Queensland Treasury and Trade's submission on the Review of the *Right to Information Act 2009* and Chapter 3 of the *Information Privacy Act 2009* Discussion Paper

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

The primary object of the RTI Act (section 3), and the access and amendment provisions of the IP Act (section 3(b)) is to:

> *Give a right of access (and amendment) to information in the government's possession or under the government's control, unless, on balance, it is contrary to the public interest to give the access (or allow the amendment).*

While QTT believes that the primary object of both the RTI and IP Acts is still relevant and valid, QTT considers that the RTI Act is being used by legal firms, acting on behalf of an individual or a group, for a class action, contrary to the Act's spirit and primary object.

The RTI reforms strive to have a public service that conducts itself in the most open and transparent way possible, as openness in government is fundamental to good government. To enable openness and transparency in government, the RTI reforms require the pro-active disclosure of government information which also supports an open and participatory democracy and improves government decision-making.

However, it is now common practice for legal firms to use the RTI Act as a means to undertake pre-litigation discovery without the control or protection of the court procedures.

Accordingly, scarce public resources are being expended on what is largely a "fishing" exercise which would otherwise be prohibited by a court in any legal proceeding. Associated with this is the uncontrolled release of information which may prejudice any subsequent litigation. While public resources are being used to provide the information, its release is also exposing public funds to costly litigation.

The RTI Act is also being used by commercial entities to obtain confidential commercially sensitive information to be used in legal disputes, but outside of the court processes. Again, public resources are being utilised to assist commercial entities to avoid the court processes. This is considered contrary to the objectives of the RTI Act.

Unlike the IP Act, the RTI Act does not require an applicant to demonstrate an interest in the subject matter of the application. Accordingly, an agency reviewing an application is not in any position to determine how the "information" would be used when considering whether it is in the public interest to release this information having regard to the provisions of the Act. In any event, considerable public resources are expended in locating all relevant information before consideration is then given as to whether the information should be released.

QTT is of the view that the demand for public resources generated by the RTI Act needs to be moderated particularly where other more appropriate avenues for the obtaining of information are available. QTT considers that this can be achieved by:-

1. Any "commercial" information provided to an agency should be exempted from the application of the RTI Act (that is, not subject to any public interest test). It is considered that the object of the RTI Act would not be defeated as this information could still be released under the present push model if the appropriate agreement and safeguards are obtained from the owner of that information. If the information is relevant to any legal proceedings then it can be sought through the appropriate legal processes. However, it is considered that it is not an appropriate use of public resources to deal with such information through the processes currently applicable under the RTI Act (that is, determining the scope of the application, locating the information, external consulting, making a decision and dealing with any review process).

2. Consideration should be given to an outright prohibition of the use of any information provided under the RTI Act to an applicant (or their agent) in any legal proceedings. The rationale for such consideration is that there already exists substantial ability for anyone affected by a decision of government to bring an action against the government in relation to that decision. The *Judicial Review Act 1991* substantially reformed the administrative law in Queensland by providing a statutory right to obtain reasons for decisions made by agencies as well as a streamlined process to review those decisions. The Supreme Court also maintains its inherent jurisdiction to issue prerogative writs in this area. Accordingly, relevant information can be released in an appropriate manner with an appropriate body (the Court) determining what is relevant.

In addition to this, the establishment of the Queensland Civil and Administrative Tribunal (QCAT) provided greater access to the public not only to information but also to a simple right of appeal.

As considerable public resources are utilised in supporting the judicial review and QCAT procedures, it is considered that a restriction on the use of information provided under the RTI Act would not take away any legitimate legal rights of individuals. Rather it would direct an individual to consider carefully their action and to pursue the appropriate avenue. That is, they have a choice – if they simply wish to know this information they can use the RTI Act but if they are aggrieved by a decision of an agency they can pursue the matter under the *Judicial Review Act 1991*, through procedures set out in the relevant legislation and then through QCAT or an appropriate court.

QTT is strongly of the view that the RTI Act is not a tool to support costly litigation, but rather as a means to inform the public on the operations of government. In this regard, QTT believes that scarce public resources would be better utilised in systems which enable individuals access to information about themselves and enabling that information to be corrected and, systems which provide the timely release of information on agency decision making.

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?

Currently, both the RTI Act and the IP Act do not provide any mechanism for agencies to either refuse to deal with an application or refuse access to documents on the basis that the documents are not 'documents of an agency' or 'documents of a Minister'.

