RTI submission from Commission for Children and Young People and Child Guardian

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

Yes, although there are other ways to access information and formal applications should be a last resort.

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

The 'push model' is still appropriate, but the current requirement for information to be made available as part of a publication scheme is too prescriptive. A lot of that information is already published elsewhere on the agency's website, and is then duplicated in the publication scheme, creating two separate sources of information that need to be maintained and updated. Furthermore, people do not intuitively know to look for information under the publication scheme and are more likely to search elsewhere on an agency's website first.

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?

Yes. The current system creates unnecessary confusion, and decisions become particularly confusing and unwieldy due to the requirement for applicants to apply under the *Information Privacy Act 2009* (IPA) for personal information but the reasons for decision refer to the *Right to Information Act 2009* (RTIA). The IPA could refer to rights of access under the RTIA (in addition to other access administrative or legislative schemes), but all applications, both personal and non-personal, should be made under the RTIA.

Also, the definition of personal and non-personal applications should be clarified, because the current provision in section 40(1) IPA which refers to "documents of an agency [or Minister] to the extent they contain the applicant's personal information" (my underlining) and similar wording in section 8(1) RTIA, is confusing. The OIC Guidelines provide that if a document contains *an*y personal information, the request can be processed as a personal application. Although that is the preferable interpretation, it is arguable that it is not consistent with the plain meaning of the words in the legislation as it currently stands.

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?

Yes

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

No

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

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?

Yes

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?

Yes

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

Yes

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?
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?*

No comment

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?

Yes. The move to outsource more government activities to the private sector is likely to mean that there are more contracted service providers providing 'government' services funded from the public purse. The provisions would have to be carefully drafted, but to the extent that government functions are being performed by contracted service providers, there should be a similar level of accountability.

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

It is preferable that this information be made available on an agency's website, but see comments about the form of the publication scheme in paragraph 1.2.

5.2 Would agencies benefit from further guidance on publication schemes?

No comment

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

The Commission is continually exploring new ways of making information available, including maximising the use of new technologies, such as interactive online publications and mobile web apps.

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

Because of the new disclosure log requirements, it is preferable that the application form is retained and is compulsory for applications under RTIA, because applicants should be made aware *before* making an application that their identity as an applicant and the information they seek may be published.

The application form for IPA and amendment applications should be retained, but should not be compulsory. Nor should it be a requirement that the applicant specify their application is made under the legislation. Informal requests for personal information are often processed under our administrative access scheme, but if that cannot be done, it is appropriate to have a less bureaucratic way of treating the request as a formal application than requiring the applicant to submit a specific form. However, time to process the application should not commence running until it meets all the substantive requirements in the IPA.

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?

No comment

6.4 Should agents be required to provide evidence of identity?

Yes, unless they are a legal practitioner and they state on letterhead that they are acting on behalf of the applicant.

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

No. There are significant costs to agencies providing a refund.

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

The Commission has not experienced any difficulties in this regard. Section 50 of the RTIA provides significant protections, because it enables decision makers to refuse access to personal information of the child if it would not be in the child's best interest. It has not arisen in applications dealt with by the Commission, but it may be preferable if the discretion to refuse access was extended to apply to *any* information (not just the child's personal information) if it was assessed that it would not be in the child's best interests.

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?

The further specified period should begin at the end of the processing period.

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?

Yes

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

Charges estimate notices (CENs) are beneficial for both applicants and agencies because they provide a 'reality check' that helps to avoid a situation where an agency applies considerable resources to process an application and an applicant refuses to pay the costs because they are greater than the applicant expected, but the work has already been done. It also gives applicants the chance to reduce the scope of the application to something more affordable. However, where it is apparent that the application will be dealt with in less than five hours, it should be sufficient for the CEN to state there will be no charge because the anticipated processing time will be less than five hours.

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

6.10 – Yes

6.11 – No. CENs are by definition an estimate and there is nothing to be gained by allowing the estimate to be contested. The current process which allows for discussions about varying the scope of applications means that such questions may actually be clarified during preliminary contact with applicants. Ultimately, the estimate must be justified in the final calculation of charges, and that is a reviewable decision.

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

No. It is of little benefit as there will rarely be sufficient detail in the schedule for it to be meaningful for applicants (and if it is detailed, there is a risk of inadvertent disclosure of exempt or contrary to the public interest information) and it involves substantial work on the part of agencies to compile.

