Review of the *Right to Information Act 2009* and Chapter 3 of the *Information Privacy Act 2009*

Response to Discussion Paper

Department of Health

The Department of Health welcomes the review of the *Right to Information Act 2009* (RTI Act) and Chapter 3 of the *Information Privacy Act 2009* (IP Act).

Generally, while operating well, four years of experience by agencies in administering the legislation has identified a number of opportunities for improvement and/or clarification, as well as minor drafting anomalies or inconsistencies, which would similarly benefit from this review.

The primary issues identified by this department are set out in detail in the following submission. Please note that this submission is made on behalf of the Department of Health only. The Hospital and Health Services, as independent authorities, may lodge their own submissions to the Discussion Paper separately.

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

The Department of Health has made a concerted effort to push as much information into the public domain as possible. While not always published under the RTI banner, the philosophy of the push model is reflected in many public release strategies on our internet site, for example:

- "Our Performance" pages (which contains details, up-to-date and regular information on the activity and regular information on the activity and performance of Queensland Health's reporting hospitals)
- Queensland Health Policy site (which contains all mandatory policies and associated implementations standards, protocols, procedures and guidelines for the department)
- Health Service Directives site
- Patient Safety and Quality Improvement site
- Health Statistics Centre – includes a wide range of health information statistical data
- Open Data Initiative – the department has identified numerous data repositories for publication under this initiative. Details can be found in the Open Data Strategy document on the website.
- Transparency site (which includes additional data/information determined to be of broader public interest)
- Public health information and initiatives
- Workforce information
- Departmental governance (strategic plans, financial data/information, organisational structure, health reform and so on)

The above is a broad outline of the types of information available on the Queensland Health website. There are vast repositories of information already available to the public but the department continues to monitor and update in line with the push model philosophy.

As such, the department is supportive of the current object of the Act. In terms of the 'push model', the department is also supportive of the appropriateness of the provisions. As outlined above, while not always published under the banner of the RTI push model, the department continues to make improvements in the appropriate publication of information/data in line with the push model philosophy.

Part 2 – Interaction between the RTI and IP Acts

The Department of Health strongly supports the suggestion that the right of access/amendment be changed to the RTI Act as a single entry point.

At present, the separation between the RTI and IP Acts is both confusing to applicants and difficult to administer by agencies. In reality, applicants and decision-makers are required to cross-reference between the Acts in order to work through the process for access/amendment applications for personal information which is frustrating for applicants and difficult to administer.

Decision letters for access/amendment applications issued under the IP Act are necessarily complicated and lengthy, due to the current need to refer to RTI provisions.

The idea to separate personal and non-personal access applications between the Acts led to a great deal of duplication in drafting the legislation, such that it would appear to be far simpler to limit the access/amendment provisions, irrespective of the nature of the application (personal or non-personal), to a single Act (RTI Act).

The added benefit of having the RTI Act as a single entry point is that the IP Act will relate solely to information privacy (that is, the rules for handling personal information). At present, the privacy principles are relegated to the end of the legislation, rather than being the primary focus. The IP Act should be solely about information privacy and the rules regarding appropriate and lawful handling of personal information.

Part 3 – Applications not limited to personal information

The comments set out under Part 2 above apply equally here and reinforce the idea that the RTI Act should be the single legislative entry point for access to government held information.

The whole process of negotiating with an applicant regarding the appropriate Act for their application to be processed under prolongs the time for an applicant to actually have their application finalised. From an applicant's perspective, the section 54 process could be seen to be "red tape" and an unnecessary delay.

Section 54 is a good example of an additional bureaucratic process that could be completely removed if the RTI Act becomes the sole entry point.

If access provisions remain in both Acts, then the proposal that the timeframe for section 54(5)(b) be 10 business days instead of calendar days is supported. References to time periods in both Acts should be consistent.

Part 4 – Scope of the Acts – Documents of an agency and a Minister

The Department of Health supports the proposal that the Acts should 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. As such, the suggestion that these decisions should be reviewable is also supported.

Part 4 – Scope of the Acts – Applications outside the scope of the Act; Difficulties with part applications

The Department of Health supports the proposal to align the timeframe for making a decision that a document or entity is outside the scope of the Act (10 days) to the processing period (25 days). It would be unusual for a single application to relate to documents that entirely fall within the scope of one of these provisions. As such, as outlined in the Discussion Paper, agencies are then left with the difficulties associated with part applications/decision-making.