QTT has received a number of applications for access to documents that relate to party political information or documents relating to the Minister's role as an elected Member of Parliament. As these documents do not relate to the affairs of QTT, they are not considered to be 'documents of a Minister' as defined in the Act. QTT therefore cannot process these applications and all QTT can do in these situations is write to the applicant explaining that the documents they are seeking access to are not subject to the operation of the RTI Act and therefore QTT is unable to process the application.

To date, this approach has not been challenged by an applicant, however, QTT considers that providing a mechanism for agencies to refuse access to these types of applications, would provide agencies with clearer instructions on how to deal with such applications.

As public resources are already being expended in responding to these type of requests, then QTT would support the option to have the two Acts amended, providing a basis for agencies to either refuse to deal with an application or refuse access to documents on the basis that the documents are not 'documents of an agency' or a 'documents of a Minister'.

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

Schedule 6 of the RTI Act maintains an exhaustive list of 'reviewable decisions'. While QTT is cognisant of adding further detail to an already extensive list, QTT considers that a decision a document is not a 'document of an agency' or a 'document of a Minister' be a reviewable decision.

Refusing access to a document/s is essentially refusing an applicant their right of access to government information under the Act. However some information that is requested through an RTI application is simply not government information, therefore agencies should have the ability to refuse access to such applications, likewise RTI applicants should have the ability to seek a review of such decisions to ensure that the decision has been made in accordance with the legislation and to ensure the efficient use of scarce public resources.

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

The *Right to Information Act 2009* and Government Owned Corporations

Background

The current RTI Act applies to the GOCs except to those which are specifically exempted. Ergon Energy Corporation Limited, Stanwell Corporation Limited, CS Energy Limited, QIC Limited and Queensland Rail (as a rail Government entity) are exempted except in respect of community service obligations (CSOs).

Under the former FOI Act documents received, or brought into existence, in carrying out the activities of a GOC, were exempted from disclosure except those in relation to CSOs.

QTT is of the firm view that the RTI Act should not apply to the GOCs given their commercial charter and the purpose for which they exist. GOCs were set up as part of Government's corporatisation process to implement national competition principles. Corporatisation was a structural reform process which changed the conditions and structure, where required, under which the entities operate so that they operate, as far as practicable, on a commercial basis in a competitive environment. The objective of corporatisation is to improve the efficiency and effectiveness of GOCs and a key objective of GOCs under corporatisation is to be commercially successful in the conduct of their activities. A key principle of corporatisation is competitive neutrality, that is, in order to ensure, wherever possible, that each GOC competes on equal terms with other entities carrying on business, any special advantages or disadvantages of the GOC because of its public ownership or its market power is removed or minimised or made apparent.

It is QTT's view that the RTI Act does not promote the principles of corporatisation contrary to those principles.

GOCs – Functions and Operations

GOCs are entities with a commercial charter and the clear expectation is that they deliver a commercial return to Government on its significant investment in the GOC sector. The returns on this investment are an important source of funding for Government's important programs in health and education. Consistent with their corporatisation charter, GOCs should be able to perform their functions and activities without the shackles of public sector policies that do not assist in or promote their commercial operations.

QTT considers that there is little basis for the application of public sector legislation such as the RTI Act on the basis that some may consider certain GOCs, e.g. the Ports, do not operate in a competitive environment. While some port GOCs may be said not to directly compete with each other, they still must operate in a commercial environment, undertake commercial activities and routinely enter into significant commercially sensitive arrangements with third parties which operate in a competitive market. The more critical consideration therefore is the impact of such public sector legislation on their commercial operations and not just from the perspective of the market they operate in.

However, it should be noted that with the sale of the Port of Brisbane, the partial sale of the Port of Abbot Point, the privately operated Dalrymple Bay coal terminal, the privately owned Wiggins Island coal terminal at the Port of Gladstone, there is in fact substantial competition between the privately owned ports/terminals and the port GOCs.

Given the nature of their businesses, GOCs routinely engage in commercially sensitive arrangements and deal with commercially sensitive information, both of their own creation or provided to them by third parties. Typical examples of such information would be pricing structure or procurement contracts or construction tenders from third parties. The wide-ranging, pro-disclosure provisions of the RTI Act provide access to important commercially sensitive information not only created by GOCs but also provided to them by third party entities.