6.13 Should the threshold for third party consultations be reconsidered?

Yes. Section 51 of the *Freedom of Information Act 1992* required an agency to consult third parties if it was considering disclosing information that "may reasonably be expected to be of substantial concern to a government, agency or person" (my underlining). The lower threshold creates a greater consultation and decision-making burden with arguably limited benefit. Consulting people about the possible disclosure of relatively insignificant information may itself create unnecessary anxiety, particularly if the identity of the applicant is not disclosed as part of the consultation process.

The requirement to include documents in disclosure logs also potentially complicates the process of third party consultations, because although they may be willing to consent to information being disclosed to a particular applicant, they may not be happy to have it published more widely.

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

The Acts could include a provision that the identity of the applicant may be disclosed to third parties as part of the consultation process, unless the applicant provides a sufficient reason not to do so. If the application form is retained, the privacy notice should be amended to refer to this possible disclosure and there should be a question on the form asking whether there is any reason why the applicant's identity should not be disclosed during any third party consultation.

However, there should be a presumption that the identity of third parties would not be disclosed during consultation. Whereas applicants make a conscious decision to make an access application, third parties are 'caught up' in the process and their right to privacy should be given significant weight. This may mean that copies of documents cannot be provided during consultation. Whether the identity of third parties should ultimately be disclosed will be considered by the decision-maker in making their decision, with the benefit of any feedback from the consultation process.

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 comment

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

The fact that there are two Acts and the reasons for decision are contained within one of them adds unnecessary complexity and confusion to decisions (eg person applies under IPA and decision refers to RTIA). Including all access provisions in one Act would simplify the process.

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?

The application of this provision is fraught, because relying on it may confirm that the information does exist. It is recommended that reasons should not be required, with the safeguard that the applicant retains their right of appeal to the OIC, which can review the decision (including any documents, if they exist) and consider whether the provision was properly applied.

The use of this provision in relation to CMC information (possibly adopting a broader definition of CMC information in schedule 3, factor 10(4)) is preferable to the approach recommended in the Callinan Report of not giving reasons for *any* RTI decisions for a nine month period. For example, if a

person applied for information about a CMC complaint concerning a named person, a decision could be made neither admitting nor denying that the information exists, because if it did it would be prescribed information. If the application was framed in more general terms, because there are several categories of prescribed information, relying on this provision would not conclusively establish that documents of a particular type do exist.

However, it is important to ensure that the section is consistently relied upon, because a decision that information does not exist, followed at a later time by a decision neither admitting nor denying that information exists, may itself indicate that information does now exist.

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?

Yes

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?

The Commission has previously argued that Child Death Case Review Committee information should be excluded from the scope of the RTIA and IPA, as it is comparable in nature to root cause analysis information, which is exempt under schedule 1, section 9.

7.2 Are the exempt information categories satisfactory and appropriate?

No comment

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 exemption provisions under the FOI Act provided greater clarity about when information should not be disclosed because there were specific provisions with elements that must be established, even if a public interest balancing test was then applied. The adoption of just the public interest balancing test increases the importance of the decision-maker's discretion in the decision-making process.

There is no clarity about the appropriate treatment of the public interest considerations in schedule 4, parts 3 and 4. If it is assessed that certain public interest considerations against disclosure should be given greater weight, that should be made explicit in the legislation.

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?

The list of public interest considerations is not exhaustive, so although additional public interest considerations could be added, they are not required for additional matters to be considered by decision makers.

Consumer protection could be potentially be captured in schedule 4, part 2, section 14 – Public health and safety.

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

No comment

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

No comment

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

No comment

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

No comment

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. Public servants are paid from the public purse and it is entirely appropriate that the process for appointing them be as open and transparent as possible in relation to the successful applicant. The current approach (where information that is relevant to the decision about their appointment and their suitability for the role is disclosed, while personal information such as home address, personal phone numbers etc, is protected), is appropriate. It is also appropriate that the personal information of unsuccessful applicants is protected, as currently occurs.

8.1 Should fees and charges for access applications be more closely aligned with fees, for example, for access to court documents?
8.2 Should fees and charges be imposed equally on all applicants? Or should some applicants pay higher charges?
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?
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?

No comment

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

No comment

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?

Yes, on the same basis as requests for extensions of time are managed in relation to initial applications.

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?

No comment

9.6 Should applicants have a right to appeal directly to QCAT? If so, should the Commonwealth model be adopted?

No. Such a change would be likely to lead to an increased number of matters going to QCAT, including matters that do not require that level of review. This would have the consequence of burdening the QCAT system (which is already under pressure) and tying up resources in order to respond to matters that are being satisfactorily managed through the current review processes.

10.1 Are current provisions sufficient to deal with the excessive use of OIC resources by repeat applicants?
10.2 Are current provisions sufficient for agencies?
10.3 Should the Acts provide additional powers for the OIC to obtain documents in performance of its performance monitoring, auditing and reporting functions?
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?

