# Submission to review

## *Right to Information Act 2009* and Chapter 3 of *Information Privacy Act 2009*

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## 1.0 Introduction

The Department of Communities, Child Safety and Disability Services welcomes the opportunity to provide submissions to the statutory review of the *Right to Information Act 2009* (RTI Act) and *Information Privacy Act 2009* (IP Act). This agency is equipped with highly experienced officers and as such, is in a position to comment on many aspects of the current legislative framework.

This submission represents a detailed review of the RTI Act and chapter 3 of the IP Act which is inclusive of the department's views on the majority of the targeted questions posed by the public discussion papers.

## 2.0 Agency context

DCCSDS has one of the largest RTI processing units across government, with 20 FTE decision makers. Primarily, the agency deals in large applications for child protection information; these make up 86% of the total volume. Over half of the child protection applications are from people with current or recent child protection matters followed by over a quarter of the remaining applications being from former children in care (Forgotten Australians).

Over the past financial year the department has received 844 RTI and IP applications with 654 of these reaching a valid status. In this same financial year 627 decisions were made on valid applications with 181,588 pages having been considered after negotiating scope. The majority of these decisions were pages which contain highly personal shared information which were granted in part, with the Schedule 3(12) exemption and section 50 protection for children's information being the primary provisions invoked.

Even though most of the documents held by this agency are personal, administrative release of information is encouraged where possible. One example of this is by assisting applicants gain access to their historical time in care information and thereby entitling Forgotten Australians to a range of other beneficial government services.

The agency also processes access applications on behalf of the Department of Aboriginal and Torres Strait Islander and Multicultural Affairs (DATSIMA). DATSIMA has a relatively small volume of applications each year, primarily in relation to corporate matters or historical immigration records.

A summary of comments is included in Appendix 1.

## 3.0 Discussion paper questions

**Discussion paper question 1.1**
**Is the Act's primary object still relevant? If not, why?**

The primary object of the Act is still relevant; however, if the IP aspects of access and amendment are to be included in the one act then the objects need to include references to IP access and amendment.

The objects of an Act are important given their role in statutory interpretation. The current objects could be strengthened to acknowledge the fundamental concept that the framework is intended to

strike a balance between competing interests without weakening the push model philosophy. The concept of essential public interests warranting protection could be incorporated, as could the concepts of competing interests and protecting the private or business affairs of members of the community. This might be particularly relevant as the government moves forward to a service delivery environment informed by the principles of contestability where services will be increasingly delivered by the non-government sector.

For example:

*Parliament recognises that, in a free and democratic society—*

*(a) the public interest is served by promoting open discussion of public affairs and enhancing government's accountability; and*

*(b) the community should be kept informed of government's operations, including, in particular, the rules and practices followed by government in its dealings with members of the community; and*

*(c) members of the community should have access to information held by government in relation to their personal affairs and should be given a way to ensure the information is accurate, complete, up-to-date and not misleading.*

*Parliament also recognises there are competing interests in that the disclosure of particular information could be contrary to the public interest because its disclosure in some instances would have a prejudicial effect on—*

*(a) essential public interests; or*

*(b) the private or business affairs of members of the community about whom information is collected and held by government.*

*This Act is intended to strike a balance between those competing interests.*

*The object of this Act is achieved by—*

*(a) giving members of the community a right of access to information held by government to the greatest extent possible with limited exceptions for the purpose of preventing a prejudicial effect on the public interest of a kind mentioned in subsection (3); and*

*(b) requiring particular information and documents concerning government operations to be made available to the public; and*

*(c) giving members of the community a right to bring about the amendment of documents held by government containing information in relation to their personal affairs to ensure the information is accurate, complete, up-to-date and not misleading.*

New Zealand's *Official Information Act 1982* provides a balance in a simpler form:

***4 Purposes***

*The purposes of this Act are, consistently with the principle of the Executive Government's responsibility to Parliament,—*

*(a) to increase progressively the availability of official information to the people of New Zealand in order—*

*(i) to enable their more effective participation in the making and administration of laws and policies; and*

*(ii) to promote the accountability of Ministers of the Crown and officials,— and thereby to enhance respect for the law and to promote the good government of New Zealand:*

*(b) to provide for proper access by each person to official information relating to that person:*

*(c) to protect official information to the extent consistent with the public interest and the preservation of personal privacy.*

If the access and amendment provisions of the IP Act are to be integrated into the RTI Act, we need to amend the objects of the RTI Act to reflect this change.

Consider recognising in the objects of RTI Act that there are competing interests that must be balanced and essential public interests that must be protected while maintaining the rights of Queenslanders to seek accountability of government through access to information.

**Discussion paper question 1.2**
**Is the 'push model' appropriate and effective? If not, why not?**

It is difficult to discern how effective the RTI Act has been in furthering the 'push model' philosophy. The public sector landscape has changed significantly since 2008 when the now repealed *Freedom of Information Act 1992* (FOI Act) was reviewed which led to the introduction of the RTI and IP Acts.

The basic elements of the push model in the RTI Act are:

- publication schemes
- disclosure log
- pro-disclosure bias
- section 20

However, push model elements can now be found in a range of other initiatives across government.

## Publication schemes

**Discussion paper question 5.1**
**Should agencies with websites be required to publish publication schemes on their website?**

The publication scheme was introduced in 2009 and essentially provides a mandatory framework of headings for agency web pages under which standard information was to be published as well as providing a space on the agency's web page to publish new information.

Although the publication scheme was an electronic replacement for the Statement of Affairs (SOA), there was a policy approach that saw it take on the secondary purpose which, particularly during the initial implementation phase in 2009-2011, saw a push for agencies to publish as many new documents as possible. This approach resulted in duplication.

The annual SOA was agency specific and operated as a type of register that had previously assisted the community to locate documents by listing the type of documents held by an agency and how access might be obtained to those documents.

The Solomon report stated the following with regard to publication of agency documents:

> *…it is desirable that agencies should continue to be required to make public specified information about their affairs. What has been demonstrated in the past decade and a half is that it is desirable that both the content (…) and its means of delivery or availability need to be flexible, so that they can be adjusted to changes in what information should be required to be made available, and how that happens.*

While agreeing with the sentiment, improvements in information, technology and government web standards, and exciting new data initiatives like Open Data may have made the concept of the RTI publication scheme redundant.

Agencies already publish reasonably consistent information on their websites; for example, annual reports, strategic plans, key project papers and corporate structures. It appears to be of little benefit to have these types of documents on a separate Publication Scheme at a time when websites have become more easily navigable and consistent with user experience requirements. Further, a move towards grouping web content into franchises will make navigating to the content much easier for people seeking to engage with Queensland Government.

The Publication Scheme model might no longer be relevant given that there are measures in place to ensure agencies publish similar information on their websites. These data initiatives might better led by the data management sector so that one approach to all information is taken with minimal duplication. Open Data goes a significant way to fulfilling the push philosophy so consideration should be given to allowing Open Data to grow into that space and remove the publication scheme entirely from the RTI Act and Information Commissioner (IC) functions.

However, reinstating a register of the types of documents held by an agency in the form of the previous SOA may be useful in assisting members of the community locate the correct contact for matters associated with those documents. It may be that a whole-of-government approach would be of more value to the community so that the register could be accessed through one portal rather than through individual government agencies. This would also make the register agile enough to cope with changes in Machinery of Government changes.

**Discussion paper question 5.2**

**Would agencies benefit from further guidance on publication schemes?**

If the Publication Scheme was to continue, consideration should be given to providing for it by way of policy rather than statute. This would give it greater flexibility so that it could more easily respond to changing policy approaches and developing technologies.

**Discussion paper question 5.3**

**Are there additional new ways that government can make information available?**

A number of initiatives make information routinely available. The most recent and potentially influential is the Open Data initiative, but others include:

- Ministerial diaries;
- Lobbyist registers;
- Gifts and Benefits registers;
- Summaries of Cabinet considerations and decisions;
- Contracts over a certain value;
- The new Investment Portals in the areas of grants and procurement; and
- Queensland Globe which publishes data with geo-spatial references.

**Discussion paper question 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 recommended framework for the access and amendment scheme is through one single entry point with the information privacy management obligations remaining in a Privacy Act designed only to deal with information handling practices and complaints management.

The current system, with two acts and two entry points is confusing and overly burdensome for both applicants and agencies. The current approved application form sets out the following, requiring applicants to check the relevant box:

*a. All of the documents I'm applying for contain my personal information OR I'm seeking access on someone else's behalf, and all the documents contain that person's personal information –* ***IP application, no application fee.***

*b. Some of the documents I'm applying for do not contain my personal information OR I'm seeking access on someone else's behalf, and some of the documents do not contain that person's personal information –* ***RTI application, application fee payable.***

*c. None of the documents I'm applying for contain my personal information OR I'm seeking access on someone else's behalf, and none of the documents contain that person's personal information –* ***RTI application, application fee payable.***

If applicants are not familiar with the definition of personal information as stated in the Act, or have difficulty understanding that, for example, information about other family members is not their personal information, applicants will often choose the incorrect check box.

When this occurs, the application must be dealt with under section 54 of the IP Act (Application not limited to personal information) i.e. the 'wrong Act' provisions. When an applicant cannot be contacted immediately, the agency must write to the applicant to give them an opportunity to re-scope their application so that it applies only to their own personal information or to pay the fee to change their application to RTI. This process appears confusing for applicants who have little knowledge of how the legislation works and adds another layer of unnecessary red tape.

A way to simplify this for applicants, while enabling them to maintain a high level of involvement and control in the process, a single entry point (i.e. the RTI Act) should be considered. Applicants would still be able to specify in the first instance whether their application is limited to personal information; however the agency could decide ultimately whether the terms of their request are likely to include documents containing non-personal information, without further consultation with the applicant.

This was the case in the repealed FOI Act and worked well. An application fee could be levied at the initiative of the agency where there was at least one document that did not contain the applicant's personal information.

The benefits of one act for access and amendment would include:

- eliminating the administrative burden associated with 'wrong Act' applications;
- increasing the likelihood of compliant applications;
- re-aligning the public perception of the system with the reality of the system;
- creating an easier system for decision makers and agencies to administer;
- streamlining administrative processes generally; and
- separating information privacy management obligations from access and amendment rights.

**Discussion paper question 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 RTI Act?**

If the two-entry point access system continues, this seems a sensible approach to ensure that the full processing period can be used for real processing tasks and not for administrative processes.

**Discussion paper question 3.2**

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

If the two-entry point system continues, this should be omitted because, as discussed above, it appears to add further administrative burden and confusion for applicants.

**Discussion paper question 3.3**

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

This appears to be a drafting inconsistency and if the two-entry point system continues, this should be made consistent with timeframes stipulated throughout the RTI Act.

**Discussion paper question 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?**

**Discussion paper question 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?**

There should be a mechanism, and review rights, for a decision that a document is not a document of an agency or a document of a Minister.

**Discussion paper question 4.3**

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

The decision timeframe should be aligned with ordinary processing periods and additional timeframes for third party consultation and charges estimate processes.

**Discussion paper question 4.4 and 4.5**

This agency has no comment to provide in relation to discussion paper questions 4.4 or 4.5 given their specific relevance to government owned corporations.

**Discussion paper question 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?**

The application of RTI Act and Chapter 3 of IP Act to contracted service providers performing functions on behalf of the government would need careful consideration and consultation across government and with the sector.

In this environment of contestability and more dynamic approaches to service delivery, it is likely that the public's interaction with government services will increasingly be via a range of service delivery models including the non-government sector so it is timely to consider this issue.

In 2012-13, this agency administered $2.3B in grants and had many of its frontline services delivered by the non-government sector. Any move to bring funded service providers and contractors under the RTI access and amendment regime would bring with it significant challenges for the service providers. However, a number of other jurisdictions have extended their freedom of information legislation to private organisations that receive government funding. The types of mechanisms that commonly deal with this issue include:

- legislating for access in statues under which the services are funded.

- deeming the relevant documents as 'documents of an agency' (NZ)
- including an access and amendment scheme in privacy legislation – see Commonwealth provisions and IPPs 6 and 7 in the Queensland IP Act
- providing for access and amendment obligations in the service agreement or contract, essentially under a constructive possession principle.

If funded service providers were required to process their own access applications it would involve significant compliance costs in terms of developing administrative systems and decision making staff. The Commonwealth FOI Act sets out its approach to contracted service providers in section 6C, which is as follows:

> ***6C Requirement for Commonwealth contracts***
>
> *(1) This section applies to an agency if a service is, or is to be, provided under a Commonwealth contract in connection with the performance of the functions or the exercise of the powers of the agency.*
>
> *(2) The agency must take contractual measures to ensure that the agency receives a document if:*
>
> *(a) the document is created by, or is in the possession of:*
>
> *(i) a contracted service provider for the Commonwealth contract; or*
>
> *(ii) a subcontractor for the Commonwealth contract; and*
>
> *(b) the document relates to the performance of the Commonwealth contract (and not to the entry into that contract); and*
>
> *(c) the agency receives a request for access to the document.*

**Discussion paper question 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?**

Mandatory forms for access and amendment applications were introduced with the RTI and IP Acts in 2009. Section 49 of the *Acts Interpretation Act 1954* allows agencies to accept applications not on the mandatory form as long as the application is 'substantially compliant' with being lodged in the mandatory form. That said, the prescribed form, while useful for ensuring that validity requirements are met, does not assist the applicant to craft the terms of their request with any precision. This could be addressed by amending the Act to allow agencies to design their own forms with some common mandatory fields.

The generic application form lodged online often results in the terms of the applications being imprecise. Clarity of terms is critical and best achieved through liaison with applicants at the earliest opportunity and where possible, prior to lodging the application. Where this is not possible, an application form that reflects the type of documents held by the agency assists applicants to craft the terms of their application in a way that minimises confusion and delay.

For example, this department holds significant amounts of protected child safety information which can only be given to the person to whom it relates. Most applications received by this agency will have terms of application that will need to be amended through consultation. The rate of applications which have to be amended would reduce if the application form was customised to suit the information holdings and special conditions that attach to particular information.

Advances in technology since the introduction of the online application portal should allow for the online application to reflect agency specific forms. A set of 'mandatory fields' could be set by statute or Ministerial guideline for agencies to include on their form.

**Discussion paper question 6.2**

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

Yes. The amendment form could be improved by requiring an applicant to provide more information to assist the agency determine how the record is incorrect, incomplete, out of date or misleading.

**Discussion paper question 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 current list is too limited and some applicants report difficulties in having to provide certified identity documents. On average, 26% of all applications submitted to this agency under the IP Act never become valid applications because of a failure to supply appropriately certified proof of identity. It is not clear what proportion of these applications do not become valid because of the certification rules; some applicants may not have access to the relevant evidence of identity documents and others may have just thought better of continuing with their application.

Adopting the list of authorised witnesses under the *Statutory Declarations Act 1959* (Cth) may be a good starting point for the expansion of the list of qualified witnesses. This list includes public service officers as witnesses which may facilitate single entry point style service provision.

**Discussion paper question 6.4**

**Should agents be required to provide evidence of identity?**

It is recommended that there be less statutory prescription in relation to agent identity particularly in relation to agents such as legal representatives who are subject to professional standards of conduct.

**Discussion paper question 6.5**

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

Currently there is no discretion to waive the application fee in relation to RTI access applications. Fees can be refunded only in a limited range of circumstances. A 'cooling off' period might be worth considering where a refund can be processed under the Act if an application is withdrawn within a particular timeframe, for example, 5 business days from receipt of application.

**Discussion paper question 6.6**

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

Yes, for the most part. This agency processes a large number of applications made on behalf of children and finds that the current system works well. The only improvement suggested would be to include statutory guidance as to dealing with applications from parents who make application on behalf of teenage children.

Currently, a parent has the right to act for a child if the child is under 18 years. Most other comparable jurisdictions in Australia are more restrictive as to the right of parents or do not embed the power of parents acting for children with regards to access and amendment or privacy rights.

In Victoria, the right of parents with regards to their children is set out in the *Information Privacy Act 2000* at section 64. An 'authorised representative' in includes guardians or parents on behalf of children (section 64(6)). The capacity and power to give consent may be exercised by an authorised representative if a person is *incapable* of consent. This power is limited by section 64(5) where it states an organisation may refuse a request if they reasonably believe access by an authorised representative will endanger an individual, and the onus is on the authorised representative to act in the best interests of the child (see section 64(4)) or else an application is void. Therefore, the right of parents only arises where a person is incapable of consent, giving a decision maker the responsibility to assess and be satisfied whether at a particular age it is more appropriate for a child to apply in their own right and/or to assess that a child is not incapable of giving consent. This ability is lacking in Queensland where parents always have a right to apply and so applications may be accepted even where a decision maker has doubts as to whether the child would give consent if they were aware of the application.

New South Wales does not legislate with regard to the right of parents in relation to their children in the *Privacy and Personal Information Protection Act 1998* or its RTI equivalent *Government Information (Public Access) Act 2009* (GIPA). Rather, departments determine a cut off age, varying depending presumably on the type of information likely to be dealt with, so that parents seeking information on behalf of children over a certain age must have a written consent. A review of agency application forms published online (for an application under the GIPA) indicates the following status quo in NSW – the Department of Education and Communities requires parents applying for information of children over 12 years to have written consent, the Department of Health requires consent from the child where they are over 14 years and has a cut off point where parents are unable to apply for their children's information at all from the age of 16 years and the Department of Family and Community Services requires consent from children over 10 years of age. This inconsistency across departments is not desirable for Queensland however it does represent a much more restrictive and protective view for children's information unless it can be proven that a parent has gained consent from their child. The right of parents in NSW is reduced once a child reaches a certain age, presumably based on when they are likely to understand the information themselves and understand what it means for their parents to be accessing that information as well.

It is more desirable for the onus to be put on the parent to demonstrate a child over a certain age, for example, 12 - 14 years, consents to acting on their behalf.

