Submission of the Information Commissioner

in response to the Legal, Constitutional and Administrative Review Committee's

Discussion Paper No. 1 - Freedom of Information in Queensland

Part A - My comments on the topics specifically raised in the Committee's letter to me dated 5 May 2000.

A1. FOI purposes and principles (DP 1)

Compatibility with Westminster system

FOI legislation involves some minor modification of the Westminster system. There is nothing wrong with that. The Westminster system is not static. It has changed and developed over hundreds of years, in a similar way to the common law which has been developed by the courts over that time. Indeed, significant differences have evolved as between the different jurisdictions which have adopted the Westminster system, as would be apparent to any political scientist who undertook a comparative study of how national government operates in, say, Canberra, Wellington and Ottawa. Yet all those governments have embraced FOI legislation, as have governments whose organisational principles (especially with respect to Ministerial responsibility) are markedly different - such as federal and state governments in the United States of America. The reason for this is that the objects of FOI legislation are so fundamentally compatible with, and supportive of, the basic principles and objects of any system of government based on representative democracy (see, generally, the comments I made at paragraphs A1-A15 of my first submission).

There is no justification for taking a snapshot of the Westminster system as it was 10, 50 or 100 years ago and saying that that is the system which cannot be changed, even in the slightest respect. One of the greatest strengths of the Westminster system is that it can adapt and develop over time. The modification of Westminster principles was recognised and discussed at some length by the Commonwealth Senate Standing Committee on Legal and Constitutional Affairs in its major reports on FOI legislation (1979 and 1987). The FOI Act has no significant effect on the principle of collective ministerial responsibility. That is afforded protection by the s.36 Cabinet exemption. The FOI Act is of some significance in terms of individual ministerial responsibility - the concept that the Minister is responsible for his or her department, and that public servants are shielded from criticism. However, I suggest that the anonymity of public servants is a concept which is out-of-date in the general political and social climate today (and out-of-step with the rise of consumerism which demands accountability for service delivery even in respect of government services), and that its modification by the FOI Act is merely a reflection of that societal change. The Senate Standing Committee suggested that FOI was likely to "*give a new vigour and meaning to the concept*" of individual ministerial responsibility.

Use of the FOI Act for purposes related to litigation

While I am not aware of statistical trends at primary decision-making levels, the number of cases proceeding to external review in which the applicant seeks information under the FOI Act for use in litigation has been statistically insignificant: see Information Commissioner's 7th Annual Report (1998/99) at pp.15-16. Generally speaking, the use of curial procedures (discovery, subpoenas, *et cetera*) to obtain access to information relevant to the issues in dispute in litigation may be more expensive, but is ordinarily faster and more effective than use of the FOI Act (not least because the grounds for withholding production of relevant documents to a court are considerably narrower than the grounds for withholding information under the FOI Act). That is probably why the OIC receives few such cases at external review level.

I have no conceptual difficulty with a citizen making use of a general statutory right to access government information (that has been conferred without any test of standing), to obtain information for use in litigation: see *Re Willsford and Brisbane City council* (1996) 3 QAR 368, *Re Hobden and Ipswich City Council* (1998) 4 QAR 404. Nor do the courts: see *Johnson Tiles Pty Ltd v Esso Australia Ltd* [2000] FCA; *Sobh v Police Force of Victoria* [1994] 1 VR 41.

Particular reference was made in the Committee's letter to me dated 5 May 2000 to s.134A of the *Evidence Act 1977* Qld. Section 134A affords a simplified procedure for a litigant to obtain third party discovery from a government agency. It is only available for use by a person who is "a party to a civil proceeding". Its aims are linked to the aims of discovery (i.e., ensuring that litigation is conducted, and disputes are adjudicated by the courts, in light of the availability of all relevant evidence) and not to the aims of the FOI Act. There is no merit in attempting to make the FOI Act and s.134A consistent.

If the purpose of raising this general issue is to endeavour to steer litigants toward the use of s.134A of the *Evidence Act*, rather than use of the FOI Act, to obtain access to information from government agencies, then it may be possible to do so by amending s.22 of the FOI Act to add a new paragraph (f) as follows:

> ***22***. *An agency or Minister may refuse access under this Act to—*
>
> ...
>
> *(f)* *a document that would be available to the particular access applicant pursuant to an application made to the agency or Minister under s.134A of the* Evidence Act 1977*, provided that the particular access applicant is entitled to make such an application under s.134A of the* Evidence Act 1977.