A particular concern is special interest groups or commercial entities seeking access to information from GOCs under the RTI Act when they do not have similar access to information held by private sector entities which may operate in competition with or have commercial or business dealings with GOCs.

Given that the primary object of the RTI Act is to give a right of access to information in the Government's possession or under the Government's control unless, on balance, it is contrary to the public interest to give the access, there is the possibility that commercially sensitive information could be subject to release if release is considered to be in the public interest. This is particularly so given the Parliament's intention that the RTI Act should be administered with a pro-disclosure bias and the Parliament's intention that the grounds on which access may be refused are to be interpreted narrowly and an agency or Minister may give access to a document even if a ground on which access may be refused applies. This raises the fundamental question as to why information commercially sensitive to GOCs or to third parties which provide such information to the GOCs should lose that character once it is passed on to Government, something that did not apply under the FOI Act and does not extend to similar private sector entities.

This is contrary to the principles of competitive neutrality as it exposes GOCs to a greater degree of scrutiny and cost of compliance to which their private sector counterparts are not similarly subject.

The *Government Owned Corporations Act 1993* (GOC Act) clearly provides for the State as owner on behalf of the people of Queensland, to set financial performance targets and to monitor the performance of the GOCs against these targets. The pro-disclosure objective of the RTI Act potentially acts as a disincentive for GOCs to provide to shareholding Ministers full details of commercially sensitive information they would need to monitor the performance of the GOCs while there exists the distinct possibility that such information, particularly information provided by third parties in commercial negotiations, could be subject to disclosure under the RTI Act.

Reduction of Regulatory Burden

A key plank in the current Government's reform agenda is regulatory reform and the reduction of red-tape. In support of this position, the Government's policy has been to remove all unnecessary public sector policies from applying to GOCs to enable them to focus on their core business.

While QTT agrees there is a place for public sector policies that promote important objectives such as health and safety, it is of the view that there is no justification for public sector policies and legislation that selectively impose a regulatory burden on commercial entities simply because of their public ownership. There is not only a financial cost to the GOCs but it also results in inefficiencies and diversion of valuable GOC resources to non-productive outcomes while their private sector counterparts are not similarly impacted.

As part of its implementation of the Government's red-tape and regulatory burden reduction initiative, QTT has undertaken an extensive review of the increasing number of public sector policies that have progressively been applied to the GOCs. This review has resulted in the removal of public sector policies that were considered of no relevance to the GOCs (e.g. *Sport and Recreation Policy*) or which were considered to be contrary to the commercial activities of GOCs (e.g. *State Procurement Policy*, currently in the process of being withdrawn).

The purpose of QTT's review has been to remove policies and guidelines that do not contribute to the GOCs' pursuit of their commercial activities.

Commission of Audit Recommendation

The Commission of Audit recommended that governance arrangements for GOCs be further reviewed to assess their continuing relevance and applicability once any Government decisions relating to the Commission's other recommendations have been implemented. The Government accepted this recommendation, noting that QTT has commenced a review of the GOC Act as part of a broader review of the GOC model.

The proposed review of the RTI Act provides an opportunity to reconsider the application of this legislation in the broader context of the governance of GOCs. If this is not possible as part of this process, then serious consideration should be given to amending the RTI Act to remove its application to GOCs.

Conclusion

QTT is of the firm view that the RTI Act should not apply to GOCs.

GOCs operate at arms' length from Government and, as corporatised entities with a commercial charter, should not be subject to the RTI Act in the same way Government's activities are. There is a cost associated with GOCs responding to requests under the RTI Act, which is not the best use of scarce public resources.

As corporatised entities with a commercial charter, GOCs should not be subject to any greater level of scrutiny than their private sector counterparts with respect to their commercial operations, except where the nature of public ownership would suggest otherwise. QTT does not support the view that the nature of public ownership also implies that the commercial operations of GOCs should be subject to public scrutiny to an extent beyond that which applies to their private sector counterparts. QTT is of the view that the RTI Act should not apply to GOCs and recommends that the current exemption be extended to all GOCs and cover all documents created by GOCs no matter who has the possession or control of those documents.

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

It is noted that little material has been included in the discussion paper about question 4.5. It is understood that there is no central register of government subsidiary corporations and thus it is difficult to make generalisations about them. Given the grouping of this question with question 4.4 it is assumed that there is a recognition that government subsidiary corporations may be involved in the commercial business of the State.

