Review of the *Right to Information Act 2009* and *Information Privacy Act 2009* – Response to Consultation Paper (December 2016)

Note: this response paper is designed to be read with reference to the text of the Department of Justice and Attorney-General's *Review of the Right to Information Act 2009 and the Information Privacy Act 2009* discussion paper. It does not reproduce the content of the discussion paper in its entirety.

1. **Are the objects of the RTI Act being met? Is the push model working? Are there ways in which the objects could be better met?**

It is considered that the primary object of the *Right to Information Act 2009* (RTI Act) is being met. The cultural shift over recent years in Queensland towards an open data model and the greater proactive release of Government information has had a positive effect on information held by Government now being more open and accessible. The primary object of the RTI Act supports this cultural shift and aligns with the Queensland Government's open data initiative by pro-actively releasing information where appropriate to do so. The only valuable way in which the objects could be better met is with time. The longer the RTI Act and the push model remains in place, the more familiar departments become with releasing information and the more routine the proactive release of information becomes.

The 'push model' remains appropriate, but overall, is not as effective as it could be in operation.

The 'push model' was introduced to achieve a greater proactive and routine release of Government information. This is reflected in section 2 of the Preamble to the RTI Act, which sets out that Government information is to be released administratively as a matter of course, with formal applications for access under the RTI Act being necessary only as a last resort.

There are challenges in how the Government implements the 'push' model. The RTI Act introduces mechanisms such as the publication scheme, disclosure log, and administrative access to achieve the 'push' of Government information. However, the practical implementation of these mechanisms has been resource intensive.

For example, the disclosure log essentially requires the reprocessing of documents at the finalisation of an application as documents which may have been appropriate for release to an applicant, may not be appropriate for release to the public. As discussed later in this submission, the amendments to the disclosure log are extremely resource intensive for agencies to implement and significantly compromise compliance with agencies' responsibility of processing RTI and IP applications within statutory timeframes.

2. **Is the privacy object of the IP Act being met? Is personal information in the public sector environment dealt with fairly? Are there ways that this object could be better met?**

Yes, the fundamental principles are being met relatively well. In general, personal information is respected and dealt with fairly. However, there is a tension between the current privacy regime and constantly emerging technology with the push from government for improved client service through data portals, shared or 'federated' Customer Relationship Management Systems with one entry point across multiple agencies along with the use of third party service

providers. In some situations use may not be directly related to the original purpose for collection despite being of benefit to an individual and/or in the public interest.

The scope of the *Information Privacy Act 2009* (IP Act) extends more to promoting the protection of personal information rather than to the protection of individual privacy as such. The current objects of the IP Act do not refer to privacy, yet the concept of protecting the personal information of individuals is directly linked to providing individuals with control over the use of their personal information in order to protect their privacy. To acknowledge this, and to recognise the evolving ways in which Government functions are being undertaken, it may be useful to consider expanding the objects of the IP Act to include, as per the Commonwealth Privacy Act, the objects:

a) to promote the protection of the privacy of individuals; and
b) to recognise that the protection of the privacy of individuals is balanced with the interests of entities in carrying out their functions or activities

Consideration could be given to object (b) being rephrased to:

c) to recognise that the protection of the privacy of individuals is balanced with ***other public interests both of individuals*** and ***of agencies*** in carrying out their functions or activities

This would provide for the application of the public interest in balancing individual rights and the carrying out of functions or activities bearing in mind that while the right to privacy is not absolute, in most instances, applying the public interest will, and should, align both with an individual's interests and the completion of the required functions and activities of agencies.

The reference to the public interest in the objects clauses would provide important and useful guidance to officers, for example, in situations where consent cannot reasonably be obtained, risk to individuals is low and the public interest benefit is high. An example is where non-public historical and current land information collected for administering land tenure is required for the scoping of a road project but this data is held by another government agency/s and/or another level of government. The public interest test could be similar to the balancing test that currently exists in the RTI Act.

Further consideration regarding these issues is discussed throughout this submission and at section 34 below.

3. Should the way the RTI Act and Chapter 3 of the IP Act applies to GOCs, statutory bodies with commercial interests and similar entities be changed? If so, in what way? Is there justification for treating some GOCs differently to others?

No comment on this matter.

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?

No comment on this matter.

5. **Should GOCs in Queensland be subject to the Queensland's IP Act, or should they continue to be bound by the Commonwealth Privacy Act?**

No comment on this matter.

6. **Does the IP Act deal adequately with obligations for contracted service providers? Should privacy obligations in the IP Act be extended to sub-contractors?**

Yes, section 35 rules are generally adequate (see comments at point 38). Under current arrangements subcontractors should be bound by the provisions of the head contract between the agency and contractor where personal information is involved. This may require a privacy deed be signed by all contracting parties and specified in the head contract. This should provide sufficient controls and safeguards without the need to legislate further.

7. **Has anything changed since 2013 to suggest there is no longer support for one single point of access under the RTI Act for both personal and non-personal information?**

No. It is suggested that the right of access to both personal and non-personal information be combined in the RTI Act as a single entry point.

Operationally, having a right of access to information under the RTI Act and IP Act is confusing and unnecessary. The access provisions in the IP Act largely mirror those in the RTI Act word-for-word and defer to the RTI Act any considerations regarding the grounds on which access may be refused (see section 67 of the IP Act). RTI officers are given the task of administering the access provisions of the IP Act, while the focus of privacy officers is on the Government's obligations in dealing with personal information in accordance with Chapter 2 of the IP Act[1]. The overlap between the access provisions in the IP Act and those in the RTI Act have led to confusion for agencies and also for applicants who do not understand the interaction between the two Acts.

By relocating the access provisions of the IP Act to the RTI Act, the RTI Application Form would need to be amended. Instead of asking applicants which Act they are applying under, the form could simply ask the applicant to indicate whether their application is seeking personal or non-personal information, as was the case in the predecessor *Freedom of Information Act 1992* (FOI Act). This would adequately distinguish the difference between applications and assist with a decision being made as to whether or not an application fee is required.

