The President
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Submission No 160
Spec 1.4

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The Research Director
Legal, Constitutional and Administrative Review Committee
Parliament House
George Street
BRISBANE 4000

Dear Madam

Review of the Freedom of Information Act 1992 (QLD)
Discussion Paper No. 1

Once again the Council welcomes the opportunity to participate in this important review of the *"Freedom Of Information Act"*.

We will go through each point in the discussion paper separately and comment as necessary.

Point 1

The Council is somewhat perplexed by the continuing assertion of an incompatibility between the Westminster system of Government and Freedom of Information Legislation.

The "Westminster" system of Government is not some Holy Grail. In fact, as Will Hutton passionately and convincingly argues in his book "The State We're In" there are many problems at the very heart of the Westminster system of Government, the mother parliament itself.

More importantly FOI legislation is designed to deal with what is plainly one of the great faults of the Westminster system of Government, namely its obsession with secrecy. In so far as the opponents of FOI legislation are arguing the concept is inconsistent with cabinet government, which does rely on its secrecy, the proof of the pudding seems to lie in the

eating. Freedom of Information Legislation has now been in place in this country at a federal level for over 15 years and for approximately a decade in many Australian states, New Zealand and Canada. In none of those jurisdictions do we see the cabinet system breaking down. This experience shows that it is quite possible to isolate cabinet from FOI and maintain the cabinet system of government.

Points 2-6

The Council repeats its original submission that a provision should be inserted in the Act requiring it to be interpreted so as to further the aims and objects of the Act and further that if there is any discretion conferred by the Act it must be exercised as far as possible to facilitate and promote the disclosure of information promptly and at the lowest reasonable cost.

Points 7-8

The writer's personal experience from working in the Commonwealth Government as a legal officer is that most public servants forget that there is provision such as Section 14 of the FOI Act Queensland.

Alternatively, when this is pointed out to them, many officers prefer to process an application for information through the Freedom of Information Act process in order to obtain the protection of the Commonwealth equivalent of Section 102 of the Act.

It is clear therefore as the Council submitted on page 11 of its previous submission that one of the most important steps to facilitate greater access to information would be to extend the operation of Section 102 to any officer exercising a delegation under Section 33 who releases a document other than under the FOI Act provided the document would not have been exempt had it been requested under the FOI Act.

The Council whole - heartedly endorses the concept of agencies being required to make copies of their most recent statement of affairs and of their policy documents available for inspection and purchase by members of the community. The Council also endorses the proposition that the range of "policy documents" should include an indexed register of non-personal information released in response to FOI requests which would allow the entire public benefit from the disclosure.

Equally, the posting of that information on the internet would be particularly valuable.

Points 9 - 10

It is the writer's experience that not only is the statement of affairs little known to the public its contents and importance is little appreciated within the public service itself. Once again, that is based on Commonwealth experience.

Certainly, steps need to be taken to publicise FOI and in particular the statements of affairs more widely.

We do feel that it would be useful to have a body whose specific role was to promote FOI. This body would not have the apparent conflict of interest which quite often develops between Public Servants working in individual departments, considering FOI requests and the need to promote FOI.

Such a body could give detailed consideration to the practicalities of promoting access through public libraries and on line.

Point 11

The Council would support performance agreements of senior public servants including provisions making them responsible for ensuring efficient and effective freedom of information practices.

Point 12

The Council would agree with Rick Snell and Paula Walker that an important symbolic change would be achieved by altering the title of the Act to the *Access to Information Act*.

Point 13

The Council would support the inclusion as a "Fundamental Legislative Principal" in the *Legislative Standards Act 1992* of the "Right to Access Government held Information".

Points 14-15

The Council has nothing to add here beyond what it said in its previous submission and says elsewhere in this submission.

Points 16-18

At this stage the Council is not convinced that there is particular need to rationalise the existing harm tests.

We would submit that a substantial harm test should be applied to Sections 40, 45, and 46(1)(b).

Points 19-22

The Council has nothing to add on this point to what it said in its previous submission.

Points 23-24

The Council considers that the decision to exclude an agency from the operation of the FOI Act should only be taken after full parliamentary scrutiny. Therefore, it should be impossible to exclude an agency from the operation of the Act except by legislation.

