Guidelines are sufficient and an amendment to the RTI Act requiring agencies to publish a publication scheme on their websites is not necessary.

5.2 Would agencies benefit from further guidance on publication schemes?

Yes.

5.3 Are there additional new ways that Government can make information available?

The Queensland Police Service uses a range of mechanisms to make information available to the public including social media, blogs, twitter and Facebook.

Part 6 - Applying for access or amendment under the Acts

6.1 Should the access application form be retained? Should it remain compulsory? If not, should the applicant have to specify their application is being made under legislation?

Unlike section 25(2) of the repealed FOI Act which required merely that an application be in writing, the RTI and IP Acts require that an application be in the approved form. There are a couple of issues here. Firstly, section 24(2)(a) of the RTI Act and section 43(2)(a) of the IPA require that the Application be “in” the approved form, rather than “on” the approved form. Secondly, where an application is not made on the approved form, the application may still be valid pursuant to section 49(1) of the *Acts Interpretation Act 1954* provided that it is made in a way which substantially complies with the form. It is uncertain, then,

that the RTI and IP Acts specifically provide that an application will not be valid unless it is made on the approved form. However, in the event that they do, it is recommended that the requirement of the form not be retained and the Acts merely require that an application be in writing.

6.2 Should the amendment form be retained? Should it remain compulsory?

The Acts should be amended to merely require that an application for amendment be in writing.

6.3 Should the list of qualified witnesses who may certify copies of identity documents be expanded? If so, who should be able to certify documents for the RTI and IP Acts?

Yes. The list of qualified witnesses should be consistent with the list of persons who are qualified to witness statutory declarations.

6.4 Should agents be required to provide evidence of identity?

Section 24(3)(b) of the RTI Act and 43(3)(b) of the IPA require that evidence of the identity of the agent be provided. The apparent object these sections is to reduce the risk of unauthorized access of personal information by requiring persons who purport to act on behalf of another prove not merely their entitlement to act, but also their identity. In the case of "institutional" agents such as solicitors, the risk of identity fraud is minimal. Further, the risk that such agents would deliberately attempt to access the personal information of another person without authority is negligible. With other agents, the risk may be greater. It is recommended that the requirement that agent identity be obtained be removed and that the section give decision-makers a discretion to ask for identification of agents.

6.5 Should agencies be able to refund application fees for additional reasons? If so, what are appropriate criteria for refund of the fee?

The Right to Information and Information Privacy Acts list a number of circumstances in which an application fee may be refunded. Specifically:

- Where an application to not dealt with within the processing period and a deemed decision is made;
- Where an application made under the RTI Act is, after consultation with the Applicant, dealt with under the IPA.

The general principle arising under the RTI Act is where a considered decision is made, the applicant is not entitled to a refund of the application fee. This position should be maintained. However, where an application is withdrawn prior to the

making of a considered decision, it is recommended that the application fee be refunded.

Applications by children

6.6 Are the Acts adequate for agencies to deal with applications on behalf of children?

Difficult issues arise with respect to the ability of third parties such as parents to make applications on behalf of children under sections 25 RTI and 45 IPA. The definition of parent under the Acts identify three categories; mother, father, and any other person exercising parental responsibility. These Acts do not distinguish between custodial and non-custodial parents and do not recognize that, in some cases, a mother or father may not have parental responsibility for the child. The Acts merely requirement the establishment of the biological relationship. Further, the definition of a child as being under 18 years of age would include children who have legal capacity to apply in their own right. In this case, the position of the parent is that of an agent of the child, rather than standing in place of the child. However, sections 25 and 45 do not distinguish between children because of their age; as long as a parent can establish the parent-child relationship, they are entitled to apply as parent. For a younger child however, (under 10 years), the absence of legal capacity may be assumed and the parent can stand in the child's place.

The approach of the RTI and IP Acts is to deal with the above issues at the point of decision, rather than application. The only requirement of standing to apply is that there be evidence of the relationship between the parent of the child. Sections 49 and 50 of the RTI Acts provide that access may be refused where disclosure would be contrary to the public interest or disclosure would not be in the child's best interests. However, the "best interest of the child" is a notoriously difficult concept. In Australia the meaning of the term 'best interests of the child' has been explored most comprehensively in the family law area. The Family Law Act lists the factors that the court must consider in determining the child's best interests, beginning with any wishes expressed by the child. The best interests principles state that any decision or action taken must consider the protection of the child from harm, the protection of the child's rights and the promotion of the child's development. Consideration must also be given to strengthening family relationships and giving the widest possible assistance to the family. In practice, determining whether disclosure of particular documents to a parent would or would not be in the best interests of the child can be extremely difficult.

It would be appropriate for the review to consider whether issues such as capacity and parental responsibility should be dealt with in terms of the standing of a parent to apply on behalf of the child, as matters to be taken into account as part of the processing of the application (e.g. consultation with a child who may

have capacity to apply in their own right) or as relevant factors for decision-making purposes.

Longer processing period

Section 18 of the RTI Act and 22 of the IPA define processing period as 25 business days from the date an application an application is received. In legal terms, a specified period of time can be extended in three ways:

(i) adding additional on the end and redefining the meaning of processing period to include that additional time (the extension method)
(ii) suspending the period whilst something happens (the suspension method);
(iii) a combination of (i) and (ii).

Under the RTI and IP Acts, only the suspension method is used. This is clear from the wording of sections 18-2 RTI and 22-2 IPA which state that the nominated events do not count as part of the processing period. The result that the legal processing period is never greater than 25 business days, notwithstanding the fact that the actual processing period may, in some cases, be considerably longer than this. Sections 18-2 of the RTI Act and 22-2 of the IPA sets out the categories of events which result in the processing period being suspended (the suspension events). Suspension events fall into two categories; specific time events and "consequence events". In the case of specific time events, the period of suspension is prescribed. With consequent events, the period of suspension will be variable, depending upon the time taken to satisfy the threshold requirements of an event. A consultation under section 37 of the RTI is a specific time event in that the period of suspension is prescribed as ten business days. Where an agency consults under this provision, the processing period is suspended for ten business days. Where a suspension event occurs, the legal processing period stops and remains suspended until the threshold requirements of the event are satisfied. For example, the issuing of a Charges Estimate Notice under section 36 suspends the processing period for the duration of the review period, defined as the period starting on the date of the first charges estimate notice given under section 36 RTI and ending on the day the applicant confirms the application or, if the applicant narrows the application, confirms the changed application.

6.7 Should a further specified period begin as soon as the agency or Minister asks for it, or should it begin after the end of the processing period?