No comment

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

The current reporting system should be simplified. It is appropriate to report on the number of RTI and IP applications received, number of pages released in full or in part or not at all, basis for non-disclosure relied on in decision; number of amendment applications received, and whether amended or refused, but without the granular detail of the number of times an exemption is relied upon.

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?

The recent amendments to the disclosure log provisions are more prescriptive and onerous than previously. For example, departments no longer have a discretion to decide not to publish a document in the disclosure log. Instead, they must take further steps to remove personal information of the applicant or third parties if publication would unreasonably invade their privacy, and also delete information that would be potentially defamatory or a breach of confidence. This process creates an additional burden for agencies, for arguably limited benefit to the public.

Privacy submission from Commission for Children and Young People and Child Guardian

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

As a general principle, it is desirable that privacy is regulated in a similar way for all Queensland agencies and for federal agencies, private organisations and health service providers covered by the federal legislation. This would avoid the additional compliance burden on companies bound by the federal legislation, which are required to meet state requirements when they enter into contracts with state government agencies. It would also address the current situation where Queensland Health is bound to comply with the National Privacy Principles and all other Queensland agencies are bound to comply with the Information Privacy Principles (IPPs).

The amendments to the Commonwealth legislation are the result of a thorough review of the changing information environment in which privacy operates and detailed consideration of the appropriate regulatory response. Queensland has the opportunity to take advantage of the extensive work that has been done in considering whether to adopt the Australian Privacy Principles (APPs) as part of its privacy regime.

If the APPs were adopted in Queensland, it appears that the impacts on agencies would be relatively minor. From the Commission's perspective, the biggest impacts would be in the following areas:

- **Allow individuals to interact with the agency without identifying themselves or using a pseudonym (APP2)**
  The Commission currently has procedures for dealing with anonymous complainants. It may be necessary to provide additional information at the point of collection (eg online forms, telephone messages), advising people about their right to provide information anonymously. However, that would be a minor change. Most other Commission functions would be likely to fall within the exceptions (ie required or authorised by law to deal with individuals who had identified themselves, or impracticable to deal with individuals who have not identified themselves).

- **Obligations in relation to 'sensitive information' (APP3)**
  The requirement that agencies can only collect sensitive information with the person's consent or if one of the exceptions applies is unlikely to have a significant impact on the Commission. The Commission frequently collects sensitive information, but those collections would fall within the exceptions because they are authorised by specific provisions in the Commission's legislation relating to complaints, blue cards, community visitors etc.

- **Dealing with unsolicited personal information (APP4)**
  The Commission already has practices in place to ensure that all personal information (solicited and unsolicited), is afforded appropriate privacy protections. Similarly, records are retained and disposed of in accordance with the relevant disposal schedules. However, it may be necessary for the Commission to implement more rigorous processes for promptly assessing whether unsolicited information falls within the definition of a 'record' and must be retained, or whether it should be disposed of or de-identified.

- **More detailed privacy notices (APP5)**
  APP5 is more prescriptive than IPP2 about what information an agency must provide to an individual in a privacy notice. It would require a detailed review of the Commission's privacy notices, and they might become quite lengthy.

  The requirement to notify people if their personal information is collected from another source would be a significant change. There is a possibility that disclosing that information has been obtained may itself identify the source, for example, in some circumstances when

information is provided by notifiers, complainants or whistleblowers. In addition, privacy notices would have to state that third party information may be disclosed to the third party, and that may make people less inclined to provide information to the Commission.

- **Cross border disclosures (APP8)**
  Under APP8, unless one of the (quite extensive) exceptions applies, the agency remains accountable for any breach of the APPs by the overseas recipient. Therefore, if APP8 was adopted, the Commission would be likely to implement procedures to ensure that information was not sent overseas unless it fell within one of the listed exceptions, eg the person provided express informed consent or the recipient was subject to a law or binding scheme that had the effect of protecting the information in a way that is substantially similar to the way in which the APPs protect information.

- **Mandatory notification of data breaches**
  In addition, the requirement for the mandatory notification of data breaches that will result in a real risk of serious harm, if adopted, would require some changed practices. Currently, the Commission's policy is to notify an affected person if there are steps that they could take to mitigate any damage arising from a privacy breach. Mandatory notification of serious breaches would potentially capture additional cases.

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 IP Act does not inappropriately restrict the sharing of personal information where agencies can identify a legislative authority to request/obtain the information or another exception to IPP11 applies. Issues arise where agencies do not identify an authority in support of their request (which frequently occurs). This means that the agency receiving the request must either ask for that authority or conduct its own research.

