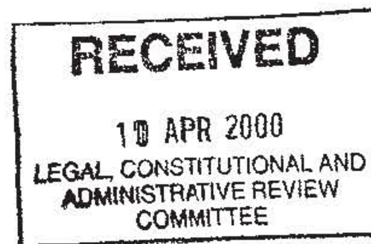

Submission No 147.

7 April 2000

The Research Director
Legal, Constitutional
and Administrative
Review Committee
Parliament House
George St;
Brisbane Qld. 4001

7 April 2000

SUBMISSION TO THE LEGAL AND CONSTITUTIONAL REVIEW COMMITTEE OF THE QUEENSLAND LEGISLATIVE ASSEMBLY

Re: Freedom of Information in Queensland – Discussion Paper No.1

From: W B Lane, Faculty of Law QUT

Discussion Points 14 & 15: Removal or variation of current exemptions.

- *Sections 36 & 37: Cabinet/Executive Council matter*

1. The Discussion Paper indicates that the Committee has already received many submissions on the Cabinet/Executive Council matter exemptions. I think this indicates that there are important reasons for the Committee to give particular attention to these two exemptions and the way they currently operate in the *Freedom of Information Act 1992 (Qld)* (FOIQ).

2. Firstly, the Cabinet/Executive Council exemptions relate to the most important executive institutions of government and for that reason alone, they occupy a place of symbolic importance in Australian FOI legislation.

3. Secondly and unlike other exemptions in the FOIQ, sections 36 and 37 have been the subject of repeated legislative change since the FOIQ was originally passed. For the most part, these changes have been ad hoc measures made in response to rulings made by the external review body under Part 5 of the FOIQ. They were all specifically designed to enlarge the protection offered by these exemptions. Some attracted considerable media

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attention and one bout of amendments in 1995 was particularly controversial because it was designed to achieve a specific result during the course of proceedings in an external review matter. This was unfortunate because it gave the impression that half way through the process of external review, the government suddenly decided it was not prepared to abide by the rules it had previously set for the determination of FOI matters. If any of the respondent government agencies in that case considered that the Information Commissioner's approach to s36 was legally incorrect, they could have sought to establish this in the usual manner by judicial review before the Supreme Court.

Section 36, the Cabinet exemption.

4. Of the two exemptions, section 36 (the 'Cabinet exemption') has attracted the most attention, so much of the following discussion relates to its operation. The commonly accepted rationale for its existence is the need to ensure that the confidentiality and unity of Cabinet decision-making is not imperilled. It existence recognises the importance in the Australian system of government of the convention of collective Ministerial responsibility.

5. As indicated earlier, the Cabinet exemption has been the subject of repeated, ad hoc and controversial legislative change since the FOIQ was originally passed. Therefore, in order to emphasise the need for reform, it is worth highlighting the history of the amendments, which have led to the current wording of section 36.

6. When the FOIQ was enacted, section 36 closely resembled its counterpart in the Cth.FOI Act and other State FOI legislation. Its wording expressed the real purpose of the exemption, namely: (i) to protect the *actual deliberations* of Cabinet, including its unpublished decisions and (ii) to protect submissions intended for Cabinet, that is, *submissions drawn up for the purpose of being considered by Cabinet*.

7. These purposes were emphasised in *Hudson v Department of the Premier Economic and Trade Development* (1993) 1 QAR 123, where the Information Commissioner ruled for the first time on the operation of section 36. The decision confirmed that in order to establish that a submission was intended for Cabinet's consideration, it had to be shown that it was created with that purpose in mind. The *Hudson* interpretation followed a thorough analysis of the authorities concerning the analogous Commonwealth FOI Act exemption and was entirely consistent with the then wording of s36.

8. However, in a series of subsequent amendments, the scope and operation of section 36 were dramatically altered. Firstly, in November 1993, the government considerably broadened the reach of the exemption by removing the need to show a purposive element in the creation of a submission to Cabinet. These amendments provide that *any* matter *actually submitted* to Cabinet for consideration is exempt, even though it was not created for that purpose. Secondly, the amendments provide that matter which has not gone to Cabinet will be exempt if a Minister has *at any time* in the past proposed to submit it to Cabinet (or Executive Council), even though that proposal has been

subsequently abandoned. Only one other Australian FOI jurisdiction - Victoria, has amended its Cabinet exemption in this manner.