The confusion associated with the interpretation of the phrase 'to the extent' in section 40 of the IP Act would also be negated if the access provisions of the IP Act were relocated to the RTI Act. Currently, it is a source of difficulty for decision makers and confusion for applicants to decide which Act an access application should be processed under. Also, there would no longer be the need for two sets of delegations, for what is essentially the same legislative power. Finally, amendments would also need to be made to the definition of 'reviewable

[1] Chapter 2 of the IP Act includes the obligation for agencies, other than the health department, to comply with the Information Privacy Principles (IPPs), the transfer of personal information outside of Australia and binding relevant contracted service providers to the privacy principles.

decision' in Schedule 6 of the RTI Act to include those grounds of review which are currently specific to IP Act applications.

8. Noting the 2013 response, should the requirement to provide a schedule of documents be maintained?

The 'schedule of relevant documents' (Schedule) is an important processing step for both applicants and agencies, and should be maintained in section 36 of the RTI Act.

This was introduced primarily as a tool to provide the applicant with information categorising the responsive documents located from searches within the agency to better inform their decision on how best to respond to the charges estimate notice (CEN). However, in practice this provision can be interpreted differently and in some instances the Schedule is sent with the final decision.

Adding further confusion is that many RTI decision letters provide a schedule (or table) listing the documents included in the decision and the final set of responsive documents. While this schedule has a different purpose to the Schedule (in section 36), the intent of each is at times blurred.

Accordingly, it is recommended that an amendment be made to section 36 of the RTI Act in order to clarify the relationship between the CEN and the Schedule, and the time at which a Schedule should be provided to the applicant.

Section 36(1)(b) of the RTI Act provides that, before the end of the processing period, the agency must give the applicant a Schedule and a CEN. However, there is no provision in the RTI Act which requires this to occur specifically at the CEN stage. Therefore, it is still compliant with the provisions of the RTI Act to provide a Schedule with the access decision notice, rather than enclosed with the CEN. However, this reduces the benefit to the applicant of being provided with a Schedule, as this is of most benefit at the CEN stage when the scope can still be negotiated.

For these reasons, a Schedule should be provided at the same time as the CEN, unless the applicant chooses to waive that right. An amendment should be made to section 36 of the RTI Act to more clearly specify the timing of these requirements, in order to provide decision makers with more certainty.

Additionally, section 36(1)(b) of the RTI Act requires a CEN and a Schedule to be provided even when the total processing time is less than 5 hours and no processing charges are imposed. The issuing of a CEN and Schedule in these instances, and consequently stopping the clock until the applicant responds, does not provide any benefit to the applicant or the agency and in fact unnecessarily delays the processing of the application. It is therefore suggested that section 36(1)(b) of the RTI Act is amended to remove the requirement to provide a CEN for applications with processing time less than 5 hours.

9. Should the threshold for third party consultations be changed so that consultation is required where disclosure of documents would be 'of substantial concern' to a party?

Yes, the third party consultation threshold should be raised and more guidance provided to demonstrate what obligations section 37 of the RTI Act and section 56 of the IP Act place on decision makers.

Section 51 of the repealed FOI Act required agencies to consult with third parties if release of the documents may reasonably be expected to be of substantial concern to the third party. The introduction of the RTI and IP Acts saw the removal of the word 'substantial' from this equivalent consultation provision, effectively lowering the threshold for the level of concern requiring third party consultation. This has consequently meant that agencies are now consulting with significantly more third parties on more documents in comparison to the previous threshold of 'substantial concern' under the FOI Act. This results in additional processing time and processing charges for applicants. The increased number of consultations with third parties also results in increased numbers of review applications lodged by third parties, thus delaying an applicant receiving responsive information due to deferred access to documents.

Although disclosure log provisions and RTI access decisions are separate processes under the RTI Act, it is noted the 2012 disclosure log amendments are also resulting in a significantly higher number of third parties objecting to the most basic routine information being disclosed, as the information, if released, may be published on the department's disclosure log. This is primarily due to a lack of appeal rights for disclosure log publication. Third parties appear to be objecting more frequently under third party consultations for access applications as a compromise for not having an opportunity to comment in relation to the disclosure log decision making process.

Additional third party decisions result in RTI decision makers drafting and issuing more third party decision notices. This significantly increases the time required to complete the processing of an RTI application which has a further impact on an agency's resourcing. It would appear that some third parties (e.g. legal firms representing multi-national enterprises) who regularly object and submit reviews on the disclosure of the same information, or information that is already publicly available, are taking advantage of this provision and use it to delay applicants from receiving information they are granted access to.

However, despite this it is considered that a return to a consultation threshold as high as substantial concern would not be appropriate given the pro-disclosure bias of the RTI Act and the new disclosure log provisions. Perhaps a threshold that meets the middle ground of 'substantial concern' and 'concern' would be more appropriate. It is evident that a better balance needs to be reached between consulting with third parties where it is appropriate to do so, but also to have a defined benchmark or criteria where consultations are only undertaken in reasonable circumstances.

Perhaps more detail is required within section 37 of the RTI Act and section 56 of the IP Act to include examples within the legislation which provide the types of situations where it would be appropriate to consult. Alternatively, the legislation could expand the threshold and factors the decision maker must consider, such as including a cumulative criteria of when consultation would be reasonable under different circumstances. A set of criteria of this nature, would

result in a broader range of considerations for determining when to consult, which could be more appropriately adapted to the vast array of circumstances that encompass third party consultation considerations.

10. Although not raised in 2013, is the current right of review for a party who should have been but was not consulted about an application of any value?

This right of review should be maintained. As the consultation paper notes, this right of review is ineffective in some cases as a third party who has not been consulted is unlikely to know that a decision has been made and as such, cannot seek a review of that decision.