The suggested proviso is necessary because the entitlement to use s.134A of the *Evidence Act* arises only when a person becomes a party to a civil proceeding (i.e., s.134A is not available for seeking discovery of documents prior to the commencement of proceedings, and a prospective litigant who wishes to seek relevant information from a government agency at that time can only seek a court order, or make use of the FOI Act) and ceases when the person ceases to be a party to a civil proceeding.

It would not be difficult to circumvent the proposed provision by a litigant arranging for another person to apply for access under the FOI Act to the documents which the litigant seeks, although that course of action may have some shortcomings in that the litigant might be able to demonstrate a public interest in disclosure to him or her (see *Re Willsford*) which the surrogate applicant could not. Some of the practical considerations detailed below would also bear on the issue of whether the provision suggested above would be a worthwhile amendment to the FOI Act.

I am uncertain whether the parliamentary committee is seeking to canvas a broader issue as to whether the availability of discovery processes (including s.134A of the *Evidence Act*) should be a basis for refusal of an FOI access application.

In *Re The Director-General, Department of Families, Youth and Community Care and Department of Education and Ors; Perriman (Third party)* (1997) 3 QAR 459, I said (at p.464, paragraph 19):

> *The applicant also pointed to the existence of other "accountability mechanisms", such as recourse to the Ombudsman, the Criminal Justice Commission, local elected representatives, the Minister, and the courts under the* Judicial Review Act 1991 *Qld or*

> *the common law. The applicant submits that "the determination is whether these mechanisms are insufficient to ensure the accountability of the Department of Education." I do not accept that the existence of other accountability mechanisms can be used as a basis for any significant diminution of the public interest in disclosure of information under the FOI Act in order to promote the accountability of government agencies. The FOI Act was intended to enhance the accountability of government (among other key objects) by allowing any interested member of the community to obtain access to information held by government (subject to the exceptions and exemptions provided for in the FOI Act itself). The FOI Act was not introduced to act as an accountability measure of last resort, when other avenues of accountability are inadequate. The FOI Act gives a right to members of the community which is in addition to, and not an alternative for, other existing rights. Indeed, applications are frequently made under the FOI Act to enable members of the community to arm themselves with the information necessary to afford a meaningful opportunity to pursue some of the other accountability mechanisms referred to by the applicant.*

I do not believe it is fair, or practical, to deny to a person the use of a general right conferred on all members of the community by s.21 of the FOI Act, merely because the person has, or might if he/she started legal proceedings have, an alternative means of obtaining information through discovery processes (albeit an expensive one, which would permit use of the information obtained only for the purposes of the particular litigation). The practical issues which arise are:

- an agency decision-maker would have to decide for what purpose the information was sought - applicants could hardly be expected to admit to a purpose that limited their options;
- the difficulties faced by a person in a situation where the possibility of litigation is being investigated but no action has commenced - in such a case, the options for obtaining relevant information would be limited and expensive (it would be necessary to seek a court order, since the use of s.134A of the *Evidence Act* would not be available), if use of the FOI Act were denied;
- what would happen if the documents were sought for two purposes, one of which was litigation. Discovery would only allow use for the purpose of the particular litigation - use for any other purpose could be a contempt of court;
- discovery processes are limited to disclosure of documents relevant to the disputed issues in a particular action - would an agency decision-maker have to distinguish between documents that would be available under discovery rules, and those that would only be available under the FOI Act, by applying the standard legal test of whether a document is relevant to the issues in dispute in a particular legal proceeding (which would require knowledge of those issues, and the making of a legal judgment), thereby adding significant complications to the process of dealing with FOI access applications within agencies.

These practical problems raise considerable doubt that excluding documents that are, or might be, available by discovery would lead to any resource-savings to agencies.