As set out in our original submission the Council docs consider that the Act should be extended to private sector bodies contracted to perform functions formally carried out by the Government or in receipt of Government funds.

Points 25-28

As Geoff Airo-Farulla argued recently his article entitled "Politics and Markets - What are they good for?" (1999) 8 1 GLR 1 at page 24:

> "The greater use of market - like processes can be another mechanism of government learning, opening up new feedback mechanisms and increasing the information available to government. However, they are inadequate feedback mechanisms on their own, just as structure of representative and responsible government are inadequate on their own. The danger is that many existing administrative law mechanisms will be closed down on the assumption that they can be replaced by market processes. However, making government learn better requires "increasing" feedback to government not simply replacing one partial mechanism with another. A clear challenge for administrative

lawyers in the 21st Century will be to ensure that administrative law's traditional values of participation and accountability remain part of new, market like techniques of government".

The Council argues that FOI should apply to government business enterprises due to their connection with government and consequently their need for some degree of accountability to the public, with only documents relating to their competitive commercial activities being exempt. As is pointed out by the Information Commission (Queensland) a specific exemption appears unnecessary to achieve this end.

Points 29-30

The Council has nothing to add to its previous submission on this issue.

Points 31-32

The Council contends that two amendments, proposed elsewhere, should effectively address concerns about the use of the commercial in confidence exemptions: (i) alter Section 45(1)(b) and (c) to provide for a "substantial harm" test and (ii) the introduction of a power in the Information Commissioner to release exempt documents where it would be in the public interest.

Point 33

The Council takes the view that it would be unreasonable to expect agencies to create new documents. Therefore subject to its comment on point 34, the Council considers it remains appropriate for the FOI regime to grant access to documents rather than information.

Point 34

As noted in its previous submission the Council agrees that the Queensland Act should be amended take into account the recommendation of the ALRC/ARC in relation to data.

Point 35-36

The Council has no particular remarks to make on this issue.

Point 37

The Council would oppose any narrowing of the definition of the term "document of an agency". This follows from the position that we have already taken that FOI should continue to apply to government business enterprises and private sector organisations carrying out Government Services under Contract. The narrowing of the definition of the term "document of an agency" would only serve to facilitate the contraction of FOI's scope. So far as costs are concerned, we can only repeat the remarks made previously that the cost of FOI is a cost of democracy.

Point 38

The Council is in agreement with the proposal of the Information Commissioner (Western Australia) that the Information Commissioner should be given a generous discretion to accept complaints without internal review occurring.

Points 39-40

Council sees no reason to change the present review arrangements.

Discussion Points 41 - 42

The Council does not believe there is any merit in the contention that the approach of the Ombudsman is excessively legalistic. The Council agrees with the submission that in certain circumstances a "legalistic" approach is unavoidable and in fact desirable particularly as an educational tool for administrators.

The Council does see some merit in the Information Commissioner publishing all decisions with the most important ones being published full and the others in summary form only.

Points 43-44

The Council would support imposing time limits on reviews by the Commissioner. The main merit of this proposal being that it is likely to encourage office efficiency and a more client focused approach.

The Council would support the Commissioner being given the power to extend the time for review once only for a maximum period equivalent to the initial period for review.

Points 45-47

The Commissioner should be able to enter the premises of agencies and in inspect those premises in order to satisfy itself that the documents do not and never have existed.

The Council would object to the Commissioner being granted a power to punish for contempt. Surely this is a matter that can be dealt with by Internal Departmental Disciplinary Procedures or if necessary the Criminal Justice Commission. If such a power is to be given it should be dealt with by a Court on reference or complaint from the Commissioner.

In its original submission the Council has already indicated its support for granting to the Commissioner the power to order the disclosure of otherwise exempt matter in the public interest.

In addition, the Council repeats its support for the abolition of conclusive certificates.

Points 48-52

The Council can only reiterate its strenuous opposition to any amendment that would result in an increase in the fees presently payable.

Points 53-54

The Council is opposed to the introduction of any fees for internal and external reviews.

In particular, it can see no reasonable justification for a fee on an internal review given that an internal review does nothing more than give the Department an opportunity to fix an error.

