Submission to the

Department of Justice and Attorney-General

2016 Consultation on the Review of the *Right to Information Act 2009* and the *Information Privacy Act 2009*: Consultation paper

3 February 2017

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Part One:
INTRODUCTION

In December 2016, the Queensland Government released, *2016 Consultation on the Review of the Right to Information Act 2009 and Information Privacy Act 2009: Consultation paper*. The paper explains that the reviews are required under legislation and the purposes are to consider the validity of the primary objects of the Acts, whether the primary objects are being met, whether provisions in the Acts are appropriate for meeting the objects, and any other issues recommended by the Minister or the Information Commissioner.

PeakCare welcomes the opportunity to make a submission in response to the options paper.

Part Two:
ABOUT PEAKCARE AND THIS SUBMISSION

PeakCare Qld Inc. (PeakCare) is a peak body for child and family services in Queensland. Across Queensland, PeakCare has 59 members. These organisations are a mix of small, medium and large mainstream and Aboriginal and Torres Strait Islander non-government organisations that provide universal, prevention and early intervention, and generic and intensive family support to children, young people, adults, families and communities. Members also provide child protection and out-of-home care services (e.g. foster and kinship care, residential care) to children and young people who are at risk of entry to, or who are in, the statutory child protection system. Some members are local operations and others operate across the state, in a number of Australian jurisdictions, and some are part of international networks.

In addition, PeakCare's membership includes a network of 24 individual members and other entities supportive of PeakCare's vision of 'Safe and well children. Safe and well families'.

This submission reflects on privacy issues for non-government organisations that do, or have in the past, provided child and family welfare services to children, young people and / or adults, some of whom are or were subject to statutory child protection intervention. These organisations collect, store, use and disclose personal information about individuals as provided for in legislation and other regulatory frameworks. All of the organisations are under contract with the Department of Communities, Child Safety and Disability Services to deliver services and perform functions 'on behalf of government'. For some of the organisations, the services they offer may be funded by other state or commonwealth agencies, or self-funded. By operating in one or more jurisdiction, the organisations may be subject to multiple privacy regimes and multiple legislative requirements around sharing the personal information of prospective or current clients with other non-government or government agencies.

This submission responds to some of the questions posed in the consultation paper.

Part Three:
RESPONSES TO QUESTIONS POSED IN THE CONSULTATION PAPER

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?

This is a controversial issue in many states given the number and nature of child and family welfare services that are already contracted out, or planned to be contracted out, to non-government organisations. In the child protection area, the number and nature of contracted services is growing, in part in response to recommendations from the Queensland Child Protection Commission of Inquiry (the Carmody Inquiry). Out of home care services (i.e. foster and kinship care services, residential care services, supported independent living services for young people preparing to transition from state care) and what are, under the *Child Protection Act 1999*, termed 'recognised entities' are administratively required to transfer closed child files to the Department of Communities, Child Safety and Disability Services.

The consultation paper proposes that contracted service providers become 'agencies' and subject to the RTI Act and Chapter 3 of the IP Act. This would impact active files of contracted service providers and would mean that these organisations would be required to have a publication scheme and disclosure log. Requirements relating to publication schemes and disclosure logs would be onerous. Some members are small, stand-alone organisations with few employees. It is also important to note that our members carry out a number of functions, many not on behalf of government. They therefore have documents relating to other aspects of their business that may not be appropriate to include in publication schemes and disclosure logs. The time and cost involved in making decisions as to what is to be included, in addition to the time and cost in maintaining publication schemes and disclosure logs for documents relating to the functions they provide on behalf of government, would be disproportionate to any benefit in requiring contracted service providers to be subject to the RTI Act. In this regard, we note that standard service contracts already require service providers to provide access to records and to assist government agencies when a request for records is made.

Question 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?

PeakCare supports privacy obligations in the IP Act being extended to sub-contractors so that liability is not carried by the contractor. Procurement and contracting arrangements are changing in child and family services and examples are increasing where a contractor sub-contracts to 'buy-in' specialist expertise or as one approach to partnering with other non-government organisations.

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

PeakCare supports a single point of access given the vulnerability of current and past clients of child protection services who may want access to both personal information and other information. The more straightforward and streamlined the system, the easier it is for users.

Question 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?

Without a clear definition of 'substantial', which increases the threshold for consultation with third parties, there is the potential for more confusion than currently exists.

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

Notwithstanding that a third party needs to be aware that a particular document has been disclosed without them having been consulted or that a disclosure log could result in a third party seeking review, review processes should be seen as contributing to an organisational culture of continuous learning, in addition to being a healthy aspect of transparent decision making processes and decisions.