A2. The Act's objects clause (DP 2)

In my first submission (paragraphs B1 - B4), I identified some of the limitations of s.4 and s.5 as follows:

- Important rights conferred by Part 4 of the FOI Act (e.g., amendment of personal information) are omitted;
- The reasons for the enactment of the FOI Act (s.5) are separated from the objects clause (s.4), which may result in uncertainty in interpreting provisions of the Act;

- Section 4, as an objects clause, is too general to ascertain with any specificity the purpose of the Act;
- Fundamental principles of FOI are omitted, for example, explicit references to the democratic imperative of open government, accountability of public officers, and the promotion of public participation in the processes of government.

An objects clause is the Parliament's statement of how it intends the legislation to operate. In Queensland, s.14A of the *Acts Interpretation Act* 1954 requires that the preferred interpretation of any provision is the interpretation that will best achieve the purpose of the Act in question.

Rather than s.4, in its current brief form, producing clarity, it is, in my view, too general to be of very much assistance in ascertaining the purpose of the FOI Act. The amendments to s.4 and s.5 that I recommended at paragraph B4 of my first submission create a direct connection between s.4 and s.5, so that objects are identified in s.4 and the mechanisms by which those objects are to be achieved are set down in s.5 of the Act.

In my view, an **expanded statement of objects** would result in:

- improved community understanding of the Act;
- more certain guidance in interpreting other provisions of the Act;
- recognition of the right to seek amendment of information, as well as the right to seek access to documents; and
- explicit reference to, and recognition of, fundamental principles such as the promotion of public participation, the accountability of public officials, and the democratic imperative of open government.

A3. Reversing the FOI concept (DP 8)

Concept generally

I am generally supportive of the idea of making further information available, either by publication or by administrative access schemes that provide information on demand. In my experience, a number of agencies have developed administrative access schemes which give a high level of access to particular categories of documents, on demand by a particular individual seeking access to documents relating to that individual. (However, where access to a document or information would be refused under an administrative access scheme, the usual agency practice is to deal with the access request under the FOI Act, so that the applicant has the right to pursue the avenues of appeal available under the FOI Act, in respect of the withholding of information. Consequently, such schemes are of benefit for getting information into the hands of information-requesters more quickly where there is no dispute over access. But they do not lead to any reduction in disputes over information which the relevant agency believes should be withheld from access.) Publication of information has been more limited, except in a number of user-pays areas.

I am confident that there is a considerable range of information that agencies could make public, either free of charge or for an appropriate fee. The potential for publication at a reasonable cost has been greatly enhanced by the advent of the Internet, and the possibilities will no doubt continue to expand. The simplest type of information to be placed on the Internet would no doubt be information of general interest to members of the public. However, there is already considerable scope for placing information about individuals on the Internet in such a way that only the relevant individual can access it. This already occurs in terms of Internet banking, Internet provider accounts themselves, and, I believe, tertiary entrance data for year 12 students. There is potential,

for example, to one day have high school student records available over the Internet on provision of an appropriate password and/or identification number.

Notwithstanding my comments above, I consider that, for the great majority of public records, it will never be logical or cost effective to publish them. The everyday workings of government in Queensland produces a staggering amount of documents, most of which will rarely be of interest to any but one or two members of the public. It is necessary to maintain provision for access on demand (either under FOI or by some other means) for such documents, but I consider that it would be a waste of public resources to endeavour to make every document available on the Internet.

Agencies could, however, be monitoring, and servicing, demand for particular documents. Thus, for example, if requests for access to a particular document or documents have been made by two or more unrelated persons, the document(s) could be published (subject to deletion of exempt matter, if necessary) on an agency website devoted to frequently requested documents and documents of general public interest (similar to that which is operated by the US Federal Bureau of Investigation). The time and resources involved in processing future FOI requests for such documents could be saved, by simply referring the access applicant to the website.

The extent to which documents should be published involves a trade-off between the benefits to the public and the costs involved. While making documents available on the Internet may be relatively cheaper than publishing them in hard copy, a significant investment of resources is nevertheless involved to bring documents on-line. I consider that there is room for substantially greater publication and use of administrative access schemes within agencies. I think the best means of encouraging such initiatives would be the creation of an appropriately funded central co-ordinating office (discussed at paragraphs C146-C173 of my first submission) to promote and assist with cultural change. An office of this type could promote, and assist in, implementation of expanded publication and administrative access schemes.

