20 June 2025

Independent Review of Tasmania's Right to Information Framework
Department of Premier and Cabinet
GPO Box 123
HOBART TAS 7001

By email: **tasrti.review@gmail.com**

Dear Professors McCormack and Snell,

Submission to the Independent Review of Tasmania's 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. I write as a recent law graduate of the University of Tasmania (UTAS), who undertook my First Class Honours thesis on Tasmania's *Right to Information Act 2009* (Tas) and framework in 2024. I also write with experience as a member of the UTAS Law School's Right to Information Training project team. The views expressed are my own.

This submission details reflections and recommendations drawn from my research for my Honours thesis, and my work with the Law School's Right to Information project team. For the reasons I outline in my submission, Tasmania's Right to Information Framework needs considered administrative and legislative change, if it is to be a system capable of achieving its intended accountability objectives and improving democratic governance in Tasmania.

I would be happy to discuss my submission further, if necessary.

Yours sincerely,

Phoebe Winter
Honours Student and Law Graduate, University of Tasmania Law School 2024

SUBMISSION TO THE INDEPENDENT REVIEW OF TASMANIA'S RIGHT TO INFORMATION FRAMEWORK

EXECUTIVE SUMMARY

Right to Information (RTI) systems are integral to effective government, as they facilitate the public's access to government information.[1] The original intent of the RTI legislation in Tasmania was to 'strengthen trust in democracy and political processes'.[2]

The *Right to Information Act 2009* (Tas)('*RTI Act*')[3] and RTI framework was implemented to improve accountability in all levels of government by supporting a proactive 'push model' of information disclosure.[4] As part of the efforts to promote greater openness the *RTI Act* was intended to reflect a presumption of disclosure, facilitating a pro-disclosure approach to information access.[5] This can be seen in s 7 of the Act, which provides there is a legally enforceable right to be provided with information *unless* that information is 'exempt information' in accordance with the *Act*[6] and is further supported by s 3(4)(b) of the *Act* which provides that any exercise of discretion under the *RTI Act* should advocate for providing the maximum amount of information.[7] However, the current implementation of Tasmania's *RTI Act* and system has been operating with a 'closed, obstructive approach',[8] threatening accountability and transparency in Tasmanian government and the health of Tasmania's democracy.

My submission is that Tasmania's current RTI regime and *RTI Act* is not meeting its original objectives, and needs reform, as it does not possess necessary 'markers' for an effective information disclosure system capable of promoting government accountability.

---

[1] Joseph Stiglitz, 'Transparency in Government', in *The Right to Tell: The Role of the Mass Media in Economic Development* (WBI Development Studies, World Bank, 2002) 27, 28-9.
[2] Tasmania, *Parliamentary Debates*, House of Assembly, 15 October 2009, 70 (Lara Giddings) ('*RTI Bill Second Reading Speech*').
[3] *Right to Information Act 2009* (Tas) ('*RTI Act*').
[4] *RTI Bill Second Reading Speech* (n 2) 70.
[5] Ibid 72.
[6] *RTI Act* (n 3) s 7.
[7] Ibid s 3(4)(b).
[8] Integrity Commission Tasmania, *Misconduct Risks in Tasmania's Right to Information Regime* (Report, 22 May 2024) 10 ('*ICT Report*').

Accountability literature suggests there are some essential markers including 1) a proactive political and agency culture to RTI,[9] 2) appropriate and adequately resourced oversight bodies,[10] and 3) a clear and facilitative public interest test (PIT) capable of promoting the pro-disclosure objectives of RTI legislation.[11]

My key submissions are;

1. Currently, Tasmania has a notable RTI culture issue, and disclosure avoidant practices which are undermining the accountability objectives of the RTI system;
2. The Ombudsman, as the current oversight body for RTI in Tasmania, is currently unable to promote the objectives of the RTI system because it is inadequately resourced and retains a problematic external review jurisdiction; and
3. The *RTI Act's* public interest test (PIT) is currently insufficient and requires reform as it is susceptible to being misapplied in favour of non-disclosure, reducing disclosure, increasing external reviews and undermining citizens capacity to scrutinise information.

