Community Legal Centres Queensland

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

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

Dear Sir/Madam

Review of the *Right to Information Act 2009* (RTI Act) and the *Information Privacy Act 2009 (IP Act)* - 2016 Consultation Paper

Community Legal Centres Queensland refers to the *2016 Consultation on the Review of the Right to Information Act 2009 and Information Privacy Act 2009, Consultation Paper* that was released in December 2016 by the Hon. Yvette D'Ath, Attorney General and Minister for Justice, Minister for Training and Skills. This submission is in reply to the Consultation Paper, and we recommend:

1. The RTI Act and Chapter 3 of the IP Act should not be extended to apply to the documents of contracted service providers insofar as an extension of this nature would capture community legal centres.
2. The public interest test should be simplified and reworked consistent with that contained in the *NSW Government Information (Public Access) Act 2009* in order to make it more comprehensible and accessible to all Queenslanders.
3. Decision notices should be redrafted in plain English.
4. Aspects of the RTI Act which allow for the frustration or unnecessary holding or delay of processing periods or timeframes should be minimised or removed, where possible.
5. Retain current non-discretionary waiver provision in the RTI Act tied to the presentation of a concession card.
6. Fees and charges associated with RTI applications should not be tied to the court system of filing and accessing court documents.

Community Legal Centres Queensland is the peak body representing funded and unfunded community legal centres across Queensland. Community legal centres are independently operating not-for-profit, community based organisations that provide free legal advice to the public who present with a range of legal issues. This can include assisting clients in their dealings with government authorities, and community legal centre lawyers often seek to access documents relevant to their clients' matters using the RTI Act and/or the IP Act.

Clients of community legal centres are, in the vast majority, clients who are societally marginalised or disadvantaged, and unable to source other assistance. In that respect, community legal centres fulfil a vitally important social service role, including by relieving the "on flow" pressure that would general pass to State Government bodies in the absence of such assistance being able to be obtained.

Question 4: Should the RTI Act and Chapter 3 of the IP Act apply to the documents of contracted service providers where they are performing functions on behalf of government?

As part of the funding arrangements with the State Government, community legal centres are subject to stringent reporting obligations, including provision in the funding agreements for the relevant departments to request various documentation as and when required to ensure transparency and probity.

At present, community legal centres are not subject to any provisions of the RTI Act and Chapter 3 of the IP Act.

However, by virtue of some of the funding arrangements with the Federal and State Governments, community legal centres are generally obliged to comply with the personal information and amendment regime established under the relevant Information Privacy Principles (IPPs) as provided for under Schedule 3 of the IP Act and/or the relevant Australian Privacy Principles (APPs) as provided for by the Privacy Act 1988 (Cth) (Privacy Act). Some social service providers consider themselves to be bound by the relevant provisions of Chapter 2 of the IP Act insofar as they are contracted service providers.

In our view, the RTI Act and Chapter 3 of the IP Act should not be extended to apply to the documents of contracted service providers such as community legal centres.

Community Legal Centres Queensland makes no submission as to the issue of whether there is merit generally in extending the RTI Act and Chapter 3 of the IP Act to contracted service providers. Rather, Community Legal Centres Queensland submits that if the State Government was minded to adopt such an extension, bodies such as community legal centres should be expressly exempt from such an extension.

In support of this position, Community Legal Centres Queensland submits that:

- **Community legal centres are not government, and do not undertake functions of government:** We are not government agencies, and ought not to be regulated as government agencies. Whilst Community legal centres acknowledge that the term "functions of government" is a term of broad legal meaning, Community Legal Centres Queensland suggests that the scope of this term would not extend to capture services and functions such as case management, legal services, tenancy support and counselling to under-privileged members of the community. Consequently, at a factual level, documents and information received or generated by Community legal centres in performing these functions would not fall within the range of documents said to evidencing "functions of government". Given these circumstances, should any consideration be given to the extension of the RTI Act and Chapter 3 of the IP Act to the documents of contracted service providers, it should be clear that Community legal centres are not subject to such an extension;
- **Appropriate accountability mechanisms are already in place:** Appropriate accountability mechanisms are required to be in place where public funds are applied

and expended for any purpose, and these mechanisms are already in existence and being applied. In these circumstances, it is not necessary to extend the application of the RTI Act and Chapter 3 of the IP Act to the documentation of Community legal centres.