Policy documents

At the moment, this category is limited by definition to documents that impact on members of the community in the ways described in the definition in s.7 of the FOI Act. The category could be broadened by removing that part of the definition, thus including all policy documents within the scope of s.19(1). Whether the scope of "policy documents" should be broadened, and whether s.19(1) should include a requirement to publish policy documents on the Internet, would require careful consideration of the resource costs involved.

Section 102

One could extend s.102 to apply to access, whether or not granted under the FOI Act, and, if the latter, whether or not access was given in response to a specific request from a member of the community. However, it may well by arguable that the protection this would give to disclosures by agencies is too broad, and that affording protection from legal action to the State, an agency, a Minister or an officer, provided there was a genuine belief that access was permitted to be given, does not strike an entirely fair balance. One would have to consider whether there are cases where staff disclosing information should not be protected, e.g., the re-publication of maliciously defamatory material, or publication in wilful or reckless disregard of a binding obligation of confidence.

A4. Performance Agreements (DP 11)

In my first submission (paragraph A34), I expressed the view that the recommendation of the ALRC/ARC review (namely, that performance agreements of all senior officers should be required to impose a responsibility to ensure efficient and effective practices and performance in respect of access to government-held information, including FOI requests) should be considered for implementation in Queensland.

In response to arguments in the submissions against this proposal, I make the following comments:

- *difficulties in application to local government* - I can see no justification (and there does not appear to be any justification set out in the submissions) for distinguishing state and local government agencies in relation to the inclusion in performance agreements of senior officers of the responsibility to ensure efficient and effective practices and performance in respect of access to government-held information, including FOI requests. Performance agreements for senior officers of both state and local government agencies routinely include similar key objectives (for example, responsibility for the implementation of systems for employee performance appraisal, employee development and training, employee grievances and management of diminished performance), and I am unable to identify any difficulties, in the implementation of performance measures for efficient FOI practices, which would be unique to local government.

- *the possibility that it would give rise to a perception that the FOI decision maker is acting at the direction of more senior officers* - The responsibilities of senior officers would operate at a general level, not on a case by case basis. Senior officers would be responsible for encouraging a culture of openness and promoting access, whether under the FOI Act or by other means. There is no reason why this should conflict with the duties of agency FOI decision-makers in particular cases. In my view, the perception of FOI users that cultural change is being promoted and is occurring within agencies, will be enhanced by an agency's expressed commitment to good information management and FOI practices, and the introduction of performance appraisals for senior officers in respect of those practices is an important means of reinforcing that commitment.

- *difficulties in measuring FOI efficiency and effectiveness, particularly if there were to be more emphasis on administrative access and the routine release of information* - The recommendation is for performance agreements to impose a responsibility to ensure more effective and efficient practices and performance in respect of access to government-held information, including, but certainly not limited to, FOI requests. Accordingly, performance agreements could include indicators in respect of the initiatives introduced to promote administrative access to documents; the initiatives introduced to improve access to documents under the FOI Act, the proportion of FOI requests dealt with in accordance with the time frames set in the FOI Act, the proportion of FOI decisions which proceeded to internal review, the proportion of agency FOI decisions which proceeded to external review and which were affirmed as correct (or substantially correct) by the Office of the Information Commissioner (the OIC), and statistical indicators in relation to the proportion of FOI requests in respect of which access to documents was given in full and in respect of which access was refused, in full or in part, and the exemption categories relied upon by the agency.

In response to the Committee's query as to how I see performance agreements including FOI responsibilities, I favour a whole of government approach to the introduction of information access responsibilities as an additional key objective in the performance agreements of senior public officers, in the same way as responsibility for employee performance appraisal, responsibility for employee development and training, *etc*., currently exist as key objectives in the performance agreements of senior officers.

A5. A change in name of the Act (DP 12)

The perceived benefits of a change to the name of the Act would have to be weighed against the following factors:

- there is a current level of public awareness of what is referred to by "Freedom of Information" and "FOI". A change may require re-education of users.

- it would be inconsistent with titles used in all other Australian jurisdictions;

- there would be administrative costs in implementing the change.