Part 4 – Scope of the Acts – Documents of contracted service providers

The Department of Health is supportive of exploration of this proposal. Given the government's mandate to increase public-private partnerships, it therefore necessarily follows that there is a need to ensure that accountability is not lost in these arrangements. The idea that costs of compliance by private sector partners may be unreasonable needs to be explored but perhaps the RTI responsibilities for those organisations could be retained by the purchasing or partnering government agency. This would have the added benefit of utilisation of inhouse expertise and economies of scale (that is, all government agencies already have RTI services established – rather than private sector partners being required to create that capacity, the already established RTI Units could extend their capacity).

Part 5 – Publication schemes

The Department of Health is supportive of the suggestion that further guidance be provided to agencies on publication schemes. There is a great deal of disparity between agency schemes at present and while that is inevitable, given the wide variety of services and responsibilities of agencies, there is also opportunity for some consistency to be achieved.

For example, all departments are required to publish Gifts and Benefits Registers each quarter in the publication scheme. Through consultation across departments, other publications held commonly by agencies could also be routinely disclosed in the publication scheme (for example, consultancy registers).

Part 6 – Applying for access or amendment under the Acts

Application forms

The Department of Health does not support the retention of the prescribed application for access/amendment forms. As outlined in the Discussion Paper, requiring applicants to complete the form before an application is considered compliant is unnecessarily bureaucratic and completely inflexible.

Further, the prescribed forms do not allow for the needs of individual agencies to be met. For example, when seeking access to health information, it is often useful and sometimes necessary to have the date of birth of the applicant.

If agencies are allowed to develop their own forms and/or accept written applications in other forms, this would assist greatly in terms of having all relevant information to enable the application to be processed at the outset. This should also see quicker turnaround times for processing.

Qualified witnesses/evidence of identity for agents
The list of qualified witnesses has so far been sufficient for applicants to the Department of Health. However, we accept that there may be difficulties for people in rural or remote communities and as such, we are open to further discussion on additions to the list.

Agents should continue to be required to provide evidence of identity. However, consideration should be given to allowing some flexibility for agents lodging multiple applications with the same agency (for example, a lawyer who may make a number of applications to a single agency for a variety of clients). As a suggestion, agencies should be able to accept evidence of identity from an agent to cover all applications for a period of time (for example, if appropriate EOI documentation is supplied at a point in time, then the agency could have the option of deeming that acceptable for all applications lodged by that agent for one year or other suitable period).

Application fee refund
There are occasions where it would be good for agencies to have some further flexibility in relation to the refund of application fees. For example, where RTI applications are received for access to documents that are already publically available or there may be compassionate reasons for allowing an application fee to be refunded or waived.

Longer processing period
Whether or not a further specified period begins as soon as it is requested or is added to the end of a processing period is not really an issue, as agencies will adjust their requests for further time accordingly.

Clarity regarding the issue outlined in question 6.8 is welcome. If an agency has requested further time and does not hear otherwise (ie that an external review has been lodged), then the agency should be able to continue and possibly finalise the application in the interim.

Charge Estimate Notices (CENs)
The Department of Health has found that the CEN process works reasonably well. However, consideration should be given to the reintroduction of a requirement to pay a deposit at the time a CEN is agreed to by an applicant. One of the primary reasons for the CEN process was to ensure that an applicant provides some commitment to paying processing/access charges for an application.

On occasion, this department has had an applicant agree to pay the CEN, then refuse to pay charges at all at the conclusion of the process. The department has expended resources in order to process the application, on the basis of a commitment by the applicant but at the end of it all, had little capacity to recoup the agreed sum.

Paying a small deposit (ie 20% of the total estimated charge) would ensure that the department recoups at least some of the cost of processing in a situation described as above.

Schedule of relevant documents
The Department of Health supports the removal of the mandatory requirement to provide applicants with a schedule of documents.

Apart from the issues raised in the Discussion Paper, the department offers the following observations in support of removal of this requirement:

- the time taken to prepare the schedule of documents, on some occasions, takes longer than making the decision for the application;
- there is potential for exempt information to be inadvertently disclosed within the schedule of documents (this is a particular risk when it comes to legal professional privilege and personal information);
- preparation of a schedule of documents can be a time-intensive exercise which may take a great proportion of the timeframe allowed to process the application, leaving little time to produce a properly considered and adequately researched decision;
- it is also possible that a schedule of documents requiring a significant amount of time to complete could trigger the "unreasonable diversion of resources" mechanism contained in the RTI Act
- there are likely to be cost implications for the applicant (ie if processing charges are applicable, then they will need to pay for the time taken to prepare a schedule which ultimately, may not be of value to the process)

This department has found it is much more beneficial (for both the applicant and the department) to contact the applicant as early in the process as possible to discuss the categories, types and potential numbers of documents relevant to the application. This method of communication with the applicant is far more workable and user-friendly than the requirement to produce a schedule of documents.