**Discussion paper question 6.7**

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

The further specified period begins at the end of the processing period. Any other periods that do not count towards the processing period should fall before the further specified period. For example –

At day 15 – an agency seeks an extension of 10 business days to process the application; but at day 25, an agency finds that a third party consultation process is required. The further specified period should not begin until after the 10 business days from the third party consultation.

| | | | | |
|---|---|---|---|---|
| Processing day 1 | Processing day 2 | Processing day 3 | Processing day 4 | Processing day 5 |
| Processing day 6 | Processing day 7 | Processing day 8 | Processing day 9 | Processing day 10 |

| | | | | |
|---|---|---|---|---|
| Processing day 11 | Processing day 12 | Processing day 13 | Processing day 14 | Processing day 15<br><br>Further specified period of 10 business days asked for and agreed to |
| Processing day 16 | Processing day 17 | Processing day 18 | Processing day 19 | Processing day 20 |
| Processing day 21 | Processing day 22 | Processing day 23 | Processing day 24 | Processing day 25<br><br>TPC commenced |
| TPC day 1 | TPC day 2 | TPC day 3 | TPC day 4 | TPC day 5 |
| TPC day 6 | TPC day 7 | TPC day 8 | TPC day 9 | TPC day 10 |
| Further specified period day 1 | Further specified period day 2 | Further specified period day 3 | Further specified period day 4 | Further specified period day 5 |
| Further specified period day 6 | Further specified period day 7 | Further specified period day 8 | Further specified period day 9 | Further specified period day 10 |

**Discussion paper question 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. The current Acts render a decision maker *functus officio* where a decision is taken to have made (deemed). Currently, a notice must be issued for deemed decisions. Once an access decision is deemed, nothing further can be done until the matter is the subject of external review.

It appears that the intention was to encourage agencies to make decisions within the time period. Issuing a notice at deemed decision serves the purpose of alerting applicants that the time has expired. Applicants must then seek external review to enliven the application.

The repealed FOI Act allowed for applications to continue to be processed until the OIC advised acceptance of an external review and it is suggested that this approach be reinstated.

If there is a concern about timeliness of agency decisions, one way of encouraging compliance could be to include the number of deemed decisions in the annual report. This would ensure transparency of decision times and reduce red tape.

Consideration be given to allowing a decision to be continued to be worked upon and notified after the expiration of the time period and before the external review application is received.. This would benefit the applicant by not further delaying the application. It would also save the OIC time and resources by reducing the number of external reviews.

Another suggestion to save red tape would be to allow applicant notice of deemed decisions to be advised verbally.

**Discussion paper question 6.9**

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

The CEN process is important and should be continued. However, the statutory requirement should only require CENs to be issued in cases in which charges will apply. The requirement to issue a CEN in all cases (and for an applicant to have to accept the CEN even when there are no charges payable) should be removed from the Act.

The CEN is a key mechanism in the RTI Act that ensures that applicants are advised if they are liable for charges. It also provides an opportunity for applicants to negotiate with agencies to reduce those charges. Currently, CENs must be issued to applicants, and applicants must respond, even when it is clear that no charges will apply. This is confusing and inconvenient for applicants and stops the processing period; increasing the time for notifying the decision.

In 2012-13, 82% of CENs issued by this agency were for nil charges, because the time involved in processing the non-personal documents was fewer than five hours. or because all documents contain the applicant's personal information. Only 3% of CENs led to narrowing the terms of the application. This would appear to be an unnecessary time spent on a process which serves no purpose for applicants or the agency.

The Solomon review introduced another concept (the schedule of documents) in the belief that applicants would significantly narrow the terms of their application if they had a list of responsive documents to review early in the application process. The Solomon review noted that the schedule of documents "dovetails" with the charging regime ([p. 92]). This led to this system of CEN and schedules where the intended focus was on confirming the terms of the request rather than accepting charges. The three responses demanded of applicants are to confirm, narrow or withdraw the application. At no point in the CEN process is the applicant required to explicitly accept the charges.

The purpose of a CEN should be primarily to notify and seek acceptance of charges liability when charges are payable.

Consideration may also be given to allowing agencies to seek payment of a deposit at the time of CEN acceptance in order to focus the applicant on reducing the terms of the request.

Finally, clarification may be warranted on the point of whether CENs are required for particular refusal decisions; for example, for neither confirm nor deny (section 55) and refusal to deal under section 40, 41 and 43. In the case of sections 55 and 43, this would only be the case if there are no other responsive documents the agency is dealing with.

**Discussion paper question 6.10**

**Should applicants be limited to receiving 2 charges estimate notices?**

Yes. It is better to have a limit of CENs and two seems to work well. It may be beneficial to make it clear that applicants can continue to narrow the terms of their request as many times as they see fit – that they just will not receive a further CEN. This is appropriate given the amount specified in the CEN is the maximum liability.

**Discussion paper question 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?**

No, the current system works well.

Applicants are able to seek review of a decision that charges apply to their application; but a decision about the amount of charges imposed is not reviewable. Given that charging for services fits more closely with an agency's responsibilities under the Financial Administration and Audit Act, these are arguably administrative decisions which are more appropriately dealt with by the Ombudsman if an applicant is aggrieved.

**Discussion paper question 6.12**

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

The 'schedule of documents' does not need to be a separate requirement requiring formal waiver. While the provision of the numbers of general classes and categories of documents to applicants may be useful for applicants to understand the nature of documents located and the basis upon which the estimate has been calculated, it may not be efficient or necessary in some cases.

**Discussion paper question 6.13**

**Should the threshold for third party consultations be reconsidered?**

Yes. The threshold for third party consultations would be better returned to the pre-2009 standard of *substantial concern*.

Section 37 of the RTI Act is a natural justice provision which requires that access can only be given to a document that contains information the disclosure of which may reasonably be expected to be of concern to a government, agency or person if steps that are reasonably practicable have been taken to obtain the views of the relevant third party about whether the document is a document to which the Act does not apply or whether the information is exempt or contrary to public interest.

The threshold for consultation was lowered in 2009 from '***substantial concern***' to '***concern'***.

The Solomon Review recommended section 51 of the now repealed FOI Act be retained and did not appear to contemplate lowering the threshold to the current section 37 provision that "matter the disclosure of which may reasonably be expected to be of ***concern*** (…)". Indeed, it may have been a drafting error.

The lowering of the threshold has proven to be administratively burdensome and an onerous obligation. This department has dealt with a number of applications which, on the newer test, required consultation with up to 40 third parties. Where there are multiple third party participants there is a raised prospect of refusing to deal which is clearly not an intended or desirable outcome. The original test of 'substantial concern' worked well having struck an appropriate balance between the rights of third parties, rights of access applicants and the administrative demands of processing applications.

**Discussion paper question 6.14**

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

No.

Agencies should be able to assess the circumstances in which it is appropriate to withhold the identity of an applicant on a case by case basis as is the current practice. These administrative processes are well handled by properly qualified and experienced decision makers. There may be merit in making it clear that the identity of an RTI applicant is not *prima facie* confidential.

An unnecessary layer of red tape would result from prescribing a process for considering requests for confidentiality, or making reviewable, decisions on whether or not an applicant's identity is confidential. The issue is not one that arises with any frequency and mostly only in relation to third party consultations. Case study guidance and training may be more cost and time effective ways of dealing with the issue.

**Discussion paper question 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?**

Yes. Implementation of this would produce a number of benefits:

- the agency with expertise in relation to the documents would be the only agency responsible for processing documents, reducing the need for cross-agency consultation
- chief executives and Ministers would retain control over the way their delegation is exercised in relation to their documents, and could be briefed easily by agency decision makers
- when machinery-of-government change occurs and an agency retains control over records which technically relate primarily to another agency the responsibility transfers with the administrative function more readily, giving the public service more resilience to continue providing good customer service in the face of change; for example, corporate records of another agency's staff.

**Discussion paper question 6.16**

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

The notice provisions in the RTI Act are unnecessarily complex for decision makers and applicants alike. In general, the RTI Act seeks to prescribe too many decision making processes which then results in loss of flexibility in decisions that are difficult to follow.

While notices of decision should follow legal form and substance and not be 'dumbed down' , decisions under the RTI Act should conform to the requirements of administrative decisions generally. In the Solomon Review, there may have been concerns that the quality of decisions was neither consistent nor high. Issues about consistency and quality of decisions may be better addressed by having:

- decision makers properly qualified to make administrative decisions
- specific administrative decision making training
- the IC addressing these issues in external reviews informally or by using its power to require better reasons.

The department has adopted a number of strategies to work around the complexities of the decision requirements including splitting the decision and reasons for decision into two parts so that the applicant is able to discern the decision from the first page of the notice. The decision part of the notice states:

- The date and terms of the application;
- the number of documents (pages) in issue;
- the number of documents (pages) to which access is granted in full and in part and refused and the broad ground for those decisions (e.g. because the information is contrary to public interest or because it is contrary to the best interests of the chid);
- the applicant's review rights in relation to the decision; and
- the decision maker's name.

The reasons for decision are attached to the decision and can number up to 30 pages depending on the number of documents in issue and diversity of material requiring consideration. These reasons follow the form required by the Act.

The disclosure log obligations are met by an information sheet included in the decision or at acknowledgement letter/third party consultation time.

These measures have not been able to address entirely the issue of overcomplicated notices of reasons.

The Commonwealth FOI Act model follows a standard model of statement of reasons and which may be preferable for Queensland, allowing decisions to be fashioned to suit the audience whilst maintaining the requirements to conform with administrative law principles. A decision under the Commonwealth FOI Act provides a simpler notice structure according to section 26 of its Act:

> ***26 Reasons and other particulars of decisions to be given***
> *(1) Where, in relation to a request, a decision is made relating to a refusal to grant access to a document in accordance with the request or deferring provision of access to a document, the decision maker shall cause the applicant to be given notice in writing of the decision, and the notice shall:*
> *(a) state the findings on any material questions of fact, referring to the material on which those findings were based, and state the reasons for the decision; and*
> *(aa) in the case of a decision to refuse to give access to a conditionally exempt document—include in those reasons the public interest factors taken into account in making the decision; and*
> *Note: Access must generally be given to a conditionally exempt document unless it would be contrary to the public interest (see section 11A).*
> *(b) where the decision relates to a document of an agency, state the name and designation of the person giving the decision; and*
> *(c) give to the applicant appropriate information concerning:*
> *(i) his or her rights with respect to review of the decision;*
> *(ii) his or her rights to make a complaint to the Information Commissioner in relation to the decision; and*
> *(iii) the procedure for the exercise of the rights referred to in subparagraphs (i) and (ii);*
> *including (where applicable) particulars of the manner in which an application for internal review (Part VI) and IC review (Part VII) may be made.*
> *(…)*

The Western Australia FOI Act is also simpler, providing (at section 30):

> ***30 Notice under s. 13(1)(b) of decision, form etc. of***
> *The notice that the agency gives the applicant under section 13(1)(b) has to give details, in relation to each decision, of —*
> *(a) the day on which the decision was made; and*
> *(b) the name and designation of the officer who made the decision; and*
> *(c) if the decision is that a document is an exempt document and that access is to be given to a copy of the document from which exempt matter has been deleted under section 24 —*
> *(i) the fact that access is to be given to an edited copy; and*
> *(ii) the reasons for classifying the matter as exempt matter and the findings on any material questions of fact underlying those reasons, referring to the material on which those findings were based; and*
> *(d) if the decision is that access to a document is to be deferred — the reasons for the deferral and, if applicable, the period for which access is likely to be deferred; and*

*(e) if the decision is to give access to a document in the manner referred to in section 28 — the arrangements to be made for giving access to the document; and*
*(f) if the decision is to refuse access to a document — the reasons for the refusal and the findings on any material questions of fact underlying those reasons, referring to the material on which those findings were based; and*
*(g) if the decision is that the applicant is liable to pay a charge to the agency — the amount of the charge and the basis on which the amount was calculated; and*
*(h) the rights of review and appeal (if any) under this Act and the procedure to be followed to exercise those rights.*

The following changes to the decision making process may simplify decision making and so too the notice of reasons for decision.

a. Disclosure log
   This could be handled at the front end of the application so that applicants and third parties are informed in making decisions during the process understanding the disclosure log requirements.

b. Deletions
   As long as the Act provides for deletions it seems unnecessary to include in the reasons. This could be handled in an applicant information pack explaining the process of RTI given to applicants when an acknowledgement letter is sent to the applicant.

c. Irrelevant considerations
   There is some ambiguity about the statutory irrelevant considerations being included in the notice of decision. The prevailing view is that reference to these should be included in the decision even where such factors have not been put to the decision maker. The better approach for clarity would be to revert to a standard decision making process and statement of reasons format, requiring only matters relevant to the decision to be considered in the decision making process. Those statutory irrelevant considerations then merely making it clear to all that those factors are irrelevant to making the decision. The only time these should be included in the statement of reasons is where submissions have been made that raise irrelevant considerations.

d. Another measure to streamline prescribed written notices would be to cluster all the requirements of notices in one section rather than throughout the Act making it simpler for decision makers to locate their obligations.

**Discussion paper question 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 or denied is prescribed information?**

None. This agency tends to use the neither confirm nor deny provisions for the identities of child protection notifiers or complainant information. Notifications from the public and from statutory notifiers are the backbone of the child protection system and the protection of same must be of the highest order to ensure that the public's confidence in this fundamental protective system is not eroded. However, rather than to apply section 55 in the first instance, this agency attempts to work with the applicant to make the application in terms that remove the need to call upon section 55.

Where section 55 is needed, the external review process is the mechanism for the agency to demonstrate that the information is prescribed information. The IC, as review body, can confirm this for the applicant as required.

**Discussion paper question 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?**

It would seem to be appropriate for the content of the notation to be reviewable in these circumstances.

This issue can arise when the decision on an application is to amend the document by way of notation so in fact there has not been a refusal to amend, merely, a refusal to amend in the way requested by the applicant.

**Discussion paper question 7.1**

The department has no comment to make in relation to discussion paper question 7.1 as these exclusions are specific to the agencies which hold the documents in question.

**Discussion paper question 7.2**

**Are the exempt information categories satisfactory and appropriate?**

**Cabinet**

The changes to the Cabinet exemption arising from the introduction of the new Act in 2009 narrowed the types of documents to which the cabinet exemption would apply. One area where consideration could be given to revising relates to information that was prepared for the use of or for the briefing of a Minister or principal officer in relation to a matter submitted or brought into existence for submission to Cabinet. The Western Australia and Commonwealth FOI Acts contain similar provisions, as do many other jurisdictions. Inconsistency of approach can arise when dealing with information that has been created that concerns the core business of Cabinet which qualifies for exemption but the related briefing material does not.

There would be greater consistency if executive processes and communications between agencies and Ministers in relation to core Cabinet business were brought back into this provision. This would also realign with the current Executive Council exemption.

**Executive Council**

The Executive Council exemption mirrors the format of the former Cabinet exemption in the now repealed FOI Act. This provision is rarely applied and most commonly is raised where there are documents in issue concerning:

- Senior appointments submitted to Executive Council for approval such as senior statutory appointments, departmental executives, judicial appointments etc;
- Decisions of government, particularly financial decisions that can only be taken by Executive Council.

It should be noted that this provision maintained the exemption for information that was brought into existence for briefing, or the use of, the Governor, a Minister or a chief executive in relation to information submitted or proposed to be submitted to Executive Council and it might we warranted to consider reinstating its equivalent in the Cabinet exemption as noted above.

**Information briefing incoming minister**

**Discussion paper question 7.6**

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

Generally, where there is a good reason to refuse information because of protections for what might be regarded as essential public interests and processes, the Act should work if properly applied by experienced and qualified decision makers.

As a relatively new provision, previously these types of documents did not qualify for exemption as a class of documents rather; they were treated as ordinary briefing notes with decision makers applying the usual tests available in the Act. Having processed a number of those types of applications before they were exempt, the approach was to deal with each document and refuse access only to information which qualified for refusal. Examples of grounds which those briefs may contain information that would be refused included:

- it concerned the personal affairs of a person other than the applicant,
- commercial affairs, business or professional affairs;
- confidential information;
- deliberative process information;
- legal professional privilege.

If there is some special character about incoming briefs that requires special protection, then Parliament may exclude them from the Act as is the current situation. The current Commonwealth FOI Act does not exclude those briefs but the Hawke's review recommends they be excluded as a genre of documents, which would bring them into line with Queensland.

**BCC – committee, Budgetary information for local governments, Sovereign communications, National or State security**
No comment.

**Contempt of court/parliament**
This exemption should stand as drafted. Contempt of court and the concept of Parliamentary privilege are generally understood and there is sufficient case law on these topics to allow decision makers to apply them with clarity.

**Legal professional privilege (LPP)**
There is sufficient general law on this concept to allow the exemption to stand as is drafted. The concept should be well understood in the sector and the community as a central pillar to the legal system which warrants continued protection as an essential public interest.

One aspect of LPP that is sometimes misunderstood is the question about who owns privilege. The privilege is the client's and in government, the Attorney-General is the 'client' as the first law officer and not the chief executives or legal officers within departments who perhaps seek the legal advice or are involved in litigation. This is a critical point when considering whether or not information can be disclosed despite it being protected under privilege. To disclose information that would otherwise be protected under privilege is essentially to waive that privilege. Privilege can be waived expressly, in which case a question that can only be determined by the Attorney-General, or impliedly, in which case the focus is on whether or not the conduct in respect of the information is consistent with maintaining confidentiality of the client/legal advisor communications. So where it is found that privilege has been waived impliedly then the information is not exempt under LPP and may be disclosed subject to any other relevant public interest factors that may favour nondisclosure. Ministerial guidance on this point might be warranted.

**Breach of confidence**
The maintenance of the breach of confidence exemption (as opposed to the harm factor favouring nondisclosure outlined in part 4 of schedule 4) is supported. It protects confidential information where the obligation is owed to parties other than the government and its value in protecting those interests is supported by the department. It is a complex area of law that requires experienced decision makers to determine whether it applies. There is a considerable body of case precedent drawing on general law and equity, and is an evolving area.

**Law enforcement and public safety**

The exemption to section 10(4) of Schedule 3 needs clarification. Section 4 exempts information obtained, used or prepared for an investigation by a prescribed crime body or another agency in the performance of the prescribed functions of the body. This section mostly arises in the context of CMC investigations. The exception is found in section 10(6) of Schedule 3. It provides that the information is not exempt in relation to a particular applicant if it consists of information about the applicant and the investigation has been finalised.

