26 June 2025

To: Independent Review of Tasmania's Right to Information Framework

By email: tasrti.review@gmail.com

Dear Professors McCormack and Snell,

Tasmania's current right to information framework

Thank you for the opportunity to make a submission in relation to the Independent Review of Tasmania's Right to Information Framework. We make this submission as members of the Law School's Right to Information Training project team, under which the University of Tasmania has been engaged by the Department of Premier and Cabinet to develop online training on the *Right to Information Act 2009* (Tas) ('RTI Act') for all State Service staff ('RTI Training Project').

This submission details several reflections and recommendations drawn from our work on the RTI Training Project, but due to the constraints of time these do not represent a comprehensive list of recommendations on the Tasmanian RTI framework more broadly. The views expressed are our own.

Presumption of disclosure

Unlike some other jurisdictions (NSW, Qld and the ACT), the RTI Act does not currently articulate an explicit presumption of disclosure, though this presumption is implied through ss 3 and 7, when read in light of the subject matter, scope and purpose of the Act. Noting that existing criticisms have often focused on an apparent bias *against* disclosure in the RTI Act's implementation, an explicit presumption of disclosure would help to emphasise the pro-disclosure nature of the Act and support implementation of the RTI Act's objects in s 3.

- ***Recommendation: Section 7 of the RTI Act be amended to explicitly include a presumption in favour of disclosure of any information requested under s 13 of the Act.***

Proof of applicant's identity

For an application for assessed disclosure to be valid under s 13 of the RTI Act, it must contain the minimum information prescribed in the *Right to Information Regulations* 2021. Regulation 5 provides that where a person applies to access their own personal information through an RTI request, they must provide proof of their identity. The list of proof of identity documents in r 3 is exhaustive and currently presents barriers to certain individuals accessing the RTI system. For example, r 3 does not include certified prison IDs, and yet often this is the only accessible form of identification that prisoners have access to without having to request their official documents through prison administration. In this situation, the prisoner's application does not meet the minimum requirements of an RTI request, and the application can be refused.

In practice, we understand that some agencies accept prison certified ID as sufficient proof of identity in an effort to apply the RTI Act in good faith. Some other agencies apply a 'workaround' to this gap and process the request as an application under the *Personal Information Protection Act 2004* (Tas) ('PIP Act'). However, this restricts the information the applicant can receive to information of the applicant themselves, meaning that the prisoner would still have to make a separate RTI request if they are also seeking other information.

- ***Recommendation: The RTI Regulations be amended to include prison certified identity documents.***

S 18(5) restriction of medical and psychiatric records

Under s 18(5) of the RTI Act, a request for access to a person's own medical or psychiatric records can be denied where 'it appears to the principal officer of the public authority or to that Minister that the provision of the information to that person might be prejudicial to the physical or mental health or wellbeing of that person'. In such circumstances, the principal officer or Minister 'may direct that the information must not be provided to the person who made the request but must instead be provided to a medical practitioner nominated by that person'. There is an equivalent provision in s 3B of the PIP Act.

This provision requires that the RTI decision-maker exercise a discretion as to whether the provision of information of a medical or psychiatric nature should be provided to the person whose information is requested. The discretion is expressed as a low threshold: 'if it appears'... that the provision of the information... *'might* be prejudicial to the physical or mental health or wellbeing of that person'. The broad nature of the discretion given to principal officers and Ministers under s 18(5) has the potential to result in a lack of consistency, fairness and certainty in the provision's implementation. While the provision is well-intentioned, it is also paternalistic and raises significant questions around the right of individuals to access their own information and to make informed decisions about their health.

- ***Recommendation: That the Ombudsman provide new guidance on how s 18(5) of the RTI Act and s 3B of the PIP Act should be applied in practice.***

Vexatious applicants: s 20(b)

Section 20(b) of the Act allows for an RTI request to be refused where 'the application is considered vexatious by the public authority or Minister'. The capacity for a decision-maker to refuse an RTI request in such circumstances has significant practical importance, and requires a delicate balancing of factors: on the one hand is the pro-disclosure nature of the RTI Act and its emphasis on the *application* and not the applicant's motivations for making the request; on the other hand, public authorities' resources for managing RTI requests are limited and should not be unduly used in response to applications that are not aligned with the objects of the RTI Act.

At present, there is some inconsistency between the Ombudsman's Manual and Guidelines on this issue. For example, the Manual states that 'This provision is not similar to a "vexatious litigant" provision - it is not the conduct of the applicant which is at issue, or their intentions, but the nature of the application.' The 2010 'Guideline in relation to refusal of an application for assessed disclosure under the Right to Information Act 2009' states that 'The notion of a "vexatious application" seems to be similar to that of vexatious proceedings, in litigation' (page 3).