Consultation
As outlined in the paper, the threshold for third party consultation in the Act is too low. It has resulted in a higher number of consultations that are often unnecessary. This potentially adds to the cost of processing for an applicant and takes up resources of RTI units that may be better utilised elsewhere (both in conducting and responding to consultations on documents which are highly unlikely to be of any real concern if disclosed).

This department supports a return to the "substantial concern" threshold contained in the former FOI Act.

Disclosing the identity of applicants and third parties
While the issues raised in the Discussion Paper have been experienced by this department, legislating a process for determining whether the identity of applicants and third parties should be disclosed is probably unnecessary. The exception to this may be to make it clear that unless the applicant/third party is an individual (and therefore, entitled to some level of privacy protection), that identities will be disclosed, unless the organisation notifies the department of some valid reason for not disclosing to the other party.

This department takes the approach set out in the Discussion Paper – that is, on a case by case basis. Sometimes, it is very evident that disclosure of applicant/third party identity to the other party would be highly problematic and if consent cannot be obtained, then disclosure of identity does not occur during the consultation process. Conversely, there are occasions when an applicant (an organisation rather than an individual) insists on anonymity where there does not appear to be a public interest or otherwise sound basis for doing so. This can make processing cumbersome and difficult to progress.

Transferring applications
The reintroduction of the provision that allows agencies to transfer applications to an agency whose functions more closely relate to the documents to be processed is supported.

It is not unusual and quite understandable that applicants are sometimes unsure which is the most appropriate agency to process an RTI/IP application. If it is lodged with an agency that has some or simply a copy of documents held by another agency, it is logical that that application should be able to be transferred to the "primary" agency. In reality, the agency receiving the application would likely need to consult with the primary agency and as such, the primary agency is in effect making a determination on disclosure of the documents through its response to the consultation.

Notifying decisions and reasons
As indicated above, changing the right of access/amendment such that RTI is the only entry point would assist greatly with the administration of the legislation. This also extends to notifications of decisions and reasons. Preparing a statement of reasons under the IP Act which, if access is refused to any documents in that decision, requires constant referral to another piece of legislation (the RTI Act) is cumbersome and necessarily requires a complex and lengthy statement of reasons.

This department has endeavoured to assist applicants by using a format that includes a brief explanation of the salient points of the access decision (ie what has been found, what is being disclosed, charges owed (if any) and review rights) as a covering letter and attaching a full statement of reasons regarding the decision. This approach appears to work reasonably well but any consideration of the requirements of prescribed notices which would lead to simpler statements of reasons being written is supported.

Information about the existence of certain documents
This department agrees that it is difficult to strike a balance between properly informing an applicant of the basis of a decision under this provision, while still protecting the information in issue. As such, clarity in the legislation regarding the extent of detail to be provided to applicants for these types of applications may assist in administering this provision.

No review of notation to amended personal information
While the amendment provisions in the IP Act are not often used for documents of this department, when a notation is made as a result of such an application, it has been done in consultation with the applicant, such that a situation of dissatisfaction regarding notation content has not been raised to date.

However, given that applicants have a right of review regarding other aspects of amendment applications, it would appear sound to include this provision as being reviewable as well.

Part 7 – Refusing access to documents

Disclosure contrary to the public interest

The Department of Health supports the proposal to simplify the public interest test provisions, particularly in relation to Schedule 4, Part 4. The reasons for the separation of the public interest reasons in Schedule 4, Part 4 is unclear and it is difficult to explain how the schedule works to applicants/third parties. Especially when the applicant/third party has a view that meeting the threshold of a Schedule 4, Part 4 factor completely tips the public interest balance against disclosure.

There is still some propensity to treat the Schedule 4 factors as a checklist or numbers game – that is, if an applicant/third party can "tick off" more factors in support of their argument for or against disclosure, then they consider that this is the determining factor in deciding release or otherwise. Perhaps this is more of a matter of education and awareness for RTI applicants/third parties, but if the Act can set out with more clarity how a public interest balancing test/determination works, then this may provide some benefit to both users and administrators of the legislation.