- **Community legal centres are appropriately and closely monitored by virtue of provisions in their funding agreements with Government.** These agreements generally provide the relevant funding departments the power to compel any documents from the Community legal centres relating to the provision of services as may be required. Measures such as these are of course designed to ensure that public monies provided to community services are being applied and expended appropriately.
- **State Government agencies providing funding are, obviously open to the standard application of the RTI Act.** Any public interest in ensuring that the Community legal centres are properly applying funding may be demonstrated through enquiries and subsequent RTI applications being made through the relevant funding agencies.
- **Resource implications would be significant:** The extension of the RTI Act and Chapter 3 of the IP Act to community legal centres would require these entities to expend significant funds and apply resources to deal with RTI Act and IP Act issues. This would see funds and resources otherwise able to be dedicated to provide community services instead diverted to dealing with RTI Act and IP Act issues. In particular:
    - RTI access requires, in practice, the allocation of significant time and resources. The costs incurred include those of dedicated internal decision makers or legal staff, as well as the cost of outsourcing, in appropriate cases, relevant work;
    - The processing of RTI applications can require the dedication of extensive time by legal and administrative staff who are making the final decisions under the RTI Act; and
    - Consideration must also be had to the potential impact on the other staff within the community legal centre who may have knowledge about the information being sought, or who know about context in which the information was received or created, and/or clients themselves, whose information may be subject to potential release and therefore need to be consulted.

  The costs associated with extending the RTI Act to apply to community legal centres would be largely thrown away, with the end-result simply being the ultimately otherwise unnecessary diversion of funds from the Community legal centres service delivery.

Chapter 3 of the IP Act

As detailed above, community legal centres may be subject to the alternative personal information and amendment regimes established under the IPPs and/or APPs, by virtue of either their funding arrangements or Chapter 2 of the IP Act.

From a resourcing point of view, it is wasteful for community legal centres to be subject to the personal information access and amendment regimes in both Chapter 3 of the IP Act; and the alternative personal information and amendment regimes established under the IPPs

and/or APPs. Such an outcome would render community legal centres subject to unnecessary regulatory duplication in circumstances where, as addressed above, administrative and funding support is already limited, and any diversion directly impacts upon the community legal centres' ability to effect service delivery to clients.

RECOMMENDATION

The RTI Act and Chapter 3 of the IP Act should not be extended to apply to the documents of contracted service providers insofar as an extension of this nature would capture community legal centres.

Question 12: Given the 2013 responses, should the public interest balancing test be simplified; and if so how? Should duplicated factors be removed or is there another way of simplifying the test?

Community legal centres' clients represent marginalised and vulnerable groups within the community and in this capacity, may have significant difficulty understanding their legal rights and obligations as well as the reasoning processes undertaken in reaching decisions. This is specifically relevant for community legal centre clients in accessing and using the RTI and Chapter 3 IP Acts and importantly, understanding the decision-making framework relevant to the decisions on access reached under these Acts.

The establishment of a prescribed public interest test (complete with factors relevant and irrelevant to determining whether the public interest lies in the disclosure of a particular document) was a sensible and well-considered advancement over the previous *Freedom of Information Act 1992*. Schedule 4's practical (though non-exclusive) codification of relevant factors making up the public interest test has gone a long way towards providing some clarity in an area that previously was poorly understood to those outside of the legal profession.

However, Schedule 4 has taken the codification process somewhat too far, and in doing so, added an unnecessary level of complexity. There are, in total, some 55 factors which must be weighed and considered in Schedule 4 of the RTI Act.

Community Legal Centres Queensland's members' experience is that many clients find the full gamut of factors, and whether all need to be applied and/or referenced to be confusing. From a client's perspective, the interplay between ***Schedule 4 Part 3 – Factors favouring non disclosure in the public interest***, and ***Schedule 4 Part 4 – Factors favouring non disclosure in the public interest because of public interest harm in disclosure***, is particularly confusing.

The actual balancing exercise itself, as set out in section 49 of the RTI Act is similarly difficult to understand for legally unsophisticated clients. The apparent complexity of section 49 is evidence by the ongoing review and appeal processes arising in which one ground alleged is misapplication of the test.[1]

Community Legal Centres Queensland submits that the public interest test under the RTI Act should be considered to be reworked consistent with that in the *Government Information (Public Access) Act 2009* (NSW), particularly at sections 12 to 15 of that Act. The NSW regime applies broad public interest principles and considerations relevant to determining whether disclosure should be made.