This part of the law enforcement exemption is drafted in the same terms as the now repealed FOI Act. It is understood that the purpose of the exception was to allow for the people who have been the subject of investigations to not be prohibited for all time from obtaining access to the information about them. This approach is supported. However, the way the exception is drafted leaves open the question of whether information contained in documents which refers to people other than the subject officer is available to others. The IC has accepted the view that information contained in a departmental investigation report that refers to another person is about the subject officer not the other person. In that case, information about a complainant was not considered to qualify for the exception with the exemption only falling away in respect of an application made by the subject officer and not an applicant who was mentioned in extracts of interviews with the subject officer.

In *McKay and the Department of Justice and Attorney-General* (25 May 2010) 210801, the IC found, in respect of the equivalent provision in the FOI Act, that (at [69]:

> *The FOI Act does not define the term 'about'. Sections 42(3A) and 42(3B) of the FOI Act are relatively new exemption provisions inserted into the FOI Act by the Freedom of Information and Other Legislation Amendment Act 2005 (Qld) which commenced on 31 May 2005. I note that there is no equivalent provision in other Australian jurisdiction. Section 4 of the FOI Act relevantly provides:*
>
> > *4 Object of Act and its achievement*
> > *(1) The object of this Act is to extend a s far as possible the right of the community to have access to information held by Queensland government.*
> > *(2) Parliament recognises that, in a free and democratic society—*
> > > *(a) the public interest is served by promoting open discussion of public affairs and enhancing government's accountability; and*
> > > *(b) the community should be kept informed of government's operations, including, in particular, the rules and practices followed by government in its dealings with members of the community; and*
> > > *(…)*
> > *(3) Parliament also recognises there are competing interests in that the disclosure of particular information could be contrary to the public interest because its disclosure in some instances would have a prejudicial effect on—*
> > > *(a) essential public interests; or*
> > > *(b) the private or business affairs of members of the community about whom information is collected and held by government.*
> > *(4) This Act is intended to strike a balance between those competing interests.*
> > *(5) The object of this Act is achieved by—*
> > > *(a) giving members of the community a right of access to information held by government to the greatest extent possible with limited exceptions for the purpose of preventing a prejudicial effect on the public interest of a kind mentioned in subsection (3); and*
> > > *(…)*
> > *(6) It is Parliament's intention that this Act be interpreted to further the object stated in subsection (1) in the context of the matters stated in subsections (2) to (5).*

*Consistent with Parliament's intention expressed in section 4(6) of the FOI Act, section 42(3B) of the FOI Act must be interpreted in a way that best achieves the purpose of the FOI Act:*
*(…)*
*In accordance with section 4(6) of the FOI Act, and in light of the explanatory notes, section 42(3B) of the FOI Act may be interpreted as a provision protecting the private affairs of individuals who are the subject of relevant investigations, unless the documents:*

- *are about the applicant; and*
- *relate to a finalised investigation by the relevant crime body.*

*The plain meaning of the word 'about', as defined in the Macquarie Dictionary includes: of; concerning; in regard to connected with*
*I understand the applicant's argument to be that because he made a complaint to the CMC and the matter in issue is matter contained in the resulting report of the investigation of that complaint, it is therefore about him.*

*In this case, while it can be said that the matter in issue came into existence as the result of the applicant's actions (making the complaint), that does not in and of itself make that matter in issue about the applicant. The matter in issue is about persons other than the applicant. It is about the conduct of the legal officers the subject of the investigation and report.*

*Accordingly, I am satisfied that:*

- *section 42(3B) of the FOI Act does not apply to exclude the operation of section 42(3A) of the FOI Act in the current circumstances*
- *the Matter in Issue qualifies for exemption under section 42(3A) of the FOI Act.*

For the sake of certainty and to put it beyond doubt the circumstances in which the exception to the exemption applies should be made clear.

**Investment incentive scheme information**
The circumstances in which this exemption would apply are rare. Consideration could be given to whether or not information of this nature warrants true exemption status or whether an approach could be taken whereby the particular circumstances of each case could be assessed allowing public interests to be taken into account for the access decision after consultation with relevant parties.

**Information prohibited by an Act**
We strongly urge the addition of a consideration of the public interest to this exemption.

Both the new RTI Act, and the repealed FOI Act, provide for an exemption from release of information prohibited from release under section 314 of the *Adoption Act 2009* (Adoption Act); or sections 186-188 of the *Child Protection Act 1999* (CP Act). However, the new RTI Act did not include a key element from the repealed FOI Act: that disclosure of information prohibited from release under those sections of the Adoption and CP Act could be permitted if it was found that disclosure was required by a **compelling reason** in the public interest.

The Solomon review recommended that this type of information be removed from the exemption list and handled by way of the pro-disclosure bias and weighing the relevant public interest factors for disclosure against those against disclosure on the grounds that the information is prohibited from release by another Act. The recommendation was not accepted with the Government response noting that:

> *Schedule 1 provides a very limited list of secrecy provisions in other legislation relating to the protection of the rights or safety of citizens. These matters require an absolute guarantee of confidentiality to ensure upfront public confidence and participation in certain processes of government. For example, Schedule 1 protects the confidentiality of the witness protection program, adoption information, child protection notifications and personal taxation information. The government considers there is a compelling public interest in protecting this information from public disclosure in all circumstances.*

Without a public interest test attached to the exemption provision, the effect has been to raise the protection of relevant information above that which it had been afforded under the repealed FOI Act.

The consequences of this change for child protection and adoptions information began to appear in late 2011, when the IC considered an external review of a departmental RTI decision refusing access to the identity of the person named as the adopted applicant's biological father in a departmental document (putative father) (*7CLV4M and Department of Communities*).

In that decision, the IC upheld the department's decision to refuse access to adoptions information on the grounds that the information is exempt information because it is prohibited from release under section 314 of the Adoption Act. The IC commented that the exception to the exemption (which states that information is not exempt if it is personal information for the applicant) did not apply because the identity of a putative father should be characterised as *shared* personal information (that is, personal information of the adopted person and personal information of the individual identified). The applicant appealed to the Queensland Civil and Administrative Tribunal (QCAT) which decided that neither the department nor the IC had made an error of law in refusing access.

Similarly, the IC considered a decision of the department to refuse access to child protection information about persons other than the applicant in late 2012 (*Hughes and the Department of Communities, Child Safety and Disability Services)*. The Hughes decision was that the child protection information was exempt information because it is prohibited from release under section 187 of the CP Act. The decision also held that in an RTI or IP application for child protection information, only information which is solely about the applicant can be released to the applicant.

However, in both these decisions, the IC implied that the department retained a residual discretion to release otherwise exempt material. At this time, the department became concerned that its decision making approach was not consistent with the decisions of the IC and the scope of the residual discretion was in question. [redacted]

The effect of the removal of the public interest test in 2009 has had a significant impact on the ability of the department in granting access to child protection information in particular. The department no longer has any flexibility or discretion with regard to the release of information prohibited from release by either the Adoption Act (information that identifies putative fathers) or CP Act (child protection information not solely about the applicant).

[redacted]

In relation to child protection information, the circumstances in which documents are exempt from disclosure to the applicant include where:

- a parent applicant seeks information about their deceased child;
- an individual applicant seeks access to historical information for family history research or to administer an estate;
- an individual applicant seeks access to their own child protection information but significant parts are shared with their family members – this shared information is exempt in all scenarios because it will never be 'solely' about the applicant and effectively, no one can access it.

The approaches under the RTI and IP Acts have impacted on the procedural and substantive aspects of RTI, particularly with regard to child protection applications, which made up 88% of the total applications processed in 2012-13.

Where a single RTI application was previously processed for a family, the new approach means that each family member must make their own application under the IP Act. This results in unnecessary red tape for these families. Each application requires a separate form to be completed and each applicant (including each of the children) must provide certified identification.

Between 18 April and 18 July 2013, 70 applications were received which related to 24 families. Under the repealed FOI Act these could have been processed as 24 applications because it was possible to give access to information about all members of the family to one applicant as a representative of the family.

Having to process multiple applications for families increases the workload of the RTI unit and reduces the revenue collected for application fees and processing charges, which do not apply to applications under the IP Act. As an example, recently four applications were processed for one family (two parents and two children) in which 2400 pages were considered. Four sets of the same documents had to be marked up, each in a different way, so that only information solely about the particular applicant was released only to that applicant.

It is recognised that reinstating a public interest test to the statutory confidentiality provisions would not entirely remove the need to process multiple applications for particular family circumstances, but it would significantly reduce the instances where such an approach was necessary.

One of the most concerning and undesirable consequences of the strict approach afforded by not having a public interest test for these types of documents is the case of documents of deceased persons. Parents are denied the opportunity under RTI and IP to receive child protection documents about their deceased children. Historical child protection information about deceased persons is also not accessible.

The department recognises that child protection information is particularly sensitive with a high privacy interest. The high level of protection found in the CP Act needs to be maintained however it is inconsistent with the intention of the RTI and IP Acts, and does not service the greater public interest, by denying access to child protection information to particular individuals and families with sufficient interest on a case by case basis considering the context of the documents in the decision making process.

The department does not believe a generic public interest that applies to all secrecy provisions in the vein suggested by the Solomon Review is sufficiently robust to focus decision maker's minds on the special nature of the information that is listed in section 12 of schedule 3.

The department strongly urges that the RTI regime effectively returns to the pre-2009 state where the secrecy exemption was subject to a public interest test. This course of action would allow

public interest factors to be considered in deciding whether to release adoptions and child protection information. Relevant public interests include, for example, the public interest in:

- eligible family members being given access to the personal information of an individual who is deceased;
- researchers and executors of estates (including the Public Trustee, which is now unable to effectively execute estates of individuals who have died intestate) being able to access historical documents;
- revealing the reason for a government decision and any background or contextual information that informed the decision;
- promoting accountability for the discharge of the important functions of child welfare and child protection and would further the public interest in promoting informed scrutiny and debate on these important issues of community concern;
- promoting accountability of the government that would be assisted by disclosure of the information concerning an investigation; and
- the applicant having information that would enable them to pursue a legal remedy.

Considerations around the age of documents and importance of the information to the applicant could then be taken into account. This would allow the department, in appropriate circumstances, to provide access to a family's shared information to a representative of the family with each member's consent; or to give access to the identity of a putative father when it is clear that the individual is deceased. Accordingly, the amendment would reduce red tape and multiple processing by allowing, in appropriate cases, one application to be lodged for a family as a whole.

**Discussion paper question 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 public interest factors in Part 3 of Schedule 4 should be removed from the Act entirely and be the subject of guidelines issued by the IC. This is the approach taken at the Commonwealth level.

The public interests that are listed in the Part 3 of Schedule 4 are essentially more specific examples or subsets of the major public interests. The factors as listed mostly derive from case law and as such have arisen from particular circumstances of a case and can be relevant in some cases and not relevant in others depending on the circumstances. Extracting public interest factors and listing them in a schedule risks the application of them out of context and in circumstances that may have been expressly excluded in the case in which they were originally developed. They lack the sophistication necessary to balance complex interests which are characteristic of many RTI applications. Although the list was never intended to be exhaustive or applied in a mix and match way, this is almost inevitable without the grounding in the context of the law from which they derive. They are frozen in time and so specific that they may cease to be useful.

It is understood that the lists of public interest factors in Schedule 4 Part 3 were intended to assist decision makers, applicants and third parties and to improve the quality of decisions and reasons for decision; however, they do not promote excellence in decision making.

The 'harm factors' in Schedule 4 Part 4 are much more useful for decision makers because their form is familiar across jurisdictions and they essentially equate to the conditional exemptions in the repealed FOI Act and to the Commonwealth FOI Act. The form and substance of these factors are commonly found internationally and allow for leveraging off other law for the purposes of making quality decisions. Their structure is clear with elements to be satisfied, information to be characterised and material facts identifiable so that making decisions on access to particular documents and writing reasons for those decisions becomes a much less random exercise as can be the case with the lists of factors.

Extracting the list from the Act and asking the IC to continue to develop detailed and information sheets and add more detail to the annotated Act on how the public interests have been applied across jurisdictions would be a better approach. This would be more helpful to decision makers, applicants and third parties alike. It would also reduce confusion and duplication arising from lists in conjunction with the harm factors (where both may need to be considered by decision makers). This would also allow the IC to write decisions based on the exemptions and the harm factors, driving the development of relevant case law to support applicants, third parties, agencies and Ministers in the RTI process.

**Discussion paper question 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?**

See previous comments in 7.3.

**Discussion paper question 7.5**

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

It is recognised that there are circumstances in which it would be proper to refuse access to communications between public officials and offices of the Minister and it may be time to put some certainty around this.

The Hawke's review of the Commonwealth FOI Act notes that the deliberative process conditional exemption, which is similarly worded to the deliberative process harm factor in the RTI Act, allows a decision maker to consider whether disclosure would be detrimental to the proper workings of government by impairing the policy development process, particularly in relation to development of sensitive policy matters. Like the RTI Act, the Commonwealth FOI Act contains statutory irrelevant considerations which generally equate to some of the elements of the *Howard Principles*. But it should be noted that the 'frankness and candour' element is not an irrelevant factor in either the RTI Act or the Commonwealth FOI Act.

One thing that has become clear from experience in applying the deliberative process test since the *Howard Principles* fell out of favour is that it is unclear as to when it is proper to claim that the deliberative processes of government would be prejudiced by disclosure.

New Zealand and the United Kingdom adopt a different approach which removes much of the uncertainty.

In New Zealand, section 9(g) of the *Official Information Act 1982* provides that a good reason for withholding information, unless outweighed by other considerations in the public interest, is to maintain the effective conduct of public affairs through:

> *(i) The free and frank expression of opinions between or to Ministers of the Crown or members of an organisation or officers and employees of any department or organisation in the course of their duty; of*
> *(ii) The projection of such Ministers, members or organisations, officers, and employees from improper pressure or harassment….*

In the UK, section 36(2)(b) & (c) of the *Freedom of Information Act 2000* provides that *information is exempt information if in the reasonable opinion of a qualified person disclosure of the information under the Act would, or would be likely to inhibit:*

*(i) The free and frank provision of advice; or*
*(ii) The free and frank exchange of views for the purposes of deliberation or*

*(c) would otherwise prejudice, or would be likely to otherwise prejudice, the effective conduct of public affairs…..*

Consideration be given to providing some clarity in relation to deliberative process matter along the lines of the New Zealand or UK models.

**Discussion paper question 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?**

**Discussion paper question 7.8**

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

It is considered that, in general, the existing grounds for refusal in the Act would tend to protect the interests reflected in these documents, probably negating the need to exclude the documents entirely, but more clarity around the treatment of Commission of Inquiry documents would still be useful.

Once a Commission of Inquiry ends, the agency responsible holds the documents and they are subject to the RTI Act as normal. Most submissions to Commissions are now published online, reducing the need for formal access requests under the RTI Act. Those that are not are published are often subject to a specific order of the Commission. Access requests for documents subject to such an order would be considered having regard to the exemption outlined in section 6 of schedule 3 (Contempt of court or Parliament).

**Discussion paper question 7.9**

This agency has no comment to make in relation to discussion paper question 7.9.

**Discussion paper question 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, panel members and officers authorised to make appointment decisions understand that they operate in an environment in which all parties to a selection process and the community expect a high degree of transparency and accountability.

The approach in relation to recruitment documents has been consistent since the introduction of statutory access schemes and one that is generally accepted by the community and the public servants as appropriately striking the right balance between the privacy of the individual and the level of accountability for merit-based public service recruitment.

A successful candidate will usually be given access to all information about them in the selection process including the comparative assessments against other candidates. The names and any identifying information about unsuccessful candidates will usually be refused on the grounds of privacy.

Unsuccessful candidates will usually be given access to the information about them as well as limited information about the successful candidate and other unsuccessful candidates as per the approach outlined below for non-interested RTI applicants.

A non-interested third party applicant for information about a successful applicant for a public service position is generally taken to be as follows:

- **Letter of application**
  The letter of application is usually disclosed, subject to deletion of any information about candidates' domestic or private affairs. There have been issues over the years with candidates claiming copyright on letters of application. In such cases the usual approach is that such a claim does not alter the access decision but may impact on the form that access can be given – usually opting for access by way of inspection.
- **Resume**
  The resume is usually disclosed excluding any information about a person's domestic or private affairs or perhaps where there are secrecy provisions that still apply in relation to candidates who served in the forces or for security organisations.
- **Qualifications**
  Disclosed.
- **Referee reports**
  Referee reports are usually disclosed where the referee is a public sector officer who has a duty to provide referee reports. Where the referee is a private person or not under a duty to provide a report, then other factors may be taken into account which may result in a different approach. In all cases, the views of the referee on disclosure would be sought and appeal rights preserved in the case of disclosure contrary to a third party view. Private information of both the applicant and referee would be refused. The grey areas are where there are negative comments from which natural justice obligations arise. In those circumstances the consultation process is important.
- **Criminal history check**
  Access refused since it is sensitive personal information. Although access to this type of information may be obtained by persons who have a need to know, for example, employers or professional bodies, for the purposes of employment screening, this access is usually by way of statute or by obtaining the express written consent of the person to whom the information applies.
- **Recruitment tests**
  Access to recruitment tests would be given unless to do so would prejudice the effectiveness of such tests.
- **Panel interview notes**
  Access would usually be given to panel notes about successful candidates except for the private information collected by the panel in the course of the interview or perhaps information about previous workplaces of a confidential character.
- **Panel assessment documents and scores**
  Access would usually be given subject to the deletion of private information.
- **Selection report**
  Access would usually be given to information about the successful candidate subject to any private information.

Senior appointments including many SES and all judicial appointments are part of the Executive Council process. Accordingly, the documents that relate to those recruitment and selection processes qualify for exemption from disclosure as Executive Council documents.

**Discussion paper question 8.1**

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

No. The current charges regime works well enough; it is simple and easy to apply. The charges scheme is not complex or tiered which means that it is compatible with the newer case management systems. If the charges regime adopted a tiered model this agency's state of the art RTI case management system would not be able to be configured to make the complex calculations associated with tiered charging regimes. Reverting to a manual calculation model would be a retrograde step and add time to the decision making process.