While this is the case, it has been used occasionally by third parties. The right of review is an important right in administrative law and the justice system generally. Given that this right has been used before and it is not a review right that 'clogs up the system' or uses excessive resources, it is recommended that it be maintained. This is fair and consistent with the spirit of administrative review.

11. Are the exempt information categories satisfactory and appropriate? Are further categories of exemption needed? Should there be fewer exemptions?

The current exemption categories available in Schedule 3 of the RTI Act are generally sufficient and changes should not be made.

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?

The public interest balancing test works effectively; however, the duality of Parts 3 and 4 of Schedule 4 of the RTI Act can be confusing for decision makers and applicants alike.

Part 3 contains a list of nondisclosure factors that interact well with the factors favouring disclosure. However, the Part 4 factors are essentially another list of public interest factors favouring non-disclosure for decision makers to consider when deciding where the balance of the public interest rests. It is unclear in the legislation whether additional weight is to be afforded to these factors and how the harm factors are to interact with the Part 3 factors. This is confusing and makes it difficult for decision makers to know how to apply the public interest correctly.

Amendments to the RTI Act are recommended to improve certainty and clarity of the public interest balancing test with regard to public interest factors favouring non-disclosure.

The following amendments are suggested:

1. Schedule 4, Parts 3 and 4 could be combined into one list to avoid the overlap that presently exists. This would benefit as it would simplify the process by providing one combined list of public interest factors favouring non-disclosure.

   While the public interest factors outlined within Schedule 4 of the RTI Act are not intended to be an exhaustive list, consideration would need to be given to how the factors within Part 4 will fit with the less detailed public interest factors in Part 3. It would also be important to ensure that a list comprising an increased number of factors

favouring nondisclosure is not created as this would automatically skew the perception of the test toward nondisclosure which would go against the object of the Act.

2. Schedule 4, Parts 3 and 4 could be left as two separate lists and more weight afforded to the harm factors. Should Parts 3 and 4 be retained as is currently stated in the RTI Act, it should be clarified that Part 4 is intended to outline harm factors that are of particular concern. In addition, clearer guidance should be given within Schedule 4 as to how the perceived overlap and interrelationship between Part 3 and Part 4 factors should be approached and taken into consideration for the purpose of the public interest balancing test in line with the pro-disclosure object of the RTI Act.

3. Schedule 4, Part 4 could be removed entirely from the RTI Act. There is a substantial list of nondisclosure factors contained within Part 3 and the addition of Part 4 adds further reasons to refuse access to information which, as discussed above, gives the perception of skewing the test in favour of nondisclosure – a direct contradiction to the object of the RTI Act. The lists outlined in Parts 2 and 3 are non-exhaustive and a decision maker can add any factor they consider of importance when deciding the public interest. The addition of Part 4 causes confusion and is arguably redundant.

Also, it is recommended that a notation be applied in Parts 2 and 3 that these are not exhaustive lists and that further factors can be included in the final determination made by the decision maker. This will assist decision makers who may not be aware of this fact.

13. Should the public interest factors be reviewed so that (a) the language used in the thresholds is more consistent; (b) the thresholds are not set too high and (c) there are no two part thresholds? If so, please provide details.

Yes, a review of the language used in the public interest factors should be undertaken. The wording currently used is not consistent in terms of the thresholds. For example:

- disclosure of the information could reasonably be expected to ***contribute***
- disclosure of the information could reasonably be expected to ***ensure***

The requirement that information *ensure* a purpose is much higher than a requirement that the information *contribute* to a purpose. The test for the first factor is much more difficult to establish than it is for the second. Further, the addition of two part thresholds within the public interest factors (e.g. '*positive and information debate*') creates another high standard as the information must meet both thresholds before the factor can apply.

However, as discussed above, the lists in Parts 2 and 3 are not exhaustive and different factors can be taken into account depending of the information in issue. This means that any changes to the language used in these sections is arguably redundant. It may be a better option to add the notation, as suggested in question 12, notifying decision makers and applicants that the list is not exhaustive so it is clear that a decision maker can use other factors as opposed to changing the language used in the factors.

14. Are there new public interest factors which should be added to schedule 4? If so, what are they? Are there any factors which are no longer relevant, and which should be removed?

No, there is no need to create additional public interest factors and the current factors are relevant. Schedule 4, Part 2 and Part 3 are already extensive, and both are intended to be non-exhaustive examples of public interest factors. This means that agencies can use any additional factors they consider necessary and as such the inclusion of additional factors is unnecessary.

15. Are there benefits in departmental disclosure logs having information about who has applied for information, and whether they have applied on behalf of another entity?

It is considered that there is limited benefit in disclosure logs having information about who has applied for information. It is difficult to assess the benefits from a practitioner perspective as it is not possible to know how the public would use or benefit from the applicant's name being associated with the RTI application. The publishing of the benefit or use also has the potential to be inconsistent with the spirit of legislation and the concept of privacy. Similarly, the benefits in publishing whether an applicant has applied on behalf of another entity are also questionable. It is suggested that further research and consultation with the public would need to be completed to assess whether the public derive any benefit from the inclusion of this information.

16. Have the 2012 disclosure log changes resulted in departments publishing more useful information?

The 'push' model regarding the release and publication of Government held information is supported, however, additional resources were not provided to implement the 2012 disclosure log changes and therefore its impact has been minimal in terms of publishing useful information and burdensome in terms of agency resources.

The disclosure log is intended to promote the pro-disclosure objectives of the RTI Act and ensure more information is accessible to the public. However, in the majority of RTI applications, the information applied for is often only of interest to the applicant, rather than to the public at large. For example, a set of documents concerning a workplace incident involving the applicant is unlikely to be of any interest to anyone other than the applicant.

Additionally, the amendments to the disclosure log are extremely resource intensive for agencies to implement. The current provision under section 78(3) of the RTI Act states that a department or Minister must publish certain information on a disclosure log as soon as practicable, making this requirement a compulsory action on all valid RTI applications (compared to the previous discretionary criteria).