To address these issues, and recentre the *RTI Act* and system toward promoting and achieving its intended accountability and transparency objectives, the following reforms are suggested:

1. Strong, targeted RTI training for new RTI delegates which reinforces the objects of the *RTI Act* and stresses the use of assessed disclosure as a last resort;
2. RTI training should also include detailed guidance on the use of exemption provisions in the *RTI Act*, to improve delegate understanding and limit overuse of exemption provisions to avoid disclosure.[12]

[9] Daniel Stewart, 'Assessing Access to Information in Australia: The Impact of Freedom of Information Laws on the Scrutiny and Operation of the Commonwealth Government' in John Wanna, Evert A Lindquist and Penelope Marshall (eds), *New Accountabilities, New Challenges* (ANU Press, 2015) 79, 80, citing Alasdair Roberts, 'Structural Pluralism and The Right to Information' (2001) 51 *University of Toronto Law Journal* 243, 244.
[10] Rick Snell, 'Failing the Information Game' [2007] (10 January/March) *Public Administration Today* 5, 8.
[11] Danielle Moon and Carolyn Adams, 'Too Much of a Good Thing? Balancing Transparency and Government Effectiveness in FOI Public Interest Decision Making' (2015) 82 *Australian Institute of Administrative Law Forum* 28, 30-7.
[12] Environmental Defenders Office, *Transparent Failure: Lutruwita/Tasmania's Ineffective Right to Information System and How to Fix It* (Report, July 5 2023) 39 ('*EDO Report*'); Note that the University of Tasmania has been engaged by the Department of Premier and Cabinet to deliver such new delegate training in the State Service.

3. Ongoing professional development training to ensure RTI decision-making reflects guidance from the Ombudsman and external review decisions; [13]
4. As suggested by the EDO, amending s 3(2) of the *RTI Act* to emphasise the focus on the Act's objects being pursued through public authorities prioritising routine and active disclosure;[14]
5. As also suggested by the EDO, amending s 7 of the *RTI Act* to include a rebuttable presumption that all information sought via assessed disclosure is disclosable;[15]
6. Amending the *RTI Act* to move the external review jurisdiction for RTI decisions from the Ombudsman to the Tasmanian Civil and Administrative Tribunal ('TASCAT').
7. Alternatively, amending the *RTI Act* to include TASCAT as an alternative body for external review or having additional review by TASCAT following review by the Ombudsman;
8. If external review remains with the Ombudsman, removing the requirement for the Ombudsman to consult with public authorities on adverse preliminary decisions or legislate a time frame for response from public authorities; and
9. The *RTI Act* should be amended so its public interest test (PIT) reflects the structure in Queensland's *Right to Information Act 2009* (Qld).[16] This would include;
    a. Legislative amendment to separate the sch 1 mandatory factors into factors weighing in favour of disclosure and factors weighing against disclosure; and
    b. If the amendment to sch 1 factors was implemented, inserting a pro-disclosure bias for the PIT.

AREAS OF CONCERN & RECOMMENDED REFORMS

1) Tasmania's current RTI system lacks a pro-disclosure political and agency culture toward RTI which is undermining the pro-disclosure and accountability objectives of the *RTI Act* and system.

There is no doubt that RTI delegates are working tirelessly to release information efficiently and comprehensively. This can be seen, for example, in the fact that of 1685

[13] Department of Premier and Cabinet Tasmania, 'Right to Information Uplift Project' (Discussion Paper, No 23/18552, Department of Premier and Cabinet Tasmania, 2023) 41 ('RTI Uplift Project Discussion Paper').
[14] *EDO Report* (n 12) 37.
[15] Ibid.
[16] *Right to Information Act 2009* (Qld) – see s 44(4) and sch 4 pts 2-3.

total applications determined by government departments in the 2022/23 financial year, only 51 had internal review requests and only 40 were then referred for external review, meaning only a small proportion of applicants were dissatisfied with their outcome (2.4%).[17] Negative public perceptions of the legislation and its efficacy also no doubt impacts the ability for delegates to effectively and efficiently administer the *RTI Act*, especially where such perceptions may affect recruitment of experienced RTI delegates.[18]