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?
Question 13: Should the public interest factors be reviewed so that 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.
Question 14: Are there any new public interest factors which should be regarded as relevant to schedule 4? If so, what are they? Are there any factors which are no longer relevant, and which should be removed?

With reference to questions 12 to 14, a comparative analysis between the New South Wales and Victorian jurisdictions regarding exempt information and the public interest balancing test shows that:

- The *Government Information (Public Access) Act 2009 (NSW)* (the GIPA Act) allows individuals the right to access government information unless there is an overriding public interest against that release. The GIPA Act accompanies other avenues by which the public can access information held by the NSW government including the *Personal Information and Privacy Protections Act 1998* and the *Health Records and Information Privacy Act 2002.* Section 13 of the GIPA Act provides for public interest considerations against disclosure outweighing public interest considerations for disclosure if and only if considerations in favour are outweighed. The NSW public interest test is a three step

process wherein 1) factors in favour of disclosure are identified with reference to a list of five non-exclusive factors given as examples, 2) factors against disclosure are identified against an exhaustive list of public interest considerations, and 3) the weight of public interest considerations in favour and against are measured to determine the balance

- The Victorian *Freedom of Information Act 1982* (the FOI Act) allows individuals to access government documents from Victorian state and local government agencies. An applicant is entitled to access a document unless the document is exempt. In the event that it is possible to release a document with exempt sections deleted, an agency should do so. While documents should be released with exempt material deleted, wherever practicable this should not be done if the document subsequently released would be meaningless, misleading or unintelligible. The FOI Act lists specific exempt documents and an additional section provides a relatively prescriptive public interest test to other potentially exempt documents. There is also a government-produced step-by-step guide for decision makers regarding FOI applications.

In Queensland, access to information under the RTI Act can be refused if, on balance, its release would be contrary to the public interest. The RTI Act requires decision makers to follow the process set out in the RTI Act to ensure all relevant factors are taken into account in deciding where the balance of the public interest lies. In contrast with New South Wales and Victoria, Queensland's public interest balancing test is long-winded and convoluted and would benefit from simplification and consistency with corresponding legislation in other states. Queensland government agencies may benefit from having less steps to consider and more clarity as to when to disclose documents. Those seeking access would also benefit from a more easy to understand, less complex process. Something similar to the NSW GIPA Act as in a three-step process supported by a comprehensive list of public interest considerations for and against disclosure would be preferable.

Adding new public interest benefit factors should be approached with caution as it implies the list is exhaustive and also means the disclosing party has another specific factor to consider and 'mark off'. If however the intent is to provide an exhaustive list, then any other factors normally considered should be added and the list specifically stated as exhaustive. If the list is not intended as exhaustive, a shorter, non-exhaustive list that states some discretion to the decision maker, is preferable.

In regard to public interest factors, the NZ public interest test does not include a blanket exemption from disclosure of cabinet documents where the consequences of releasing the information outweigh the public interest in keeping the information confidential. Cabinet papers and minutes related to the Better Public Services program that have been approved for release are available on government agency websites. Re-consideration of the public benefit test around the exemption of Queensland cabinet documents is supported.

Question 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?

In an environment where there is a very high level of media scrutiny of the statutory child protection agency and related services, the 'Courier Mail test' drives public policy from time to time, and frequent public inquiries into the standard of care provided to children and young people removed from parental care, it is reasonable and transparent that information about applicants and any other entity is included in departmental disclosure logs.

Question 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 need to disentangle implementation or practice issues from information sharing – 'use' or 'disclosure' - that is supported by or prescribed in legislation is unfortunately a consistent feature in discussions about information sharing. The review of the *Child Protection Act 1999*, which is (re)considering information sharing provisions, and the Queensland Law Reform Commission's review of whether Queensland should introduce a domestic violence disclosure scheme are two current projects that intersect with this consultation process and demonstrate the need for clarity around sharing information that is 'purpose-related'.

Question 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?

Currently, Queensland's standard is that agencies 'must ensure' that documents are protected against loss and misuse. The NSW standard is that agencies must ensure documents are protected by safeguards 'as are reasonable'. In Victoria, organisations 'must take reasonable steps'. PeakCare supports consistency with other jurisdictions and supports the amendment.

Part Four:
CONCLUSION

PeakCare appreciates the opportunity to make this submission and looks forward to participating in ongoing discussion about privacy and access to personal and non-personal information.