Practically, this obligation means that an agency has to re-process an application prior to it being put up on the disclosure log to ensure information that would be inappropriate for disclosure if not released. This is extremely resource intensive as it requires the agency to make a decision on the suitability of each document for publication on the disclosure log. The greatest resource implications are experienced when the final set of documents provided to the RTI applicant includes sensitive information relating to the applicant.

Unfortunately, this means that departments, especially those that receive a high number of applications, have a significant backlog of information needing to be processed for the disclosure log. Accordingly, the major issue with disclosure log is not about whether useful information is published under the scheme but a lack of departmental resources necessary to publish the information.

17. Should the disclosure log requirements that apply to departments and Ministers be extended to agencies such as local councils and universities?

No comment on this matter.

18. Is the requirement for information to be published on a disclosure log 'as soon as practicable' after it is accessed a reasonable one?

The requirement for information to be published on the disclosure log 'as soon as practicable' is reasonable.

As noted above, the disclosure log requirements require extensive resources from departments. Processing of the disclosure log requires a number of steps including:

- publishing details of valid applications on the department's web site
- advising relevant parties that details of the application and documents may be published on the disclosure log
- re-processing released documents in accordance with 78B of the RTI Act; and
- publication of the documents once all review rights have expired and the documents have been accessed by the applicant.

This is extremely resource intensive for agencies to implement and significantly compromises compliance with the responsibility of managing a RTI and IP application workload within statutory timeframes. By diverting resources to the disclosure log the processing timeframes of existing RTI and IP applications are greatly impacted upon, resulting in delays to applicants accessing documents in relation to their access applications. This can have various negative personal and legal impacts on applicants.

For these reasons, it is recommended that the current timeframe of 'as soon as practicable' is reasonable and should not be changed as a shorter, or more defined, timeframe would not be achievable.

Additionally, to achieve a better balance between the pro-disclosure model and the public receiving their RTI/IP application in a timely manner, it is recommended that alternative approaches in determining which RTI applications are captured for inclusion in the disclosure log are considered.

Suggested options include:

- Only publish a summary of the scope of completed RTI applications on the disclosure log i.e. no documents published. Website visitors would be encouraged to contact the department (a hyperlinked email reply function could be enabled) to obtain a copy of the documents released under the original RTI decision if it is of interest to them. This would remove the requirement for departments to consider and prepare all documents released under RTI 'as soon as practicable' for the disclosure log. When a member of

the public emails the department seeking access to the disclosure log documents, only then, would the RTI unit have to divert resources to preparing the documents for the disclosure log. This would save agencies a large majority of the resources currently devoted towards the disclosure log, as the uptake rate on requesting disclosure log documents would be low in relative terms to what is presently required; or

- RTI applications submitted by political and media entities and private enterprise retain the existing requirements, however, a link is published for applications lodged by individual members of the public that outlines the scope of request and the department's contact details.

Further concerns in relation to disclosure log exist regarding the lack of review rights offered to third parties who have been contacted for consultation under section 37 of the RTI Act. Often, a third party may have no concerns about releasing the subject information to the RTI applicant, but they may still object in the consultation process as they do not want the documents published on the disclosure log. Third parties do so, as this is the only avenue for exercising their review rights. This increases the number of third party decision notices being prepared for RTI applications, as well as a larger amount of documents being deferred from access.

Some of the options recommended are:

- The section 37 consultation provision could stipulate that third parties have no rights to object to the publication of information on the disclosure log; or
- A provision to enable consultation relating to the disclosure log to be conducted at the initial section 37 consultation stage. An amendment to sections 37 and 78B of the RTI Act could provide third parties an opportunity to submit objections relating to the disclosure log, while maintaining the existing third party rights to object separately to the information at issue in the initial RTI application. This could take place in the consultation letter sent to the third party (for the initial decision). However, any objections lodged by the third party regarding disclosure log publication would need to be responded to separately from any RTI application objections. It is strongly recommended that disclosure log review rights continue to not be afforded under this model.

19. Do agency publication schemes still provide useful information? Or are there better ways for agencies to make information available?

The publication scheme is still useful and provides a common, coherent and standard means of accessing information across all agencies.

There is a variety of information published on policy registers, via the publication scheme and via the whole of government publication portal. Additionally, many business units publish information directly on the web in their functional areas which are linked to internet publication schemes. While some of this information is duplicated, much is not. Even where the information is duplicated, the varying local classification and/or storage conventions and rationale behind publication may make finding a particular resource/policy difficult whereas the common structure of the publication scheme may be more helpful for some users across all departments. In addition, any duplication issues will be less significant as time goes by as

policies and procedures are increasingly stored in a way which enables them to be linked to multiple web pages.

Feedback from local users is that the publication scheme, with its seven listed headings/classes of information (about us, our policies, our lists etc) is an easy and consistent way of looking at departmental information. While access to this information may be more likely to be by government users, having an easily locatable and consistent information source to assist with work and/or for response to members of the public is useful. From this perspective, and at this point in time, we believe it is worthwhile to keep the different methods and allow choice in the variety of publication portals. The reflection of this choice in the *Ministerial Guidelines* would definitely assist agencies with compliance.

20. Should internal review remain optional? Should the OIC be able to require an agency to conduct an internal review after it receives an application for external review?

The current system of an optional internal review process is supported.

It is important to continue to allow an applicant or third party the choice to request either, an internal review to have the agency review their own decision or to go directly to the OIC for an external review in the first instance. An optional internal review process gives the applicant flexibility to determine what process would best suit their situation and concerns.

Some applicants maintain a distrust of agencies and it may suit their circumstances to have their appeal application submitted directly to the OIC after the initial decision stage. If the OIC was able to direct an agency to complete an internal review, it may go against the wishes of an applicant and extend timeframes for the review process. Additionally, if internal review applications were compulsory, applicants would be forced to undertake an additional review process in order for the matter to be heard by an independent body, if that was their preferred option.

By internal review applications remaining optional, the appeal process maintains its efficiency as applicants are able to decide which review body they wish to utilise in submitting their appeal applications.