Section 35 of the RTI Act provides for extensions to the processing periods. Pursuant to section 18-2 RTI, a request for an extension is a suspension event which has the effect of suspending the processing period for the specified time. As to when the further period begins, a distinction must be drawn between the legal processing period and the actual processing period. From a legal

perspective, the further specified period commences as soon as the agency or Minister asks for it and continues until the further period expires at which point the processing period revives and continues (unless further suspended) until it expires at business day 25. In actual terms, the processing period is suspended; as it is not possible to suspend real time, the further period is added to the end of the existing real time processing period to change the actual due date of the application.

6.*8 Should an agency be able to continue to process an application outside the processing period and further specified period until they hear that an application for review has been made?*

Because of the operation of sections 35 and 18-2 of RTI, provided that an applicant requests an extension of time prior to the end of the legal processing period, the application will never become deemed if the applicant does not respond to the request for an extension. This is because the legal processing period remains suspended under section 18-2 RTI until such time as the threshold requirements in section 35(3) have been satisfied. At that point the processing period will revive and continue for the balance of legal time remaining. A decision will not become deemed until such time as the legal processing period expires, regardless of the amount of actual time taken to process an application. Accordingly, if a request for a further period is made by an agency under section 35(1) and the applicant does not respond or apply for review, the agency can continue to process the application beyond the requested further period because the legal processing period is not revived.

On a related issue, the use of only the suspension method for extending the actual processing period is inherently problematic, particularly where there are multiple overlapping suspension events. In these circumstances, the suspension events operate concurrently, rather than cumulatively, with the effect that the actual processing period may become attenuated. For example, if a Charges Estimate Notice is issued, followed by a consultation under section 37 of the RTI Act, the suspension periods are not cumulative as the suspension periods for the CEN and the consultation run in parallel rather than end to end. If a response to the CEN is not received before the end of the consultation suspension period, this period is subsumed under the CEN suspension period and cannot be added to increase the actual processing period by ten business days.

It is recommended that:

- section 18 of the RTI Act and 22 of the IPA be amended to exclude the consultation under section 37 of the RTI Act and section 56 of the IPA;
- a new section be inserted into section 37 RTI and 56 IPA which modifies the legal processing period by extending it by ten business days in the event of a consultation. The effect will be to increase the legal processing

period from 25 to 35 business days. Where a suspension event under section 18 RTI or 22 IPA occurs, the suspension will operate on the 35 business day processing period, rather than the 25 business day processing period.

Charges estimate notices (CENs)

6.9 Is the current system of charges estimate notices beneficial for applicants? Should removing the charges estimate notice system be considered?

Yes, the current system is beneficial to clients and, no, its removal would not be supported.

6.10 Should applicants be limited to receiving two charges estimate notices?

The limitation to two CENs is an arbitrary restriction which appears to be primarily designed to short circuit negotiations by limiting the ability of an applicant to amend his or her application. From an agency's perspective, the limitation to two CENs has benefits because it reduces the need for negotiation and contributes to the efficient processing of applications.

6.11 Should applicants be able to challenge the amount of the charge and the way it was calculated? How should applicant's review rights in this area be dealt with?

From an applicant's perspective, there is merit in being able to challenge a charges estimate notice. To the extent that a charges estimate notice is an estimate of the likely cost of processing an application, it operates in a similar way to a quotation. If the CEN is accepted, the applicant is legally bound to pay the costs. However, the crucial difference between a quotation and a CEN is that there is only one supplier of the products so there is not the ability to go to another supplier if the "quote" is believed to be too high. However, the introduction of review rights for a CEN is likely to impact on the efficient processing of an application. Any such review would be interlocutory in nature and the processing period would have to be suspended whilst the review was being conducted.

From a consumer protection perspective, there is merit in the provision of review rights for CENs, particularly because of the dearth of suppliers. However, review rights would be administratively burdensome and reduce the efficiency of processing.

Schedule of relevant documents

6.12 Should the requirement to provide a schedule of documents be maintained?

Section 36(1)(b)(i) of the RTI Act requires that, before the end of the processing period, the agency give to the Applicant a schedule of documents. The provision of a Schedule is a procedural step imposed by the RTI Act. In *Project Blue Sky v ABA* (1998) 194 CLR 355, the majority of the High Court held that the test of whether or not failure to follow a procedural step will render a decision invalid will depend on whether it was a purpose of the legislation that an act or omission would invalidate the decision. Notwithstanding the mandatory character of section 36(1)(b)(i) RTI , it is submitted that the requirement to provide a Schedule is merely directory, in that the failure to provide a Schedule will not affect the power of the decision-maker to decide the application or invalidate the decision on other grounds. The threshold requirements for the exercise by a delegate of his power to decide an application is not contingent on the provision of a Schedule of documents. From a resourcing perspective, the creation of a schedule of documents can be labor intensive, particular in the case of large applications. Further, it may impact adversely on applicants. The definition of processing charge under section 56 RTI includes, under subsection (b) the charge prescribed by regulation for making, or doing things related to making, a decision on the application. Subsection (b) refers to "related to the making of a decision" rather than "directly related to the making of a decision" so the provision of a Schedule could fall within the scope of this subsection. Neither the RTI Act nor the RTI Regulation expressly excludes from the ambit of processing charges the compilation of a Schedule of documents. As a result, it is feasible that not only would an applicant be required to pay for the provision of a schedule, but the time taken to prepare a Schedule may increase the processing charge period beyond the five hour limit, rendering the applicant liable to pay processing charges in circumstances in which they would nor normally have to pay. It is accepted that a Schedule of Documents may assist an applicant in narrowing the scope of his or her application by identifying the classes of documents responsive to the application. However, section 36(1)(b)(i) RTI requires that a Schedule be given to an applicant before the end of the processing period; the definition of "processing" under regulation 5(4)(b) includes making or doing things related to making a decision on an application. As a result, a Schedule may be provided at the time of decision, rather at the time at which the CEN is issued.

The Queensland Police Service recommends that the requirement to provide a Schedule of Documents under section 36(1)(b)(i) RTI be removed. The provision of Schedules is resource intensive for agencies and potentially expensive for applicants. Because Schedules can be provided at any time prior to the end of the processing period, they are of limited use in assisting applicants to understand the scope of documents responsive to the application and manage their application accordingly.

