Submission No 139
See 1.4.

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The Legal, Constitutional and Administrative Review Committee
Parliament House
George Street
Brisbane Qld 4000

Dear Sir/Madam

Please find attached a submission from the Whistleblowers Action Group (Qld) Inc for your review of the Freedom of Information Legislation.

Gordon Harris
President

Friday, 7 April 2000

Whistleblowers Action Group (Qld) Inc

SUBMISSION ON FREEDOM OF INFORMATION ACT

As society grows in complexity and citizens become better educated, citizens' expectations of their relationship with the State are changing and drifting away from that which our forefathers once accepted as the 'norm'. An example of this change is the impact of the Internet, which allows any citizen access to virtually as much information on any subject that they want. Gone are the days when the ordinary citizen had to rely upon the radio or read a newspaper to get an understanding of affairs affecting their community, State or Nation.

With such changes in our society, our laws must also change to keep pace with the expectations of the citizenry.

In its recent discussion paper, the Legal, Constitutional and Administrative Review Committee referred to the much quoted Fitzgerald report, in which the Committee noted Mr Fitzgerald's statement that: '*Information is the lynch-pin of the political process. Knowledge is, quite literally, power. If the public is not informed, it cannot take part in the political process with any real effect*'. [my emphasis]

Similar sentiments are reflected in the object and reasons for enactment of the Freedom of Information Act:

> **Object of Act**
> **4.** The object of this Act is to extend as far as possible the right of the community to have access to information held by Queensland government.
>
> **Reasons for enactment of Act**
> **5.(1)** Parliament recognises that, in a free and democratic society—
>
> (a) the public interest is served by promoting open discussion of public affairs and enhancing government's accountability; and
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> (b) the community should be kept informed of government's operations, including, in particular, the rules and practices followed by government in its dealings with members of the community; and

(c) members of the community should have access to information held by government in relation to their personal affairs and should be given the ways to ensure that information of that kind is accurate, complete, up-to-date and not misleading.

(2) Parliament also recognises that there are competing interests in that

the disclosure of particular information could be contrary to the public interest because its disclosure in some instances would have a prejudicial effect on—

(a) essential public interests; or

(b) the private or business affairs of members of the community in respect of whom information is collected and held by government.

(3) This Act is intended to strike a balance between those competing interests by giving members of the community a right of access to information held by government to the greatest extent possible with limited exceptions for the purpose of preventing a prejudicial effect to the public interest of a kind mentioned in subsection (2).

To sum up the basis of the Act, the Legal, Constitutional and Administrative Review Committee in their discussion paper has stated: *'the main objective of the FOI legislation is to enhance certain key principles underpinning democratic government – openness, accountability and public participation. In a healthy democracy, citizens should be able to effectively scrutinise, debate and participate in government decision-making and policy formulation in order to ensure government accountability and to make informed choices.'*

The Whistleblowers Action Group (Queensland) Inc. (WAG) endorses those sentiments unreservedly.

However, WAG is of the opinion that the legislation which is proposed does not address the basic issue of Freedom of Information access and therefore diverges from both the stated intentions of the legislation and the rhetoric which lies behind it.

An analogy can be drawn between the Queensland FOI legislation and the Hubble Space Telescope just after its launch. The problem with the telescope was that the structure was there, but the focus was completely out. The Hubble's problem was an incorrectly ground mirror. The FOI problem is more complex. But the result is the same: the ability to see (in the case of the FOI Act, to see documents and glean information) is impeded because the focus is wrong.

The words of Mr Tony Fitzgerald sum up the problem succinctly: '*If the public is not informed, it cannot take part in the political process with any real effect*'.

Think of it in this light: if the public is only partially informed, then citizens are not in a position to make reasoned decisions in relation to policy alternatives or other

choices put before them. They are not in a position to fairly assess what the Government is doing, or what it has done. This may be of great advantage to a political party, for it protects power while limiting accountability. But it flies in the face of the principles of representative democracy. Parliamentarians are elected to represent citizens, not to promote party political interests.

To highlight the relevance of Freedom of Information legislation in this context, WAG would like to provide an answer to the discussion point in question no 7: *"Is there a 'culture of secrecy' in Queensland? If so, how is this evident? What can be done to overcome any such culture?*

The answer to the question of whether there is a *'culture of secrecy'* is a resounding "Yes!"