21. Should applicants have a right to appeal directly to QCAT? If so, should this be restricted to an appeal on a question of law, or should it extend to a full merits review?

Applicants should not have a right of appeal (merits review) directly to QCAT as the current Information Commissioner model offers the most accessible and affordable review option for the applicant.

However, it may be beneficial for the Information Commissioner to adopt the Commonwealth model and be provided with the discretion not to review a decision in appropriate matters, but instead refer a matter to QCAT for a full merits review, not just in relation to a question of law.

22. Should the OIC have additional powers to obtain documents for the purposes of its performance monitoring, auditing and reporting functions?

The OIC does not require additional powers to obtain documents in relation to its performance monitoring, auditing and reporting functions. This is because the Information Commissioner

has the general power provided by section 125 of the RTI Act, to undertake all functions that are necessary or convenient to be done for or in connection with the performance of the Commissioner's responsibilities under an Act. As such, the current provisions of the RTI Act provide sufficient powers to enable the OIC to adequately perform their monitoring, auditing and reporting functions.

23. Is the information provided in the Right to Information and Privacy Annual Report useful? Should some of the requirements be removed? Should other information be included? What information is it important to have available?

It is recommend that annual reporting is managed strictly to the requirements as outlined in section 8 of the RTI Regulation, and that consideration is given to reducing those requirements further.

Preparing the Annual Report is an extremely resource intensive exercise for agencies who not only report on their own department's statistics, but also their Minister's office statistics, and those of the portfolio's public and statutory authorities and Government Owned Corporations. Some agencies report on upwards of 60 such bodies for the financial year. This becomes a highly resource intensive exercise, particularly if unnecessary information is being requested.

The purpose of providing a detailed Annual Report is to enable thorough scrutiny of the effectiveness of the RTI Act. However, the current process has 11 spreadsheets to record requested information and can take around a month to compile. It is not clear how often this information is accessed by the public and if it provides any benefit to them.

It is suggested that the process be limited to high level statistical information, rather than the detailed information that is currently expected. For example, information such as the number of applications received and the number of reviews received would be within the public interest to publish. However, in regards to the additional information that agencies are currently expected to supply (e.g. the provisions used by decision makers to refuse access to documents or the number of external reviews lodged direct from the original decision versus those that proceeded from internal review), it could be argued that it has little benefit to the public that would outweigh the resources it currently takes to complete the reporting requirements.

24. What would be the advantages and disadvantages of aligning the IPPs and/or the NPPs with the APPs, or adopting the APPs in Queensland?

There are 13 APPs, a number of which are significantly different to the IPPs. The advantage in aligning the Queensland IPPs with the APPs would be consistency with the Commonwealth, reducing the likelihood of confusion for our customers where they deal with both regimes. However, there are implications regarding the implementation of a new set of principles, particularly in an environment where there are limited agency resources for privacy implementation and compliance.

Of particular note would be the further and more prescriptive obligations that agencies must take reasonable steps to implement practices, procedures and systems relating to their functions that will ensure the agency complies with the APPs and enable the agency to deal with inquiries or complaints from individuals. This is likely to have further resource implications on agencies.

Other obligations, some of which have been favourably canvassed in this paper include:

- individuals must be given the option of being anonymous or using a pseudonym when dealing with the agency (unless authorised or required by law or the agency can demonstrate it is impracticable)(see 34(i) for consideration of this obligation)
- the collection, use and disclosure of sensitive personal information will have greater obligations (there is no special treatment for sensitive information under the IPPs)
- the collection of unsolicited personal information has specific requirements, e.g. notifying the individual and determining in a reasonable time if the information could have been collected by the agency (in which case other APP obligations apply) or if not, the agency must lawfully destroy or de-identify the information as soon as practicable (if not a public record)
- privacy statements will have additional requirements (may be more complex)
- agencies must take reasonable steps to de-identify or destroy personal information if it is no longer needed (unless it is contained in a public record or the agency is required by law / court order to retain the information) agencies must have a clearly expressed and up-to-date privacy policy which deals with a range of issues that is available to the public
- statutory timeframes (30 days) for responses to requests for access to personal information (outside of information access applications) and to amendment of personal information, which also require written reasons for the decision
- extending the obligation to ensure information is accurate, up-to-date and complete to include disclosure as well as use
- changes to the limitations on the use and disclosure of personal information, with the introduction of some new exceptions, including allowing use or disclosure for a secondary purpose if it is a 'permitted general situation' as specified in the privacy legislation
- extending obligations to ensure information is accurate.

25. Should the definition of 'personal information' in the IP Act be the same as the definition in the Commonwealth Act?

The Commonwealth definition appears simpler and clear. However, changing the definition would not produce significant benefit to justify the cost of changing all policy and procedural documents and training modules given the current wording is not incorrect. However, a decision to amend the definition to mirror the Commonwealth definition is recommended.

26. Does the IP Act inappropriately restrict the sharing of information? If so, in what ways? Do the exceptions need to be modified? Would adopting a 'use' model within government be beneficial? Are other exceptions required where information is disclosed?

The IP Act does not necessarily **inappropriately** restrict sharing but rather at times **inconveniently** restricts sharing. Officers working on projects to support 'federated' customer relationship management systems and the Government's general aim for more online data, open portals and 'one stop shops' need to factor in privacy obligations in consultation with the Privacy Commissioner to ensure a consistent and legal model is applied. Current moves towards 'sharing' customer information to provide efficiencies, improve services and provide better value for money would benefit from a 'use' model within government. However, issues may still occur with the increasing use of outsourced service providers to deliver IT solutions and the sharing of information with other government agencies - local or interstate.

Consideration should thus be given to whether a 'use' model could be applied for all Queensland Government agencies and whether this should be extended to include local and interstate government agencies as all have the same or similar obligations to protect personal information.