Certainly, if an external review fee is to be imposed then:

1. It should not apply to personal information, which would be in line with the existing fee charging structure.
2. It certainly should not be any more than $50.00.
3. The Commissioner should have power to waive the fee where the applicant is in poor financial circumstances.
4. Any fee actually paid should be refundable where the applicant is wholly or partially successful.
5. It should not be applied to cases of deemed refusal as an incentive for departments to make decisions within the appropriate period of time.

Points 55-58

In its original submission the Council argued that these changes to the Act could be sufficient to deal with vexatious applications:

1. Deleting the word "only" from Section 28(2) of the Act.
2. Amending the Act to provide that agencies may refuse to process a repeat request for the material to which the applicant has already been refused access provided there are no reasonable grounds for the request being made again.
3. Amending the Act to provide that agencies should also be able to refuse a request for access to documents which have in fact already been provided.

In addition, the Council supports the suggestions that the Act be amended to require an agency to consult in the case of voluminous requests:

1. Firstly with the applicant in an attempt to narrow the request and
2. If this fails to consult with the Information Commissioner before refusing to process a voluminous application.

As we said in our earlier submission the Council does have some sympathy with the concerns of Departments about vexatious requests but suggests that this model should be attempted before a broader power is granted.

Point 59

The Council considers that there should be an entity responsible for:

(a) Ensuring the timely, accurate and consistent reporting of data.
(b) Undertaking a meaningful analysis of that data and

(c) Ensuring, that as a result of that analysis appropriate remedial action is taken.

Points 60 - 66

The Council has nothing to add on the question of whether time limits should be reduced to what was contained in its original submission.

On the other issues raised in the discussion paper the Council offers these comments:

1. It would be useful if provision was made for agencies and applicants to agree to extend response times subject to a partial or interim decision within the prescribed time limits on as many documents as possible.

2. As noted in our previous submission the Council is of the opinion that a failure to make a decision within the prescribed time limits should result in deemed access.

3. We would agree that in order to facilitate the speedier processing of applications that Section 27 should be redrafted to provide that an agency or Minister must decide an application and notify the applicant "as soon as is reasonably practicable", but, in any case, within relevant time limits.

Point 67

Perhaps the committee should consider a half-way house under which the time limit for considering an internal review remains the same but an amendment is made to allow the agency or Minister and applicant to agree to an extension of time.

Point 68

The Council would oppose reducing the period for lodging an application for external review.

Point 69

The Council in it original submission stated its opposition to the proposed amendment and does not see any reason to change its opinion.

The Council refers the Committee to an article by Mr Mick Batskos entitled "Recent Developments in Freedom of Information in Victoria" 20 AIAL Forum 22 which catalogues a number of deficiencies in the conduct of the Frankston Hospital, the decision which led to this issue becoming one of major public concern. Mr Batskos notes in particular the absence of consultation with the nurses which probably would have been required by section 51 of the Queensland Act. Whilst not ensuring non-disclosure the availability of such a procedure would have ensured that all matters were ventilated.

By way of additional remark we can only concur with those submitters who have pointed out the practical difficulties of placing limitations on the use to which documents released under FOI can be put.

Points 70 and 71

We consider that the balancing act provided for in the Act is appropriate. Once again the changes proposed risk violating the principle that disclosure under the Act is to the world at large.

Points 72 and 73

In its previous submission the Council agreed with the ALRC/ARC that releasing information to specified persons subject to conditions would be highly problematic. The Council remains of that view.

In its previous submission that Council did state its feeling that the proposal that the existence of a special relationship between the applicant and a third party be identified as a factor which decision-makers could take into account in weighing the public interest was worthy of consideration. The Council remains of that opinion.

Points 74 and 75

We confer with the submissions which argue that there should be an entity responsible for:
(a) monitoring compliance of the Act; and
(b) providing advice about and ensuring a high level of Agency and community awareness of the FOI Act.

We do agree with the concerns of the Information Commissioner (Queensland) that to assign that function to his office would be to create the perception of a conflict of interest. This function could perhaps be assigned to the Ombudsman if the functions of the Information Commissioner were assigned to a person other than the Ombudsman.

Yours Faithfully,

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26/04/00