However, despite the concerted efforts of RTI delegates, a common theme raised during the Commission of Inquiry into the Tasmanian Government's Responses to Child Sexual Abuse in Institutional Settings (COI) was obstructive departmental attitudes toward information disclosure, highlighting a sector-wide culture issue. [19] The Commission itself recognised the 'absence of a pro-release culture'.[20]

Concerningly, there is a notable reactive, rather than proactive implementation of RTI across Tasmania. Assessed disclosure - where an application is made under s 13 of the *RTI Act* and assessed by an authority- was intended to be, and is legislated as a last resort [21], while required and routine disclosure (not requiring application) were intended to improve accessibility of government information to the Tasmanian public. [22] Yet, in practice, assessed disclosure is being inappropriately used as the default method, reinforcing a clear reluctance by entities toward information disclosure. [23]

This reluctance is reinforced by the heavily criticised overreliance on exemption provisions under the *RTI Act.*[24] Such overreliance suggests that despite the prima facie right to information in the *RTI Act* (in s 7), in practice, authorities have replaced this with the assumption they are entitled to rely on exemptions, sustaining a propensity for non-disclosure. [25] There have also been recent illustrative examples of problematic approaches

---

[17] Department of Justice Tasmania, *Right to Information Annual Report 2022-23* (Report, February 2024) 5,7, 15, 33.
[18] 'RTI Uplift Project Discussion Paper' (n 13) 32.
[19] *Commission of Inquiry Into the Tasmanian Government's Responses to Child Sexual Abuse in Institutional Settings* (Final Report, August 2023) vol 7, ch 17, 184-5 ('*COI Report*'); Integrity Commission Tasmania, *Investigation Gatehouse: An Investigation into the Management of a Right to Information Request in the Department of Health* (Report No 1 of 2024, 22 May 2024) 20 ('*ICT Investigation Gatehouse*').
[20] *COI Report* (n 19) vol 7, ch 17, 186.
[21] *RTI Bill Second Reading Speech* (n 2) 71; *RTI Act* (n 3) s 12(3).
[22] *RTI Bill Second Reading Speech* (n 2) 70.
[23] 'RTI Uplift Project Discussion Paper' (n 13) 12.
[24] *ICT Report* (n 8) 8.
[25] Rick Snell, 'The Kiwi Paradox: A Comparison of Freedom of Information in Australia and New Zealand' (2000) 28 *Federal Law Review* 575, 591.

to RTI, such as delegates overly leveraging technicalities to avoid disclosure contrary to the spirit of the *RTI Act*.[26] The resultant tendency toward non-disclosure not only systematically inhibits citizens from being able to access information and meaningfully scrutinise and assess government actions and decisions, but in doing so, increases the information asymmetry between government and the people of Tasmania. Tasmania's current political and agency environment is not conducive to effective and efficient information disclosure and reform is required to better enable the RTI system to achieve its accountability objectives and improve democratic government in Tasmania.

The current limited formal training for RTI that is available to existing and incoming RTI delegates/decision-makers is directly linked to high rates of error in assessed disclosure, potentially only reinforcing tendencies toward obstructive disclosure practices.[27] The lack of robust formal training also causes reliance on internal, non-standardised 'passing of knowledge' processes, potentially reinforcing knowledge gaps and perpetuating any disclosure reluctant behaviour.[28]

Strong targeted training for existing and new RTI delegates is therefore very important in assisting to re-orient RTI culture and improve information release. Training which explicitly stresses the use of assessed disclosure as a last resort, and which provides detailed guidance on the use of exemption provisions, may beneficially improve delegate understandings of how to correctly apply the *RTI Act* and limit overuse of exemption provisions to avoid disclosure.[29] Ongoing professional development training will also be important to make sure decision-making reflects updated guidance from the Ombudsman and any review decisions.[30]