A possible solution could be an additional provision in IPP11 allowing the disclosure and/or exchange and/or use of personal information between agencies for the administration of a law or function that is directly related to, the purpose for which the personal information was originally obtained. The threshold could also be lowered (similar to the Commonwealth Privacy Act) by dropping 'directly related' to 'related' in certain circumstances where the information is not sensitive or the disclosure/exchange/use does not breach confidentiality provisions in other legislation.

This would facilitate a 'one government' approach. A distinction between 'sensitive' personal information and routine personal information could be made in the IP Act (as per the APA) and an IPP11 exclusion be made for this type of disclosure or exchange where sensitive personal information is involved. This distinction is a useful one when applying a risk based approach to information privacy protection. Clearly, the more sensitive the information, the more detriment could be caused by use and disclosure and therefore a higher threshold for protecting this information should be applied. The distinction would also allow for the application of use and disclosure for a 'related' purpose in the public interest but not where sensitive information was concerned (unless existing exceptions apply).

In addition, as per the suggestion at point 2 above, the application of a public interest test to balancing those situations which may involve competing public interests or where the original purpose of collection is unclear (such as where an IPP 2 notice was inadequately worded or where consent was not possible or was unnecessarily onerous), would provide clarity and a systematic practical approach for practitioners to follow.

27. Does section 33 create concerns for agencies seeking to transfer personal information, particularly through their use of technology? Are the exceptions in section 33 adequate? Should section 33 refer to the disclosure, rather than the transfer, of information outside Australia?

Further consideration should be given to the definition of 'transfer' to exclude the temporary transfer of data. For example, when it is emailed from one person located in Australia to another person located in Australia, but, because of internet routing, the information travels (without being viewed) outside Australia on the way to the recipient.

Currently, the section 33 and 35 requirements place clear obligations on agencies however due to the ubiquitous rise in offshore online programs, services and Apps where small or no direct cost is involved, the reality is that service providers are not going to waste their time negotiating contract terms with a Queensland government department for a very low cost use of their product. So, the agency either foregoes the use of the technology solution for their issue (when smart uses of technology are being actively promoted from within government to reduce costs and improve service delivery) or they use it with the belief that the companies' privacy policy will be sufficient to protect the personal information flows and/or they consider the risk low and the benefits high.

Most online programs (vision6, surveymonkey, signupgenious, iauditor, camcard etc) are the products of companies hosted in the US or increasingly China and often have servers located in third party countries. Should there be a privacy breach then the reality is that the Queensland Government would have little or no chance of seeking recompense/redress from them for the individuals whose information was mishandled. The reason the online databases and Apps are free or low cost is to entice users initially then sell a bigger or better version once they are locked into the service and system. Additionally, personal information itself is a saleable item with a high market value particularly internationally and from 'rich' countries like Australia. Consideration could be put to allowing the disclosure and/or transfer under sections 33 and 35 of the IP Act where a standard offer arrangement exists with the Queensland Government and where it would not breach other IPPs to do so. This would enable tighter controls to be placed on overseas cloud based solutions.

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

It could provide the ability to extend the complaint timeframe after consultation if all parties agree.

29. Should there be a time limit on when privacy complaints can be referred to QCAT?

Within 30 days of OIC being asked to do so by the complainant would seem a more practicable timeframe than the current 20 days in section 176. In other circumstances, the timeframe could be extended after agreement by the complainant, the respondent and the OIC but must not exceed one year.

30. Are additional powers necessary for the Information Commissioner to investigate matters potentially subject to a compliance notice under the IP Act?

No comment on this matter.

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

The 'generally available publication' currently used is preferred as it is simple, clear and technology neutral and thereby 'future proofed' should other means of publication evolve over time.

32. Should IPP 4 be amended to provide, in line with other IPPs, that an agency must take reasonable steps to ensure information is protected against loss and misuse?

The amendment of IPP4 to be in line with the other IPPs is supported as there should be a consistent approach throughout the IPPs.

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

The use of the term 'collect', rather than 'ask for' is supported. The APPs do not use the phrase 'ask for'. However, this would require the clarification of solicited and unsolicited information in the collection IPPs.

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

RTI Act – recommended amendments

Review Rights

Under section 82 of the RTI Act, an applicant has 20 business days from the date of the decision in which to seek a review. This is the appeal timeframe irrespective of whether access to the documents has been deferred. It can be difficult for applicants to determine if they wish to seek a review without first accessing the documents that are granted access in the RTI decision. Either the applicant forgoes their rights of review, or submits unnecessary reviews so that the appeal timeframe is met and their appeal period remains open. This, in some cases, would not occur if the applicant is provided with an appeal period once they have had the opportunity to view all of the subject documents.

As such, consideration should be given to amending the applicant's rights of review to begin 20 business days from the date the documents are provided to the applicant. Specific provisions will need to address the possibility that a third party might apply for both internal and external review and how this will impact upon the applicant's right of review.

Section 24 – Making access application

The recent amendments to section 24(2) of the RTI Act, with the inclusions of new sub-sections (d) and (e), require that applicants must state if access to the documents is sought to benefit another entity and if so, who that entity is prior to an application becoming valid.

However, the application of this section as a validity requirement is unnecessary. This is because there are no provisions within the RTI Act that provide an agency with any recourse if an applicant provides false information. An applicant can state the information is for anyone and the department must accept that information and proceed with processing the application. It is recommended the provision be removed as it is unnecessary or alternatively, remain within the legislation but not be a validity requirement.

Statutory Timeframes

The RTI Act is not clear with regard to when the actual processing period timeframe commences. Section 18(1) of the RTI Act and section 22(1) of the IP Act state that 'the processing period is a period of 25 business days from the day the application is received by the agency or Minister.'

The OIC guideline entitled *Timeframes for Access and Amendment* states that the timeframe for calculating the due date excludes the event which starts the clock. The OIC guideline then refers back to the 'initiating event', which, in this case, is the day the compliant application is received, which is in turn treated as 'day zero'. Section 38 of the *Acts Interpretation Act 1954* confirms this, and provides that 'if a period beginning on a given day, act or event is provided or allowed for a purpose by an Act, the period is to be calculated by excluding the day, or the day of the act or event'.