Consultation

6.13 Should the threshold for third party consultations be reconsidered?

Third party consultation is a statutory expression of the hearing rule under common law procedural fairness. Under sections 37 of the RTI Act and 56 of the IPA, the threshold for consultation with a third party is that he or she may be "concerned" about disclosure. This threshold is lower than the previous requirement of "substantial concern" under the now repealed *Freedom of Information Act 1992*. The test of concern is objective; ie would the third party, on the basis of the evidence, be reasonably expected to be concerned about disclosure. The lowering of the threshold from "substantial concern" to "concern" has not necessarily resulted in a significant increase in consultations; in practice, the dividing line between "concern" and "substantial concern" can be difficult to discern and a consultation would often be undertaken under the FOI Act where a third party could be considered to be "concerned", rather than "substantially concerned". From a resourcing perspective, the lowering of the threshold has not had a major impact on the Queensland Police Service. It is to be expected that a certain proportion of third party consultation would flow through to third party decisions under sections 37(3) of the RTI and 56(3) of the IPA. It would follow, from the lower threshold that a greater number of third party consults would proceed to decision (and, potentially, review). However, a review of applications does not point to a significant increase.

6.14 Should the Acts set out the process for determining whether the identity of applicants and third parties should be disclosed?

As noted above, sections 37 of the RTI and 56 of the IPA are statutory expressions of the hearing rule of procedural fairness. Whilst the provisions require that a consultation take place, they are silent on the content of the consultation. It is arguable that the power to consult includes an implied power to disclose the identity of the applicant as the third party will not be aware of the case that they are being called upon to answer without knowing the identity of the Applicant. In this sense, the disclosure of the Applicant's identity (to the extent that it consists of the Applicant's personal information) would be a disclosure authorized or required by law under Information Privacy Principle 11(1)(b) of the *IPA*. However, there are considerable uncertainties in this regard. There is no rule of thumb as to what is required and the content of the hearing rule will vary according to the circumstances of the case. In some cases, procedural fairness will require that the identity be disclosed as the Applicant's identity is so integral to the consultation process that the third party would be denied a fair hearing if he or she was not made aware of it. In other cases, it may not.

It is recommended that section 37 of the RTI Act and section 56 of the IPA include express provisions to facilitate the disclosure of the Applicant's identity. Whilst disclosure should primarily be consent based, there should also be provision for non-consensual disclosure. In these circumstances, the applicant should be notified and given the option of amending his or her application to remove the need to consult.

Transfers

6.15 If documents are held by two agencies, should the Act provide for the agency whose functions relate more closely to the documents to process the application?

No. The existing provisions are adequate to deal with transfers.

Notifying decisions and reasons

6.16 How could prescribed written notices under the RTI Act and IP Act be made easier to read and understood by applicants?

The requirements of prescribed written notices under section 191 of the RTI Act and section 199 of the IPA do not, in themselves, impose unreasonable obligations on agencies as they merely set out standard administrative law requirements of a lawful decision. It is in the application of the provisions that the difficulties arise, particularly concerning the content of reasons under subsection (b).

In *Ansett Transport Industries (Operations) v Wraith* (1983) 48 ALR 500 at 507, Woodward J provided the following summary of the required content of a statement of reasons:

The passages from judgments which are conveniently brought together in Re Palmer and Minister for the Capital Territory 1978 1 ALD 183 at 193-4, serve to confirm my view that s. 13(1) of the Judicial Review Act requires the decision-maker to explain his decision in a way which will enable a person aggrieved to say, in effect, "Even though I may not agree with it, I now understand why the decision went against me. I am now in a position to decide whether that decision has involved an unwarranted finding of fact, or an error of law, which is worth challenging".

This requires that the decision-maker should set out his understanding of the relevant law, any findings of fact on which his conclusions depend (especially if those facts have been in dispute), and the reasoning processes which led him to those conclusions. He should do so in clear and unambiguous language, not in vague generalities or the formal language of legislation. The appropriate length of

the statement covering such matters will depend upon considerations such as the nature and importance of the decision, its complexity and the time available to formulate the statement. Often those factors may suggest a brief statement of one or two pages only.

Section 27B of the *Acts Interpretation Act 1954* provides:

27B Content of statement of reasons for decision
If an Act requires a tribunal, authority, body or person making a decision to give written reasons for the decision (whether the expression 'reasons', 'grounds' or another expression is used), the instrument giving the reasons must also—
(a) set out the findings on material questions of fact; and
(b) refer to the evidence or other material on which those findings were based.

A significant part of the problem with prescribed written notices arises from the prescriptive interest balancing test in section 49 and Schedule 4 of the RTI Act. Section 49(3) sets out the steps which an agency is required to take when assessing whether disclosure would or would not be in the public interest. Whilst sections 191 of the RTI Act and section 199 of the IPA require that the prescribed written notice set out the chain of reasoning, they do not require that the section 49(3) process be set out in detail in the decision letter, merely that the decision set out the material findings of fact and the evidentiary basis upon which those findings are based. It is not necessary, for example, to state in the prescribed written notice that the irrelevant factors in Schedule 4, Part 1 have not been taken into account. Further, only those public interest factors relevant to the making of a decision need be identified. It is sufficient, for the purpose of a prescribed written notice for the decision-maker to state that they have complied with the process for assessing the balance of the public interest in section 49(3) and then identify the factors material to the decision.

It is the submission of the Queensland Police Service that sections 191 of the RTI Act and 199 of the IPA sufficiently state the requirements of a lawful decision. It would not be appropriate to amend these sections by removing particular requirements.

Information about the existence of certain documents

6.17 How much detail should agencies and Ministers be required to provide to applicants to show that information the existence of which is not being confirmed is prescribed information?

Section 55 essentially enacts section 35 of the FOI Act. The operation of section 35 FOI was explained by the Information Commissioner in *EST and Department of Family Services and Aboriginal and Islander Affairs* (1995) 2 QAR 645. In *EST*, the Information Commissioner noted that section 35 is directed towards *"document of such a character that merely acknowledging their existence, even if*

accompanied by a denial of access, will result in the very damage against which the exemption provision is designed to protect. Section 35 permits a "neither confirm nor deny response" to be used in two circumstances:
(i) the document exists but contains matter which is exempt from disclosure on the prescribed grounds; and;
(ii) the document may or may not exist but, if it did, it would be exempt from disclosure on the prescribed grounds."

The Queensland Police Service submits that legislative clarification to section 55 is not required and, indeed, could defeat the object of the provision as identified by the Information Commissioner in *Re Est*. The more detail required to be put into a section 55 decision, the more likely that an applicant would be able to discern that the document exists. Section 55 merely requires that a responsive document (if it existed) would be of a prescribed kind. Any clarification should be directed towards establishing that the document falls into a prescribed class of documents. The more information required to be provided before section 55 can be relied upon, the greater the likelihood that the existence of the document will become apparent to the applicant.

Accordingly, it is recommended that section 55 not be amended or clarified but that any uncertainty with respect to the operation of section 55 be addressed by way of training.