It is noted under discussion on the Ambit of the Act that City North Infrastructure Pty Ltd (CNI) which managed a large commercial infrastructure procurement for the State had been engaged in some cases with the Office of the Information Commissioner (OIC) including the case of *Davis v City North Infrastructure Pty Ltd* [2011] QSC 285, where the proposition that City North Infrastructure Pty Ltd was an agency was not approved by the Court. It is noted that the OIC expended considerable public resources in pursuing CNI in this and other reviews. It is questioned as to whether it is an appropriate use of public resources to pursue this company when a simple mechanism exists under the RTI Act to resolve the issue.

QTT submits that to the extent that a government subsidiary corporation is engaged in the commercial business of the State, they are entitled to the same level of confidentiality that their private sector counterparties are. It is further submitted that given the inherent limitations of the confidentiality exemption in the RTI Act (ie confined to the equitable doctrine of confidentiality rather a broader commercial doctrine of commercial in confidence), that a government subsidiary corporation should not be subject to the RTI Act.

4.6	Should the RTI Act and Chapter 3 of the IP Act apply to the documents of a contracted service providers where they are performing the functions of government?

There seems to be an overlap between question 4.6 and 4.5. The term "contracted service provider" is derived from section 34 of the IP Act. A government subsidiary corporation may be a "service provider" under section 34 of the IP Act if it contracts with the State, but this is not necessarily the case, since the point of incorporating a subsidiary is to separate the functions of the agency into a separate vehicle.

There is already a mechanism in the IP Act to require compliance with Chapter 3 of the IP Act. See section 35 of the Act. A properly documented contract such as the Government Standard Terms and Conditions makes provision for the mechanism in section 35 of the Act. It is not necessary for a member of the public to be a party to the contract between the agency and the service provider because the right of access and amendment is recognised in the contract.

With regards to the RTI Act, although there may some policy benefit in a member of the public having visibility to the performance of the functions of a contracted service provider, it is difficult to see why this is necessary, except when that member of the public's rights have been affected. In this case a right of access has been granted under the IP Act. QTT endorses the argument that there will be strong resistance to additional "red tape" being imposed on contracted service providers not to mention the additional cost of managing RTI applications.

Perhaps if the concern is that agencies are not contracting in accordance with section 35 of the IP Act, that there is a case that section 35 be statutorily deemed to be a provision of any contract with a contracted service provider.

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?

While there may be some merit in having a whole of government access application form, QTT considers that it is not necessary for the application form to remain compulsory.

The current wording of section 24 of the RTI Act implies that the application form isn't compulsory as subsection 2 states that the application must *'be in the approved form'* and not *'on the approved form'*. One could argue that if an applicant submitted their application in a letter format providing all the information that is required had they completed the application form, then the application has been correctly made. This raises the question as to whether there is the need for the application form to be compulsory.

Under the repealed *Freedom of Information Act 1992* (FOI Act), the only requirements when submitting an access application were that it must be in writing and that sufficient information is provided to identify the documents and current contact details for the applicant were included.

The current 'Right to Information and Information Privacy Access Application Form' is a four page document that must be completed in order to access documents held with Queensland Government agencies and statutory bodies. There is also an online version of the application form (2-3 web pages to complete) where the application fee (if required) can be paid online via credit card. Both forms are confusing to complete and essentially unnecessary given the current wording of section 24(2) of the Act.

Some applicants don't have access to a computer, or the internet and will contact agencies to have an application form sent to them by post. This is an unnecessary cost to public resources. Applicants should be able to have the choice to either use the application form (either hardcopy or online) or to simply complete their application in the form of a letter as previously allowed under the repealed FOI Act.

Agencies often receive applications where the application form has been completed as a formality and attached to the application form is a document detailing the information/documents required. This document is often referred to as 'Attachment A' or 'Annexure A' and is often from private law firms or private organisations. QTT questions the validity of having a compulsory application form when applications of this nature are regularly received by agencies.

The form is regularly revised to reflect the scheduled increases to the application fee (now removed completely from the form) and to keep the form current with the legislation again at a cost to public resources.

Under the repealed FOI Act, agencies had the discretion of creating their own application form which contained specific information about the agency's documents and had key fields that assisted both applicants and agencies.

QTT would favour the retention of the application form as optional for applicants to complete and allowing applicants to submit their own application provided their own submission complied with the current requirements under the Act.