It is recommended that section 18(1) of the RTI Act and section 22(1) of the IP Act be amended in an effort to make this position clearer, as follows:

'1 The processing period is a period of 25 business days commencing on the next business day after the application is received by the agency or Minister…'

This amendment will confirm the correct calculation of the processing period and will remove any perceived ambiguity in relation to the statutory timeframes for RTI and IP access applications.

Processing period extension

The current processing period to complete RTI/IP applications requires amendment.

The reduction from 45 calendar days (FOI Act) to 25 business days (RTI Act and IP Act) to complete processing of an application has had widespread implications on RTI decision makers, as well as departmental and Ministerial staff alike. Unexpected delays are consistently experienced at all processing stages, including, document search processes, awaiting applicant advice relating to decisions that have no 'clock stopping' provision, third party consultations and internal briefing procedures.

While the extension of time provision in the RTI Act and IP Act does allow the decision maker to request an extension of this period to allow for such occasions however the regularity of seeking an extension and the haste applied to all processing stages, now sees the extension of time provision utilised in a far greater percentage of applications than what the provision is intended for. Multiple extensions create an unfavourable perception.

An example of this regularly occurs within document search processes. In particular, this is the case for regionalised departments whose staff routinely visit remote locations and are often away from the office for a week at a time. In these business areas, it is common for the work unit to have case managers or investigators that solely manage a particular case, incident or region. It is this officer, who in many cases is the only person who can accurately assess which documents are responsive to an application.

Significant delays are experienced in waiting for the return of the officer best placed to respond to the RTI document search request. Often, that officer is then pressured to complete the RTI document search request task within tight timeframes subject to their availability, which causes greater issues in the latter stages of processing the application (e.g. incomplete document searches, such as email attachments not being provided – causing sufficiency of search issues at internal and external review; and not advising the RTI decision maker of all relevant concerns or sensitivities relating to the content of the documents – which may compromise the decision maker's final decision on access).

Furthermore, third party consultations are not always completed within the 10 business days provided for in the RTI Act and IP Act. It is often that the third party's existing workload takes priority and responses are provided many days after the RTI decision maker's original due date for response. The remote locations of many third parties can also contribute to the time taken to receive responses in relation to consultation documents.

As noted in the *OIC Model Protocols for Queensland Government Departments on reporting to Ministers and Senior Executive on RTI and IP Applications*, even when powers are delegated, Directors-General, as well as senior executives of relevant business areas, have a need to be kept informed of significant decisions. This also applies to Ministers (insofar as they are relevant to the Minister's responsibilities), for example for those applications where

giving access to information requires the Minister or agency to prepare for public debate. In a practical sense, these processes can also provide an opportunity for the relevant business areas to raise any relevant issues and provide any necessary context to the decision maker that may impact on the release decision. The practicalities of such briefings are not always catered for in the existing limited processing period.

While every effort is made by all parties concerned and at all decision making stages, the current timeframe provisions do not allow for enough flexibility. Accordingly, it is recommended that the processing period be increased to a minimum of 30 business days for both RTI and IP applications.

Further specified period (sections 18 and 35 of the RTI Act)

The application of section 35 of the RTI Act (longer processing period) and section 18(2)(b) of the RTI Act (meaning of processing period…) has been interpreted various ways in relation to extensions of the processing period. Section 35 of the RTI Act is titled "Longer processing period" and refers to a further specified period. The OIC advised the further specified period is not part of the processing period. The OIC advice also stated that the clock cannot stop during the further specified period and any processing steps that must be done before the end of the processing period cannot be done in the further specified period. If delays are experienced during the processing of an application, then sometimes the required steps are not able to be completed by the end of the processing period, and may need to be undertaken during the further specified period.

The application of some other provisions in the RTI Act is unclear as a result of the interpretation and the wording of sections 18 and 35 of the RTI Act. For example, section 36(1)(b) of the RTI Act states that a schedule of relevant documents (SoRD) and a CEN must be given to the applicant before the end of the processing period. If a longer processing period is exercised under section 35 of the RTI Act, and based upon the interpretation as mentioned above, it is therefore not compliant to provide a SoRD and CEN to the applicant during the further specified period. The clock stopping mechanism also cannot be applied in this situation. However, an alternative option in practice is to issue a SoRD and CEN during the further specified period and to manually manage the timeframes through an extension under section 35 of the RTI Act. This option is technically non-compliant under section 36(1)(b) of the RTI Act, but options are currently limited to continue processing an application once the further specified period is engaged.

Therefore, to remove the restrictions placed upon the general processing of applications and different interpretations of section 35 of the RTI Act and section 18(2)(b) of the RTI Act (as well as other relevant provisions), the wording of these sections could be improved. From a practical perspective and for consistency, the reference to a further specified period could be included as being part of the processing period defined under section 18 of the RTI Act to more accurately reflect being a "longer processing period" as stated in the title of section 35 of the RTI Act.

Irrelevant information – section 73 of the RTI Act and section 88 of the IP Act

Section 73 of the RTI Act and section 88 of the IP Act permit the deletion of irrelevant information from the documents where the information is not responsive to the scope of the request. In particular, section 73(3) of the RTI Act and section 88(3) of the IP Act state that

matter can be removed as irrelevant if, from the terms of the application, or after consultation with the applicant, the agency considers the applicant would accept a copy with parts deleted and it is reasonably practical to give access to the copy.

The requirements of section 73(3) of the RTI Act and section 88(3) of the IP Act has resulted in media applicants specifying in their application they do not consent to the deletion of irrelevant material from the documents requested. In this situation, the requirement cannot be satisfied when the scope provided by the applicant states from the outset that no information is to be removed under this provision.