Schedule 1 of the *Recording of Evidence Regulation 2008* sets out the fees for copies of transcripts of court proceedings, as follows:

*1 For issuing a copy of a transcription, in printed or electronic form, of a record under the Act of a legal proceeding before the Queensland Industrial Relations Commission—*
*(a) first copy—each page . . . . . 3.70*
*(b) additional copy issued to the same person—each page 0.80*

*2 For issuing a copy of a transcription, in printed or electronic form, of a record under the Act of another legal proceeding—*
*(a) first copy—*
*(i) the first 8 pages . . . . . 77.50*
*(ii) each extra page . . . . . 9.60*
*(b) additional copy issued to the same person—each page 1.20*

*3 For issuing a copy, if available in electronic form or cassette tape form, of a record under the Act of a legal proceeding—each hour . . . . . 32.10*

Schedule 2 of the *Queensland Civil and Administrative Tribunal Regulation 2009* sets out the fees for black and white copies of records of proceedings, as follows:

3 Fee for a black and white copy of part of the register (under section 229(4)(b) of the Act) or part of a record for a proceeding (under section 230(3)(b) of the Act), other than a plan or drawing, for each page—
(a) for less than 20 pages. . . . . .1.75
(b) for 20 to 50 pages . . . . . 1.45
(c) for more than 50 pages . . . . . 1.00

With regard to access charges which are charged on a 'per page' basis, amending the charge structure to align with either of these regimes would have a significant impact on applicants.

As an example, an applicant given paper access to 500 pages under the current regime would be required to pay $100 in access charges. Under the court transcript regime, they would be liable for $960.70 and under the QCAT copy regime they would be liable for $500 in access charges. Such an increase in charges would appear to be excessive.

With regard to processing charges, it is difficult to compare a charging regime which is based on the number of pages processed to the current regime with charges based upon number of hours. However, as an approximate figure only, charges tend to be around $1.00 per page.

**Discussion paper question 8.2**

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

It is this agency's view that it would be cumbersome and not in accordance with fundamental legislative principles if a charges regime was implemented that did not treat all applicants equally. Reasons for increasing in charges for some applicants, for example, corporations, include:

- demand management; and
- ensuring return for the use of information for commercial purposes.

In relation to demand management, the current charging regime generally assists where there is an eye to frugality by an applicant. In this agency's experience, however, charges do not appear to be a disincentive to large corporations and do not regularly result in the re-framing the terms of their requests. The other demand management strategies in the Act, for example, refuse to deal provisions, work well enough to ensure agencies are not unduly burdened by large applications.

In relation to the use of information for commercial purposes, attempting to obtain a return for government for the use of that information would seem to be at odds with the generally accepted principles of use and re-use of government information which underpin the Open Data strategy.

**Discussion paper question 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?**

Yes, this would seem to be a sensible approach.

**Discussion paper questions 8.4 and 8.5**

This agency has no comment to submit in relation to discussion paper questions 8.4 and 8.5 given that they are specific to the Department of Health and its associated Health and Hospital Services.

**Discussion paper question 9.1**

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

This agency does not have a view as to whether internal review should be optional or mandatory. For reference, on average, 3% of considered decisions are subject to internal review (amounting to an average of 15 annually) and 5% are subject to external review (amounting to an average of 26 annually). On average, 32% of internal reviews undertaken by this agency are followed by external review processes, indicating some level of applicant satisfaction with the internal review process.

The current system works well, giving applicants freedom of choice, but this is not to say that a mandatory two-tier review system would not also work well.

**Discussion paper question 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?**

This agency is supports extending this mechanism to apply to other agency decisions but only upon request of the agency rather than providing a general power for the Information Commissioner to remit for internal review. Currently, only deemed decisions subject to external review may be remitted to the agency to continue processing the application, upon agency request.

A power for an agency to request that a matter be remitted for internal review would be useful in a small number of cases, for example, where additional documents are located after the decision is made. This would save the applicant time because the agency decision would be made more quickly than the external review resolution.

**Discussion paper question 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. It is suggested that applicants are entitled to this currently. However, it is agreed that the internal review provisions are ambiguous and this could certainly be clarified.

**Discussion paper question 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. Additional time for third party consultations and extension of the internal review processing period upon request to the applicant would be supported. These provisions are ambiguous. The Internal Review application must be dealt with as though it was a fresh application but the legislation does not expressly import the supporting procedural steps like consultation. It is understood that the shorter timeframe is to account for the likelihood that searches have already been conducted, but internal reviews often raise sufficiency of search issues which require further detailed searches to be undertaken.

The time and processing framework for internal review should mirror the considered decision process including the ability to seek extensions of the time period from the applicant.

**Discussion paper question 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?**

Yes. This issue arises in the informal resolution processes at the IC and is the subject of some dispute. An agreement by the agency to give access to documents in the informal resolution stages of an external review is not an authorised disclosure under the Act, rather, an administrative access decision. What follows then is that concessions will only be made in respect of that information where the chief executive or Minister could otherwise have the authority to release. Also, in relation to documents which third parties have an interest, this agency takes the view that it will generally only make concessions at external review when it is clear that those third party's consent to the suggested approach. This agency is therefore limited in the kinds of documents it will release for the purposes of an informal resolution and will not agree to 'trade' third party interests for resolution of a review. If there was an explicit provision in the Act to state that agreements reached at informal resolution to release additional documents were subject to protections and third party consultation obligations, then this agency would be more than willing to enter into such negotiations. An informal resolution settlement would strengthen such provisions, but may not be required if provided appropriately for in statute.

**Discussion paper question 9.6**

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

A typical administrative law review process consists of 2 levels of merits review and at least one level of review on law. This agency supports retaining a single path model which includes both merits and review on law.

The current model, with internal and external review satisfies the 2 levels of merits review. Once merits review has been exhausted there is only an appeal to QCAT on error of law.

The Administrative Appeals Tribunal (AAT) at the Commonwealth level does have jurisdiction to hear appeal of the merits of a decision. Prior to 2010, the review of Commonwealth agency decisions was shared between the Ombudsman and the AAT. The AAT merits review has been a review mechanism in place since 1982 when the Commonwealth FOI Act was introduced, with appeals on law directed to the Federal Court. There is a solid body of law that has developed over the years but it remains to be seen whether the two tier external merits review is a sustainable model. The current 2 tier merits review system has worked well in Queensland and appears to be straightforward for applicants and agencies alike.

The current model is:

1. internal review by the agency (optional)
2, external review by the Information Commissioner
3. appeal to QCAT on error of law (followed by Supreme Court).

An alternative model to that which is in place currently and would still satisfy the 2 merits and one law model would be:

1. Internal review by department – Merits
2. External Review by QCAT – Merits and error of law.

**Discussion paper question 10.1**

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

The current provisions the Act appear to be adequate to deal with applicants who seek to abuse the RTI process or who lodge applications which abuse the RTI process.

Section 94 lists the circumstances in which the IC may decide not to deal with all or part of an external review. Specifically, where the IC is satisfied that the application is frivolous, vexatious, misconceived or lacking in substance, the IC may refuse to deal with the application. These are not defined in the Act and this should remain the case as there is general law that deals with what might constitute frivolous or vexatious applications.

In addition to section 94, section 114 gives the IC power to declare a person a vexatious applicant. This power can be exercised on the IC's own initiative or on the application of one or more agencies.

The IC must be satisfied that a person has repeatedly engaged in access actions and either the repeated conduct or the particular conduct would be an abuse of process or would be manifestly unreasonable.

Included in the type of conduct that the IC might regard as an abuse of process includes harassing or intimidating an individual or an employee of an agency relation to an RTI application process, unreasonably interfering with the operations of an agency in relation to an RTI application process, or using the Act for the purpose of circumventing restrictions on access imposed by a court.

The effect of declaring a person a vexatious applicant is that the person must obtain the permission of the IC to lodge access, internal review and external review applications.

Section 94 and section 114 appear to strike an appropriate balance between an applicant's unfettered right to apply for documents of an agency or Minister with the need to ensure that process is not subjected to extreme misuse or abuse. There have been a small number of applicants since the introduction of FOI where a disproportionate amount of resources have been used to deal with multiple applications. It would not seem appropriate to extend any further the current provisions which appear to adequately deal with abuse of process issues for the sake of a

small number of persistent users for which the current mechanisms for abuse of process cannot be called upon. If those current mechanisms do not apply, then it is likely that those applicants, as frustrating as they may be for reviewers, have a legitimate right to exercise their application and review rights.

**Discussion paper question 10.2**

**Are current provisions sufficient for agencies?**

Yes. In this department's experience sections 41 and 43 of the RTI Act are effective for dealing with repeat applicants or multiple applications. These mechanisms strike the appropriate balance between the right of the community to apply for documents of an agency or Minister and the use of government resources. Section 43 allows for an agency to refuse to deal with an application where the same documents are applied for in a subsequent application and no reasonable basis for seeking the documents again is found. If the second application for the same documents does disclose a reasonable basis for seeking the documents again then the agency proceeds to process those documents. However, if the application, on its face, does not disclose a reasonable basis for again requesting the documents, then the agency is entitled to refuse to deal with the application.

It is important to not prohibit repeat applications entirely because from the time of the original decision circumstances may have changed so that the grounds for refusal in the initial application no longer apply. The requirement for a reasonable basis for accepting the later application appropriately shifts the onus to the applicant and seems appropriate.

**Discussion paper question 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.

**Discussion paper question 10.4**

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

We believe there is merit in considering not mandating the requirement for informal resolution. Bypassing the informal resolution phase of an external review can lead to more timely formal decisions.

As a department we recognise that the process of review can be complex and it is not necessarily the case that a formal decision takes longer than resolving a case informally. The IC approaches reviews in a linear progression, mandating all applications progress through an informal resolution process before progressing to formal decision in cases in which informal resolution has been unsuccessful. Formal decisions don't necessarily take longer; they are just at the end of the process.

The IC reports to the parliamentary committee and issues such as timeliness of decision making are explored within that framework and performance measures put in place and reported on through the IC Annual Report and to the parliamentary committee. If there is a desire to more formally deal with the issue of unreasonably long review times then it may be worth considering, rather than imposing a statutory timeframe for decision, a mechanism which provides for unresolved applications over a certain age (6 months) to be reported on to the parliamentary committee. Such a report would include an explanation for the delay in resolution, a management plan for the application and expected date for resolution. This would signal to the applicant and agency that their matter is being dealt with. However, it should be recognised that the reasons for applications being unresolved for longer periods include:

- whether the application is suitable for informal resolution;
- delays in agencies or applicants or third parties responding to requests for information or submissions;
- high numbers of documents to be considered;
- high numbers of third party participants;
- complex legal issues involved;
- novel questions of law; and
- uncooperative applicants, agencies or third parties.

The usual approach of the IC is to conduct a review 'on the papers' rather than adopting a hearing model. A review on the papers is particularly suitable for RTI reviews where information the subject of the review is not able to be put to all parties, particularly where the contention is that information should be refused. This approach is supported by this agency as it does seem to benefit all parties by minimising the costs and allowing a more informal and collegiate approach. However, for particular reviews a formal hearing model may be appropriate and bring the parties to the table quicker, focusing their minds on the issues in dispute.

The review process in the IC should not be prescriptive; rather, it should assess the suitability of applications for informal resolution at the beginning and during the process according to their characteristics. Applications which may not be suitable for informal resolution include:

- where the applicant or agency expresses a preference for a formal decision
- where the subject matter of the documents raise novel issues which the sector would benefit from have the point decided by way of decision.
- where the agency is not in a position to make concessions because of the types of documents in issue

**Discussion paper question 10.5**

Given this agency's response to discussion paper question 10.4, it has no comments in relation to discussion paper question 10.5.

**Discussion paper question 11.1**

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

The current reporting requirements should remain, with some additions, as follows.

Sections 55 of the RTI Act and 69 of the IP Act do not appear as refusals of access under section 47(3) of the RTI Act and it is this agency's view that the neither confirm nor deny provisions should be refusals of access and so be reported on.

Section 33 of the RTI Act and section 53 of the IP Act in relation to noncompliance are not reported on. It would seem to be of value for data analysis purposes to report on the number of applications that are never properly made. Noncompliant decisions create an administrative burden on agencies and are reviewable decisions, the number of which should be publicly available.

If a two Act system is maintained, rather than a single point of entry for access and amendment which would eliminate the 'wrong Act' issues, a refusal to deal because of a 'wrong Act' application should be reported upon.

# 4.0 General comments

## 4.1 Red tape reduction

The RTI Act and Chapter 3 of the IP Act could be improved to reduce red tape and applicant confusion. These measures have been addressed elsewhere in this report, including the section

on application forms and the section on charges estimate notices and exemption provision Information prohibited by an Act. The source of much of the red tape involved in processing RTI and IP applications is the two-entry point system. Another source is the heavy prescription for notices of decision which leads to long and onerous decision letters.

## 4.2 Delegations, directions and supervision

There appears to be some confusion around delegations, directions and supervision and the relationship between these. Given that there is an offence provision in relation to directions to act in a particular way, it is prudent to clarify these by way of statute or Ministerial guideline.

Chief executives and Ministers have both the right and obligation to ensure their delegations (principal officers) and directions (Ministers) are being exercised appropriately and in a way which is appropriate for their documents. The *Acts Interpretation Act 1954* does appear to operate so as to allow the delegator to make conditions about the exercise of the delegation, but it is likely that this provision would not extend so far as to support a principal officer issuing guidelines about the exercise of their power. It would be much clearer if the RTI Act expressly provided for the delegator to be able to issue guidelines about the approach they want taken by the persons exercising their delegated decision making power under the RTI Act.

This department has a large number of RTI decision makers who are delegated to make decisions. It is important to achieve consistency of approach for applicants applying for types of documents, very similar in nature and content. This is largely achieved by training and supervision. However, greater certainty could be achieved if the delegator was expressly permitted to issue guidelines on how they expect their delegation to be exercised in relation to the types of documents held by the agency. This would help avoid confusion for supervisors and delegated officers about appropriate supervision and unlawful directions.

Further, clarification could be warranted in relation to the offence provision as to whom in the agency or Minister's office can issue a lawful direction to a delegated officer. If a lawful direction is one that can only be issued by officers in the reporting line of the decision maker, then that could be clarified with wording used in the Act or by Ministerial guideline. Given that there are penalties attached to this area, agencies would benefit from greater clarity around what constitutes an unlawful direction.

## 4.3 Alternative access options – summaries

Most agencies have particular holdings of information which are more sensitive than others. This agency deals in child protection information, the protections of which are of the highest order. There is a clear public interest however in ensuring that the public can access general information about the department's performance of its child protection functions. While the department publishes a large amount of data each quarter in relation to this, we still get more specific requests.

As an example, in 2013 an applicant applied for documents about substantiated matters of concern (that is, investigations into notifications made about foster and kinship carers). There was some data in relation to these on the department's website but it was not as fulsome as the applicant had hoped. The applicant was offered a summary of the primary documents but refused. The primary documents are obviously highly sensitive and child-based. The documents were heavily redacted to show only outcomes of the investigation and assessments. This meant that there was a high risk of inadvertent release.

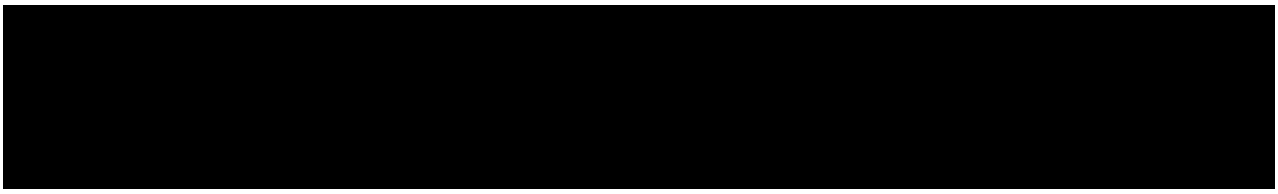
In cases such as these, where there is public interest in releasing some information but where the primary documents carry such high risk, it would be beneficial to have a mechanism in the Act for the provision of a summary instead of the primary documents in the first instance, without the agreement of the applicant. If the applicant is not satisfied with the summary then that issue could be the subject of external review.

Section 16 of the *Official Information Act 1982* (New Zealand) provides that access can be given by way of summary or excerpt. Applicants can request access in another form but that can be refused on public interest grounds.

Consideration be given to adopting a further option for access, by way of summary or excerpt. It is recommended that although such a document would technically be a 'post application document' that review rights be attached to the giving of access in order for applicants to be more agreeable to access in that form.

## 4.4 General residual discretion – limitations

The limitations of the residual discretion could be recognised for purposes of clarity and consistency of decision making across government agencies. The scope of this discretion is not defined in either Act, and based on prior decisions of the Information Commissioner is a matter of judgment by the relevant agency or Minister. Both the RTI and IP Acts contemplate that an agency or Minister retains residual discretion to give access to exempt information. Section 48(3) provides that despite an agency or Minister being able, under section 47(3)(a), to refuse access to all or part of a document, the agency or Minister may decide to give access.



Likewise, the residual discretion in section 48(3) would properly be limited by the operation of other law or principles which apply to the release of the information. If the chief executive officer or Minister is not authorised to release the information then the delegated decision maker is not authorised to exercise the residual discretion in the RTI and IP Acts in respect of releasing information that possesses the character of exempt information. This approach is logical.

Common limitations on release of documents for which the general discretion could not be lawfully exercised by a delegated decision maker would include:

Legal advice or documents prepared for litigation (Legal professional privilege)

- The privilege attaches to the client. In the case of legal advice provided to the state, the Attorney-General as the first law officer is the client and therefore the only officer with the power to waive privilege.

Cabinet documents and executive council (cabinet confidentiality)

- Only Cabinet or Executive Council can waive confidentiality.

Documents which are the subject of judicial or quasi judicial orders (Contempt of court)

- Only the court, tribunal or commission of inquiry can vary the orders.

Documents the release of which would infringe the privileges of Parliament (parliamentary privilege)

- Only Parliament can waive parliamentary privilege.

Documents where there are legal agreements which govern the confidentiality of the documents, for example, where the terms of a contract provide for confidentiality of documents or where there would be found to be an equitable obligation of confidence.

- In these cases the general law and equity determine the rules of disclosure so that the relevant parties can rely on the promises made and obligations arising from contract or fiduciary obligation for example.