[1] *Z'Quessah Bosch v Office of the Information Commissioner & Anor* [2016] QCATA 191*; Gordon Resources Pty Ltd v State of Queensland* [2012] QCATA 135

Community Legal Centres Queensland submits that such drafting is more consistent with the intent of the legislation which is that of push-model disclosure to the broader public, and should not be targeted at only those are able to comprehend legislation with a legal or high level understanding.

Community Legal Centres Queensland further submits that decision notices need to be simplified and written in plain English. At present, clients with limited English or limited education find these notices complex and difficult to fully appreciate and understand.

RECOMMENDATION

The public interest test should be simplified and reworked consistent with that contained in the NSW *Government Information (Public Access) Act 2009* in order to make it more comprehensible and accessible to all Queenslanders.

Decision notices should be redrafted in plain English.

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

Many community legal centre clients, given their reasons for seeking access to documentation through RTI Act processes, will be disproportionately disadvantaged by any delays in the processing and release of documents.

Community Legal Centres Queensland members have previously experienced some agencies which have difficulty complying with relevant RTI timeframes, not generally through any deliberate attempts to obfuscate clients' rights to access the information or documents sought, but rather due to poor internal document management processes and/or inadequate resourcing to allow compliance.

In circumstances where those RTI applications have not been properly processed within time (and if, as can be understood given the external timeframe pressures and factors which may be applicable to clients, no extension has been granted) the RTI application results in a deemed refusal.[2] This then often necessitates what is an unreasonable and unnecessary external review process.

Community Legal Centres Queensland submits that the current drafting of the deemed refusal provisions indirectly punishes RTI applicants, and is quite inconsistent with the push-model and pro-disclosure intent of the RTI Act. The onus should always be on the relevant agencies to comply with their timeframe obligations under the RTI Act.

The deemed decision provisions should be redrafted so that the deemed decision is one of release. This would place the onus upon the relevant agency to appropriately process the RTI application within time, or, prior to the permissible processing timeframe running out, apply to the Information Commissioner for an extension.

RECOMMENDATION

Aspects of the RTI Act which allow for the frustration or unnecessary holding or delay of processing periods or timeframes should be minimised or removed, where possible.

[2] Section 46 of the RTI Act

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

Waiver of Fees and Charges

Given many community legal centres' clients are marginalised or disadvantaged and unable to source other assistance, it is vital that the RTI Act remains open to them and that there are not financial impediments to their being able to utilise the legislation.

Currently the RTI Act makes provision that, in circumstances where an RTI application is made by an individual in possession of a concession card, the RTI applicant may at any time make a written request to an agency or the relevant Minister seeking that any processing or access charges be waived. In those circumstances, if the RTI applicant provides a copy of their concession card, relevant agencies and Ministers must waive any processing or access charges. A similar waiver must be made in circumstances where the RTI application is made by a non-profit organisation and the Information Commissioner has decided (under section 67 of the RTI Act) that the non-profit organisation has financial hardship status.

Community Legal Centres Queensland considers it most important that such a non-discretionary waiver provision, tied to the presentation of a concession card (as defined under the RTI Act) is retained.

Fees and Charges generally

The fees and charges regime for RTI Act should not be aligned with that applicable to access and/or file court documents.

Fees and charges associated with RTI applications should be substantially lower than any associated with access to court processes. Whilst court documents are similarly publicly accessible, they are not subject to the overarching consideration of the push-model and pro-disclosure intent of the RTI Act. Fees and charges should be consistent with such intent, not tied to the quite separate court system with different considerations and interests.

RECOMMENDATION

Retain current non-discretionary waiver provision in the RTI Act tied to the presentation of a concession card.

Fees and charges associated with RTI applications should not be tied to the court system of filing and accessing court documents.

We hope this information is useful, and would be happy to elaborate further if required. Please contact [redacted] on [redacted] or [redacted] if you would like to discuss our views.

Yours sincerely,

[redacted]

James Farrell OAM
Director
Community Legal Centres Queensland Inc.