6.13 Should the threshold for third party consultations be reconsidered?

QTT is of the firm belief that the threshold for third party consultations be considered as part of this review.

Under the repealed FOI Act the threshold only required agencies to consult if disclosure of the documents in issue may reasonably be expected to be of substantial concern to another agency or third party. As a result of the RTI reforms the threshold for third party consultations was amended to only require agencies to consult when disclosure may reasonably be expected to be of concern to another agency or third party.

This significant reduction in the threshold for consultation requires agencies to undertake additional consultations compared to the amount of consultations that may have been conducted under the repealed FOI Act. As a result, a considerable amount of public resources are being utilised to undertake these consultations, especially when these consultations are between government agencies.

The decision to consult is subjective, in that the decision-maker decides what may be of concern to a third party. Further, if the documents contain sensitive information, there is a reasonable expectation that the agency or Minister would be obliged to consult with the relevant third party.

Because of this lower threshold for consultation, third parties who may not be considered by an agency to be a concerned third party have developed this perception that they are "entitled" to be consulted because they may have had some involvement in a document at some stage of its inception, however, the agency's RTI decision-maker has considered, based on the sensitivity of the information and the nature of the documents involved, that the there is no requirement to consult the third party.

This perceived entitlement, places an unreasonable workload on RTI decision-makers as they will now be required to consult all third parties who had some involvement in a document regardless of whether the agency feels that the disclosure will be of concern to the third party. It also requires additional public resources being utilised to unnecessarily consult with third parties.

QTT believes (subject to the following paragraphs), that the threshold for consultation under the RTI and IP Acts be increased so that only those third parties who may have a substantial concern with the release of documents are consulted. In this respect, consideration should be given to only requiring third party consultation when the document is that of the third party and provided by it to the agency.

However as an exception to this position, QTT is concerned that not all agencies are properly consulting with QTT regarding information that was brought into existence in the course of the state's budgetary processes (budget information). QTT has found that there is an inconsistent approach by agencies in consulting with QTT where the document itself has been created by QTT and failure to consult with QTT regarding other documents that may not have been generated by QTT but still contain budget information. Budget information, especially pre-budget information is extremely sensitive and the disclosure of this information could reveal budget strategies of government as well as negotiation positions of agencies during the budget process. This undermines the fundamental principles of the State budget process. Despite the current low threshold for third party consultation, documents containing sensitive budget information are being overlooked for consultation.

As part of this review, QTT submits that section 37 of the RTI Act should include a section stipulating that where a document contains budget information (as defined by Schedule 3, section 2(1)(c) of the RTI Act), and is subject to an access application (regardless of the origins of the document) that consultation with Treasury is required before access can be granted to the document.

7.2	Are the exempt information categories satisfactory and appropriate?

Schedule 3, section 8(1) – information disclosure would found action for breach of confidence

It is QTT's submission the confidential information exemptions needs to be amended. The current model is based on the equitable doctrine of confidentiality and is inconsistent with modern business practice.

In order to successfully make out the breach of confidence exemption, it is necessary to initially show that "*Information is exempt information if its disclosure would found an action for breach of confidence*."

It is QTT's submission this test excludes contractual obligations of confidentiality because an action for breach of contract is not the same as an action for a breach of an equitable duty of confidence.

Most commercial contracts that the State enters into provide for confidentiality obligations being imposed upon the contractor, subject to carve outs including disclosures required by law. The difficulty for an agency is that unless the confidential information also meets the test of an equitable duty of confidence, then the confidential information is subject to RTI.

QTT submits that this exemption should be amended to provide that:

"Information is exempt information if its disclosure would found either an action for breach of confidence or the breach of a contractual confidentiality obligation."

Schedule 3, section 2(1)(c) – brought into existence in the course of the state's budgetary processes

It is QTT's belief that this exemption is not being applied appropriately or consistently by agencies as there have been a number of instances where sensitive budget information has been released under the RTI Act. This occurs when agencies do not properly consult with QTT regarding the release of budget information or agencies are not aware of the importance and significance of this exemption. While QTT applies this exemption (where applicable) when making its decisions under the RTI Act, other agencies appear to either overlook or disregard this exemption and the overall importance of protecting budget information in its possession. Disclosure of sensitive budget information significantly impacts on the State budget process.