Section 3A of the *Commonwealth Freedom of Information Act 1982* is framed so as to make clear the limitations on the exercise of the residual discretion and should be considered as an approach for Queensland. Section 3A provides:

***3A Information or documents otherwise accessible***

*Scope*

*(1) This section applies if a Minister, or an officer of an agency, has the power to publish, or give access to, information or a document (including an exempt document) apart from under this Act.*

*Publication and access powers not limited*

*(2) Parliament does not intend, by this Act, to limit that power, or to prevent or discourage the exercise of that power:*

*a. In the case of the power to publish the information or document-despite any restriction on the publication of the information or document under this Act; and*

*b. In the case of the power to give access to the information or document-whether or not access to the information or document-whether or not access to the information or document has been requested under section 15.*

## 4.5 Disclosure log

There may merit in agencies having a greater discretion to determine what documents or applications are suitable and appropriate to be published to the Disclosure Log.

This Department deals with the obligations for disclosure logs with reference to the two statutory requirements.

The first requirement relates to 'applications received' (which we term the DL1) which is a register of applications received published as soon as practicable after receipt of a valid application. This scheme works well but could be improved by changing the wording to enable publishing a summary of the terms of the application rather than requiring the terms of the application "as stated in the application".

The second requirement relates to the publication of documents accessed (which we term DL2). This obliges agencies to publish all documents to which access has been given under an RTI application unless the document contains the personal information of the applicant or subject to removal of information in the documents which:

- is prevented from publication by law
- may be defamatory
- may unreasonably invade privacy if published
- is confidential
- is protected from disclosure by contract
- would cause substantial harm if published.

The obligation requires the documents accessed to be assessed a second time after the decision has been notified to ensure that protected information according to section 78B(2) is not published. This is an additional and resource intensive obligation on agencies and is not without risk.

One particular risk is in relation to defamatory material which requires a degree of specialised legal judgment which is not usually available in RTI units. This issue does not arise in access decisions under an initial application because the access decision is made in the context of who the applicant is and their interest in the documents, as well taking into account any third party interests.

However, in the case of the disclosure log, the obligation is that certain material 'must not' be published and although the publication of that material does not raise review rights, it can perhaps be the subject of civil proceedings. If prohibited information is published then the extent to which parties, decision makers and the State are protected needs to be clear.

Another risk is where there is an RTI application that contains mostly personal information. Heavily redacting the documents to remove identifying information may remove the grounds for unreasonable invasion of privacy however, there are questions around the degree to which certain types of RTI applications for example, adoptions, child protection and nominated immigrant files are suitable, as a class of file, for publishing to the DL2. It would be preferable to have greater discretion to determine what documents or applications are suitable and appropriate to be published to the Disclosure Log.

## 4.6 Review of section 37 decisions

The decision to disclose documents is currently a reviewable decision if an agency should have taken, but has not taken, steps to obtain the views of a person under section 37.

It would be rare for a decision not to consult with a person to be the subject of an external review application. From experience, the question has only arisen after the documents have already been accessed by the applicant. There may be value in the IC reviewing a decision not to consult for the purpose of making a formal decision that would then guide the sector on the circumstances that would require consultation, however, as far as the review applicant goes, there would appear to be no remedy available in respect of the actual access decision once the documents have been accessed. The IC is already positioned to make guidelines on consultation so having it as a reviewable decision as well would seem to be duplication.

**Consultation and the disclosure log**

Consultation requirements require that the views are sought on whether the document is a document to which the RTI Act applies and whether the information is exempt or contrary to the public interest information. Also, the obligation is to inform the third party that access may also be given to the document under a disclosure log.

If would be preferable if at the time of consultation that a third party is encouraged to provide the agency with their views on publishing the information to the disclosure log. The disclosure log provisions require that all but particular applications must be published but that certain information must not be published, for example, information that may be defamatory, invade a person's privacy, is prevented by law or protected under contract.

These issues may not concern the initial decision maker because they may not have access to information about the context of the documents or because of who the applicant is in relation to the third party. A third party may not object to the disclosure of the information to the particular applicant, because for example, they are both parties to a contract, but publishing the information to the disclosure log would be another matter entirely. It would be preferable for third parties to be given the opportunity to provide information about the possible consequences of publication to a disclosure log so that at the time when the documents are being prepared for publication they can be assessed properly with the benefit of third party information on publication. Without this there is significant risk of publishing information that may impact on third party interests.

**Duty of the decision maker and jurisdictional error**

If a decision maker fails to follow a prescribed procedure in an Act they may fall into jurisdictional error making the decision void. If a person believes they should have been a 'relevant third party' to be afforded the opportunity to provide views under section 37 and the decision maker turns their mind to the question, forming the view on the information before them that the threshold for consultation is not met, then it should be made clear that a failure to consult in these circumstances does not constitute jurisdictional error making the decision void.

As an example, a decision maker has reviewed the documents and assessed the various interests and found that some persons would meet the threshold for consultation while others have not. A person who was not consulted finds the documents on the disclosure log and forms the view that they should have been consulted during the initial decision making process. Currently, that person

may seek external review of the decision not to consult with them, however, that does not appear to impact on the access decision where the applicant has already had access to the documents. A finding that there was a failure to consult does not alter the fact that the documents have been accessed by the applicant and published to the disclosure log. The IC may issue a decision about the circumstances in which it would be prudent to consult, but guidelines and training might be a better approach to ensuring that decision makers understand their duties.

One action that is open for the agency in circumstances such as these would be to remove the material from the disclosure log once alerted to the objections of a third party who believes they should have been consulted.

**Time period for review for deferred access**

The time period for review starts from the date of the prescribed notice that is given to the applicant. If access to documents is deferred because the decision to give access is contrary to the views of a third party, the review period starts from the date of the notice to the applicant regardless of whether or not the applicant has had access to all of the documents. It should be made clear to all parties to the application at what date the review time starts and finishes. An access applicant needs to lodge a review application before they access the deferred documents – this is essentially a 'protective' review application – preserving the applicant's general rights of review.

## Appendix 1

### Summary of comments for the RTI and IP Discussion Papers

### 1. Framework

- Move the access and amendment rights currently in the IP Act to the RTI Act to reduce red tape and assist applicants submitting applications by having a single entry point.
- Confine the IP Act to personal information handling obligations and complaints handling.
- Expand the objects of the Act to better reflect how the push model balances competing essential public interests that are protected in the Act, such as privacy, privileged information and third party commercial information.
- Consider whether the Queensland Audit Office could perform the audit functions in the RTI and IP Acts.
- Remove the obligation for agencies to have Publication Schemes in view of the recent developments with the Open Data initiative, franchises and whole of government one stop shop initiative.
- Careful consideration be given before extending the reach of the RTI Act to providing a mechanism for access and amendment to documents held by non-government service providers delivering services that would otherwise be delivered by government.

### 2. Decision making and review

- Amend Schedule 3 section 12 to include the option of disclosing confidential child protection and adoption information if there is found to be a compelling public interest in favour of disclosure.
- Include in the Act a formal mechanism for allowing delegators such as CEOs to issue guidelines to their delegated decision makers on how they expect the Act to be applied to the types of documents held by the agency.
- Remove the duplication of public interest factors in Schedule 4 by omitting Schedule 4 Parts 2 and 3 and retaining Schedule 4 Part 4 Harm Factors. The omitted parts be provided for in the Information Commissioner's (IC's) guidelines and annotated legislation.
- Retain the RTI review process of two merits review and one review on questions of law which is the current framework for review.
- Consider issues in relation to the application of the Cabinet exemption, deliberative process public interest and law enforcement exemption (CMC).
- The status quo be maintained in relation to the application of the RTI Act to recruitment and selection processes.
- Include specific provision along the lines of the Commonwealth Act to guide the exercise of the residual discretion in access applications.
- Reinstate the higher threshold for consultation with third parties from 'concern' to 'substantial concern'.
- Amend the Act to provide that charges estimate notices (CENs) only be issued when charges are payable.
- To remove unnecessary complexity for all parties the prescribed written notices should be simplified by adopting the standard administrative decision making framework and statements of reasons aligned to the *Judicial Review Act 1991* and the *Acts Interpretation Act 1954*.
- The Act should provide greater clarity on how, and in what circumstances, the general residual discretion may be exercised.
- A mandatory time limit for external review is not supported.
- That the status quo be maintained in relation to agencies and IC requirements in relation to vexatious, repeat applicants and multiple applications.

## 3. Information Privacy

- Adopting the Australian Privacy Principles by Queensland is not supported at this time.
- The sharing of personal information across government would be better facilitated if sharing of information was considered a 'use' rather than a 'disclosure'.
- The definition of personal information should be amended to bring it in line with the Commonwealth definition.
- The provisions that deal with the international transfer of personal information should be amended to reflect the reality of globalisation and the digital environment.
- Given the privacy complaint jurisdiction allows for the award by QCAT of up to $100,000 in compensation for a privacy breach, the complaints processes should be robust and transparent. To that end, the Act should provide detail about the complaints handling process including the threshold requirements for applications, compliant handling processes for agencies and the IC, and the scope of QCAT referrals.
- The provide greater certainty in relation to the definition of 'generally available publication' to ensure that it applies to information published in the digital and cyber world or social media and the internet.
- Remove the application to government agencies of the compliance notice provisions in the IP Act.
- The status quo be maintained in relation to non-mandatory reporting of privacy breaches.
- Adopting an approach whereby access to documents required for evidencing cultural linkages is facilitated.

## 4. Technical and process issues

- Consider clarifying the disclosure log obligations to minimise duplication of effort and reduce risk of inappropriate publication of third party information.
- Maintain the mandatory RTI access and amendment forms but designate common fields to allow agencies to develop forms relevant to their business which will assist applicants in framing applications which will reduce red tape by minimising 'wrong act' or imprecise terms of applications.
- That a cooling off period be provided for at the discretion of the agency so that the application fee can be refunded if the application is withdrawn within 5 days.
- That the status quo be maintained in relation to processing charges. That multi-tiered charging rates be avoided and that fees and charges be imposed equally on all applicants save for those who qualify for financial hardship waiver.
- The timeframe for making a decision under section 32 of the RTI Act be aligned with the prescribed period of 25 business days.
- Expand the list of qualified authorised witnesses for certifying evidence of identity documents.
- Remove the mandatory requirement of agents providing certified evidence of identity in cases where, for example, the agent is a legal representative.
- That the ability for parents to lodge applications on behalf of children not be an absolute right, with the Act providing for discretion to accept applications particularly in cases for teenage children.
- That the schedule of documents requirement in the CEN process be omitted.
- Reinstate to the pre-2009 position the ability for the agency whose function most closely aligns to the documents to process the application to reduce the need for unnecessary duplication and cross-agency consultation.

# Submission to review

*Information Privacy Act 2009*

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## 1.0 Introduction

The Department of Communities, Child Safety and Disability Services welcomes the opportunity to provide submissions to the statutory review of the *Right to Information Act 2009* (RTI Act) and *Information Privacy Act 2009* (IP Act). This agency is equipped with highly experienced officers and as such, is in a position to comment on many aspects of the current legislative framework.

This submission represents a detailed review of the IP Act which is inclusive of the department's views on the majority of the targeted questions posed by the public discussion papers. Matters relating to information access and amendment under the IP Act are generally dealt with in the RTI response paper.

## 2.0 Agency context

This agency's core business is child protection, disability services and community services so apart from the usual corporate and business information held by this agency, there are significant holdings of highly sensitive personal information which need to be managed in accordance with particular legislation that applies to the handling of that information as well as the remaining obligations in the IP Act.

Another dimension of this agency's core business is the range of service delivery models which includes both front line service delivery by agency officers as well as providing support and clinical services through service agreements with the non-government sector. This adds an additional level of complexity for managing the community's personal information which is held by government or held by funded non-government service providers performing functions on behalf of government.

## 3.0 Discussion paper responses

**Discussion paper question 1.0**

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

The Commonwealth Privacy regime currently contains two sets of privacy principles (National Privacy Principles (NPPs) and Information Privacy Principles (IPPs)).

The first applies to the public sector and the second applies to particular private sector organisations. In 2014, these will merge into one set of privacy principles, the Australian Privacy Principles (APPs) that will apply to both the Commonwealth public sector and particular private sector organisations. The IPPs that are contained in the Queensland IP Act were modelled on the NPPs in the Commonwealth Act.

A review of the new APPs finds that although their purpose covers similar territory to the Queensland IPPs, there are enough differences to take a very cautious approach to the question of whether or not adopting the APPs would best serve Queenslanders.

The IPPs were introduced in 2009 and closely resembled the previous administrative privacy scheme outlined in the now repealed Information Standard 42 (IS 42). Local governments are also covered by the IP Act, coming under the IPPs in 2010.

Apart from local governments, Queensland public entities and contracted service providers have been bound by IPPs from early 2000 since the introduction of the administrative privacy scheme under IS42 and subsequently from the introduction of the IP Act in 2009 which adopted very similar IPPs to those which were included in IS 42. The Queensland public sector has implemented its privacy regime in accordance with those IPPs and the information handling practices have been adopted in accordance with those principles. The implementation and compliance costs which would come with introducing a completely different set of privacy principles, both in structure and content, would be significant for arguably little benefit for Queenslanders.

**Harmonisation**

The main driver for considering adopting the APPs would be to move towards a national privacy scheme. This is an important goal as it would mean greater certainty for the community across borders as well as potentially removing the need for business to comply with various privacy obligations if they do business across borders or meet the threshold for coming under the Commonwealth privacy scheme.

However, before moving to adopt the APPs consideration should be given to the following:

1. There is no national commitment to adopt the APPs so to move to the APPs without the likelihood of the other states adopting the same principles would not greatly assist the community in terms of red tape and cross jurisdictional issues.
2. The APPs have been developed to deal with private as well as public sector environments. It may be that the privacy issues confronting these two environments are not sufficiently similar to warrant adopting common obligations. It is likely that the critical private sector privacy issues are not issues for the public sector because of the regulatory and integrity frameworks that apply to the public sector. Since the APPs and the new Commonwealth privacy framework have yet to be introduced they have not had the benefit of testing by the community, government or industry.
3. The APPs include obligations that are sufficiently different from the IP Act current obligations which have had the benefit of lessons learned from 2000 when IS 42 was introduced. The costs of implementing a new scheme aligned with the APPs would be significant at a time of fiscal restraint. If resources need to be reallocated to implement a different regulatory scheme then other work will need to be deferred.

A review of the IPPs is timely because there have been a small number of recurring issues identified since implementation and a review presents an opportunity to rectify these so that Queensland can have a mature privacy scheme that strikes the right balance between protecting the private information held by government and ability of government to facilitate the provision of services to the community. Making some minor amendments to the IP Act will assist in the development of a mature privacy regime for Queensland.

**Compliance with the privacy principles**

Section 27 of the IP Act states that agencies must comply with the privacy principles. The Commonwealth Act adopts an approach that allows for circumstances where it may not be

reasonable to comply with the principles. The approach taken in APP 1 seems to be a sensible way to deal with compliance which should be considered for incorporating into section 27.

The wording of APP1 is clear and may provide a model for section 27.

> ***APP 1***
> ***Compliance with the APPs etc.***
> *1.2 An APP entity must take such steps as are reasonable in the circumstances to implement practices, procedures and systems relating to the entity's functions or activities that:*
> *(a) will ensure that the entity complies with the APPs and a registered APP code (if any) that binds the entity; and*
> *(b) will enable the entity to deal with inquiries or complaints from individuals about the entity's compliance with the APPs or such a code.*

It would seem to be appropriate to move away from an approach which leaves little room for risk assessment in relation to particular circumstances which might impact on an agency's ability to strictly comply with all the obligations in relation to all the information holdings. It might be preferable to adopt an approach similar to APP 1 by amending section 27 of the IP Act.

**Deceased persons**

The prevailing view is that the obligations under the IP Act do not apply to the personal information of deceased persons because 'personal information' refers to an 'individual' which means 'natural person'. The IC advice is that natural people are those individuals who are alive. There is some uncertainty about this because the IP Act does not expressly oust personal information of deceased people. It would be preferable to have this matter expressly provided for in the IP Act.

The question then becomes one of whether or not it is desirable to afford deceased people the same protections as living persons. As a human services department which holds a great deal of personal information of deceased people it would be preferable from the community's perspective to have that information subject to at least a minimum requirement in relation to information handling practices. Currently this department does not distinguish between living or deceased persons' information for the purpose of the IPP obligations. It is true that a deceased person is not able to have a 'privacy interest' and is not entitled to make a privacy complaint pleading a 'breach of privacy' however, the IP Act is not a statute which is rights based, except in relation to lodging complaints. It sets standards for agencies for personal information handling practices. The IP Act could be amended to include deceased persons for all but complaint and notice provisions which would mean that deceased persons' information would be subject to the same prohibitions on use and disclosure as that of living persons.

However, personal information of persons living or deceased which is held by government should not be subject to strict prohibitions found in IPP11 where that information is needed for the purposes of establishing family linkages for the purpose of cultural identity.

**Personal sensitive information and personal non-sensitive information**

The Commonwealth privacy regime distinguishes between sensitive and non-sensitive personal information. Sensitive personal information is a sub set of personal information and is afforded a higher level of protection. Sensitive personal information is defined as:

- Information or opinion about an individual's:
  - Racial or ethnic origin
  - Political opinions
  - Membership of a political association
  - Religious beliefs or affiliations
  - Philosophical beliefs
  - Membership of a professional or trade association
  - Membership of a trade union
  - Sexual preferences or practices or
  - Criminal record
- Health information about an individual
- Genetic information
- Biometric information that is to be used for the purpose of automated biometric verification or biometric identification
- Biometric templates

The APP Guidelines note that having a class of sensitive personal information recognises that inappropriate handling of this type of information can have particular ramifications for the individual concerned or those associated with the individual. However, the current framework of the IP Act appears to work well enough to protect the type of information defined as 'sensitive' in the Commonwealth Act. Applying a two tier approach would not add any greater protection *per se*. The approach generally taken in Queensland in relation to security, storage and collection is one in which the sensitivity of the information is a prime consideration in determining the level of protection required for the type of information. Agencies are used to working within that framework and it would appear to be unnecessary to overly complicate the obligations by having separate obligations in relation to prescribed types of information. A move to a model that prescribes particular classes of personal information and higher standards in relation to those classes would be onerous for administering the information handling practices and arguably add no value or greater protection for the community.

**Comments relating to the APPs**

**APP 1—open and transparent management of personal information**

See above comments on the compliance framework in APP1, which is dealt with in section 27 of the IP Act.