In some circumstances, there is no legislative authority or other exception to IPP11, and information cannot be provided even though it might assist an agency performing a legitimate function. When drafting legislation, careful consideration should be given to ensure that the circumstances where personal information should be disclosed are expressly authorised (and confidentiality provisions include appropriate exceptions for when disclosures are required or authorised by law). Also, as a matter of best practice, agencies should always identify the authority for their request when asking other agencies for personal information.

Furthermore, a provision in another State's legislation arguably does not bind a Queensland agency, and this can create obstacles to sharing personal information with interstate agencies.

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?

Yes. It is desirable to achieve consistency, as far as possible. The definition of personal information in the Commonwealth Privacy Amendment Act is not substantially different from the definition in the IP Act. Amending it would address the issues identified in the discussion paper and bring it into line with the definition in other jurisdictions and international instruments.

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?

If the APPs are adopted or the IPPs are aligned with the APPs, this will not be an issue.

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

Section 33 applies when personal information is *transferred* overseas. By contrast, APP8 deals with cross-border *disclosures* and it recognises that in some circumstances, providing personal information to an overseas contractor may be a *use* rather than a disclosure (eg providing personal information to a cloud service provider located overseas for the limited purpose of storing and managing personal information where the agency retains effective control of the information). In that case, the agency does not need to comply with APP8. If the APPs are not adopted, it may be appropriate to amend section 33 to operate in a similar manner to address some of the uncertainties about its operation (eg when information is routed through an overseas server or stored overseas).

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

The Commission only publishes personal information online with express consent from the person concerned. Occasionally, that means something cannot be published online, but generally it does not present insurmountable problems.

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

The accountability approach appears at first reading to be quite onerous, but in reality any liability is only likely to arise in limited circumstances. APP8.1 does not apply if:

- personal information is transferred overseas to a recipient that is subject to a law or binding scheme that is substantially similar to the APPs, or
- the person provides informed consent, or
- the disclosure is required or authorised by an Australian law or court order,
- the disclosure is required or authorised under an international information sharing agreement to which Australia is a party, or
- necessary for certain law enforcement activities, or
- a permitted general situation exists.

If an agency discloses personal information overseas and none of the exceptions applies, it must take reasonable steps to ensure that the recipient does not breach the APPs, and it takes responsibility for any privacy breaches that may occur. The advantage is that it allows the agency discretion about whether to transfer personal information overseas, while maintaining protections for individuals.

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

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

No. Although the IP Act doesn't specify how privacy complaints are to be handled, there are standardised procedures under the Complaints Management System and privacy complaints are dealt with in accordance with that regime.

Yes. The legislated timeframe for complaint handling should be amended to allow investigators to request extensions of time, eg if it is a complex matter involving extensive forensic investigations. Similarly, the complainant should be able to refer their complaint to the OIC immediately they receive the written response from the agency, without having to wait for the expiration of 45 business days.

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

The Information Commissioner should have investigative powers in relation to matters potentially subject to a compliance notice, and a general provision such as that included in the Commonwealth Privacy Amendment Act would appear to be appropriate.

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

It is appropriate that a parent should be able to act on a child's behalf, because frequently they will be the only person who can do so, particularly for a very young child. However, there should be limits on that power. Those limits could be similar to those in section 50 of the RTI Act, which provides that a decision-maker may decide not to give access to a child's personal information if it assesses that it would be contrary to the child's best interests. In making that assessment, the decision-maker must consider whether the child has the capacity to understand the information and the context in which it was recorded and make a mature judgement as to what might be in his or her best interests. A similar rider on section 196 of the IP Act would allow agencies to independently assess whether a proposed disclosure or other action was in the child's best interests.

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

Yes, the definition should be clarified and the Commonwealth provision is a useful model.

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

Yes. The reference to 'documents' is too limiting. Guidance should be taken from the experience of Queensland Health dealing with the NPPs and the experience in other jurisdictions which do not have this limitation, in order to assess how it should be regulated.

14.0 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

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

This approach is consistent with the APPs, which deal with solicited and unsolicited information separately, but still have obligations in relation to privacy notices and use (although the APPs contain the additional explicit requirement that agencies assess whether the agency could have collected the unsolicited information and whether it is contained in a record, and if not, destroy or de-identify the information as soon as possible (if it is lawful and reasonable to do so)).

The proposed change will require agencies provide a privacy notice after collection.

However, it may be difficult to identify the purpose for which the unsolicited information was collected in order to apply IPP3(2).