It is also thought that a reason for this particular exemption being overlooked or disregarded by agencies is because it is hidden within the Cabinet exemption provision. While QTT recognises that this exemption relates to the protection of the confidentiality of the Cabinet process and operations, QTT considers that this exemption holds sufficient weight to become a stand-alone exemption. Therefore QTT submits that the existing section 2(1)(c) of Schedule 3 of the RTI Act be removed from section 2(1) and become a stand-alone exemption provision.

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?

As part of the review of the RTI and IP Acts, QTT considers that a provision of a longer processing period, very similar to the existing provision set out in section 35 of the RTI Act and section 55 of the IP Act be introduced for internal review decisions. The existing provision as outlined in section 35 of the RTI Act and section 55 of the IP Act both states:

> **Longer processing period**
>
> *(1) At any time before a deemed decision is taken to have been made in relation to an access or amendment (IP Act only) application, the agency or Minister may ask the applicant for a further specified period to consider the application.*
>
> *(2) Additional requests for further specified periods may be made under subsection (1).*
>
> *(3) The agency of Minister may continue to consider the application and make a considered decision in relation to it only if —*
>
> *(a) the agency of Minister has asked the applicant for a further specified period under subsection (1); and*
>
> *(b) the applicant has not refused the request; and*
>
> *(c) the agency or Minister has not received notice that the applicant has applied for external review under this Act.*
>
> *(4) If a considered decision is made, the considered decision replaces any deemed decision for the purposes of this Act.*

QTT considers the inclusion of a longer processing period provision for internal review decisions would be beneficial for agencies with small processing areas. Larger agencies with substantially larger RTI Units may have enough decision-makers at the appropriate officer level to undertake their internal review decisions, however small agencies are often tasked with finding internal review decision makers from other areas of the agency and usually these decision-makers are required to be at a senior executive level.

It may take smaller agencies up to a week after an internal review application is received to allocate an internal review officer due to the current workloads of an agency's delegated internal review officers as they are all at senior executive level and these positions typically have very demanding work schedules.

Once an internal review officer has been allocated, even though they may already have a basic understanding of the RTI and IP Acts, initial discussions between the original decision-maker and the internal review officer are still required to ensure the internal review officer is apprised of all the issues concerning the internal review and

what is required of them when considering an internal review application and making an internal review decision. Due to an internal review officers existing work schedule, having these discussions may not occur until halfway through the 20 business day period.

Further, some applications for internal review involve complex matters especially where the original decision exempted information as it was subject to legal professional privilege or is information its disclosure is prohibited by law. Therefore, the allocated internal review officer will be required to liaise with other areas to obtain further advice or clarification on matters raised as part of the internal review and to have certain complex matters explained to assist them in making the internal review decision. Again these discussions take considerable time and in these instances the benefit of having a provision in the RTI and IP Acts for a longer processing period would allow internal review officers more flexibility and time to have all matters clarified regarding particularly complex internal reviews.

As considerable public resources are being expended to conduct an independent and thorough internal review, agencies should be afforded the benefit of an appropriate processing period which in turn would also benefit the community through agencies given proper processing periods to conduct internal reviews and provide well prepared and considered decisions.

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

While the issue described below is not directly relevant to the operation of the RTI Act and Chapter 3 of the IP Act, QTT considers that because public resources are expended in order to meet the requirements of the RTI Act and IP Act, it is important that as part of the review that the issue concerning the overall costs to agencies for implementing and administering the RTI Act and IP Act be addressed.

QTT have raised this issue previously. In view of the Commission of Audit recommendations and the contestability framework, QTT considers that the current arrangements need to be completely examined.

While QTT acknowledges that both the RTI and IP Acts are intended to provide as much government information as possible either through the publications scheme, disclosure log or through RTI and IP applications, it must also be acknowledged the substantial costs that are incurred by agencies in ensuring that these mechanisms are maintained.

The discussion paper makes no mention of the true costs incurred by agencies as a result of implementing and maintaining the fundamental objectives of the RTI and IP Acts (i.e. pro-disclosure bias). Agencies have incurred substantial costs in ensuring that they are complying with both the Acts, yet as part of this review, other cost effective methods do not appear to be under consideration in an effort to reduce costs to government which effectively reduces costs to the community. QTT considers that cost effective options should be a consideration for the discussion papers.
It is suggested that as part of this review, detailed consideration be given to the costs involved in adopting any of the recommendations that arise from this review and whether there are better ways to administering the RTI Act and IP Act while balancing those costs against other costs that are currently affecting the government and the community as a whole.