In relation to the APP1 privacy policy objectives, these are adequately provided for in IPP5 of the IP Act.

**APP 2—anonymity and pseudonymity**

This provision would appear to be unnecessary. Placing a general right of anonymity for any transaction or communication with the department may impose unnecessary constraint upon how an entity conducts its business, arguably leading to privacy complaints arising from a refusal to allow anonymity or pseudonymity in particular circumstances. From this department's perspective, the issue is not a live issue for our clients or the community generally. Complaints about service or the conduct of business of the department are currently able to be made anonymously where the identity of the complainant is not critical to managing the complaint properly and feedback via the departmental portal is able to be made anonymously.

**APP 3—collection of solicited personal information**

IPP 1 adequately deals with the matters provided for in APP 3. APP 3 also prescribes conduct in relation to collecting 'sensitive personal information' but since the IP Act does not adopt a two-tier model, those parts of APP 3 are unnecessary.

**APP 4—dealing with unsolicited personal information**

APP 4 would place onerous obligations on agencies in respect of dealing with personal information that has not been solicited by the agency. Essentially, APP 4 requires agencies to assess each item of personal information that is sent to it and determine whether or not it could have been collected under APP 3 and if not, then the agency must destroy or de-identify the information, unless it is in a Commonwealth record. If the agency could have collected the information under APP 3 then APPs 5 – 13 apply to that information.

The Queensland IP Act currently does not place additional obligations on agencies in respect of unsolicited information and it is this department's view that the status quo should be maintained in this regard. It is acknowledged that having to manage a range of information that has been provided to the agency does pose challenges but usually the department's record keeping obligations and its retention and disposal schedule should deal adequately with much of the unsolicited information.

**APP 5—notification of the collection of personal information**

Elsewhere in this submission there are recommendations about the wording of IPP 2 which deals with the core ideas in APP 5. However, IPP 2 is clearer than APP 5 and adequately deals with the issues of collection notice obligations. To change the IPP 2 obligations, even marginally, would result in significant implementation costs across government because every collection notice at every point of collection would need to be reworded, including all forms, counter signs, telephone notices and web notices.

**APP 6—use or disclosure of personal information**

APP 6 equates to IPPs 10 and 11 – Use and Disclosure. Comments on and suggested amendments to IPPs 10 and 11 are found later in this submission. Apart from those issues, we believe the structure of the IPPs 10 and 11 are clearer than APP 6 and that it is simpler to deal with use and disclosure issues as separate principles.

**APP 7—direct marketing**
The direct marketing APP applies only to organisations – not APP entities that are a part of the public sector. IPP 11(4) provides similar protection in relation to the public sector which would appear to be adequate in the circumstances.

**APP 8—cross-border disclosure of personal information**
Section 33 of the IP Act deals with the overseas transfer of personal information. This is an increasingly important aspect of privacy regulation, particularly in the context of globalisation and IT trends which increasingly cross national and international borders. An appropriate balance needs to be struck between adequate privacy protection for the community, facilitation of services and fulfilling the functions of government.

Comments in relation to section 33 appear below at page 12, but in short the APP 8 obligations in relation to the overseas transfer of personal information appear to be complex and onerous. The preferred approach is to maintain section 33 as a stand alone obligation rather than a privacy principle.

**APP 9—adoption, use or disclosure of government related identifiers**
APP 9 relates only to non-government organisations and regulates their handling of government related identifiers (GRIs) such as the CRV social security number and the Medicare number. There is no equivalent IPP in the IP Act. It may be worth considering including making special provision for GRIs in the IP Act so that it is clear that those numbers are only disclosed in accordance with IPP 11. An approach might be to ensure that such numbers are considered personal information.

**APP 10—quality of personal information**
IPPs 3 and 8 deal with the collection and use of personal information and agencies obligations in relation to ensuring that information is 'up to date and complete'. There would appear to be no real benefit in changing the current IPPs in relation to this APP.

**APP 11—security of personal information**
IPP 4 deals with similar obligations as those contained in APP 11. The comments on and suggested amendment to IPP 4 are found later in this submission. In short, it is suggested that the wording of APP 11(1) be considered to replace the similar obligation in IPP 4 because it is less ambiguous making it easier for agencies to apply and for the community to understand.

APP 4(2) however, is not provided for in the IPPs and it is recommended that it not be considered for inclusion. APP 4(2) places an obligation on agencies to destroy or de-identify personal information no longer needed by the agency if the information is not contained in a (Commonwealth) record. The comments above in relation to IPP 4 apply equally to this APP in that such an obligation would require systems to be put in place to assess all personal information for whether it was a record or not and if not then whether the information is still needed by the agency. If not needed then the information would need to be subject to a destruction schedule or de-identification process. This would be an onerous administrative process and arguably one that would be difficult to comply with, with any great precision. The department's record keeping obligations and the retention and disposal schedules already deal adequately with this information.

An example of where personal information may be collected and not needed as an ongoing part of the record is where identity documents are provided for in a particular process, for example, an RTI application. Once the evidence of identity has been sighted and a note made of that on the file, keeping a copy of the identity document would not be necessary. It could be destroyed, de-identified or returned to the owner. Keeping these types of documents on file comes with significant risks in terms of use if unauthorised access is obtained. It is important that the agency minimises the number of these types of documents it must keep secure but to place an obligation on an agency to destroy or de-identify would appear to be unnecessary since administrative systems and policies could be developed by agencies after assessing the risks.

**APP 12—access to personal information**

APP 12 provides for an access scheme which appears to be a quasi RTI scheme. IPP 6 contains a similar provision but it is recommended in this submission that access and amendment provisions be removed from the IP Act and placed in the RTI Act, so that there is one statutory access mechanism. This would eliminate current confusion for applicants in having two access and amendment rights in two separate statutes.

An administrative access provision in the IP Act could be specifically and unambiguously drafted for organisations that are not subject to the RTI Act. .

**APP 13—correction of personal information**

APP 13 deals with amendment and correction of personal information – its equivalent is IPP 7. As suggested in this submission, it is recommended that access and amendment provisions be moved to the RTI Act. If the one Act approach is adopted then it would not be necessary to have an IPP dealing with amendment to correct personal information.

**Discussion paper question 2.0**

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

Information should be able to be appropriately shared within government. There are many examples where the sharing of information has been artificially restricted due to the operation of the IP Act.

The most simple solution would be to define sharing of information within government as a ‘use’ rather than a ‘disclosure’. In law, the State of Queensland is the legal entity so it would align with that concept.

Government departments are established under Administrative Arrangements Orders. The composition and names of departments change relatively frequently under machinery-of-government changes (MOGs). These movements and realignments of government functions present problems for information handling practices. Adopting a ‘use’ model rather than a ‘disclosure’ model would facilitate business across departments, give greater certainty in times of change and reduce red tape by removing artificial barriers to doing business and delivering services to Queenslanders.

Under a 'use' model, a department that obtains information for a particular purpose would be able to give that information to another department if it was to be used for the particular purpose for which it was collected or another purpose that was directly related to the purpose for which it was obtained. This approach maintains a 'purpose-related' focus, still restricting uses to the original purpose and safeguarding information from use for totally unrelated purposes, which would uphold the purpose of these particular protections; to prevent the unauthorised use of information in particular, in ways and for purposes which the individual would not expect. It may require some conditions so that the secondary purpose doesn't become a primary purpose in the other department, but these are drafting issues to be considered by the parliamentary counsel.

The 'use' model is not adopted by any other jurisdiction but from an agency's perspective it would facilitate service delivery whilst maintaining the other important protections in the IP Act which ensure that personal information is handled appropriately.

**Discussion paper question 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?**

*Personal information* is the central concept in the IP Act and it is worth considering amending the IP Act definition to maximise certainty of meaning. Although this agency does not support at this time the adoption of the new Commonwealth APPs it would also be prudent take the opportunity presented by this review to align the definition with the Commonwealth Act so that agencies could leverage of the guidance from the Commonwealth jurisdiction. Accordingly, this department supports the definition in the IP Act aligning with the Commonwealth Act.

The current section 12 of the IP Act defines personal information as meaning:

> ***personal information*** *is information or an opinion, including information or an opinion forming part of a database, whether true or not, and whether recorded in a material form or not, about an individual whose identity is apparent, or can reasonably by ascertained, from the information or opinion.*

Two issues cause some uncertainty in the current definition that would be cured by adopting the Commonwealth definition without significantly altering the framework of the IP Act. The first is the uncertainty around the words 'from the information' and the second is the inclusion of the reference to information held in a data base.

From February 2014, the definition of *personal information* in the Commonwealth Privacy Act will be:

> ***personal information*** *means information or an opinion about an identified individual, or an individual who is reasonably identifiable (a) whether the information or opinion is true or not; and (b) whether the information or opinion is recorded in a material form or not.*

It is recommended that the Commonwealth definition be adopted which would omit from the IP Act definition:

- *'including information or an opinion forming part of a database'* as it is unnecessary to refer to one type of storage method. It is clear from the definition of *document* in the *Acts Interpretation Act 1954* that *personal information* held in a database is information which is caught by the definition and therefore subject to regulation by the IP Act.
- *'from the information'* because there has been uncertainty with this concept. The better approach to privacy protection, particularly in the digital and Open Data environment, is to make it certain that information is personal information if the identity of an individual can reasonably be ascertained, not just from the information itself, but from a range of information that may be available to the a person or the community.

**Discussion paper question 4.0**

This agency has no comment in relation to discussion paper question 4.0.

**Discussion paper question 5.0**

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

A review of section 33 to better allow for the realities of agencies working with personal information in the online environment is supported.

Currently, section 33 places the following restrictions on transferring personal information out of Australia. In accordance with section 33 an agency can only transfer personal information outside Australia if:

*(a) the individual agrees to the transfer; or*

*(b) the transfer is authorised or required under a law; or*

*(c) the agency is satisfied on reasonably grounds that the transfer is necessary to lessen or prevent a serious threat to the life, health, safety or welfare of an individual, or to public health, safety or welfare; or*

*(d) 2 or more of the following apply –*

*(i) the agency reasonably believes that the recipient of the personal information is subject to a law, binding scheme or contract that effectively upholds principles for the fair handling of personal information that are substantially similar to the IPPs;*

*(ii) the transfer is necessary for the performance of the agency's function in relation to the individual;*

*(iii) the transfer is for the benefit of the individual but it is not practicable to seek the agreement of the individual, and if it were practicable to seek the agreement of the individual, the individual would be likely to give the agreement;*

*(iv) the agency has taken reasonable steps to ensure that the personal information it transfers will not be held, used or disclosed by the recipient of the information in a way that is inconsistent with the IPPs.*

In the current global climate, business and agencies are increasingly taking advantage of new technologies that require personal information to be transferred overseas. The use of technologies such as cloud computing and web survey tools allow agencies to deal with personal information faster in turn improving their business performance and cost efficiency. There are compliance and

privacy risks for agencies, particularly if the use of such technologies may result in the transfer of personal information outside of Australia in circumstances where the requirements of section 33 are not able to be met.

As part of the Commonwealth's *Privacy Amendment (Enhancing Privacy Protection) Act 2012* amendments, changes have been made in respect to cross border data flows with the new APP 8. The amendment moves the focus from 'transfer' to 'disclosure' of personal information to overseas recipients. 'Disclosure' is a broader concept than that of 'transfer' and appears to be much better suited to accommodate the demands of operating in a global digital environment. In relation to online data flows this would seem to suggest for example, that the mere routing of personal information through servers outside of Australia, where there is no access to the information by a third party, will not be a 'disclosure' under APP 8. The Commonwealth changes to 'disclosure' would facilitate business across international boarders.

It is recommended that Queensland consider adopting the concept of 'disclosure' similar to APP 8 in section 33 and omit 'transfer'. Use of 'disclosure' would be less restrictive, as a disclosure could occur when an overseas recipient accesses the personal information, whether or not the personal information that is accessed is stored on a server in Australia or elsewhere for example, in the cloud.

Further, it is recommended that the current exceptions in section 33 be retained but changes to section 33(d)(i) be made to incorporate APP 8 subclause 8.2 (a) (i) and (ii) that an agency may disclose personal information to an overseas recipient if:

*(a) the entity reasonably believes that:*

*(i) the recipient of the information is subject to a law, or binding scheme, that has the effect of protecting the information in a way that, overall, is at least substantially similar to the way in which the privacy principles protect the information; and*

*(ii) there are mechanisms that the individual can access to take action to enforce that protection of the law or binding scheme.*

The challenge for agencies will be determining which international jurisdictions have substantially similar privacy protections to Queensland. The IC or a central government agency could assist the sector and industry by listing those schemes that are substantially similar to the IPPs and provide enforcement mechanisms for individuals.

**Discussion paper question 6.0**

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

Section 33 presents problems for agencies in placing personal information online. A decision to publish personal information by an agency should only be done after careful consideration and determination against the exceptions contained in IPP11 and section 33.

In accordance with IPP 11, personal information must only be disclosed where certain conditions (called "exceptions") are met.

The **exceptions** to the limits on disclosure of personal information include:

- awareness of the individual (on the basis of notification under IPP 2) that the disclosure would be the usual practice of the agency;
- that the person has agreed (expressly or impliedly) to the disclosure (consent);
- the disclosure is authorised or required under a law;
- the disclosure is necessary for law enforcement purposes;
- the disclosure is necessary to lessen or prevent a serious threat to a person's life, health, safety or welfare or public safety; or
- where the disclosure is necessary for research in the public interest.

If a disclosure is permissible because it is based on informed consent for example, then once published, it arguably becomes a generally available publication to which the privacy principles do not apply therefore, the section 33 limitations would not apply.

**Discussion paper question 7.0**

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

The Queensland privacy scheme already operates within an accountability framework. The concept referred to in the discussion paper is not supported for Queensland as the Commonwealth accountability approach appears to be based on the idea that there should be greater accountability by agencies for flows of information, a consequence of which is that agencies subject to the IP Act would continue to be liable for breaches of the privacy principles when an individual's personal information is transferred offshore.

Although the Commonwealth is adopting an 'accountability' approach, the current privacy framework already provides significant accountability mechanisms for government agencies in the handling of personal information of Queenslanders.
Such mechanisms include:

- binding contracted services providers to the privacy principles whether they are located in Australia or overseas;
- placing strict limitations on when an agency can use or disclose personal information according to the requirements of IPP11; and
- the requirements of section 33 of the IP Act

Adopting the Commonwealth 'accountability' approach in Queensland could be onerous on an agency transferring the personal information. Additionally, it would mean agencies subject to the IP Act may continue to be accountable for a breach of the privacy principles committed by an overseas recipient. Agencies may also have to re-evaluate its information security measures to ensure they are adequate or undertake due diligence when engaging service providers.

**Discussion paper question 8.0**

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

**Discussion paper question 9.0**

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

It is agreed that the IP Act should provide more detail about how to deal with privacy complaints and be more flexible about the timeframe for complaints to be lodged with the Office of the Information Commissioner (OIC).

The current provisions contained in the IP Act do not adequately detail the process for agencies and the IC in dealing with privacy complaints. This creates uncertainty and inconsistency for agencies complaint outcomes. This is in stark contrast to the detailed processes specified for applications for access and amendment of personal information held by an agency. There is certainly merit in legislative processes remaining flexible enough to accommodate differences between agencies, however a standard approach would alleviate uncertainty and inconsistency for complainants and agencies alike.

The privacy complaint handling guidelines issued by the IC is high level and provides very little guidance for agencies or complainants in managing privacy complaints and how the IC will manage privacy complaints. By contrast the IC publishes comprehensive external review guidelines under the RTI and IP Acts for both parties in relation to access and amendment applications.

Additionally, while there is provision for mediation in the IP Act, there is no detail on how the IC is to conduct the mediation process. This creates uncertainty and confusion for agencies on how the IC will deal with a privacy complaint.

**Privacy complaints to an agency**

Currently, the IP Act does not clearly outline that privacy complaints must be first made to an agency nor does it specify:

- validity requirements - the requirements which must be met for lodgement of complaints to an agency, including a statutory timeframe by which a person must make a complaint to the relevant agency;
- timeframes for management of the complaint by an agency, including provision for extending timeframes where a privacy complaint is complex before a complaint can be made to the IC; and
- how to deal with complaints including particular actions that must be undertaken (e.g. acknowledgment of complaint, investigation and formal response).

Reliance on agencies to develop an appropriate privacy complaints handling practice is not sufficient to ensure certainty and consistency, and there could be some legislative guidance and standardisation across the sector, as is the case in most other comparable jurisdictions. The only threshold requirements are found in section 166(3) in respect of privacy complaints made to the IC, where it states:

> *An individual may not make a privacy complaint to the IC unless –*
>
> *(a) the individual has first complained to an appropriate person within the relevant entity under the complaints management system of the relevant entity; and*
>
> *(b) at least 45 business days have elapsed since the complaint was made under (a); and*

*(c) the individual has not received a response to the complaint or the individual has received a response but considers the response not to be an adequate response.*

It is recommended that consideration be given to providing specific provisions in the IP Act to deal with privacy complaints first to an agency. Such provision may include, for example:

*Validity Requirements*

*An individual whose personal information is, or at any time has been, held by a relevant entity may make a privacy complaint to the relevant entity. The privacy complaint must:*

*(i) be in writing*

*(ii) be addressed to the relevant entity concerned*

*(iii) state an address of the complainant to which notices may be given*

*(iv) be made to the relevant entity within 6 months (or such a date that the relevant entity may allow) from the time the complainant first became aware of the act or practice the subject of the complaint.*

*(v) give full particulars of the act or practice complained of, including:*

*(i) when the act or practice occurred; and*

*(ii) the date on which the complainant became aware of the act or practice; and*

*(iii) which information privacy principles the complainant believes the relevant entity has failed to comply with*

**Dealing with complaints**

The IP Act could be improved by providing statutory guidance on how an agency is to deal with complaints including particular actions that must be undertaken. The IP Act does not provide for what constitutes a 'response'. Legal advice has suggested that the requirement for a response could be fulfilled by mere acknowledgment of a complaint.