No review of notation to amended personal information

6.18 Should applicants be able to apply for review where a notation has been made to the information but they disagree with what the notation says?

No. Applicants have existing rights under the *IPA* to lodge a complaint of breach of Information Privacy Principle 8 on the grounds that their personal information is not up to date, accurate or complete. In effect, a complaint on this ground will amount to a "review" of the contents of the notation. A complainant has the benefit of the complaint processes under the IPA including mediation and a right of referral to QCAT on merit grounds. Including separate review rights for notation under Chapter 3 of the IPA would essentially give applicants a further avenue to agitate this issue. In addition, it may result in eventual adverse outcomes for the applicants. Merits review of Chapter 3 IPA decisions are limited to External Review by the OIC. QCAT reviews under Chapter 3 IPA are limited to questions of law. Privacy complaints are adjudicated by QCAT on a full merits basis.

PART 7 – REFUSING ACCESS TO DOCUMENTS

7.1 Do the categories of excluded documents and entities satisfactorily reflect the types of documents and entities which should not be subject to the RTI Act?

Yes/ .

7.2 Are the exempt information categories satisfactory and appropriate?

The categories of exempt information in Schedule 3 are generally satisfactory and appropriate. However, it is submitted that schedule 3, section 12 should be amended to include the confidentiality provisions in section 93AA of the *Evidence Act*. Section 93AA protects from disclosure statements made by children and affected persons under section 93A of the *Evidence Act*. Section 93A is an exception to the rule against hearsay. Such statements are treated by courts and police as extremely sensitive because of their object and the circumstances in which they are made. They do not, however, receive automatic protection under the RTI and IP Acts; their disclosure or non-disclosure being the subject of the public interest balancing test.

7.3 Does the public interest balancing test work well? Should the factors in Schedule 4 Parts 3 and 4 be combined into a single list of public interest factors favouring non-disclosure?

The advantage of the public interest balancing test in section 49(3) RTI Act is that it requires decision-makers to systematically work through a series of prescribed steps before reaching a decision as to the balance of the public interest. The disadvantage is that the way the test deals with the factors in Schedules 2, 3 and 4 can create the impression that all factors must be considered as part of the test. Schedules 2, 3, 4 essentially constitute a non-exhaustive pick list of factors some of which may or may not be relevant to the determination of the matter in issue. Quite apart from efficiency issues, there is a substantial risk that irrelevant factors may be taken into consideration by the decision-maker, even if they are subsequently abandoned. There is also a risk that Schedule 2, 3, and 4 may be considered to be an exhaustive list of all of the factors which may be taken into consideration merely because they are specifically identified. In determining an application, there may be unlisted public interest considerations which are material to determining the balance of the public interest. However, because they are unlisted, there is a risk that an inexperienced decision-maker may not take them into account, consider that they are unable to be taken into account, or regard them to be irrelevant. There is a further risk arising from the substance of the identified public interest factors. Public interest is a dynamic concept which can alter significantly over time. As the public interest evolves, the threshold requirements for public interest consideration to arise may also change. The threshold requirements of the public interest considerations in Schedules 2, 3, and 4 are "point in time" in the sense that they represent the content of a public interest consideration at a particular point in time. However, they are presented as eternal and non-changing when this is not the case in practice. As a result, a decision-maker considering a particular public interest consideration is likely to form the view that the consideration will be made out if the stated threshold requirements are

satisfied. However, these requirements may have changed over time as a result of judicial decisions or developments in public policy. Further, listing the public interest considerations tends to militate against case research and analysis because the Schedules spell out precisely what needs to be satisfied for the consideration to be available.

The public interest balancing test distinguishes between Part 3 and Part 4 considerations. However, the precise basis for this distinction is unclear. The Office of the Information Commissioner, in its guidelines states that if a Part 4 Factor applies in relation to the information, Parliament has decided there is a reasonable basis to expect harm to the public interest. Section 49(4) of the RTI Act makes it clear that Part 4 factors do not rebut the presumption in favour of disclosure or create a presumption that disclosure would be contrary to the public interest. It is submitted that the effect of such factors is on the weight of the public interest against disclosure. That is, where a Part 4 factor has been identified, this factor exerts a greater weight in favour of non-disclosure than a Part 3 factor. If this is the case, there is a risk that if Part 3 and Part 4 factors are combined, the differential weight of Part 4 factors may not be identified.

Whilst the public interest balancing test in section 49(3) provides a useful structure for decision-makers to assess and balance the public interest, there are risks because of its static nature and its appearance as exhaustive.

7.4 Should existing public interest factors be revised considering
• some public interest factors require a high threshold or several consequences to be met in order to apply
• whether a new public interest factor favouring disclosure regarding consumer protection and/or informed consumers should be added
• whether any additional factors should be included

Whilst periodic review of public interest considerations would be prudent, any changes to the factors by altering or lowering threshold requirements should only be undertaken where there is a clear authority. The content of the listed public interest factors reflect judicial and other determinations and public policy considerations. There is no issue where a factor is "adjusted" to take account changes arising from, for example, judicial decisions. However, altering a public interest consideration because the threshold requirements are difficult to satisfy runs the risk that the public interest factor in the Schedule will become inconsistent with the public interest factor recognized at law.

There is some merit in including additional public interest considerations in Schedules 2, 3 and 4 from the perspective of guiding or informing decision-makers. However, the inclusion of such considerations raises fundamental issues with the way in which section 49(3) and the Schedules operate. Public interest considerations with respect to consumer protection are already

recognized at general law. However, for RTI purposes, such a factor my only be considered to exist when it is included in Schedule 2, 3 or 4.

Protection based on specific classes of information

7.5 Does there need to be additional protection for information in communications between Ministers and Departments?

No.

Information Briefing Incoming Ministers

7.6 Should incoming government briefs continue to be exempt from the RTI Act?

Incoming government briefs should continue to be exempt under the RTI Act. However, notwithstanding that such briefs are exempt under RTI, Ministers and Departments have the ability to release such documents through administrative processes. Further, sections 48(4) and 49(5) permit agencies to release information notwithstanding the fact that the information is exempt or disclosure would be contrary to the public interest.

7.7 Are the current provisions in the RTI Act sufficient to deal with access applications for information created by Commissions of Inquiry after the commission ends?

No.

7.8 Is it appropriate or necessary to continue the exclusion of Commission documents from the RTI Act beyond the term of the Inquiry?

Yes.

Mining safety information

7.9 Are provisions in the RTI Act sufficient to deal with access applications for information relating to mining safety in Queensland?

Nil submission.

Information about successful applicants for public service positions

7.10 Are the current provisions in the RTI Act sufficient to deal with access applications for information about successful applicants for public service positions?