Legislative amendment may also be of assistance. As the EDO highlighted, the current construction of the *RTI Act's* objects clause immediately hinders the *Act's* capacity to promote accountability and thereby achieve its objects.[31] The current wording suggests reliance on individuals requesting, rather than authorities pre-emptively publishing

[26] *ICT Investigation Gatehouse* (n 19) 20-2 – this example concerned a Department of Health RTI delegate, where it was found that the delegate's personal attitudes to the RTI applicant journalist led the delegate to overly leverage technicalities in the *RTI Act* to avoid disclosure.
[27] Ombudsman Tasmania, *Annual Report 2022-23* (Report, 31 October 2023) 18, 44 ('*Ombudsman Annual Report 2022-23*').
[28] 'RTI Uplift Project Discussion Paper' (n 13) 43.
[29] *EDO Report* (n 12) 39.
[30] 'RTI Uplift Project Discussion Paper' (n 13) 41.
[31] *EDO Report* (n 12) 36.

information, perpetuating a reactive not proactive system of disclosure. [32] Also, unlike some other jurisdictions,[33] the *RTI Act* does not currently possess an explicit presumption of disclosure. Although a presumption is implied through the *Act's* objects (s 3) and the right to information in s 7, the lack of an explicit presumption creates further risks for decisions to be made under the *RTI Act* that do not align with its pro-disclosure objects.[34] Given the current tendency/bias toward non-disclosure in the *RTI Act's* implementation, the *RTI Act* would benefit from an explicit presumption of disclosure.

Reform Recommendations

To improve the current RTI culture and re-orient it toward pro-disclosure and proactive information release, the following reforms are recommended;

1. *Strong, targeted RTI training for new RTI delegates which reinforces the objects of the RTI Act and stresses the use of assessed disclosure as a last resort;*
2. *RTI training should also include detailed guidance on the use of exemption provisions in the RTI Act, to improve delegate understanding and limit overuse of exemption provisions to avoid disclosure;*
3. *Ongoing professional development training to ensure RTI decision-making reflects guidance from the Ombudsman and external review decisions, and so RTI delegates remain up to date with how to effectively apply the RTI Act and training is standardised across agencies. Tasmania could consider adopting a similar approach to Victoria by offering monthly webinars on understanding and application of the legislation,[35] or offer online e-learning modules like Queensland and Victoria have.*[36]
4. *As suggested by the EDO, amending s 3(2) of the RTI Act to emphasise the focus on the Act's objects being pursued through public authorities prioritising routine and active disclosure;[37] and*

---

[32] Ibid.
[33] See *Government Information (Public Access) Act 2009* (NSW) s 5 ('*NSW GIPA Act*'); *Qld RTI Act* (n 12) s 44(4); *Freedom of Information Act 2016* (ACT) s 9 ('*ACT FOI Act*').
[34] *COI Report* (n 19) vol 7, ch 17, 186.
[35] Office of the Victorian Information Commissioner, 'Training', *Events and Education* (Web Page, n.d.) <https://ovic.vic.gov.au/events-and-education/#training>.
[36] Office of the Victorian Information Commission, *Annual Report 2022-23* (Report, September 2023) 105-6 ('*OVIC Annual Report 2022-23*') 28-9; Office of the Information Commissioner Queensland, *Annual Report 2023-24* (Report, 12 September 2024) 24-5 ('*OICQ Annual Report 2023-24*').
[37] *EDO Report* (n 12) 37.

5. *As also suggested by the EDO, amending s 7 of the RTI Act to include a rebuttable presumption that all information sought via assessed disclosure is disclosable.*[38] *The exact wording and form the presumption takes is important, and there are options, but some examples could be;*
    a. *The EDO's suggestion of having* '*all information sought via assessed disclosure is disclosable' and this can only be rebutted where the decision maker is satisfied the information is a category of exempt information <u>and</u> it would be contrary to the public interest to disclose*;[39] *or*
    b. *Like in NSW legislation, the presumption could be expressed more broadly as something like 'there is a presumption in favour of disclosure of government information unless there is an overriding public interest against disclosure'.*[40]