The IP Act could be amended to stipulate specific provision of the following:

1. acknowledgment of the complaint by the agency (i.e. the relevant entity must with a specified period of time after the complaint is made give the complainant a written notice that acknowledges the complaint), confirming in writing with the complainant the exact terms of the complaint (in order to focus the matters in dispute for both parties);
2. investigation of the complaint, with a reasonable time in which to adequately do so; and
3. provision of a formal response to the complainant (i.e. after investigating the complaint, the relevant entity, must with a specified period (i.e. 90 days) that sets out the outcome; and states that if the complainant is not satisfied with the outcome, they may make a complaint to the OIC or appropriate Tribunal under the applicable provision.

Currently, under section 168(f) the threshold is 12 months – the IC can decline to deal with a privacy complaint if 12 months have elapsed since the complainant first became aware of the act or practice the subject of the complaint. This time frame is too lengthy on the bases that part of the complaints process is to bring any breach to an agency's attention so the agency can deal with the issues including preserving evidence. A shorter timeframe would also allow an agency to decline to deal with the complaint or allow an individual further time to lodge a complaint due to special circumstances.

**Timeframes for management of privacy complaints**

The IP Act currently allows a minimum period of 45 business days for an agency to respond to a privacy complaint (section 166(3)(b)). If within that 45 business day period the agency has provided a response, but the complainant is not satisfied with the response or the agency has not provided a response to the complainant, the complaint may take their privacy complaint to the IC.

An agency's alibility to adequately investigate and respond to a privacy complaint within 45 business days will be different in every case and depend upon a number of factors:

- the size of the agency
- the complexity of the issues
- the number of elements to a privacy complaint (i.e. complaints which involve non privacy related issues or ethical standards matters); and
- whether the conduct is also the subject of other investigations including police or misconduct investigations.

A more reasonable timeframe for an agency to deal with complaints having regard to other jurisdictions and ICs target of finalising complaints would seem to be 90 days with an extension provision either by agreement of the complainant or the IC.

Although the IC may decline to deal with the complaint because the agency has not had an adequate opportunity deal with the complaint this makes it an additional unnecessary burden on agencies to then have to simultaneous deal with the IC in relation to a complaint that is still being investigated.

It is recommended that an agency be given a reasonable time for the management of and dealing with privacy complaints. A reasonable time having regard to other jurisdictions and IC's target of finalising complaints would seem to be 90 days with an extension provision either by agreement of the complainant or the IC.

**Dealing with complaints**

The IP Act could be improved by providing statutory guidance on how an agency is to deal with complaints including, particular actions that must be undertaken (e.g. acknowledgment of complaint, investigation and formal response). The IP Act does not provide for what constitutes a 'response.' Legal opinion has suggested that a response could be interpreted as mere acknowledgment of a complaint,

It is recommended that the IP Act be amended to adequately provide for the requirements of what is meant by a response and statutory guidance on how do deal with a complaint including:

(i) agency acknowledgment of the complaint (i.e. the relevant entity must with a specified period of time after the complaint is made give the complainant a written notice that acknowledges the complaint)

Any provision would need, with a great deal of specificity, provide for agencies to confirm in writing with the complainant the exact terms of the complaint. This focuses both the agency and complainant on the matters in dispute.

(ii) investigation of the complaint and a reasonable time in which to adequately investigate
(iii) provide the complainant with a formal response (i.e. after investigating the complaint, the relevant entity, must with a specified period (i.e. 90 days) that:
    - sets out the outcome; and
    - states that if the complainant is not satisfied with the outcome, they may make a complaint to the Information Commission or appropriate Tribunal under the applicable provision.

**Privacy Complaints to the IC**

The current provisions for how the IC is to deal with a privacy complaint are uncertain and need clarification. The processes for dealing with privacy complaints need to be robust and transparent, particularly given the privacy complaint jurisdiction allows for the award by the Queensland Civil and Administrative Tribunal (QCAT) of up to $100,000 in compensation for a privacy breach.

Dealing with a privacy complaint

The IP Act currently provides for the IC to make preliminary inquiries of the complainant and the respondent to decide whether the IC is authorised to deal with the complaint (section 167).

Section 168 provides for when the IC may decline to deal with a privacy complaint. The IP Act however, does not give the IC power to dismiss stale complaints as is the case in other state/commonwealth privacy legislation (i.e. Victoria).

The following might be considered:

1. section 168(1) be amended to include that the IC may decline to deal with a privacy complaint made or referred to the Commissioner if –
    - although a complaint has been made to the IC about the act or practice, the complainant has not first complained to the respondent.
2. section 168(1)(d) be amended to:
    - the complainant has complained to the respondent about the act or practice as required under (the relevant section), and either –
        (i) the respondent has dealt, or is dealing adequately with the complaint or part; or
        (ii) the respondent has not yet had an adequate opportunity to deal with the complaint or part.

Mediation of Privacy Complaints

This agency would support a review of the mediation of privacy complaints process under the IP Act. There needs to be greater certainty and accountability in the mediation process so that the confidentiality and protections issues are clear.

Currently the mediation complaints management processes are inconsistent and difficult for both complainants and agencies to engage in an informative way outside of QCAT. This is highlighted by the experience of this agency which has been one of uncertainty and confusion in the mediation process and complaint handling in general once a privacy complaint has been made to the IC. As part of a review, consideration should be given whether there are other forms of ADR other than mediation better suited to privacy complaint management.

The IP Act provides for mediation of complaints in section 171 but only to specify that the IC must consider whether in the circumstances resolution of the complaint could be achieved through mediation and if it is reasonably likely that resolution of the privacy complaint could be achieved through mediation the IC should take all reasonable steps to cause the complaint to be mediated. There is no further statutory guidance on how the mediation process should occur or which complaints would be suitable for mediation. The IC does not have an investigative or determination role in privacy complaints; only the provision of a mediation service to the parties. The guidelines on privacy complaints published by the IC provide little guidance and information for either complainants or agencies as to how complaints will be managed and the mediation process. This is in contrast external review guidelines under the RTI Act that provide detailed information for both parties.

Issues sometimes arise where this mediation process is not formalised in communications about privacy complaints with the ICs office, which has exposed procedural problems: for example, there is no consistent 'preliminary enquiry' process undertaken like in RTI external review.

An alternative to mediation might be conciliation. Conciliation is similar to mediation, in that it is negotiation and agreement making in a structured process, run by an impartial and unbiased third party professional, the conciliator. Conciliation however, has an element of advice that is not in the mediation process. The conciliator explains the law and processes, explore what may have occurred, point out strengths and weaknesses in each party's case, suggest options for settlement and assist the parties to understand each other's points of view. There is also the mechanism of a conciliation conference.

A further issue that could be made clearer through amendment of the IP Act concerns the referral of unresolved complaints to QCAT. The scope of what is referred to QCAT needs to be clarified:

- is it the original complaint lodged with the agency?
- is it the complaint lodged with the OIC?
- is it only the aspects of the complaint accepted by the OIC?

Other jurisdictions such as the Commonwealth and Victoria contain specific provisions that deal with the conciliation process. The *Anti Discrimination Act 1991 (Qld)* also provides for conciliation of complaints which forms part of the ADRQ complaint handling model. It may be useful to look further at other models and other forms of ADR to develop a better privacy complaints handling model including the Ombudsman or the QCAT compulsory conference model.

The IP Act also should provide for protections and confidentiality in the IC privacy complaint management process.

**Discussion paper question 10.0**

**Are additional powers for the IC to investigate matters potentially subject to a compliance notice necessary?**

Part 6 of Chapter 4 of the IP Act deals with compliance notices. Consideration should be given to whether the mechanism of compliance notices is appropriate for dealing with government compliance with the IP Act.

The IP Act gives the IC power to issue compliance notices to government agencies and to prosecute agencies if they fail to take all reasonable steps to comply with the notice (100 penalty points). The definition of agency includes department, Minister, local government and public authority. As far as this department is aware, no compliance notices have been issued since the commencement of the IP Act in 2009.

There is a question as to whether or not the IC should have the power to issue compliance notices against departments and Ministers. This power to sanction and to prosecute exceeds the powers of the IC in relation to RTI and the Ombudsman in relation to investigating administrative actions.

Specifically, the circumstance in which the IC may give a compliance notice is where the commissioner is satisfied that the agency:

- has done an act or engaged in a practice in contravention of the agency's obligation to comply with the privacy principles; and the act or practice:
  - is a serious or flagrant contravention of the obligation; or
  - is of a kind that has been done or engaged in by the agency on at least 5 separate occasions within the last 2 years.
- A compliance notice may require an agency to take stated action within a stated period for the purpose of ensuring compliance with the obligation.

An agency may apply to QCAT for a review of the compliance notice.

It might be more appropriate for the IC to assist government comply with the requirements of the Act by making recommendations to agencies about compliance rather than to exercise powers of sanction. The compliance notice model is one that is most useful when government is performing regulatory functions, particularly in respect of the private sector. The IP Act does not apply to the private sector other than by the mechanism of being a bound contracted service provider. Compliance notices can not be issued to contracted service providers.

Government agencies are required to abide by the law and if an agency was inclined to ignore an IC recommendation then the IC can use its power to report to Parliament. This model of working with government to achieve compliance is one which has worked well for the Ombudsman over the years. The types of investigations undertaken by the Ombudsman into administrative actions and processes are not dissimilar to the personal information handling practices that concern the IC.

**Discussion paper question 11.0**

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

A parent can apply for information on behalf of a child under section 50 of the RTI Act.

Section 196 of the IP Act also allows for a parent of a child to do anything that the child could do if the child were an adult in relation to any other matter under the IP Act. This means that a parent may be able to provide consent on behalf of a child for other matters involving a child's personal information under the IP Act and IPPs or to lodge a complaint on behalf of a child about a breach of the child's privacy. The ability of a parent to be an agent of a child is an important feature of the IP Act.

However, in some circumstances it may not be appropriate for a parent to act on behalf of a child in relation to the child's personal information. The right of a parent to act for children subsists so long as a child is under 18 years.

Consideration should be given to amending section 196 so that the parent's ability to do anything that the child could do if the child were an adult is restricted in certain circumstances, inserting for example:

> **196 Power of person acting for another person**
> (1) To remove any doubt, it is declared that, in relation to an access or amendment application or other matter under this Act –
> …
> (b) a child's parent is able to do anything that the child could do if the child were an adult
> (i) *if the child is younger than 12 years; or*
> (ii) *if the child is over 12 years, the child consents to the parent doing so; or*
> (iii) *where it is in the best interests of the child to allow the parent to do so*.

**Discussion paper question 12.0**

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

This agency strongly supports a definition of 'generally available publication' that includes publication by way of social media or internet generally.

Currently, the IP Act defines a 'generally available publication' as a publication that is, or is to be made, generally available to the public, however it is published. A publication includes a book, magazine or newspaper. Publish, for personal information, means to publish it to the public by way of television, newspaper, radio, the internet or other form of communications (section 28 IP Act).

This raises the issue of personal information placed on a blog or website or included on social networking sites such as, a Facebook page, wall or timeline. Social networking services can change their privacy terms without prior notice and individuals may not have configured their privacy settings in such a way that their information is restricted to their 'friends'. Although an individual may have only intended that their personal information or a specific post can be viewed by certain number of people for example their 'friends', there can be no privacy expectation by an individual that their personal information is private.

Posting something to social media means that it can also be on forwarded by 'friends' to their 'friends'. Posts can also be duplicated or archived by a search engine and made searchable and publicly assessable. Thus, it may be argued that a post on a social networking site is a generally available publication.

In response to whether this definition would be a more useful model, it does go further to make clear that a generally available publication would include publication for which a fee would be charged, such as public registers. However, it would still seem to exclude internet publication on social media sites because the class of document in the genus is book, article or newspaper.

The definition of 'generally available publication' should be expanded to ensure that publication by way of social media or other form of communication is a "publication" for the purpose of section 28. Additionally, consider adopting the (a) and (b) elements of the Commonwealth definition.

**Discussion paper question 13.0**

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

The IPPs in schedule 3 of the IP Act refer to 'documents'. For example:

- IPP 1 which requires the collection of personal information be lawful and fair, and relates to the collection of personal information 'for inclusion in a document or generally available publication'; and
- IPP 11 which relates to disclosure of personal information, and applies to an agency 'having control of a document containing personal information'.

This means that the privacy principles only apply where the personal information is in documentary form. Most personal information which becomes the subject of a complaint will be contained in a document.

It is strongly recommended that the IP Act only applies to information handling practices in relation to **'documents'** as is currently the case with the IPPs.

Removing the reference to 'document' would be a significant departure from the current regime and place an unreasonable compliance burden on agencies without the certainty of a net benefit for the community. The current obligations work well and compliment the overall record management approach in the public sector which deals with documents as public records under the *Public Records Act 2002* and documents of an agency under the RTI Act. Any move toward broadening personal information in this way would need to be carefully considered given the likely implementation and compliance costs. It is reasonable that:

- the obligation to comply with the privacy principles only relates to personal information contained in documents;
- a complaint about breach of the privacy principles can only be made where the personal information the subject of the complaint is contained in a document; and
- where a collection or a disclosure of personal information occurs verbally and is never reduced to writing or otherwise recorded then there is no breach of the IPPs.

That the references to ‘document’ in the IPPs be retained and not changed to ‘information’.

**Discussion paper question 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?**

Amendment of IPP4 to align with all IPPs would allow consistency across the IPPs and so be in the best interests for clear and consistent law.

**Discussion paper question 15.0**

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

The agency strongly supports maintaining the words **‘asked for’** for the purposes of IPP2 and 3.

The general meaning of the term ‘ask for’ is to solicit or request. The term ‘collect’ means to gather, hold or accumulate information, whether it is asked for or not and so it could include solicited and unsolicited information.

The obligations in IPPs 2 and 3 to information that is collected by an agency should not be widened to ‘collection’. The issue of interpretation of unsolicited information is relevant here. The personal information is not asked for and is not relevant or necessary for the department to use in following up the complaint/query, however this technically could be a collection.

For example, where people send a letter to the Director-General in order to lodge a complaint or raise a query, providing irrelevant background information about themselves, people they know and others they perceive to be involved. This collection, while unsolicited, would make the IPPs applicable and so could require the department to issue a collection notice to the letter writer as well as those people mentioned by the letter writer.

The concern is that the outcome flowing from this example would be unmanageable. A person has volunteered the information and even if completely irrelevant to an enquiry, then the agency must issue a collection notice. A reasonable person would not expect to receive a collection notice where an agency has not sought information from them and they have provided information freely, nor would a reasonable third party expect to receive notice that their information has been collected by the government where they have been mentioned in an unsolicited letter.

Widening of the application of IPPs 2 and 3 to collection would subsequently also increase the administrative burden for agencies in needing to determine collection scenarios and in needing to respond to an increased number of collection notices under IPP2 as a result of receipt of a large amount of unsolicited information.

# 4.0 General comments

## 4.1 Office of the Information Commissioner role and functions

**Complaints resolution**

Currently the complaints resolution functions split between three bodies, namely:

- the agency investigates the initial complaint under the agency's usual complaints handling processes
- the Commissioner can conduct a mediation to resolve the complaint informally
- QCAT can ultimately arbitrate the complaint.

Having a complaints process that includes the opportunity for informal resolution before arbitration is supported. How those processes are organised and who undertakes the responsibilities may warrant further consideration. QCAT has the processes that accommodate informal resolution followed by arbitration through the compulsory conference and hearing model. This would have the benefit of a one stop shop for complaints resolution. QCAT has established procedures and the infrastructure to deal with complaints. This type of approach would remove the need to have the IC involved as a separate body and free it to support agencies and the community in privacy advisory matters, without the risk of actual or perceived conflicts of interests arising. As it currently is structured, the IC is limited in its ability to provide formal privacy advice to government because it also may be the body who will be required to investigate. The IC has investigated only one agency formally and published a report on its investigation. This would not have been possible had the IC given that agency particular advice or if the agency was following the guidelines issued by the IC on the particular practice.

There is little data on current complaints resolution in the privacy sphere so before any changes were contemplated the data on timeliness and effectiveness of informal resolution and arbitration by QCAT would be worth reviewing. This agency is does have reservations about having the three tier structure with the informal and formal resolution split between two bodies particularly in a jurisdiction that has $100,000 compensation cap for each breach.

**Training, advice and awareness**

The training, advice and awareness roles are necessary to assist the community and agencies in achieving an understanding of privacy.

**Waiver of principles**

There have been occasions where the IPPs have been waived or modified in relation to particular circumstances. This department has been granted a waiver of the principles on two occasions since 2009 to allow for the sharing of information between agencies. If the sharing of information between agencies was to be characterised as a 'use' rather than a 'disclosure', as suggested elsewhere in this submission, neither of these waivers would have been necessary. However, this department believes that the waiver mechanism is essential to deal with exceptional and unexpected situations. It has been requested by this department only where the IP Act has been a significant barrier to beneficial government policy. The IC appears to be well equipped to perform this function and has proven to be responsive and timely in its consideration of applications for waiver under section 157 of the IP Act.

**Own motion investigations**

Own motion investigations allow for issues of public interest to be investigated and reported on to parliament. This type of function promotes best practice public administration and supports this role similar to that performed by the Ombudsman who conducts own motion investigations into administrative actions of agencies.

**Compliance**

There are a number of agencies that assess compliance of agencies with legislative obligations chief amongst which is the Queensland Audit Office (QAO). QAO is experienced in conducting audits and assessing compliance across a variety of areas of public administration. It operates under audit standards, reports to parliament and has significant infrastructure and established networks within agencies. The audit function is linked into agency internal audit programs which include privacy compliance and other integrity framework obligations such as complaints management, RTI, HR, legal and financial administration.

**Reporting**

Reporting on the IP Act is an important function. Establishing a small number of metrics, aside from access and amendment applications, that the government would consider useful for monitoring the operations of the IP Act would be supported.

## 4.2 Privacy breaches

Currently the IP Act does not deal with privacy breaches when an agency becomes aware of a breach (other than through the privacy complaint mechanism). There is also no requirement under the IP Act to notify an affected individual when a privacy breach occurs and maintaining the status quo in that regard is supported. The IP Act does, however, require agencies to provide adequate security protection to personal information in its possession which is reflected in IPP4.

The IC currently publishes voluntary guidelines on how to respond to a privacy breach and there is already a voluntary requirement to notify the IC of a breach. However, these guidelines cannot require an agency to notify affected individuals, nor do they prescribe particular timeframes for when notification should occur or impose penalties if there is a failure to do so.