Yes. .

Part 8 - Fees and charges

8.1 Should fees and charges for access applications be more closely aligned with fees, for example, for access to court documents?

An increase in processing and access charges is likely to act as a disincentive for applicants to lodge or proceed with an application, thereby detracting from the primary object of the Act to facilitate the release of government information. At the same time, there is a significant discrepancy between the value of processing and access charges and the cost of delivering the services. Further, processing charges are not recoverable where the documents contain the personal information of the applicant regardless of the amount of time taken to process an application. Finally, processing charges cannot be levied where the processing of the application has taken five hours or less (section 56 RTI Act and Regulation 5 Right to Information Regulation). The ability of an applicant to claim financial hardship further impacts on the entitlement of an agency to recover its costs. As a result, the scope for cost recovery is restricted to non-personal documents where the processing time is more than five hours and the Applicant is not under financial hardship.

Rather than increase the amount of processing and access charges, a more equitable option in line with the objects of the Act may be to:

- remove the five hour processing limitation with the result that charges may be levied immediately;
- remove the exemption for personal information, so that applicants seeking access to their personal information are required to pay at least nominal processing charges to offset the cost of dealing with their application.

8.2 Should fees and charges be imposed equally on all applicants? Or should some applicants pay higher charges?

There is a case for institutional applicants including insurance companies paying a higher rate for processing and access charges than private individuals

Waiver of charges – financial hardship status for non-profit organisations

8.3 Should the processing period be suspended when a non-profit organisation applicant is waiting for a financial hardship status decision from the Information Commissioner?

Where an application for financial hardship status is made by a non-profit organization after lodging an access application, the processing period should be suspended until the application has been determined to ensure that it does not expire before the application is decided and the agency has sufficient time to process the access application.

Waiver of fees for multiple applications made to Queensland Health.

8.4 Should the RTI Act allow for fee waiver for applicants who apply for information about people treated in multiple HHSs?
8.5 If so what should be the limits of this waiver?

Nil submission.

9 – Reviews and Appeals

9.1 Should internal review remain optional? Is the current system working well?

The implementation of the RTI and IP Acts has seen a significant reduction in the number of internal reviews, with most applicants opting instead to apply directly for external review. From the perspective of the QPS, this system of optional internal review has been generally successful and it is recommended that it be retained as it provides maximum flexibility to applicants. In this regard, the system of optional internal review follows the approach under the Freedom *of Information Act 1982* (Cth), the *Government Information (Public Access) Act* (NSW), and the *Freedom of Information Act 1982 (Vic)*

9.2 If not, should mandatory internal review be reinstated, or should other options such as a power for the Information Commissioner to remit matters to agencies for internal review be considered?

Whilst it is not recommended that mandatory internal review be reinstated, it is considered that this option would be preferable to other options such as a power on the part of the Information Commissioner to remit a matter for internal review.

9.3 Should applicants be entitled to both internal and external review where they believe there are further documents which the agency has not located?

Yes.

9.4 Should there be some flexibility in the RTI and IP Acts to extend the time in which agencies must make internal review decisions? If so, how would this best be achieved?

An internal review is a full merits review as a reviewer is required to make a new decision as if the original decision had not been made. In general, no issue will arise where the internal reviewer proposes to uphold the original decision. However, where the internal review proposes to vary the decision and release previously exempted material, difficulties can arise in meeting the twenty business day timeframe. The RTI Act does not exclude the operation of common law requirements of procedural fairness as part of the review process. Accordingly, it is arguable, that where an internal reviewer is proposing to release previously exempted documents and the disclosure of those documents could be concern to a third party, the reviewer is required to consult with that third party and obtain their views before any final decision with respect to release is made. Because of the requirement to consult, there is potential for the internal review period to expire before the consultation process is complete. Similarly, if the RTI Act is amended to permit internal reviews on sufficiency of search, the time involved in conducting searches may create difficulties in meeting the statutory timeframe.

An internal review period may be extended by consent. However, it would be preferable that a non-consent based process for extending the review period also be available. Under section 54D(3) of the Commonwealth FOI Act, an agency may apply, without the consent of the applicant to the Information Commissioner for an extension of time in which to the deal with an application in specified circumstances. Under section 54D(4), the Information Commissioner can allow further time and impose any further conditions that the Information Commissioner considers appropriate. It is recommended that a similar model be implemented with respect to both initial applications and applications for internal review.

9.5 Should the RTI Act specifically authorise the release of documents by an agency as a result of an informal resolution settlement? If so, how should this be approached?

Early resolution is dealt with in section 90 of the RTI Act. Where early resolution is achieved, section 90(4)(a) merely requires that the Commissioner give to each of the parties a notice that the external review is completed. Section 90 does not

empower the Commissioner to direct agencies to release documents. As a result, the ability of agencies to release documents in response to early resolution is problematic. In *Moon v Department of Health*, the Information Commissioner considered that section 6 of the RTI Act, read in conjunction with section 90(3), permitted agencies to release documents as part of an early resolution process, notwithstanding the fact that the documents were protected by confidentiality provisions in other legislation. If section 6 RTI did not override confidentiality and secrecy provisions in other legislation, agencies would be precluded from participating in early resolution because documents could not be released. Notwithstanding the attractiveness of this argument, there remains considerable uncertainty on this issue and it is recommended that an express provision be inserted into the RTI Act and IP Acts which empowers the Information Commissioner to direct an agency to disclose documents as part of the early resolution process.

10 – Office of the Information Commissioner

10.1 Are current provisions sufficient to deal with the excessive use of OIC resources by repeat applicants?

Nil submission. .

10.2 Are current provisions sufficient for agencies?

Repeat applicants, whilst not common, are a feature of the RTI and IP processes. Whilst these applicants are resource intensive, it is unclear what further steps, consistent with the objects of the RTI and IP Acts, could be implemented over and above the current provisions.

10.3 Should the Acts provide additional powers for the OIC to obtain documents in performance of its performance monitoring, auditing and reporting functions?

No.

10.4 Should legislative time frames for external review be reconsidered? Is it appropriate to impose timeframes in relation to a quasi-judicial function?

10.5 If so, what should the timeframes be?

There is considerable merit in considering the imposition of legislative timeframes for external review. However, in practice, external reviews vary considerably in terms of complexity of issues with the result that it would be difficult to adopt a "one size" fits all approach. An external review may require, for example, merely a review of exemptions within an identified and limited group of documents. At the other end of the spectrum, the review may necessitate significant additional

searches to be undertaken, consultations and negotiations with third parties, and extensive submissions. It would be possible to establish a statutory system of time frames which categorises reviews according to complexity. However, it would be preferable for this to be part of a flexible case-management system which is able to take account the characteristics of different kinds of reviews. The preferable approach would be to amend the Acts to require that the Office of the Information Commissioner deal with applications for external reviews in a "reasonable time".