9. This means that any kind of background material in a submission is protected, even though it does not reflect the view of a Minister and may already have been in the public domain (such as a Government Green Paper). These amendments had the effect of protecting information which previously might only have been protected under section 41 (the 'deliberative processes' exemption) provided that it could have been established that disclosure was contrary to the public interest. (See *Re Woodyatt and Minister for Corrective Services* (1995) 2 QAR 383.

10. Despite these amendments, there remained, for a time at least, a purposive element in section 36. A government agency relying on the exemption still had to show that the documents in question had been submitted to Cabinet *for its consideration* (the relevant and remaining words at that time). This required evidence showing that the documents had actually been prepared and placed before Cabinet *for its consideration.*

11. However, the government introduced further amendments in 1995. These amendments were passed during the course of Part 5 external review proceedings in *Re Beanland and Department of Justice and Attorney General* (1995) 3 QAR 26. They were put through the Parliament and came into effect in a 24-hour period. They removed the words *"for its consideration"* from s36(1)(a) and inserted a wide definition of *"submit"* which effectively rendered the purpose of submitting matter to Cabinet irrelevant. The amendments were also expressed to apply retrospectively which had the effect of ensuring a result against the applicant in this case.

12. The end result of this saga of amendments is that provided documents of any kind are physically and formally placed before a Cabinet meeting, they constitute documents *"submitted to Cabinet* within the meaning of the words used in the exemptions.

13. It is true that some purposive elements remain in these exemptions. For example, they protect matter *"prepared for briefing... a Minister..."* and decisions such as *Re Little and Department of Natural Resources* (1995) 3 QAR 170 and *Re Ryman and Department of Main Roads* (1995) 3 QAR 416, have ruled that these words require evidence that the "dominant purpose" in preparing such matter was to brief a Minister. In other words, it is not enough to simply show that it was one of the purposes. However, this is all that effectively remain of their original purposive elements.

14. The importance of maintaining the purposive element in the Cabinet exemption was emphasised by the Australian Law Reform Commission and the Administrative Review Council. In a joint report published in December 1995, "Open Government: A Review of the Federal Freedom of Information Act 1982" (ALRC Report No 77/ARC Report No 40) the ALRC and ARC expressed concern over rulings under the Cth. FOI Act which were said to exempt-documents submitted to Cabinet which had never been prepared for that purpose. The Report recommended that s34(1)(a) of the Commonwealth FOI Act should be re-drafted to make it abundantly clear that it applies

only to documents which were brought into existence for the purpose of submission for consideration by Cabinet. (Recommendation 46)

15. The relevance of the 1995 ALRC/ARC recommendation is that the wording of the Cabinet exemption in the Cth. FOI Act, to which it referred, had not been amended in the manner in which it has in the FOIQ. Despite that, the ARC/ALRC report still saw the need to emphasise the re-word the exemption to ensure it did not stray beyond its real purpose.

16. To summarise, the Cabinet exemption in the FOIQ was originally modelled on its counterpart in the pre-existing Commonwealth FOI Act and similar exemptions in State FOI legislation. Its purpose has always been to protect the system of Cabinet decision-making against possible prejudice by promoting the unity and secrecy of Cabinet discussions and deliberations.

17. However, as a result of the particular history of the legislative amendments outlined earlier, section 36 of the FOIQ has, in effect, become a convenient 'catch all' method for immunising any kind of government information from disclosure under the FOI Act, including purely factual information. This enables government agencies to thwart the central purpose of the Act by preventing FOI disclosure of material not otherwise protected under the remaining exemptions.

18. As well as this, the very circumstances in which the amendments were made and the manner in which they were effected leads, I think, to an unfortunate perception that the government is willing to abandon its commitment to the core philosophy of FOI whenever it suits. In that respect, the current wording of the Cabinet exemption stands as a litmus test of its commitment to FOI. If public confidence in the process of FOI is to be maintained, the Cabinet exemption must be returned to its original wording.

(a) *Recommendation:* That section 36 be re-written in its original form as enacted in the FOIQ in 1992.