2) The current oversight body for RTI, the Tasmanian Ombudsman, is unable to promote the objectives of the RTI system because it is inadequately resourced and retains a problematic external review jurisdiction;

Oversight of the *RTI Act* is currently discharged by the Ombudsman. On introduction of the *RTI Act*, some members of Parliament directly criticised use of the Ombudsman as the oversight body, arguing a separately resourced Information Commissioner would more effectively oversee and proactively promote RTI in Tasmania.[41] However, given Tasmania is a smaller jurisdiction than those who presently have Information Commissioners, use of the Ombudsman appears appropriate. It ensures more cost effective and streamlined services, rather than creating a comparatively small and separate statutory office.[42]

Although retention of the Ombudsman as the oversight body may be justified, it is currently insufficient to promote the objects of the *RTI Act* because it is inadequately resourced and retains a problematic external review jurisdiction. Previous recurrent

[38] Ibid.
[39] See *EDO Report* (n 12) at 37.
[40] See '*NSW GIPA Act*' (n 33) s 5.
[41] *RTI Bill Second Reading Speech* (n 2) 118 (Tim Morris).
[42] Ibid 71.

underfunding,[43] minimal full-time staff, and problematic applications of the *RTI Act*, have resulted in a significant backlog of external review decisions for the Ombudsman.[44]

There are sustained efforts towards addressing the external review backlog, and improving access to information for individuals exercising their rights under the *RTI Act*. This can be seen by the fact that in 2023, the Ombudsman reported a substantial reduction in historical backlogs, with the highest ever number of external review applications closed within the financial year (79).[45]

However, despite these positive outcomes and concerted efforts by dedicated RTI staff, a significant backlog of external review decisions, taking an average of one to two years to be finalised, remains.[46] This means a significant proportion of government information and decision-making remains out of the public eye, preventing individuals from being able to hold their representatives accountable and enforce their right to information. [47] The lengthy timeframes also risk exploitation by public authorities to prolong the unavailability of information such that it is irrelevant or no longer useful by the time it is eventually released.[48]

These issues are largely the result of the Ombudsman's external review jurisdiction which requires significant resources of the office. Due to the external review function, which is subject to underfunding, the Ombudsman is by necessity disproportionality investing resourcing into addressing the backlog.[49] Consequently, resources are diverted away from other important RTI functions of the Ombudsman, including the educative and agency focused role of providing training and updating and publishing guidelines and directions to assist RTI decision-makers.[50] Indeed, the Ombudsman's Manual has not been updated since 2010,[51] and no guidelines have been published since 2013, despite the legislated

[43] See, eg, Ombudsman Tasmania, *Annual Report 2016-17* (Report, 22 November 2017) 4; Ombudsman Tasmania, *Annual Report 2017-18* (Report, 26 November 2018) 3.
[44] *Ombudsman Annual Report 2022-23* (n 27) 43.
[45] Ibid.
[46] *Ombudsman Annual Report 2022-23* (n 27) 43; *EDO Report* (n 12) 27-8.
[47] *EDO Report* (n 12) 27.
[48] Stephen Easton, 'FOI laws: Fixing the chilling effect on frank advice' *The Mandarin* (Web Page, 18 June 2015) <https://www.themandarin.com.au/40043-abbott-takes-secrecy-new-heights-public-servants-care/>.
[49] *Ombudsman Annual Report 2022-23* (n 27) 44.
[50] Ibid.
[51] Ombudsman Tasmania, *Right to Information Act: Ombudsman's Manual* (Manual, July 2010) 37 ('*Ombudsman Manual*').

requirement for the Ombudsman to issue and *maintain* a manual and guidelines for operation of the *RTI Act*.[52]

The limited capacity to allocate resources to the educative function is resulting in insufficient guidance for decision-makers and directly sustaining misapplications of the *RTI Act*, evidenced by the fact the Ombudsman set aside or varied 86% of public authority decisions in 2022/23 alone.[53] Those misapplications are then notably fostering inappropriate overreliance on exemption provisions, [54] sustaining information withholding and exacerbating the inability of Tasmania's RTI system to promote its accountability objectives. In reality, the Ombudsman's current structure enables treating 'symptoms' but not the 'causes' of RTI issues in Tasmania, limiting the Ombudsman's vital function in improving implementation of the *RTI Act* for transparency and accountability in Tasmanian government.