Part 11 - Annual Reporting Requirements

11.1 What information should agencies provide for inclusion in the Annual Report?

It is recommended that the Annual Reporting requirements be limited to those matters prescribed in Regulation 8 of the *Right to Information Regulations*.

Part 12 - Other issues?

12.1 Are there any other relevant issues concerning the operation of the RTI Act or Chapter 3 of the IP Act that need to be changed?

Nil.

REVIEW OF THE *INFORMATION PRIVACY ACT 2009*
SUBMISSION OF THE QUEENSLAND POLICE SERVICE

1.0 What would be the advantages and disadvantages of aligning the IPPs with the APPs, or adopting the APPs in Queensland?

The Queensland Police Service would not support the adoption of the APPs in Queensland. The APPs are untested so it is not clear how they would operate. Further, the APPs could require a significant realignment of existing processes at considerable cost. The Queensland Police Service submits that it would be prudent to wait for a sufficient period for the APPs to be bedded in at Commonwealth level so that they may be properly reviewed in terms of their operational implications for agencies.

2.0 Does the IP Act inappropriately restrict the sharing of information? If so, in what ways? Do the exceptions need to be modified?

The Information Privacy Act restricts the sharing of information in the following ways:

- It can limit the scope and application of statutory disclosure provisions;
- It restricts the ability of the Queensland Police Service to rely on administrative access schemes, particularly in relation to disclosures to other government agencies;
- It impacts on the ability of the QPS to provide, on an adhoc basis, information arising from operational activities.

Limiting the scope and application of statutory disclosure provisions

Section 7(2)(b) of the IPA provides that the IPA (other than Chapter 3) operates subject to the provisions of other Acts relating to the disclosure of information. Further, Information Privacy Principle 11(1)(d) provides, as an exception to the general prohibition against disclosure, that disclosure is authorized or required by law.

The IPA is purposive legislation and its provisions are to be interpreted in such a way as to further the primary object of the Act (s.3(2)). In addition, the IPA constitutes beneficial legislation. In *I W and the City of Perth* [1997] HCA 30; (1997) 191 CLR 1 at 12, Brennan CJ and McHugh J in the High Court referred to the correct approach to interpreting beneficial legislation as follows:

...It is to be given "a fair, large and liberal' interpretation rather than one which is 'literal or technical". Nevertheless, the task remains one of statutory construction. Although a provision of the Act must be given a liberal and ***beneficial***

construction, a court or tribunal is not at liberty to give it a construction that is unreasonable or unnatural...

Provisions which promote the primary object of the IPA are to be interpreted broadly, those that abrogate from the primary object are to be interpreted narrowly. However, in both cases, provisions (either beneficial or otherwise) are not to be interpreted in a manner which is unreasonable or unnatural.

Considerable uncertainty has arisen over the scope of statutory disclosure provisions which were previously relied upon to authorize the release of information. A prominent example is section 94 of the *Transport Operations (Road Use Management) Act*. Under section 94, the Commissioner of the Queensland Police Service or the Chief Executive of the Department of Transport may authorize the establishment of a scheme for the supply of information relating to traffic incidents. The scheme established under section 94 is that operated by CITEC. Section 94 is limited to "the facts relating to an incident". Prior to the enactment of the IPA, the scope of facts covered by section 94 included the names and contact details of witnesses. Following the enactment of the IPA, considerable uncertainty not exists as to whether the "facts relating to an incident" extends to witness details; whilst it will extend to the details of the involved parties and would likely extend to the versions of witnesses, the personal information of the witnesses may, on a narrow construction, not be a fact relating to the incident. As a result, witness details previously released through CITEC Confirm are no longer released. However, insurance companies often require witness details so that further clarifying information may be obtained. The non-availability of witness details through CITEC has led to an increase in applications under the RTI Act by insurance companies. Similarly issues have arisen with respect to the supply of information under section 92 of the *Motor Accident Insurance Act* and regulation 31(2) of the Motor Accident Insurance Regulations to Compulsory Third Party Insurers and the Nominal Defendant. This latter issue has recently been resolved by through an amendment to the Motor Accident Insurance Act 1994 which has inserted a new section 37B(2) which clarified that information may be provided to an insurer despite any other law which purported to restrict or limit disclosure. This amendment was made directly in response to concerns over the impact of the IPA on disclosure.

Thus, the enactment of the IPA has had a deleterious impact in two ways:

- It has resulted in the narrowing of the scope of statutory disclosure provisions;
- It has created uncertainty concerning existing statutory disclosure processes.

Administrative Access schemes

The Queensland Police Service operates a number of administrative schemes for the supply of information to other government agencies. These schemes are outlined in Part 1.9 of the Operational Procedures Manual and consist of Commissioner's directions under the Police Service Administration Act 1990. Prior to the enactment of the IPA, the schemes permitted designated officers (including officers in charge of Stations) to make information of various kinds available to other entities including Government departments provided that the conditions set out in the provisions of Part 1.9 were satisfied. For example, Part 1.9.14 of the Operational Procedures Manual permits the supply of information by an officer in charge of a station or establishment to other government agencies where the information was required for an official purpose, it's disclosure would not interfere with the administration of justice and would not infringe any legislative prohibitions. With the enactment of the IPA, the ability of the Queensland Police Service to provide information under administrative access schemes has been restricted by the need to bring the supply of information within the parameters of one or more of the exceptions to disclosure in Information Privacy Principle 11. In the case of investigative information required by a law enforcement agency, the QPS relies upon IPP 11, the law enforcement exemption in section 29 IPA or another statutory provision which authorize the sharing of information. In some cases, however, the threshold requirement of "reasonably necessary" in section 29 and IPP 11 can be difficult to satisfy, particularly with respect to intelligence information. Where a government Department has requested personal information from the QPS, the practice is to either use dedicated statutory provisions (see, for example, sections 310 and 311 of the *Commission for Children and Young People and Child Guardian Act 2000*) or, more frequently, the general power under section 10.2 of the *Police Service Administration Act 1990* to disclose information. Whilst the release of information under section 10.2 PSAA will fall within the exception in IPP 11(1)(d) as a disclosure authorized or required by law, section 10.2 is a delegated power and the range of delegates is limited. This has had the effect of creating bottlenecks by restricting the range of persons within the QPS who can supply information to other government agencies to delegates. It has also led to something of a disconnect between the directions contained within the Operational Procedures Manual and the actual practice of releasing information.