Section 37: the Executive Council exemption

19. Most of what has been said above in relation to section 36 also applies to the Executive Council exemption in section 37. Its wording is more or less identical to section 36 and the series of amendments to section 36 (discussed above) were applied to section 37 in like manner.

20. However, dealing in isolation with section 37, it is worth noting that the joint ALRC/ARC report, referred to earlier (ALRC Report No 77/ARC Report No 40) recommended that the Executive Council exemption be repealed. The report noted that Executive Council documents tend to be a formal record of matters contained in other documents and to that extent, the exemption is largely superfluous, given the existence of other exemptions, especially the Cabinet exemption.

21. The Third Annual Report (1994/95) of the Queensland Information Commissioner also recommended that section 37 be repealed, or at least returned to its original wording. The report indicates that in Queensland more so than in other States, a large amount of routine administrative decision-making affecting individuals (information about which they should be entitled to) is reposed in the Executive Council. It argues (at paragraphs 3.45 to 3.49) that the current wording of the Executive Council exemption is too expansive and allows for the same abuse as that possible under the current wording of the Cabinet exemption. In my view, the Information Commissioner's recommendations should be adopted.

***Recommendation:* That section 37 be either (i) repealed or (ii) re-written in its original form as enacted in 1992.**

Discussion Points 39 and 40: The model of external review and whether the same person should hold both offices

- *The model of external review*

22. The mechanism established under the FOIQ for external review of decisions, which is similar to that found in Western Australia, is the most notable departure from the Commonwealth FOI model. This idea was to avoid the use of judicial or quasi-judicial (tribunal) review (or a mix of Ombudsman and tribunal review) in favour of a more flexible method which encompasses negotiation and mediation as part of the resolution process.

23. The current model of external review under the FOIQ should be retained, especially given the absence of any current plans to establish a general administrative tribunal in Queensland, like the Commonwealth Administrative Appeals Tribunal. In any event, the operation of the ICQ office since the commencement of the FOIQ vindicates EARC's view that unlike adversarial models associated with courts and tribunals, this mechanism offers a less expensive and intimidating forum for applicants and a more flexible method of resolving disputes over access to documents. It combines mediation and dispute resolution on the one hand with authoritative decision-making on the other.

24. The operation of key provisions of Part 5 of the FOIQ have enabled the Information Commissioner to obtain the documents in issue from the agency or Minister at the start of external review (s76) to confine and identify the issues in dispute and to obtain agreement and concessions from parties. They have also been used to assist an agency to reach a possible settlement outside the terms of the FOI Act. (See eg. *Re Doelle and Legal Aid Office* (1993) 1 QAR 207.)

Recommendation: **That the present model of external review under the FOIQ be retained.**

- ***Whether the same person should hold the offices of Information Commissioner and Ombudsman.***

25. This current situation was never meant to be a permanent solution to the appointment of the Information Commissioner under the FOIQ. Whilst the situation has functioned without any real difficulty, the FOIQ establishes a separate and independent regime for FOI and it is important that the office of Information Commissioner be seen to be truly independent.

Recommendation: **That different persons be appointed to the offices of Information Commissioner and Ombudsman.**

Discussion Points 41 & 42: Less 'legalistic' and time consuming external review; an agency to oversee the operation of the FOIQ and an obligation for ICQ to publish all decisions

26. One of the fundamental reasons for the creation of non-judicial merits review bodies in the system of administrative law is to provide a cheap, expeditious and informal method of reviewing administrative decisions. It is in this context that criticism about the lengthy and legalistic approach of the ICQ's decision-making process must be considered.

27. However, it is important to keep in mind that issues about 'excessive legalism' and 'taking too long' are inter-related with other issues such as adequate resourcing and the ICQ's duty to provide authoritative guidance on the operation of the FOIQ. The interplay of these issues raises a difficult balancing exercise, namely how to ensure an informal, expeditious method of external review without sacrificing the need for authoritative, reasoned decisions, especially given the intrinsically technical nature of many of the exemptions and the 'harm to others' and public interest tests which many exemptions employ.

Is the ICQ excessively legalistic?