Further, QTT considers the conflicting role of the Office of the Information Commissioner Queensland (OIC) needs to be reviewed.

As a result of the RTI reforms the OIC has dual functions. Their first (QTT's view it should be their only) role is to be an independent adjudicator of decisions made by agencies concerning RTI and IP applications. However, their second role is to provide high-level policy advice and guidance to agencies on matters concerning the processing of RTI and IP applications. The OIC is also responsible for the provision of training to agencies in the administration of the Acts while at the same time adjudicating and criticising agencies in relation to decisions made under the RTI and IP Acts.

QTT is of the view that this issue should be further explored with a view to having the training and advice function situated within an entity independent of the OIC.

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

The discussion paper does not identify any operational benefit to GOCs if the definition of agency in the IP Act was extended to cover GOCs and does not outline how it may also be easier for those interacting with GOCs to have their rights provided for under State legislation. QTT questions whether there would be any benefit or advantage if the GOCs were subject to the State based privacy legislation when they are entities established under the Commonwealth *Corporations Act 2001* which would make them subject to the Commonwealth *Privacy Act 1988* in the same manner as their private sector competitors are. Additionally, individuals interacting with GOCs would have more protection under the Commonwealth privacy legislation which enhances the argument (and to be consistent with the ambit of the *Privacy Act 1988* (Cwth)) that GOCs should continue to be subject to the Commonwealth legislation.

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

The IP Act does not specify how a privacy complaint must be handled within an agency. This contrasts with the very detailed processes specified for applications for access to and amendment of personal information held by an agency. While QTT has implemented its own procedures for handling privacy complaints that are received by the agency, QTT considers that there would be benefits in having a section in the IP Act specifying how a privacy complaint should be processed. These specifications should include:

- requirements for lodgement of a privacy complaint to any agency (e.g. written, directed to a particular officer, outlining particular points to be addressed, etc.);

- timeframes for management of the complaint by an agency (including provision for extended timeframes where complaint is complex, etc.); and

- particular actions that must be undertaken (e.g. acknowledgement of complaint, investigation of circumstances raised by complainant, formal response to complainant).

By amending the IP Act to include the above processes for agencies when dealing with a privacy complaint, will allow for a standardised process to be followed and will result in a consistent approach across government which would also contribute to the efficient use of scarce public resources.

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

The statutory 45 business day timeframe for an agency to deal with a privacy complaint is often difficult to meet for some agencies especially when the complaint is complex or is part of another grievance (i.e. a workplace dispute).

QTT would support an amendment of the IP Act to include more flexibility about the timeframe for complaints to the OIC to be lodged. If for example, a complainant has not received any correspondence from the agency about their complaint within the 45 business days, then the complainant would be entitled to lodge a complaint to the OIC.

However, if an agency requires more time to resolve the complaint and has sought an extension from the complainant, however the complainant has refused and has complained to the OIC, then the in that instance, the OIC should allow the agency to resolve the complaint at the agency level and if the complainant is not satisfied with the agency's decision on the privacy complaint, they can lodge a complaint with the OIC.

For the efficient and effective processing of privacy complaints to occur, QTT considers the IP Act should be amended to include a section similar to the 'Longer processing period' section contained in the RTI Act. Agencies would have more flexibility and would be able to make well-prepared and considered determinations in relation to privacy complaints which ultimately benefits the community.

14.0	Should IPP4 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?

QTT supports the amendment of IPP4 to ensure it is consistent with the other IPPs within the IP Act. QTT considers that the current wording of IPP4, particularly the use of the words 'must ensure' is very restrictive and essentially unrealistic in the sense that an agency may have extremely stringent protocols in place to ensure that the personal information they maintain is protected from loss, misuse or unauthorised access, however there may be an instance where an employee accesses the personal information for personal use. This is a breach of the IP Act for which the agency would be liable despite the agency taking all possible measures to ensure the personal information is protected.

QTT would support IPP4 being amended to replace the words 'must ensure' with the words 'must take reasonable steps'. This would allow for an element of 'reasonableness' and would also be consistent with the wording of other IPPs within the IP Act.

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

QTT supports IPPs 2 and 3 being amended to replace the words 'ask for' with 'collect'. This amendment would make the wording of IPPs 2 and 3 consistent with other jurisdictions' privacy legislation (e.g. Victoria, NSW and the Commonwealth) and it would encompass the variety of methods of collecting personal information including solicited and unsolicited personal information.