The law enforcement exemption

As a law enforcement agency, the Queensland Police Service has an exemption from Information Privacy Principles 2, 3, 9, 10 and 11 with respect to its enforcement activities. However, the law enforcement exception is quite narrow in its operation compared to similar exemptions in other jurisdictions. First and foremost, it is limited to the enforcement activities of the QPS It will not, for example, cover non-enforcement activities which fall within the functions of the QPS under section 2.3 of the *Police Service Administration Act 1990*. In

particular, it will not cover activities relating to the welfare functions of the QPS, including the provision of information to welfare agencies or networks such as Supportlink. Any disclosure to a welfare agency such as the Red Cross, for example, must fall within one of the exceptions in IPP 11. Whilst consent is often relied upon to authorize the disclosure, where a client is a juvenile or is affected by mental health issues, consent may be ineffective because of an absence of capacity. IPP 11(1)(c) does authorize disclosure in situations of serious risk to health or welfare. However, it can be difficult to fit the circumstances into the narrow parameters of the exception. For example, in the case of homeless persons, the disclosure of information to a welfare agency for the purpose of securing accommodation may not fall within the category of "serious harm". Equally, the disclosure of information to a support agency for the purpose of arranging counseling, may not fall within this exemption.

The narrow scope of the law enforcement exemption in section 29 may be compared with other jurisdictions. Section 13 of the *Information Privacy Act 2000 (Vic*) extends the equivalent law enforcement exemption to cover the community policing functions of the Victorian Police.

It is the submission of the Queensland Police Service that the exemption in section 29 be amended to cover not merely the enforcement function of the Service, but other operational functions including community policing.

3.0 Should the definition of personal information in the IP Act be amended to bring it into line with the definition in the Commonwealth Privacy Amendment Act 2012?

The QPS recognizes that the current definition of personal information is problematic. In particularly, the reference to "part of a database" is not necessary and can inappropriately restrict the scope of information or opinion from which the identity of the person is apparent to can reasonably ascertained. The definition of personal information in the Commonwealth *Privacy Act 2012* addresses the deficiencies in the current definition under the IPA and the Queensland Police Service would not object to its adoption provided that any significant risks associated with the adoption of this definition were identified and assessed.

4.0 Should government owned corporations in Queensland be subject to the Queensland's IP Act, or should they continue to be bound by the Commonwealth Privacy Act?

Nil submissions.

5.0 Should section 33 be revised to ensure it accommodates the realities of working with personal information in the online environment?

The Queensland Police Service supports in principle any revision of section 33 to accommodate technological developments. However, the issues raised are highly complex and are not susceptible to resolution through brief submissions.

6.0 Does section 33 present problems for agencies in placing personal information online?

The Queensland Police Service has rigorous processes for determining whether information is suitable for placement on its external website. To date, section 33 has not created a problem for the QPS. However, it is an issue subject to ongoing review.

7.0 Should an 'accountability' approach be considered for Queensland?

The accountability approach suggested by the Australian Law Reform Commission has not, to date, been the subject of consideration by the Queensland Police Service. As a result, it is not possible to provide a definitive position without undertaking a thorough review of the potential advantages and disadvantages which may arise from the adoption of this approach.

8.0 Should the IP Act provide more detail about how complaints should be dealt with?

The complaints handling process outlined in Chapter 5 of the IPA is somewhat limited, particularly with respect to the mediation of privacy complaints. Section 171 provides for the mediation of complaints but does not describe how the mediation process should be undertaken. While there are benefits in not having the mediation process legislatively prescribed for agencies and complainants, this can result in significant uncertainty. In particular, for agencies, there are considerable risks in becoming involved in mediation or conciliation without statutory confidentiality restrictions being in place to protect information because of the possibility that admissions or concessions with respect to liability may be used in later QCAT proceedings. The mediation process is weakened by the absence of a requirement that the parties participate in the mediation. In comparison with the conciliation process under the *Privacy and Personal Information Protection* Act (NSW), the Privacy Commissioner cannot compel the parties to participate in mediation; section 171 merely provides that the Privacy Commissioner can mediate a privacy complaint. The participation of the parties is voluntary. As a State Government agency, the Queensland Police Service is subject to the Model Litigant Principles and genuinely engages in mediation. However, its ability to participate fully is limited by uncertainty over the process

and the absence of protections such a dedicated confidentiality provision which would prevent any information being used in later proceedings.

It is recommended that the complaint handling process be revised. In particular, it is recommended that a structured mediation/conciliation process be implemented. As a guide, the model used under the *Anti-Discrimination Act* may be appropriate.

9.0 Should the IP Act provide more flexibility about the timeframe for complaints to the OIC to be lodged?

The existing 45 business day timeframe for the investigation and resolution of privacy complaints by agencies is inadequate. An unauthorized disclosure of personal information may constitute a criminal offence under section 10.1 of the *Police Service Administration Act 1990*, official misconduct under the *Crime and Misconduct Act*, a breach of discipline under the Code of Conduct or a breach of Information Privacy Principle 11. Where a complaint is received, the QPS requires sufficient time to properly assess and investigate the allegations. On the surface, privacy complaints and misconduct complaints are directed at different matters; privacy complaints focus on the conduct of the agency, whilst misconduct on the conduct of employees. However, with the possible exception of IPP 4, the complete focus of both privacy and misconduct investigations is on the actions of employees. Privacy investigations require a further step, namely the attribution of the employee's actions to the agency. An agency will only be liable for a privacy breach if the employee's conduct can be attributed to the agency, or the agency may be held liable on the ordinary principles of vicarious liability. Privacy breaches are investigated by the QPS first and foremost as potential criminal or misconduct matters. Such investigations may take considerably longer than forty five business days and it is risky for parallel investigation to be undertaken because of the potential that one may impact adversely on another.

It is recommended that the Chapter 5 of the IPA be amended to ensure that privacy complaints .are not progressed whilst criminal or misconduct investigations into the same matter are underway. Clearly, the QPS cannot mediate on a matter of liability where that issue is still under investigation as apart of criminal or misconduct enquiry. However, where a complaint is referred to the OIC and the QPS is unable to mediate, it is open to the OIC to form a view that the matter cannot be mediated. The complainant is entitled to refer the matter to QCAT before the investigation into the complaint has been finalized.

10.0 Are additional powers for the Information Commissioner to investigate matters potentially subject to a compliance notice necessary?

The Queensland Police Service submits that the existing powers of the Information Commissioner under the IPA are adequate and would not support further powers to investigate matters potentially subject to a compliance notice.

11.0 Should a parent's ability to do things on behalf of a child be limited to Chapter 3 access and amendment applications?