28. There is no doubt that many of reported decisions and reasons of the ICQ contain lengthy and detailed legal analyses and it is easy to criticise them as too 'law oriented.'

29. However, it is important not to lose sight of the fact that this is a criticism principally aimed at the publicly reported decisions of the ICQ. It should not be forgotten that the ICQ also resolves external review matters informally and may make what are referred

to as 'paper' decisions, which are not publicly reported because they are not considered to raise important issues requiring any exploration.

30. With this distinction in mind, it is important to realise that the reported decisions serve the specific purpose of explaining the operation of key FOIQ provisions and settling the manner in which they are to be interpreted. There is no doubt that some of them contain exceedingly lengthy tracts of legal analysis. However, this appears to be more a feature of reported decisions in the early years of operation of the ICQ when it was important to build a body of 'leading cases.' Certainly, in my capacity as editor of the Queensland Administrative Reports, it is noticeable that the more recent published decisions constitute, for the most part, succinct applications of the pre-existing principles established in the 'foundation' cases.

31. Viewed in context, the reported decisions of the ICQ constitute an informative and thoroughly researched body of 'case law' concerning the interpretation and operation of the FOIQ in Queensland. They serve as a benchmark for FOI external review bodies in other jurisdictions and in my view, they have effectively elevated the stature and importance of FOI as an administrative law remedy.

32. As indicated earlier, the 'too legalistic criticism' is inter-related with other issues such as time limits on decision-making and resources. The 'time limits' issue is addressed separately later. For the moment, any specific isolated measures taken to curb or prevent the so-called 'legalistic' approach of the ICQ in reported decisions would be misconceived.

***Recommendation:* That no specific measures be taken in relation to the content or style of the formal decision-making processes of the ICQ as part of any aim of restricting or preventing a 'legalistic' approach.**

Discussion Points 43 & 44: Time limits on external review

33. As indicated earlier, a reason for the existence of non-judicial merits review bodies is to provide expeditious and informal decision-making. However, the question of time limits for decision-making by the Information Commissioner ICQ is not a straightforward issue. As indicated earlier, it is inter-related with resources. As well as this and as the Discussion Paper points out, although some Australian FOI jurisdictions impose time limits for external review decisions in FOI, care must be taken in comparing the various external review bodies.

34. There are a number of arguments against imposing time limits. It may place undue pressure on government agencies required to respond to requests from the ICQ to search and collect additional material and prepare appropriate submissions. It may also cause hasty and ill-conceived decisions, thus leading to a diminution in the overall

performance and quality of the ICQ's decision-making. This last reason depends on the current and predicted workload of the ICQ and the level of resources available to that office.

35. The arguments in favour of imposing time limits begin of course with the right of FOI applicants to have their requests resolved promptly, especially where they relate to documents concerning the applicant's personal affairs.

36. Another argument in favour of time limits stems from the fact that with some exemptions more than others, the time taken in resolving a request may be a critical factor in their effective operation in the overall scheme of FOI. This is because the nature of requested information can change substantially, even in a relatively short period of time and delay in finalising a review may render the original purpose of the request meaningless.

37. This is especially so in relation to the ICQ because the question for the ICQ on external review is not whether the documents contained exempt matter at the date of the FOI access request but whether or not they contain exempt matter at the date of the ICQ's decision.

38. Cases relating to FOIQ requests involving 'third party information' of a commercially sensitive nature are a good example of this problem. The information in the requested documents may have particular importance for the FOI applicant at the time of lodging the access request but that importance may be lost because of delay in finalising the external review.

39. For example, in *Re McPhillimy and Queensland Treasury and Gold Coast Motor Events Co* (1996) 3 QAR 287, the applicant sought FOI access to documents concerning a government tender process. His business had originally been awarded the contract but a dispute arose whereupon the contract was terminated and the tender awarded to another party, giving rise to litigation. The central issue in his FOI request was whether or not disclosure of relevant matter would disclose and could reasonably be expected to destroy the commercial value of that information for others. In accordance with FOIQ requirements, that meant consulting with parties who might be affected, in this case, the other tenderers. Objections were raised by a company, which had been appointed by the government as a sponsor of the event, together with two of the security firms, which had participated in the tender process.