A further problematic aspect of the external review function is that the Ombudsman must consult and seek comment from public authorities on any adverse preliminary review decision, before providing a final decision.[55] Although this was designed to provide authorities with a final chance to justify non-disclosure,[56] practically it just adds an additional step to an already lengthy review process. There is also no legislated timeframe for a response which risks further delay in finalising review decisions and prolongs unavailability of information.[57]

Clearly, the current resourcing an external review jurisdiction of the Ombudsman are significantly hindering its effective oversight and educative capacity, perpetuating limited information access in Tasmania.

Reform Recommendations

Reform to the external review jurisdiction for RTI decisions is therefore necessary to rectify these deficiencies and improve the Ombudsman's function in facilitating the

[52] This requirement is contained in s 49 of the *RTI Act* (n 3).
[53] *Ombudsman Annual Report 2022-23* (n 27) 44.
[54] *EDO Report* (n 12) 37.
[55] *RTI Act* (n 3) s 48(1)(a).
[56] *RTI Bill Second Reading Speech* (n 2) 140.
[57] *EDO Report* (n 12) 38.

accountability objectives of Tasmania's RTI system. The following reforms are recommended;

6. *Amending the RTI Act to move the external review jurisdiction for RTI decisions from the Ombudsman to the Tasmanian Civil and Administrative Tribunal ('TASCAT');*
    a. *This could be achieved by appropriate amendments to the Tasmanian Civil and Administrative Tribunal Act 2020 (Tas) creating a new RTI review stream within the General Division, with a concurrent amendment to pt 4 of the RTI Act to confer the external review jurisdiction on TASCAT*
    b. *This would reduce the Ombudsman's disproportionate focus on external reviews, enabling redirection of resourcing into RTI training and revitalising RTI materials. This would hopefully then assist in authorities being better equipped to correctly apply and implement the RTI Act to reduce the occurrence of errors in applications which are currently sustaining obstructive disclosure approaches in Tasmania.*
    c. *As a quasi-judicial administrative Tribunal, TASCAT also has the strength of independence from government, which is desirable for external merits review of RTI decisions whose respondents are government authorities and Ministers.*
    d. *It is acknowledged that TASCAT already has an expansive jurisdiction, and at least for the near future, Tribunal members hearing reviews may not be experienced in RTI issues.*[58] *However, creation of a designated RTI stream could ameliorate the impact of any experience deficit as overtime, experience would develop (if appropriately resourced).*
7. *Alternatively, amending the RTI Act to include TASCAT as an alternative body for external review or having additional review by TASCAT following review by the Ombudsman;*
    a. *The risk with this is that alternative bodies could create inconsistency in review decisions (less desirable) and an additional layer of review would not address the current resourcing issues of the Ombudsman.*

[58] John MacMillan, 'Designing an Effective FOI Oversight Body: Ombudsman or Independent Commissioner?' (Conference Paper, International Conference of Information Commissioners, 28 November 2007) 6.

Nevertheless, either option would bring Tasmania in line with other Australian jurisdictions.[59]

8. *If external review remains with the Ombudsman, then removing the current requirement to consult on adverse preliminary decisions with public authorities OR at least prescribing a response time-frame in the RTI Act*;[60]
    a. *This would remove additional potential for delays in making information available to applicants, and reduce the risk of public authorities delaying review responses to render information irrelevant or no longer useful if eventually released.*

3) The *RTI Act's* public interest test (PIT) is currently insufficient, susceptible to being misapplied in favour of non-disclosure and increasing the unavailability of information to the Tasmanian public.

A clearly articulated PIT, which appropriately balances openness and refusal, and which includes factors in favour of and against disclosure, with clearly articulated steps for application, is important for effective information disclosure legislation. Well constructed PITs, which constrain the operation of exemption provisions promote accountability by ensuring information is only withheld where there is a clearly justifiable and prevailing public interest.[61] Effective PITs force decision-makers to weigh up competing interests, and justify refusal on concrete grounds, incentivising clear and robust decision-making under information disclosure legislation.