Difficult issues arise with respect to the ability of third parties such as parents to do things on behalf of children under section 196 of the IPA. Specifically, the section does not distinguish between custodial and non-custodial parents. Further, the definition of a child as being under 18 years of age would include children who have legal capacity to apply in their own right. In this case, the position of the parent is that of an agent of the child, rather than standing in place of the child. For a younger child however, (under 10 years), the absence of legal capacity may be assumed and the parent can stand in the child's place. However, in the case of older children, the child may well have the requisite capacity to act in their own right. It is appropriate for custodial parents of children who lack legal capacity to undertake a broad range of matters under the IPA on the children's behalf including the lodgment of privacy complaints where appropriate. It is noted, in this regard, that section 27 of the *Information Privacy Act 2000* (Vic) permits a parent to lodge a privacy complaint on behalf of a child. Accordingly, there is merit in extending the ability of parents to undertake actions on behalf of a child beyond applications for access or amendment under Chapter 3 of the IPA. However, there are issues with respect to the circumstances in which a parent may be considered to be acting on behalf of a child which will need to be addressed. Specifically, the review should consider whether there should be requirements of standing (beyond establishing the relationship between parent and child) as to when a parent may purport to act on behalf of a child. Issues of capacity, consent and parental responsibility are important factors in this regard.

12.0 Should the definition of 'generally available publication' be clarified? Is the Commonwealth provision a useful model?

Yes. The definition under the Commonwealth Act provides a useful model in this regard.

13.0 Should the reference to 'documents' in the IPPs be removed; and if so how would this be regulated?

The QPS would not support the removal of the reference to "documents". The IPPs require that personal information be reduced to material form. The definition of documents under the Information Privacy Act 2009 and the Acts Interpretation Act is sufficiently broad to encompass a wide array of records in which personal information is recorded. The obligations imposed by the IPPs are not absolute but essentially require agencies to undertake steps to manage

information which is under the agency's control. Personal information which is not contained in a material form is impossible for agencies to control. In *Vice-Chancellor Macquarie University v FM [2005] NSWCA 192* ("FM") the full bench of the NSW Court of Appeal considered the scope of personal information under section 4 of the *Privacy and Personal Information Protection Act 1998*. The issue concerned whether information 'recorded' only in the minds of university employees (and not separately recorded elsewhere) was "personal information" within the meaning of the PIPP Act. The court held that the inclusion of the reference to "material form" in the definition of "personal information" in section 4 of the PPIP Act is a textual indicator that information that is "not recorded in a material form" (e.g. electronic pulses held within a computer) may be within the scope of the legislative protection. However, in the context of the Act, the court considered that the protections afforded under the PPIP Act applied only to information "held" by an agency. Section 4(4) of the PPIP Act provides that information is "held" by any agency if the information is in the possession or control of an agency or agency employee, or the information is contained in a State record in respect of which the agency is responsible under State archives and records legislation. Chief Justice Spiegleman (with whom the other members of the court agreed) held:

"The natural and ordinary meaning of the words "possession or control" does not, in my opinion, extend to material held only in the mind of a person. Both words connote some form of physical object upon which or within which an information or opinion is recorded."

An agency under the IPA will only be liable under the Information Privacy Principles in respect of information in its possession or control. It is doubtful whether personal information which is held in a non-material form such as only in the minds of the agency's employees would be considered to within the possession or control of the agency. The requirement that personal information be recorded in a document reflects the position that the information must be in a form over which an agency can exercise control before an agency may be held liable under the IPPs for misuse. Removing the requirement that the information be contained within a document means that an agency may be held responsible for the misuse of personal information which is beyond its capacity to control (e.g. an employee thinks of the personal information in a particular context which is different to the purpose for which the information was collected).

Removing the document requirement also raises potential issues from the perspective of the *Public Records Act 2002*. The definition of "public record" refers to recorded information, rather than information per se. The obligation under section 7 to make and keep records applies only to information captured in some form by the agency. It would be inconsistent with the *Public Records Act 2002* to render an agency liable for its actions with respect to the management of information which would not be considered to be recorded information under the *Public Records Act 2002*.

It is not recommended that the reference to documents be removed. However, in the event that it is, it is recommended that the IPA be amended to make clear that the obligations imposed on agencies with respect to the management of personal information are limited to information within the possession or control of the agency.

14. *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?*

> ***4 IPP 4—Storage and security of personal information***
> *(1) An agency having control of a document containing personal information must ensure that—*
> *(a) the document is protected against—*
> *(i) loss; and*
> *(ii) unauthorised access, use, modification or disclosure; and*
> *(iii) any other misuse; and*
> *(b) if it is necessary for the document to be given to a person in connection with the provision of a service to the agency, the agency takes all reasonable steps to prevent unauthorised use or disclosure of the personal information by the person.*
> *(2) Protection under subsection (1) must include the security safeguards adequate to provide the level of protection that can reasonably be expected to be provided.*

Whilst the object of IPP4 is to impose an obligation on agencies to take reasonable precautions to protect personal information, the IPP 4 is poorly draftedin form and is apt to create uncertainty in its current form as to whether it imposes an absolute liability on agencies to ensure the protection of personal information, or a limited liability to take reasonable precautions. In particular, IPP 4(2) states that the IPP 4(2) refers to the obligation of agencies as "including" the security safeguards adequate to provide the level of protection that can reasonably be expected to be provided. A plain reading of the section would suggest that the obligation in IPP 4(1) includes, but is not limited to, reasonable security safeguards. Used in the context of IPP 4, the prima facie interpretation that "includes" expands the ordinary meaning is rebutted (See *YZ Finance Co Pty Ltd v Cummings* (1964) 109 CLR 395). The word "includes" in IPP 4(2) is not employed for the purpose of adding to the natural significance of IPP 4(1) but, in the context of the Act is designed to provide an exhaustive explanation of the obligations of agencies under IPP 4(1). In this sense, the QPS asserts that the proper construction of IPP 4 is that an agency having control of a document containing personal information must ensure that the document is protected against loss, unauthorised access, use, modification or disclosure or any other misuse by security safeguards adequate to provide the level of protection that can reasonably be expected to be provided.

It would be preferable to simplify IPP 4 to clearly limit the obligations of agencies to the taking of “reasonable precautions”.

15.0 Should the words ‘ask for’ be replaced with ‘collect’ for the purposes of IPPs 2 and 3?

It is accepted that replacing “ask for” with “collect” will bring the IPA into line with privacy legislation in other jurisdictions. In the context of IPP 2 of the IPA, it would be feasible to replace “ask for” with “collect” because of the operation of IPP 2(4) which requires steps to be taken before the information is collected. In principal, the QPS would not object to the substitution of “ask for” with “collect”.