



Queensland Association of Independent Legal Services Inc

15 November 2013

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

By post and email: FeedbackRTIandprivacy@justice.qld.gov.au

Dear Sir/Madam,

The Queensland Association of Independent Legal Services (**QAILS**) refers to the *Right to Information Act 2009* (Qld) (**RTI Act**) and the *Information Privacy Act 2009* (Qld) (**IP Act**) Chapter 3 Discussion Paper (**Discussion Paper**) that was released by the Hon Jarrod Bleijie MP, Attorney-General and Minister for Justice. This submission is in reply to the Discussion Paper.¹

QAILS is the independent peak body for community legal centres (**CLCs**) in Queensland and represents the 33 funded and unfunded member CLCs operating across the state. This submission draws on the experiences of QAILS's members and the lawyers working in CLCs assisting clients every day with legal issues. This can include assisting clients in their dealings with government authorities, and CLC lawyers often seek to access documents relevant to their clients' matters using the RTI Act and/or the IP Act.

QAILS considers that it may most appropriately respond to the Discussion Paper on behalf of its clients by raising issues not only in response to specific issues raised in the Discussion Paper but also at a broader conceptual and themes based level.

This approach will mean that the issues discussed below might more broadly be responsive to several other specific issues raised in the Discussion Paper. We have identified these where possible.

1. Reformulation of the Public Interest Test

Issue 7.3: Does the public interest balancing test work well? Should the factors in Schedule 4 Parts 3 and 4 be combined into a single list of public interest factors favouring non-disclosure?

QAILS notes that many of its members' clients would be considered as representing marginalised and vulnerable groups within the community and in this capacity, not commonly exposed and required to understand legal rights and obligations as well as the reasoning processes undertaken in reaching decisions. This is specifically relevant for CLC clients in accessing and using the RTI

¹ QAILS gratefully acknowledges the support of Clayton Utz in preparing this submission.

and Chapter 3 IP Acts and importantly, understanding the decision-making framework relevant to the decisions on access reached under these Acts. In this context, QAILS would note the Public Interest Exemption.

QAILS considers that the establishment of a prescribed public interest test, complete with factors relevant and irrelevant to determining whether the public interest lies in the disclosure or non-disclosure of a particular document in the RTI Act was a sensible and well-considered advancement over the previous *Freedom of Information Act 1992*. QAILS also considers that the practical (though non-exclusive) codification, through Schedule 4 of the RTI Act, of the 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, QAILS submits that Schedule 4 of the RTI Act 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.

QAILS's experience is that many of its clients find the full gamut of factors, and whether all need to be applied and/or referenced to be confusing. QAILS's experience is that, from its clients' perspective, the interplay between the Schedule 4 Part 3 - Factors favouring nondisclosure in the public interest, and Schedule 4 Part 4 - Factors favouring nondisclosure in the public interest because of public interest harm in disclosure, is particularly confusing.

The actual balancing exercise itself, as set out in s.49 of the RTI Act is similarly, for legally unsophisticated clients, difficult to understand. QAILS submits that the apparent complexity of s.49 of the RTI Act is evidenced by the ongoing review and appeal processes arising in which one ground alleged is the misapplication of the test.²

QAILS 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 ss.12 to 15 of that Act. The NSW regime applies broad public interest principles and considerations relevant to determining whether disclosure should be made.

QAILS 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 who are able to comprehend the legislation with a legal or high level understanding.

2. Reconsideration of forms

Issue 6.16: How could prescribed written notices under the RTI Act and IP Act be made easier to read and understood by applicants?

Following from QAILS's submissions in respect of Issue 7.3 above as to the reformulation of the Public Interest Test, QAILS submits that decision notices remain, largely as a consequence of the issues addressed above regarding the Public Interest Test, complex and difficult for its clients to fully appreciate and understand.

Particular difficulties in this respect arise in circumstances where some CLC clients may also have English as a second language. In those instances, RTI Act documents, including relating to requests for third-party consultation, remain overly complex.

² See most recently, *Gordon Resources Pty Ltd v State of Queensland* [2012] QCATA 135.

QAILS submits that further consultation with interested stakeholders such as QAILS should be undertaken with a view to the redrafting of RTI Act documents.

That said, QAILS would like to acknowledge that largely, in its experience, agency and departmental initiating RTI application forms are well written in simple to understand plain English.

3. Fees and Charges

Issue 6.5 / General comments: Should agencies be able to refund application fees for additional reasons? If so, what are appropriate criteria for refund of the fee?

A key concern for CLCs' clients, given many are societally marginalised or disadvantaged, and unable to source other assistance, is 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 the 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 there is in effect a decision of the Information Commissioner under s.67 of the RTI Act that the non-profit organisation has financial hardship status.

QAILS 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.

Issue 8.1: Should fees and charges for access applications be more closely aligned with fees, for example, for access to court documents?

QAILS submits that the fees and charges regime for the RTI Act should not be aligned with that applicable to access to court documents.

In QAILS's view, the 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, QAILS submits that 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.

4. Timing

Issue 6.7: Should a further specified period begin as soon as the agency or Minister asks for it, or should it begin after the end of the processing period?

Issue 6.8: Should an agency be able to continue to process an application outside the processing period and further specified period until they hear that an application for review has been made?

Many CLC 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.

QAILS members have previously experienced some agencies which have difficulty complying with relevant RTI Act timeframes, not generally through any deliberate attempts to obfuscate clients' rights to access the information or documents sought, but rather simply due to poor internal document management processes.

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.³ This then often necessitates what is, for CLC clients, in QAILS's submission, an unreasonable and unnecessary external review process.

QAILS 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, in QAILS's submission, should be on the relevant agencies to comply with their timeframe obligations under the RTI Act.

QAILS submits that the deemed decision provisions should be redrafted so that the deemed decision is one of release. This would, in QAILS's submission, 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.

QAILS's general submission is that, where possible, any 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.

We would welcome the opportunity to discuss these submissions with you in more detail.

Please address any queries to QAILS Director James Farrell on (07) 3392 0092 or at director@qails.org.au.

Yours sincerely,

A handwritten signature in black ink, appearing to be 'J Farrell', written over a horizontal line.

James Farrell
QAILS Director

³ Under section 46 of the RTI Act.