Queensland
Integrity Commissioner

Our ref: DOC/17/4672

RTI and Privacy Review
Department of Justice and Attorney General
GPO Box 149
BRISBANE QLD 4001

By email: FeedbackRTIandprivacy@justice.qld.gov.au

Dear reviewers

I refer to a letter dated 22 December 2016 addressed to me by the Acting Premier, inviting me to provide comment on the issues raised in the Attorney General's 2016 consultation paper on the review of the *Right to Information Act 2009* and *Information Privacy Act 2009* (**the RTI Act and the IP Act**).

First, I endorse the comment in Minister's foreword to the paper that 'these Acts are an important part of Queensland's integrity framework'. In my view, the RTI Act in particular is essential to the effective functioning of representative democracy in Queensland.

However, I have little first-hand involvement in the way in which the Act is currently operating, and my comments are therefore based upon general principle rather than specific examples.

I also observe that in recent times Queensland has earned a well-deserved reputation for leading the country on matters relating to right to information. This review provides an opportunity to cement that reputation.

Subject to those overriding comments, my views on the specific issues identified in the consultation paper are as follows.

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?

In my view, the objects of the Acts, and in particular the 'push' model, remain appropriate. Whilst there is always room for improvement, my perception is that the objects of the Act are being met to a reasonable degree.

I observe that the importance of administrative discretion in encouraging release of information means that the content of the legislation is only one part of an effective model. It is essential that government's senior leadership at both political and bureaucratic levels should demonstrate a commitment to genuine openness and transparency, consistent with the legislative presumption of a right of public access to information.

Level 13, 53 Albert Street Brisbane
PO Box 15290, City East
Queensland 4002 Australia
Phone **+61 (07) 3003 2888**
Fax +61 (07) 3224 2326
Email integrity.commissioner@integrity.qld.gov.au
Website www.integrity.qld.gov.au

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?

I believe that in general private information currently is handled fairly, and that a robust complaint-based system is an important protection in ensuring that this remains the case.

I believe also that what constitutes the fair handling of personal information will change as external circumstances change, and that in particular the protection of privacy in de-identified data will require continued attention as technology advances.

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?

In my view there will always be some tension between the competitive commercial interests of GOCs and similar entities, and their public responsibilities. The presumption should be that the RTI and IP Acts should apply to these bodies, but having said that I am not aware of any instances which demonstrate that the current model is inappropriate.

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?

Yes. As a general rule, if a function is provided using public money, the RTI and IP Acts should apply to whatever organisation is providing the service.

Where a function is contracted out, I would expect that in most cases the relevant information would remain under the control of the agency, and should be subject to disclosure - but the procedure outlined in section 6C of the Commonwealth Act may assist in dealing with the practical issues.

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?

In my view there is no reason to change the current arrangement. There is a strong case for national uniformity in this area because of the increasingly transborder nature of many privacy issues in the social media age, and the national operations of some GOCs.

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?

I believe that the same regime should apply to contracted service providers for both RTI and IP Acts, and that this should be specified in the legislation.

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?

No. For the reasons outlined in the consultation paper, on balance I prefer the 'single point of access' approach, notwithstanding the original recommendation of the Solomon Report.

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

In managing RTI applications, I believe that it is essential that an agency should deal directly and informally with an applicant, as early as possible after receipt of an application, to refine the scope of the application. To the extent that the requirement to produce a schedule of documents discourages this, I do not support it.

Of course, depending on the outcome of an application, it may subsequently be necessary to produce a schedule of documents for the purposes of a review, but in the initial stages I believe that the public interest is well served by minimising the agency 'bureaucracy' associated with dealing with applications.

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?

Yes. In my view a higher consultation threshold is consistent with the presumption of public access, and I would generally support any measure which simplifies the determinative process for agencies.

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?

No. In my view the remedy for a party who should have been consulted but was not lies elsewhere, such as by the lodging of a complaint.

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

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

It is convenient to note here that under schedule 1, s. 6 the RTI Act does not apply to advice given by the Integrity Commissioner and the enquiry to which it responds. This provision was reviewed by Professor Peter Coaldrake in conducting a strategic review of my office, the final report of which was tabled in Parliament on 16 July 2015.[1]

The review recommended[2] that where a designated person discloses written advice of the Integrity Commissioner, the advice should be disclosed in full. However, this recommendation was rejected by the Finance and Administration Committee, which inquired into Professor Coaldrake's report, and subsequently by the government.