It is noted that prior to the 2013 election the Commonwealth introduced into Parliament the *Privacy Amendment (Privacy Alerts) Bill 2013)* which if passed would have introduced mandatory data breach notification provisions for agencies and organisations that are regulated by the *Privacy Act 1988* (Cth). The Bill has not passed and has now lapsed.

Although Queensland agencies are not required to notify the IC or individuals, they do consider whether or not to notify privacy breaches on a case by case basis. The factors considered by agencies in deciding whether or not to notify include:

- What are the legal and contractual obligations?
- What is the risk of harm, loss or damage to the individual?
- Is there a reasonable risk of identity theft or fraud (usually because of the type of information lost, such as an individual's name and address together with government-issued identification numbers or date of birth)?
- Is there a risk of physical harm (e.g. does the loss put an individual at risk of assault, stalking or harassment)?
- Is there a risk of humiliation or damage to the individual's reputation (e.g. when the information lost includes sensitive information or disciplinary records)?
- What is the ability of the individual to avoid or mitigate possible harm?

There may be some merit in adopting a mandatory breach notification for extreme cases however, it would not seem appropriate to adopt a civil penalties approach to government agencies.

Before taking the significant step of adopting mandatory breach notification it would be preferable to have data that supports the notion that breach notification is something that agencies are not turning their mind to and acting upon in appropriate circumstances. The experience of this department is that when a breach occurs it is assessed and notification is considered.

Adopting mandatory data breach notification is not supported at this stage. The existing voluntary guidelines issued by the OIC would appear to be sufficient to assist agencies deal with privacy breaches.

## 4.3 Non-compliance of particular IPPs

This agency would support a review of section 28 of the IP Act in relation to non-compliance of particular IPPs.

Currently, under section 28 an agency is not required to comply with IPPs 8, 9, 10 or 11 in relation to an individual's personal information where an individual has published their personal information or provided their personal information to someone else for the purpose of publication.

'Publish' is defined in the IP Act as publishing it to the public by way of television, newspaper, radio, the internet or other form of communication.

However, section 28 only applies to IPPs 8, 9 10 or 11 in respect of 'use' and 'disclosure'. Section 28 should be reviewed to consider whether it should also apply to IPPs 1-3 about 'collection' of personal information. This is relevant when considering unsolicited personal information and particularly information published by an individual on social networking services.

## 4.4 Information required for purpose of establishing cultural identity and family linkage

Where personal information is critical to establishing cultural identity or family linkage of an individual it is important to recognise the importance of such information and provide for a mechanism to release this information outside the restrictions found in IPP 11.

**T**he IP Act should provide a mechanism to allowing for the disclosure of information for the purpose of establishing family linkages and cultural identity.

## 4.5 Drafting points and technical issues

1. Section 6 (Scope of personal information under this Act)
    - This needs to be redrafted to apply to not only the collection of personal information but to information held, collected, used and disclosed. These should be inserted as follows
      *This Act applies to personal information collected, held, used and disclosed*…
      regardless of when … etc

2. Section 7 (Relationship with other Acts prohibiting disclosure of information)

- Should insert a subsection to reference the RTI Act - to make clear that "authorised or required by law" includes information that has been the subject of a decision under the RTI Act.

3. Section 21(3)(b) (Meaning of public authority)
    - Needs to be redrafted as there appears to be an error *"an office or member of a body"*

4. Section 24
    - this needs to be amended to replace "*or otherwise has the document under its control*" which is using a definition to create a definition
    - could be "*or otherwise have the ability to collect, hold, use or disclose the document*"

5. Section 3 (Objects)
    - should be redrafted to clarify fair collection in line with the Commonwealth objects
    - (a) amended to read "the collection and handling of personal information" or to rearrange the sentence in order to remove doubt that the object of the Act is to allow fair handling of the information. The object of the IP Act is not only to fairly handle personal information, it is to set out the way in which personal information is handled and the law could clearly reflect this intention.

6. Section 23 (What it means to disclose personal information and to use personal information)
    - A government agency currently comes within the meaning of a second entity
    - To fulfil the intention of the Act and reduce issues of flow of information between agencies, the section should be redrafted to remove doubt; an agency cannot be a "second entity" within the meaning of this section
    - To make it clear insert a provision clarify that information passed between agencies is a use within subsection (2).

7. IPP 11(1)(a) should be redrafted to remove the limitations and to create greater certainty for agencies and the community. Omit "under IPP2 or under a policy or other arrangements in operation before the commencement of the schedule'.

## 4.6 Suggested amendments to the IPPs

| IPP | Provisions | Comments |
|---|---|---|
| **IPP 1—Collection of personal information (lawful and fair)** | *(1) An agency must not collect personal information for inclusion in a document or generally available publication unless—*<br>*(a) the information is collected for a lawful purpose directly related to a function or activity of the agency; and*<br>*(b) the collection of the information is necessary to fulfil the purpose or is directly related to fulfilling the purpose.*<br>*(2) An agency must not collect personal information in a way that is unfair or unlawful.* | **IPP 1** – no changes<br><br>• IPP 1-11<br>Remove the 'all' in IPPs that include the following line "*An Agency… must take **all** reasonable steps*" |
| **IPP 2—Collection of personal information (requested from individual)** | *(1) This section applies to the collection by an agency of personal information for inclusion in a document or generally available publication.*<br>*(2) However, this section applies only if the agency asks the individual the subject of the personal information for either—*<br>*(a) the personal information; or*<br>*(b) information of a type that would include the personal information.*<br>*(3) The agency must take all reasonable steps to ensure that the individual is generally aware of—*<br>*(a) the purpose of the collection; and*<br>*(b) if the collection of the personal information is authorised or required under a law—*<br>*(i) the fact that the collection of the information is authorised or required under a law; and*<br>*(ii) the law authorising or requiring the collection; and*<br>*(c) if it is the agency's usual practice to disclose personal information of the type collected to any entity (the **first*** | **IPP 2** –<br>• maintain the current wording 'asks for' – don't change to solicit or collect<br>• omit 'all' from 'all reasonable steps'<br>• IPP 2(5)(b) and (c) – seems impractical for people to have to turn their minds to these in the context of an emergency service – in such contexts, only IPP 2(5)(a) should be required. |

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| | ***entity**)—the identity of the first entity; and*<br>*(d) if the agency is aware that it is the usual practice of the first entity to pass on information of the type collected to another entity (the **second entity**)—the identity of the second entity.*<br>*(4) The agency must take the reasonable steps required under subsection (3)—*<br>*(a) if practicable—before the personal information is collected; or*<br>*(b) otherwise—as soon as practicable after the personal information is collected.*<br>*(5) However, the agency is not required to act under subsection (3) if—*<br>*(a) the personal information is collected in the context of the delivery of an emergency service; and*<br>*(b) the agency reasonably believes there would be little practical benefit to the individual in complying with subsection (3) in the circumstances; and*<br>*(c) the individual would not reasonably expect to be made aware of the matters mentioned in subsection (3).* | |
| **IPP 3—Collection of personal information (relevance etc.)** | *(1) This section applies to the collection by an agency of personal information for inclusion in a document or generally available publication.*<br>*(2) However, this section applies to personal information only if the agency asks for the personal information from any person.*<br>*(3) The agency must take all reasonable steps to ensure that—*<br>*(a) the personal information collected is—*<br>*(i) relevant to the purpose for which it is collected; and*<br>*(ii) complete and up to date; and*<br>*(b) the extent to which personal information is collected* | **IPP 3** –<br>• omit ‘all’ from ‘all reasonable steps’. |

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| | *from the individual the subject of it, and the way personal information is collected, are not an unreasonable intrusion into the personal affairs of the individual.* | |
| **IPP 4—Storage and security of personal information** | *(1) An agency having control of a document containing personal information must ensure that—*<br>*(a) the document is protected against—*<br>*(i) loss; and*<br>*(ii) unauthorised access, use, modification or disclosure; and*<br>*(iii) any other misuse; and*<br>*(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.*<br>*(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.* | **IPP 4** –<br>• replace 'must ensure that' with 'take reasonable steps to'<br>• IPP 4(2) – should be clarified – the level of security should be commensurate to the sensitivity of the information. |
| **IPP 5—Providing information about documents containing personal information** | *(1) An agency having control of documents containing personal information must take all reasonable steps to ensure that a person can find out—*<br>*(a) whether the agency has control of any documents containing personal information; and*<br>*(b) the type of personal information contained in the documents; and*<br>*(c) the main purposes for which personal information included in the documents is used; and*<br>*(d) what an individual should do to obtain access to a* | **IPP 5** –<br>• omit 'all' from 'all reasonable steps' |

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| | *document containing personal information about the individual.*<br>*(2) An agency is not required to give a person information under subsection (1) if, under an access law, the agency is authorised or required to refuse to give that information to the person.* | |
| **IPP 6—Access to documents containing personal information** | *(1) An agency having control of a document containing personal information must give an individual the subject of the personal information access to the document if the individual asks for access.*<br>*(2) An agency is not required to give an individual access to a document under subsection (1) if—*<br>*(a) the agency is authorised or required under an access law to refuse to give the access to the individual; or*<br>*(b) the document is expressly excluded from the operation of an access law.* | **IPP 6 and IPP 7 –**<br>• omit.<br>• only provide for access and amendment in RTI Act to reduce confusion and red tape; and prevent privacy complaints in relation to an agency's refusal to give access or to amend (review is the right course of action for this, not privacy complaint). For RTI Act – 'nothing in this Act prevents access or amendment outside the RTI Act' – to facilitate administrative release – still would need to occur in accordance with the privacy principles |
| **IPP 7—Amendment of documents containing personal information** | *(1) An agency having control of a document containing personal information must take all reasonable steps, including by the making of an appropriate amendment, to ensure the personal information—*<br>*(a) is accurate; and*<br>*(b) having regard to the purpose for which it was collected or is to be used and to any purpose directly related to* | **IPP 6 and IPP 7 –**<br>• omit.<br>• only provide for access and amendment in RTI Act to reduce confusion and red tape; and prevent privacy complaints in relation to an agency's refusal to |

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| | *fulfilling the purpose, is relevant, complete, up to date and not misleading.*<br>*(2) Subsection (1) applies subject to any limitation in a law of the State providing for the amendment of personal information held by the agency.*<br>*(3) Subsection (4) applies if—*<br>*(a) an agency considers it is not required to amend personal information included in a document under the agency's control in a way asked for by the individual the subject of the personal information; and*<br>*(b) no decision or recommendation to the effect that the document should be amended wholly or partly in the way asked for has been made under a law mentioned in subsection (2).*<br>*(4) The agency must, if the individual asks, take all reasonable steps to attach to the document any statement provided by the individual of the amendment asked for.* | give access or to amend (review is the right course of action for this, not privacy complaint). For RTI Act – 'nothing in this Act prevents access or amendment outside the RTI Act' – to facilitate administrative release – still would need to occur in accordance with the privacy principles |
| **IPP 8—Checking of accuracy etc. of personal information before use by agency** | *Before an agency uses personal information contained in a document under its control, the agency must take all reasonable steps to ensure that, having regard to the purpose for which the information is proposed to be used, the information is accurate, complete and up to date.* | **IPP 8** – omit 'all' from 'all reasonable steps' |
| **IPP 9—Use of personal information only for relevant purpose** | *(1) This section applies if an agency having control of a document containing personal information proposes to use the information for a particular purpose.*<br>*(2) The agency must use only the parts of the personal information that are directly relevant to fulfilling the particular purpose.* | **IPP 9** – nil changes identified |

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| **IPP 10—Limits on use of personal information** | *(1) An agency having control of a document containing personal information that was obtained for a particular purpose must not use the information for another purpose unless—*<br>*(a) the individual the subject of the personal information has expressly or impliedly agreed to the use of the information for the other purpose; or*<br>*(b) the agency is satisfied on reasonable grounds that use of the information for the other purpose is necessary to lessen or prevent a serious threat to the life, health, safety or welfare of an individual, or to public health, safety or welfare; or*<br>*(c) use of the information for the other purpose is authorised or required under a law; or*<br>*(d) the agency is satisfied on reasonable grounds that use of the information for the other purpose is necessary for 1 or more of the following by or for a law enforcement agency—*<br>*(i) the prevention, detection, investigation, prosecution or punishment of criminal offences or breaches of laws imposing penalties or sanctions;*<br>*(ii) the enforcement of laws relating to the confiscation of the proceeds of crime;*<br>*(iii) the protection of the public revenue;*<br>*(iv) the prevention, detection, investigation or remedying of seriously improper conduct;*<br>*(v) the preparation for, or conduct of, proceedings before any court or tribunal, or implementation of the orders of a court or tribunal; or*<br>*(e) the other purpose is directly related to the purpose for which the information was obtained; or* | **IPP 10** –<br>• 10(1)(d) – reword, no punctuation<br>• 10(1)(e) – omit 'directly' from 'directly related' –<br>• 10(2) Note 'with the document' – possibly not flexible enough, particularly for databases. Note that APP 6 provides that<br>*6.5 If an APP entity uses or discloses personal information in accordance with paragraph 6.2(e), the entity must make a written note of the use or disclosure.*<br>• IPP 10(1)(d)<br>- this needs to be amended to correct grammatically<br>- insert the comma in the following "*the agency is satisfied on reasonable grounds that the use of the information for the other purpose is necessary for 1 or more of the following, by or for a law enforcement agency"*<br>• IPP 10(2)<br>- redraft to account for fact that some forms of storage, for example data bases, do not |

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| | *Examples for paragraph (e)—*<br>*1 An agency collects personal information for staff administration purposes. A new system of staff administration is introduced into the agency, with much greater functionality. Under this paragraph, it would be appropriate to transfer the personal information into the new system.*<br>*2 An agency uses personal information, obtained for the purposes of operating core services, for the purposes of planning and delivering improvements to the core services.*<br>*(f) all of the following apply—*<br>*(i) the use is necessary for research, or the compilation or analysis of statistics, in the public interest;*<br>*(ii) the use does not involve the publication of all or any of the personal information in a form that identifies any particular individual the subject of the personal information;*<br>*(iii) it is not practicable to obtain the express or implied agreement of each individual the subject of the personal information before the use.*<br>*(2) If the agency uses the personal information under subsection (1)(d), the agency must include with the document a note of the use.* | have the facility to add notations in relation to IPP 10(1)(d) disclosures – including 'where reasonably practicable' would rectify this problem.<br>- redraft as "*the agency must include a note of use with the document where practicable for an agency ".* |

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| **IPP 11—Limits on disclosure** | *(1) An agency having control of a document containing an individual's personal information must not disclose the personal information to an entity (the **relevant entity**), other than the individual the subject of the personal information, unless—*<br>*(a) the individual is reasonably likely to have been aware, or to have been made aware, under IPP 2 or under a policy or other arrangement in operation before the commencement of this schedule, that it is the agency's usual practice to disclose that type of personal information to the relevant entity; or*<br>*(b) the individual has expressly or impliedly agreed to the disclosure; or*<br>*(c) the agency is satisfied on reasonable grounds that the disclosure is necessary to lessen or prevent a serious threat to the life, health, safety or welfare of an individual, or to public health, safety or welfare; or*<br>*(d) the disclosure is authorised or required under a law; or*<br>*(e) the agency is satisfied on reasonable grounds that the disclosure of the information is necessary for 1 or more of the following by or for a law enforcement agency—*<br>*(i) the prevention, detection, investigation, prosecution or punishment of criminal offences or breaches of laws imposing penalties or sanctions;*<br>*(ii) the enforcement of laws relating to the confiscation of the proceeds of crime;*<br>*(iii) the protection of the public revenue;*<br>*(iv) the prevention, detection, investigation or remedying of seriously improper conduct;*<br>*(v) the preparation for, or conduct of, proceedings* | **IPP 11** –<br>• 11(1)(a) – omit 'under IPP 2 or under a policy or other arrangement in operation before the commencement of this schedule' – too limiting and would not have been the intention of the section.<br>• IPP 11(4) – should we have a separate direct marketing IPP to cover these issues as in the APPs<br>• IPP 11(1)(e)<br>- this needs to be amended to correct grammatically<br>- insert a comma in the following "*the agency is satisfied on reasonable grounds that the use of the information for the other purpose is necessary for 1 or more of the following**,** by or for a law enforcement agency*"<br>• IPP 11(2)<br>- needs to be redrafted to account for fact that some forms of storage, for example data bases, do not have the facility to add notations in relation to IPP 10(1)(d) |

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| | *before any court or tribunal, or implementation of the orders of a court or tribunal; or*<br>*(f) all of the following apply—*<br>*(i) the disclosure is necessary for research, or the compilation or analysis of statistics, in the public interest;*<br>*(ii) the disclosure does not involve the publication of all or any of the personal information in a form that identifies the individual;*<br>*(iii) it is not practicable to obtain the express or implied agreement of the individual before the disclosure;*<br>*(iv) the agency is satisfied on reasonable grounds that the relevant entity will not disclose the personal information to another entity.*<br>*(2) If the agency discloses the personal information under subsection (1)(e), the agency must include with the document a note of the disclosure.*<br>*(3) If the agency discloses personal information under subsection (1), it must take all reasonable steps to ensure that the relevant entity will not use or disclose the information for a purpose other than the purpose for which the information was disclosed to the agency.*<br>*(4) The agency may disclose the personal information under subsection (1) if the information may be used for a commercial purpose involving the relevant entity's marketing of anything to the individual only if, without limiting subsection (3), the agency is satisfied on reasonable grounds that—*<br>*(a) it is impracticable for the relevant entity to seek the consent of the individual before the personal information is used for the purposes of the marketing;* | disclosures. – including 'where reasonably practicable' would rectify this problem.<br>- redraft as "*the agency must include a note of use with the document where practicable for an agency*" |

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| | *and*<br>*(b) the relevant entity will not charge the individual for giving effect to a request from the individual to the entity that the individual not receive any marketing communications; and*<br>*(c) the individual has not made a request mentioned in paragraph (b); and*<br>*(d) in each marketing communication with the individual, the relevant entity will draw to the individual's attention, or prominently display a notice, that the individual may ask not to receive any further marketing communications; and*<br>*(e) each written marketing communication from the relevant entity to the individual, up to and including the communication that involves the use, will state the relevant entity's business address and telephone number and, if the communication with the individual is made by fax, or other electronic means, a number or address at which the relevant entity can be directly contacted electronically.* | |