We recommend that the Ombudsman provide further guidance on this ground of refusal in s 20(b), drawing on equivalent guidance from other jurisdictions where appropriate. This guidance should also recognise that the evolving nature of the information environment for government and the public requires that RTI decision-makers have some flexibility in how they respond to vexatious applications while still conforming to the objects of the Act.

- ***Recommendation: That the Ombudsman provide new guidance on identifying and managing vexatious applications under s 20(b) of the RTI Act.***

Section 36 Personal information

Interaction between the RTI Act and PIP Act

Given the complexity around the disclosure of personal information under s 36 of the RTI Act, and the corresponding problems this creates with the overlap between that Act and the PIP Act, we strongly support the full implementation of Recommendation 17.8 of the Commission of Inquiry into the Tasmanian Government's Responses to Child Sexual Abuse in Institutional Settings 2023.

- ***Recommendation: That Recommendation 17.8 of the Commission of Inquiry into the Tasmanian Government's Responses to Child Sexual Abuse in Institutional Settings 2023 be fully implemented as a matter of priority.***

The disclosure of State Service employees' personal information

There have been several Ombudsman review decisions that overturned primary decisions to exempt personal information of State Service employees acting in their professional capacity. The Ombudsman has made it clear that 'personal information' of current and former State Service employees that relates to their general employment duties (name, position, signature and work contact details) is not exempt from disclosure under s 36 unless there are specific and unusual circumstances. Despite this, we understand there to be ongoing uncertainty around the 'specific and unusual circumstances' that will warrant exemption of this information.

- ***Recommendation: That the Ombudsman provide new guidance on what constitutes 'specific and unusual circumstances' for the purposes of exempting State Service employees' personal information under s 36 of the RTI Act.***

Impartiality of person conducting Internal Review (s 43)

Section 43(4)(b) permits a principal officer of a public authority to delegate their power to conduct an internal review of an RTI decision. The only statutory requirement is that the reviewer be someone 'other than the delegated officer who made the decision'. Best practice would require that the reviewer should be someone of equal or greater seniority than the original decision maker, to avoid any actual or perceived influence over the reviewer's decision.

- ***Recommendation: That either s 43(4) be amended to state that wherever possible the reviewer should be someone of equal or greater seniority than the original decision maker, or that this be provided for in a new guideline from the Ombudsman.***

Timeframes under the RTI Act

References to timeframes under the Act are often confusing and ambiguous, and at times different wording is used in similar provisions. Two examples of ambiguity are noted below:

- In s 43(1), the phrase 'notice is given to' appears. The Ombudsman's Manual provides in section 9.2.3 that this phrase should be read as 'notice is received by' to bring in accordance with other timeline references in and following s 43.
- The timeframes for undertaking internal reviews are particularly opaque and can only be identified by carefully reading s 43 together with s 44-45.

➢ ***Recommendation: That all timeframes in the RTI Act be reviewed and amended to ensure clarity and certainty regarding the point at which the relevant timeframe expires, and to explicitly list timeframe for review in the RTI Act.***

Other recommendations

In the interests of improving the efficiency and effectiveness of the RTI system in Tasmania by ensuring it is appropriately resourced in terms of funding and guidance materials, we also make the following recommendations:

➢ ***That the RTI Act be amended to give external review jurisdiction to the Tasmanian Civil and Administrative Tribunal instead of the Tasmanian Ombudsman.***
➢ ***In the alternative, that the Ombudsman's resources be increased to enable the office to:***
  - ***reduce the size of its external review backlog;***
  - ***support the timely finalisation of external review decisions; and***
  - ***publish an updated RTI Manual and new guidelines under the RTI Act.***

If you would like to discuss any of the matters raised in this submission, please feel free to contact Dr Cleo Hansen-Lohrey at [redacted].

Yours sincerely,

Dr Cleo Hansen-Lohrey, Ashley Burke, Jessica Pursell, Dr Rebecca Bradfield, Phoebe Winter and Bianca Jones

About the signatories

Dr Cleo Hansen-Lohrey is a lecturer in law at the University of Tasmania and teaches and researches in administrative law. Dr Rebecca Bradfield is a Principal Research Fellow with the Tasmanian Law Reform Institute. Cleo and Rebecca co-lead the RTI Training Project. Ashley Burke, Jessica Pursell, Phoebe Winter and Bianca Jones are current or former law students at the University of Tasmania and are research assistants on the RTI Training Project.