Take, for example, section 50 of the Freedom of Information Act, which deals with exclusions. Here the citizen will find that documents are exempt if their disclosure would "infringe the privileges of Parliament".

It is worth asking exactly what the Act means on this point. At the moment, if advice received from the Queensland Information Commissioner is correct, the Parliament interprets this to mean that the disclosure of the content of any document of the parliament which has not been otherwise published would "infringe the privileges of Parliament".

One would have to ask "Why?"

Take a moment to reflect on what parliamentary privilege is. The term 'parliamentary privilege' is explained in Odgers *Australian Senate Practices* thus:

> The term "parliamentary privilege" refers to two significant aspects of the law relating to Parliament, the privileges or immunities of the Houses of the Parliament and the power of the Houses to protect the integrity of their processes. These immunities and powers are very extensive. They are deeply ingrained in the history of free institutions, which could not have survived without them. [emphasis added]

Parliamentary privilege in its application protects members of parliament from legal action (for example, defamation) by virtue of the privileges and immunities it confers. In doing so, it promotes the robust and forthright debate that a healthy democracy demands. But those "privileges and immunities" do not extend to permitting members of parliament to behave wilfully or corruptly in speech or deed, to the detriment of the citizen or the society. That is why parliamentary privilege also applies to the power of the parliament to protect the integrity of its processes. This means that the parliament itself will act to regulate and correct the behaviour of any member who abuses the "privileges and immunities" of the House by behaving wilfully or corruptly in speech or deed. There is a recent example of such action being taken within the Queensland Legislative Assembly.

But note that parliamentary privilege does not act to limit the citizen's access to the content of documents of the House. And why should it? For to limit access to the

content of documents of the parliament would be to promote the "culture of secrecy" which is referred to in question no. 7. By creating a new arm to parliamentary privilege – that of denying the citizen the right of access to documents of the parliament – the Queensland Parliament has laid the foundations for a "culture of secrecy".

Unfortunately, this knowledge comes as no surprise to the ordinary citizen. For it is merely an extension of the culture of secrecy which is fostered throughout the Queensland public sector – a culture of not investigating complaints, of getting rid of whistleblowers, of covering up for "mates".

Let me demonstrate by example the potential for corruption that is opened up by claiming parliamentary privilege as a blanket reason for denying a citizen access to the documents of parliament.

Assume for one moment that a "culture of secrecy" might operate in Queensland. And assume also that an individual or group of individuals well placed in politics or the public sector might seek to damage or discredit a citizen who had uncovered or was threatening to uncover some corruption or maladministration which those in power wished to protect.

Would a "culture of secrecy" permit a false or misleading report to be raised and tabled in Parliament to discredit the citizen? One could answer that it was possible that it might. But the astute observer would point out that "parliamentary privilege" comes into play to guard against such abuses of power. While the member of parliament may enjoy certain immunities with regard to freedom of speech, those immunities do <u>not</u> extend to protection for dishonest behaviour. "Parliamentary privilege" <u>should</u> now come into play to protect the integrity of the processes of the House: to investigate the false or misleading report, to identify and deal with the perpetrators.

But what if it does not? What of there <u>is</u> a "culture of secrecy" – a culture of not investigating, of covering up. The wronged citizen could then turn to Freedom of Information to secure the documents of parliament relating to the false or misleading report and set in process whatever mechanisms are provided in a democracy to clear his or her name.

However, the problem that the citizen would run in to in Queensland, is that he or she would immediately find that there was no right to view those documents: the citizen would be denied access because release of the documents would be deemed to "infringe the privileges of Parliament"".

To answer the question whether there is a 'culture of secrecy' in Queensland, then, one would have to say that the Freedom of Information Act as it stands does nothing to hinder such a culture.

WAG contends that those other provisions of the Act which limit disclosure on grounds of genuine legal privilege, or to genuinely protect the privacy of individuals or to protect commercial interests provide sufficient protection for information covered within the documents of Parliament. WAG recommends that the wording of

the Act should be changed to reflect this, and to ensure that the Freedom of Information Act is not promote a "culture of secrecy" in Queensland.

Gordon Harris
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Whistleblowers' Action Group (Queensland) Inc.