---

[1] Available at http://www.parliament.qld.gov.au/documents/tableOffice/TabledPapers/2015/5515T804.pdf, retrieved on 9 January 2017. The report was referred to the Finance and Administration Committee (**FAC**), which conducted an inquiry into the matter and reported on 11 December 2015.[1] The government response to the FAC's report was tabled on 11 March 2016.[1] Links to these documents are as follows:

- Queensland Government response (PDF, 18KB) (http://www.parliament.qld.gov.au/documents/tableOffice/TabledPapers/2016/5516T273.pdf)
- Finance and Administration Committee: Inquiry into the Report on the Strategic Review of the functions of the Integrity Commissioner (PDF, 773KB) (http://www.parliament.qld.gov.au/documents/tableOffice/TabledPapers/2015/5515T1885.pdf)

[2] Recommendation 6.

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?

It is my view that the public interest balancing test is one of the real strengths of the RTI Act, and I have quoted the model in other contexts as indicating a practical way to assist decision-making where the public interest needs to be assessed.

However, as noted above I would generally support any measure which simplifies the determinative process for agencies, and removal of the duplicatory factors and overlap in Parts 3 and 4 would certainly assist in this respect.

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.

Yes to all three questions. The factors should be reviewed and simplified, with a presumption in favour of disclosure. Individual decision-makers should assess harm in the light of all the circumstances, rather than relying on the current Parliamentary-established presumption in Part 4.

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?

I would not propose any changes.

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?

In my view, the current requirements for disclosure logs are unnecessarily cumbersome. The NSW precedent provides sufficient public information about documents that have been released.

17. Should the disclosure log requirements that apply to departments and Ministers be extended to agencies such as local councils and universities?

Yes, subject to their simplification as noted in my response to the previous two issues.

18. Is the requirement for information to be published on a disclosure log 'as soon as practicable' after it is accessed a reasonable one?

Yes.

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

In my view agency publication schemes are of limited practical benefit, particularly in light of the developments in open data and other means of publication, to which the consultation paper refers.

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?

In my view, internal review should remain optional for the applicant, but the Information Commissioner should have the capacity to require than an agency should undertake an internal review before the Commissioner is required to conduct an 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?

I do not believe that any changes to the current appeal structures are necessary or desirable.

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

Yes. Generally I believe that it is unnecessarily restrictive to limit the powers of a body to specific functions. It can lead to difficulties in the categorisation of actions i.e. to which function they are ascribed. There is no reason why the Information Commissioner's powers should not be available for all 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?

I do not believe that it is necessary to specify the required contents of Annual Reports in the law. The relevant body or bodies should determine the contents of the reports as they see fit, taking into account the particular circumstances at the time.

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?

For the reasons which I have noted above, I favour the adoption of national principles in areas such as privacy. Any benefits which flow from making principles specific to individual jurisdictions are outweighed by the complexities arising from their limited geographical application.

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

A similar comment applies to this issue. In my view there is no good reason why the basic human rights – including privacy - of a person in one Australian jurisdiction should be different from those in another State or Territory.

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?

As the discussion in the consultation paper makes clear, these questions are complex, and the answers to them will vary according to specific circumstances, ranging from the provisions of the Act or Acts applicable, to the expectations of individuals.

In general, I believe that most people would expect that if personal information is provided to a government agency, it should and will be available to other agencies sharing similar purposes. I believe this is a necessary corollary of the modern conception of government as the 'single indivisible Crown', 'joined up government' and so on. I believe also that there are numerous instances in which the broad public interest, or the rights of others, will override an individual's right to privacy, and that this fact should be clearly acknowledged and openly stated.

Accordingly I agree with the adoption of a use model as outlined in the consultation paper.

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?

I do not feel that I am sufficiently familiar with the extent and purposes of overseas transfer of information from Queensland agencies to make any useful comment here. I simply observe that government is not alone in transferring information overseas, and I see no reason why in doing so agencies should be limited in ways which do not apply to information held by the private sector.

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

Yes. External review by OIC should be available at any time after an internal review determination is communicated.

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

No. It should be a matter for QCAT as to how to deal with a significantly delayed application, in all the circumstances of that application.

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

As noted above, I believe that all powers of the Information Commissioner should be available for all its functions.

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

Yes.

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?

Yes.

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

Yes.

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

I do not have any further comments.

I hope this response is useful. Please contact me if you would like to clarify my views on any issue.

Yours sincerely

Richard Bingham
QUEENSLAND INTEGRITY COMMISSIONER

12 January 2017