Effective PITs need to provide both factors in favour of and against disclosure, to ensure decision-makers undertaking PIT determinations have sufficient boundaries to balance transparency against the necessity of withholding government information and are able to attribute appropriate weight to relevant factors in a given assessment. [62] PITs which do not provide both, or which overly emphasise factors favouring disclosure can actually operate to overexpose governmental activity, and inadvertently disincentivise information

[59] See, eg, *Freedom of Information Act 1982* (Vic) ss 49A, 50; *NSW GIPA Act* (n 33) ss 89, 100; *Freedom of Information Act 1991* (SA) ss 39, 40(1).
[60] See, eg, *EDO Report* (n 12) 38.
[61] Moira Paterson and Maeve McDonagh, 'Freedom of Information and the Public Interest: The Commonwealth Experience' (2017) 17(2) *Oxford University Commonwealth Law Journals* 189, 210.
[62] Moon and Adams (n 11) 37.

release as decision-makers become fearful of intense scrutiny and respond by engaging in disclosure avoidant behaviours (e.g. by communicating orally).[63]

Additionally, an effective and functional PIT should explicitly articulate the steps to be taken as part of a PIT assessment.[64] Explicitly incorporating clearly defined procedural steps, either in the legislation or guiding materials, clarifies application of the PIT. This could facilitate more accurate applications of the test, and embed a proactive disclosure approach, minimising the opportunity for any ambiguity in the PIT to be applied conveniently to preference non-disclosure.

The *RTI Act's* PIT does possess some positive characteristics, including a non-exhaustive list of factors in sch 1 of the *Act*, which does include factors weighing against disclosure as well as those supporting disclosure. [65] This therefore provides decision makers with capacity to draw conclusions on the relevance and weight of factors, providing equal opportunity to consider a case both in favour of and against disclosure and mitigating against any 'in-built imbalance' to over preference the public interest in disclosure and the potential to incentivise disclosure avoidant behaviour.[66] The Ombudsman's manual does also provide basic step-by-step guidance for applying the PIT under the *RTI Act*. [67]

However, despite these positive attributes, the PIT under the *RTI Act* is still problematic. While it does include some public interest factors which weigh against disclosure, unlike, for example, Queensland's RTI legislation, these are not specifically delineated. [68] Instead, all relevant mandatory factors are simply listed in sch 1(a)-(y) of the *RTI Act* and individual decision-makers are responsible for correctly construing whether they weigh in favour or against disclosure when making PIT assessments. [69] The Ombudsman's manual also contains limited guidance on the positive and negative focus that should be applied

[63] Ibid; Note that the Commonwealth *Freedom of Information Act 1982* (Cth) has been directly criticised for this. Moon and Adams contend that because the Commonwealth Act includes a legislated list of public interest factors supporting disclosure, but omits any list of factors supporting non-disclosure, it unduly weights the scale in favour of disclosure in all circumstances which actually, potentially, inadvertently incentivises disclosure avoidance.
[64] Information and Privacy Commission New South Wales, 'Key Features of Right to Information Legislation' (Research Paper, Information and Privacy Commission New South Wales, 15 April 2019) 7.
[65] *Ombudsman Manual* (n 51) 37.
[66] Moon and Adams (n 11) 35.
[67] *Ombudsman Manual* (n 51) 38-9.
[68] See *Qld RTI Act* (n 16) sch 4 pts 2-3.
[69] *RTI Act* (n 3) sch 1(a)-(y).

for each of the mandatory factors, with only one or two examples detailed in each case.[70] The practical effect of this lack of clarity is that the discretion in applying the PIT remains too wide, and there is potential for factors to be misconstrued and for decision-makers to inappropriately apply more factors in favour of non-disclosure.[71] For example, paragraph 1(g) of sch 1 requires consideration of whether the disclosure *would enhance* scrutiny of government administrative processes and is intended to apply as an affirmative consideration, in favour of disclosure.[72] However, there have been examples where decision-makers have incorrectly construed and applied this factor in the negative (i.e. disclosure would not enhance scrutiny), inappropriately using the lack of enhancement of scrutiny to justify non-disclosure. [73]