Part 8 – Fees and charges – Adequacy of fees and charges

We have undertaken some limited modelling based on the charging regime proposed by the Solomon Review, as well the charging regime in place for QCAT. As total figures, we found that the Solomon model effectively tripled charges, while the QCAT model was roughly the same as charges currently applicable under RTI. For individual applications, the results were very uneven.

On the basis of the limited modelling undertaken, a page-based charging regime does not necessarily reflect the workload required to process an RTI application. For example, a complicated, time-consuming RTI application with a small number of pages would result in low charges. Conversely, a straightforward application which may not take long to process but does involve a large number of pages would result in a high charge, which would not be fair to applicants.

As such, while time time-based charging can be difficult to administer, it is our preference over a page-based model. As indicated above, basing a charging regime on the number of pages is not necessarily a true or accurate reflection of the amount of work involved in processing.

While not noted in the Discussion Paper, consideration should be given to reintroducing deposit provisions, as they were in the former FOI Act. It may be beneficial for agencies to have a deposit requirement available at the charge estimate notice stage (ie the applicant needs to agree to the CEN before processing can continue and in doing so, a deposit is payable at that point).

Access charges need further consideration. At present, the access method preferred by applicants to this department is almost exclusively by email/CD. Having an access charge model based on a per photocopied page basis is redundant so a more appropriate/current access charging regime should be considered (in conjunction with deliberations regarding processing charges).

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

The Department of Health has had only one applicant that falls into this category. Financial hardship status was obtained prior to the applicant lodging the RTI application.

Given the OIC guideline on this aspect of the RTI Act (ie that financial hardship status applications should be made prior to an access application being lodged with an agency), amending the legislation in the way proposed would serve to put the issue beyond doubt.

Waiver of fees for multiple applications made to Queensland Health
The Department of Health supports the inclusion of a discretion for application fees to be waived in the circumstances outlined in the Discussion Paper.

Part 9 – Review and appeals

Optional internal review; Sufficiency of search matters; Longer processing period for internal review
The Department of Health supports the retention of optional internal review rights for applicants and third parties. For some applications, it is unlikely that a decision will be altered at internal review by the agency, and as such, the option to proceed directly to external review should be available to the applicant. As such, the applicant has the option of cutting out a level of review that will likely add at least a month to the process. Further, for some applicants, the ability to apply for review directly to a body that is independent of the agency is beneficial and desirable.

The suggestion that applicants should be able to seek both internal and external review on "sufficiency of search" matters is supported.

The capacity to seek longer processing periods for internal review decisions to be issued is supported, but should be limited. For some internal review applications, there is a need to consult third parties or undertake additional searches/enquiries and the 20 day processing period is not always sufficient to allow these tasks to be conducted. As outlined in the Discussion Paper, sometimes it is only a matter of a week or two that is needed in order to finalise an internal review decision.

However, the ability to seek further time to finalise an internal review needs to be limited in some way, so that finalisation of applications for internal review are not significantly delayed.

Early resolution of external reviews
The RTI Act should specifically authorise the release of documents by an agency as a result of an informal resolution settlement. The protections afforded by the legislation should similarly extend to these situations, such that disclosure under an informal resolution settlement is undertaken in the same context as disclosure resulting from an initial RTI decision/OIC decision.

Part 10 – Office of the Information Commissioner

The comments in relation to "substantial and unreasonable diversion of resources" in the Discussion Paper are noted. In terms of the current provisions being sufficient for agencies, the Acts may benefit from inclusion of further guidance regarding a threshold for what constitutes "substantial and unreasonable diversion". It is acknowledged that setting a threshold may be problematic, given the spectrum of agencies and services covered by the legislation. It is also recognised that limiting the rights of access by

applicants is serious and therefore needs robust consideration. However, if a method or formula for setting a threshold can be determined, then this would assist in the administration of the Act and also, would assist applicants in terms of expectations.

Powers to enable performance of monitoring, auditing, reporting and requiring agency compliance

Having been through a compliance review by the OIC, the Department of Health did not find this issue to be problematic. However, it is recognised that it could be an impediment to this OIC function, particularly if an agency is willing to provide relevant documentation but it is of the view that confidentiality or similar provisions in other legislation prohibits disclosure for this purpose. Accordingly, adding provisions in the RTI Act which put this issue beyond doubt is supported.

Part 11 – Annual Reporting Requirements

The work that has been undertaken by the Department of Justice and Attorney-General recently in reducing the reporting requirements for the 2012/13 annual report is welcome.