However, this can create an additional burden on agencies as they are then required to examine the irrelevant information, with respect to public interest factors or exemptions. In addition, further third party consultations may need to take place, delaying completion of the application. It can also be argued that if information is not relevant to the scope of the application, then it would not add any value to the information the applicant is seeking as it is a completely unrelated subject to that initially considered by the applicant when submitting the application.

Consideration should be given to amending section 73 of the RTI Act and section 88 of the IP Act to remove the requirement under these provisions that agencies must reasonably consider that the applicant would accept a copy of the document with the irrelevant parts deleted. The applicant would still retain review rights if information is removed from documents using these provisions. This would improve the efficiency of processing RTI and IP applications, and does not result in any disadvantage to the applicant seeking information relating to their initial area of interest, nor reduce their appeal rights.

Internal review

Flexibility should be incorporated into the RTI and IP Acts with regard to the timeframes in which agencies must complete internal review decisions.

Section 80(2) of the RTI Act and section 94(2) of the IP Act requires agencies to make a decision at internal review, as if the reviewable decision has not been made. In doing so, agencies may be required to reassess a large number of pages, search for new documents, potentially deal with a large quantity of documents not previously considered and as such, conduct further, more extensive third party consultations. It is not uncommon for internal reviews to become unexpectedly complicated and require substantial processing time for the internal review decision to be completed to a sufficiently high quality level.

Considering the amount of work involved in processing an internal review, it is suggested that internal review timeframes be more closely aligned with those imposed in relation to initial RTI decision processes, such as:

- if third party consultations are required at internal review, an extra 10 business days should be added to the processing time to enable this to occur (e.g. where additional documents are located as a result of sufficiency of search procedures, or where initial decisions are being varied with previously exempt information concerning third parties being proposed for release at the internal review stage); and

- discretion to request an extension from the applicant to complete the review if insufficient time is available. However, a maximum period of extension should be included (e.g. extensions of no longer than 15 business days).

If extensions of time are required during the initial RTI processing of an access application, then it is reasonable to argue that a similar provision be included in the legislation to adequately examine and process the subject documents at internal review. These recommended amendments will greatly assist agencies to be able to process the internal review to a high standard and provide a detailed explanation to the applicant or third party, which also in turn, will reduce the likelihood of an application for external review being lodged.

Deposits for CEN responses

The RTI Act should also be amended to require applicants, when accepting a CEN, to pay a percentage of the estimated processing charge by way of a non-refundable deposit. In practice, situations arise where applicants accept the CEN but then neglect to pay the processing charges when the decision is finalised. This often occurs when access to documents is refused under the public interest or the applicant's personal circumstances change. It is timely and costly to seek payment from applicants in debt resolution processes. With no central whole of Government RTI debt recovery service available, most agencies avoid debt recovery due to it being uneconomical to do so.

Section 10 of the FOI Act required that a 25% deposit was payable when accepting the Preliminary Assessment Notice (equivalent to a CEN). This provided a form of guarantee of the applicant's intention to pay the remaining charges associated with the application once finalised. It is suggested that the process of requiring a 25% deposit be introduced into the RTI Act and the deposit payment being required as confirmation of acceptance of the CEN. Another option is to only require a deposit if a CEN is over a certain amount, for example $500. This may reduce the occurrence of applicants neglecting to pay at finalisation after agency resources have been utilised to complete processing of the application.

IP Act – recommended amendments

Evidence of identity

This should be required only where not doing so would prohibit or inhibit the resolution or ability to resolve an application, complaint or other issue. We are unsure where the public interest lies in publishing the identity of individuals who have made access applications.

It may be useful to consider pseudonymity and anonymity as exists in the Commonwealth Act. For example, APP 2 allows individuals the option of not identifying themselves or of using a pseudonym when dealing with an organisation with some exceptions allowing for the need to identify oneself if required or authorised by law or a court order or if it would be impracticable to deal with an individual who had not identified themselves.

Technology

As technology continues to evolve, it will continue to present privacy challenges. The IP Act should enable practitioners to balance the ability to do their work in the public interest with the protection of personal information (and hence the privacy of individuals), which is also in the public interest. The use of technology should, and in many instances does, facilitate this.

However, in promoting the use of smart technology solutions to provide improved customer service, efficiencies and cost reductions it must be acknowledged that the technology used is mobile and international and its use invariably means disclosure to a service provider and often to one based overseas. There is an increasing use of online apps for surveys, registrations, invitation lists, business cards, etc and this use is facilitated by the need to be more efficient, effective and creative with scarce resources.

Those who access online apps and other technology for small projects which fall under the reportable procurement threshold may not be exercising appropriate corporate governance and not only in relation to protecting personal information. Review of many of these online services' privacy statements show many loopholes in their broad-brush approach to privacy and ultimately it would be difficult to obtain any redress for a personal information breach. Aside from section 33 and 35 provisions as discussed above, consideration could be given to a risk management approach to privacy protection especially if the intention is to maintain technology neutral legislation. As stated in this paper, consideration could be given to making a distinction between: a)sensitive and non-sensitive personal information, b) directly related and related information, and c) applying the 'use' model within government (with consideration given to applying this to all tiers of government). These factors could be combined with a risk management approach where a proposed use and disclosure of low risk/detriment personal information could be permitted where required, with the application of the public interest test.

Consideration should be given to whether the IP Act needs to consider provisions specifically for data protection to reflect the growth in digital information and the collation of many data sources and personal information holdings into large data bases highlighted by current moves for 'federated' customer service management systems. Care needs to be taken to ensure that multiple pieces of information which are relatively innocuous in isolation don't become a detailed picture of a person's life when aggregated.

Re-identification of personal information

Consideration should be given to the inclusion of penalties in the IP Act for knowingly and deliberately re-identifying, or facilitating the re-identification, of government data previously de-identified. This would align with current Commonwealth moves and be a timely inclusion given the benefits of using de-identified data for policy and research etc and the increasingly "Big Data" environment.

Ultimately, as the Information Commissioner has stated, "the privacy principles are about balance: allowing necessary information to flow to enable the delivery of government services while protecting personal information from misuse or abuse".