The impact of this current deficiency, and the potential for misconstruction and misapplication of the PIT is highlighted by statistics that indicate over 54% of review decisions on PIT exemptions set aside or varied were misapplying the PIT.[74] The fact 86% of review decisions in 2022/23 were varied or set aside by the Ombudsman, to allow some form of information access, also suggests erroneous application of PIT factors in favour of non-disclosure, limiting information access. [75] The potential for misconstruction and subsequent misapplication of the PIT also increases the probability external review will be required, which only extends the time requested information is unavailable, again potentially rendering it useless or irrelevant if eventually released.

Therefore, the current risk for decision-makers to misconstrue public interest factors allows for opportunity for inappropriate or convenient application in favour of non-disclosure.

Reform Recommendations

The PIT under the RTI Act requires revision to address the current inadequacies and its susceptibility to misconstruction and misapplication, in order to ensure it is capable of assisting the RTI Act and broader RTI system to promote its accountability and transparency objects. The following reforms are recommended;

---

[70] *Ombudsman Manual* (n 51) 37.
[71] See, eg, *Gun Control Australia Inc v Hodgman and Archer* [2019] TASSC 3, [31] ('*Gun Control*').
[72] Ibid.
[73] See, eg, *Gun Control* (n 71) [29]-[31].
[74] *EDO Report* (n 12) 26.
[75] *Ombudsman Annual Report 2022-23* (n 27) 44.

9. *The RTI Act should be amended so its public interest test (PIT) reflects the structure in Queensland's Right to Information Act 2009 (Qld).*[76]
10. *This would include, legislative amendment to separate the sch 1 mandatory factors into factors weighing in favour of disclosure and factors weighing against disclosure, and updating the Ombudsman manual to specifically outline the factors and their category;*
    a. *Separating the sch 1 factors into identifiable categories could provide more clarity for decision makers and, at least to some extent, minimise the opportunity for them to inappropriately construe some of the mandatory factors and apply them to support a case for non-disclosure.*
    b. *Decision makers under the RTI Act must still consider all relevant public interest matters in a given case, not just those listed in sch 1,*[77] *so there is still room for varied applications of the PIT based on the circumstances of a given request. This amendment would just assist in providing clarity for decision makers so they do not inappropriately construe factors to support a case for non-disclosure where they are not intended to support that.*
11. *If the amendment to the sch 1 factor was implemented, then also inserting a pro-disclosure bias for the PIT (as is the case in the Qld legislation);*
    a. *Insertion of a pro-disclosure bias would beneficially limit default to non-disclosure, but must be inserted in conjunction with the sch 1 amendment to ensure the PIT does not overly balance the discretion in favour of disclosure in all circumstances and risk disclosure avoidance.*

CONCLUSION

Despite its initial aspirations, Tasmania's RTI Act and system do not currently possess the necessary markers of a system capable of achieving its original objectives. The problematic RTI culture, deficiencies in the Ombudsman's structure and resourcing as the oversight body, and lack of clarity in the construction of the PIT have only perpetuated problematic implementations of the *RTI Act* and a propensity for non-disclosure. This has physically

[76] *Qld RTI Act* (n 16) - see s 44(4) and sch 4 pts 2-3.
[77] *RTI Act* (n 3) s 33(1)-(2).

limited the information available to scrutinise decision-making and undertake the intended accountability checks to improve democratic governance in Tasmania.

The suggested reforms detailed above, may help address the current deficiencies. These include improved training for RTI, legislative amendments to foster a pro-active, pro-disclosure culture, changes to the external review jurisdictions for RTI decisions and amendment to the *RTI Act's* PIT to reduce misapplications. Such reforms would hopefully assist to re-align Tasmania's RTI system with one capable of promoting accountability and transparency and improving democratic government in Tasmania.