Again, if the proposal to have RTI as the single entry point for access/amendment applications is implemented, this would assist greatly in reducing the complexity of annual reporting.

As acknowledged in the Discussion Paper, while the reporting requirements can be onerous, the information collated is useful for a variety of reasons and apart from some provisions where there is rarely (or never) anything to report, it is not clear which requirements could be removed such that the usefulness of the data is not compromised.

The exception to this is the requirement to report the number of pages published to disclosure logs. The benefit in reporting this information is not evident, particularly given the amendments to the RTI Act late in 2012 which require departments to publish the actual documents to disclosure logs.

Given the push for agencies to implement administrative access schemes as an alternative to applicants lodging RTI/IP access applications, basic reporting regarding the operation of such schemes in agencies is suggested. An outline of the categories of documents covered by the administrative access scheme, as well as basic data (such as number of applications and possibly, number of pages disclosed) would better illustrate agencies' efforts to release information through what are usually less formal, faster methods of disclosure.

November 2013

Review of the *Information Privacy Act 2009*: Privacy Provisions

Response to Discussion Paper

Department of Health

The Department of Health welcomes the review of the *Information Privacy Act 2009* (IP Act): Privacy Provisions.

Given recent developments in privacy in other jurisdictions, particularly at the Commonwealth level, it is timely to review the Queensland IP Act.

The primary issues identified by this department are set out in detail in the following submission. Please note that this submission is made on behalf of the Department of Health only. The Hospital and Health Services, as independent authorities, may lodge their own submissions to the Discussion Paper separately.

Confusion and Complexity in privacy across Australia; Considering the Australian Privacy Principles (APPs) in Queensland

This Department supports the suggestion of a single set of privacy principles applying to all Queensland Government agencies. As such, consideration of the adoption of the APPs is also supported.

The reasons for this support are broadly outlined in the Discussion Paper. For this department, additional justification for the proposal can be found in the "Blueprint for better healthcare in Queensland and A Plan for Better Services for Queenslanders". Under this initiative, consideration is being given to how health care may be provided through public, private and not-for-profit organisations, including the development of partnerships between providers.

As such, of particular concern to this agency is the potential for barriers that may arise as a result of the differences between the privacy principles governing the private health sector under the Commonwealth's *Privacy Act 1988* and the principles specified in Queensland's IP Act that apply to the public health sector.

As of 12 March 2014, the private health sector will be required to comply with the APPs that will replace the existing NPPs. This will result in situations where there is confusion and disparity between the privacy regimes covering the private and public health sectors and may lead to difficulties in information sharing.

Information Sharing

The Department of Health has generally found that the exceptions regarding use and disclosure (NPP2) are adequate.

However, consideration should be given to inclusion of a public interest exception (similar to that found in s.160 of the *Hospital and Health Boards Act 2011* (the HHB Act)). On rare occasion, use or disclosure of personal is prohibited by the NPPs but the proposed use or disclosure is considered to be in the public interest. Inclusion of this

exception would allow chief executives, in exceptional circumstances, to authorise use and disclosure of personal information that is otherwise prohibited by the NPPs. There should also be accountability mechanisms linked to this exception (again, similar to those in s.160 of the HHB Act), where the authorisation must be in writing (including the reasons/justification for the disclosure) and a public reporting requirement regarding the nature of the personal information disclosed and the circumstances of that disclosure.

Definition of "personal information"

The Department of Health supports the alignment of the definition of "personal information" aligning with the Commonwealth definition for the reasons outlined regarding consideration of the introduction of the APPs above (that is, consistency across jurisdictions).

The Commonwealth definition is also clearer regarding the meaning of personal information.

Transfer of personal information outside Australia

While consideration of these provisions in the IP Act in light of the realities of technological advancement is supported, this Department also supports a stringent privacy framework when personal information is to be transferred overseas.

The current provisions do not prohibit such transfer, but do require a higher standard of approval before such an arrangement is put into effect. This should continue, given the importance of privacy protection for personal information and also, given the vast repositories of personal (and sensitive) information held by Queensland government agencies.

Privacy complaints – timeframe for resolving

The Department of Health does not have any particular position regarding flexibility for privacy complaints being lodged with the OIC. However, it is suggested that consideration should be given to including a timeframe for complainants to have a privacy complaint referred to the Queensland Civil and Administrative Tribunal (QCAT). At present, there is no time limit, so theoretically, a privacy complaint remains open ended in terms of an application to QCAT.

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