40. However, a period of over two years elapsed between the date of lodgment of the application for external review (16 May 1994) and the decision of the ICQ (28 June 1996). Almost 19 months after the commencement of external review, the two security firms that had originally objected to disclosure were again contacted by the ICQ but this time, each advised that they no longer held any such objections.

41. The ICQ then reached a decision that the relevant matter was not exempt under s 45 of the FOIQ. The reasons accompanying the decision expressly state that the time lapse

involved since the documents in question were prepared meant that they no longer had any commercial value, as evidenced by the fact that the two security firms no longer objected to their disclosure. In other words, the time lapse became a critical and substantive factor in determining whether or not the documents fell within the exemptions raised.

42. As indicated earlier, the Discussion Paper has acknowledged that care must be taken when comparing external review bodies across FOI jurisdictions in relation to the time taken for external review. It also notes that there have been criticisms that the process of external review by the ICQ, especially in the preparation and publishing of recorded decisions is unduly technical or legalistic.

43. However, it is important not to lose sight of what appears to have been the high demand for external review in the early years of operation of the ICQ which, the ICQ states, had to be addressed by an Office which was not adequately resourced.

44. As well as this and as discussed in the preceding section of this submission, the ICQ has outlined the need felt in the early years of operation of the office to produce leading cases, dealing in detail with the interpretation of key provisions.

45. It is recommended that a discretionary time limit be introduced for decision making on external review by the ICQ, similar to that found in the Western Australia model whereby the legislation confers on the ICQ a discretion to extend the time period within which a decision must be reached where the circumstances warrant this. The discretion could be controlled in such a way as to require the ICQ to take into account (a) the practicality of reaching a decision within the initially specified time period, (b) the likelihood of any prejudice to an applicant in extending the period.

Recommendation: **(a) That consideration be given to imposing a discretionary time limit on the ICQ in reaching decisions on external review under Part 5 of the FOIQ. (b) That consideration be given to guiding or controlling the discretion in such a way as to require the ICQ to take account of factors such as (i) whether it is practicable to make a decision within the specified time period, having regard to the complexity of issues and the likelihood of prejudice to one or more of the parties and (ii) the likelihood of any prejudice to an applicant in extending the period.**

Discussion Points 57 & 58: 'frivolous and vexatious' and serial applications

46. Some of the reported decisions of the ICQ in the QARs make it abundantly clear that the lack of any mechanism in the FOIQ for dealing with frivolous or vexatious requests has been a major hindrance to some agencies.

47. No doubt, the unwillingness of reform bodies in early years to propose such a measure was borne out of a desire to avoid any diminution of a basic principle of FOI, that access is 'to the world at large' and is not dependant on the FOI applicant proving any special interest in the requested documents.

48. However, with the benefit of hindsight, it is now obvious that if this omission is not addressed, it will threaten the effectiveness of the FOI regime and the level of acceptance and support it receives at an agency level.

49. The most significant problem appears to stem from 'serial requests' where an applicant makes one application after another, often for the same documents. The 'voluminous request' provisions of s28 of the FOIQ offer no solution because unless the agency can show that each individual application constitutes a 'voluminous request' under s28(2) of the FOIQ, it is obliged by the legislation to deal with each application.

50. The problem can be approached in two ways. One method is to provide agencies with the capacity to seek a determination from the ICQ, which entitles the agency to refuse to deal with a particular application, provided that certain matters are established. This approach is taken in British Columbia – see s43 of the *Freedom of Information and Protection of Privacy Act* (RSBC 1996 c.165). The other approach is to provide that an FOI access application cannot be made where a previous application of the same kind is currently being processed by an agency or is on external review under Part 5 of the FOIQ.

***Recommendation:* That the FOIQ be amended by providing agencies and Ministers with a statutory power to refuse to deal with frivolous or vexatious requests by either: (a) enabling agencies and Ministers to seek a determination from the ICQ which entitles them to refuse to deal with a particular application, where the ICQ is satisfied that the request is unreasonably repetitive, frivolous or vexatious. (b) providing that an FOI access application cannot be made where a previous application of the same kind is currently being processed by an agency or is on external review under Part 5 of the FOIQ.**

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