I am inclined to the view that the perceived symbolic benefits, or greater accuracy, of a change to the title of the FOI Act, do not outweigh the costs and other administrative burdens that would be imposed as a consequence of such a change.

If, however, a change of title is recommended, and no change to the present functions of the OIC is proposed, I recommend a corresponding change to the title of the OIC to more accurately describe its functions, *viz*., the Information Access Review Tribunal (Qld), with the holder of the office of Parliamentary Commissioner for Administrative Investigations designated as the President of that Tribunal, unless another person is appointed as President. If, however, it is proposed to recommend an expanded role for the OIC, including an Advice and Awareness function, retention of the present title would be more appropriate.

A6. Specifying harm tests of disclosure (DP 16, 17 and 18)

In developing the exemption provisions set out in the FOI Act, Parliament has made provision for three broad types of cases:

1) **cases where harm is assumed to flow from any disclosure of classes of information** - e.g., personal affairs information, cabinet or executive council documents, documents which satisfy the legal tests under the general law to attract legal professional privilege, or parliamentary privilege, or the protection of a binding legal obligation of confidence;
2) **cases where harm, or a reasonable basis for expecting harm, must be demonstrated as a consequence of disclosure of the particular information in issue, but where <u>any</u> harm of the specified kind is sufficient to confer *prima facie* exemption** - exemption provisions with tests of "prejudice", "adverse effect", "endanger";
3) **cases where harm, or a reasonable basis for expecting harm, must be demonstrated as a consequence of disclosure of the particular information in issue, and something more than bare harm must be shown** - exemption provisions with the test of "substantial adverse effect".

Standing in a category of its own is s.41(1) of the FOI Act, which describes a category of matter but provides for exemption only if disclosure of particular matter falling within that category would, on balance, be contrary to the public interest.

While there is an obvious appeal in a "substantial harm" test being adopted throughout the Act, it must be recognised that this would erode the widely recognised legal protections referred to in type 1) above. There are genuine arguments to support the use of each of the three types of tests in different situations throughout the Act. It could well be argued that standardised terms could be adopted for all "harm" tests discussed in 2 above, and for all "substantial harm" tests discussed in 3 above. However, I must say that the different terms used in the exemption provisions of the FOI Act have not, to date, appeared to cause significant problems in interpretation.

The only specific alterations that I would recommend that touch on the question of harm are:

- In paragraphs B26-B32 of my first submission, I recommended that the personal affairs exemption be amended so that information concerning the personal affairs of an individual other than the applicant for access would be exempt only if its disclosure would be an "unreasonable disclosure". This test is the one used in most other jurisdictions. It would introduce a harm test to the exemption. While the amendment would not assist in the aim of standardising wording within the Act, I nevertheless consider it justified.
- In paragraphs B41-B44 of my first submission, I recommended that s.45(3), dealing with research results, be amended to require a "substantial adverse effect".

A7. Defining the public interest (DP 19, 20 and 21)

While a detailed definition of the public interest is probably not desirable or possible, there is certainly room for argument that a provision along the lines of s.59A of the New South Wales FOI Act, which sets out matters that are not to be considered in determining the balance of the public interest, may have some merit.

I also accept that there is merit in development of guidelines concerning factors that may be relevant to the application of the public interest balancing test based on previous decisions both within and outside Queensland. In my view, it would be appropriate for the proposed central co-ordinating office referred to earlier in this submission to carry out that task in the course of updating the existing guidelines on the application of the FOI Act (published by the Department of Justice some years ago in the form of a Manual).

A8. Conclusive certificates (DP 22 and 47)

The grounds upon which conclusive certificates can be issued under the FOI Act are limited to the cabinet, executive council, and law enforcement and public safety exemptions. Conclusive certificates, under s.36(3), s.37(3) and s.42(3) of the FOI Act, enable Ministers to state, in respect of claims for exemption under those sections, that the relevant documents are exempt from disclosure. Subject to limited review by the IC, the effect of a conclusive certificate is to establish, conclusively, that the relevant documents are exempt. The logical rationale or justification for conclusive certificates is very murky indeed. (It seems to be that, for the specified kinds of documents, the executive government should not have to tolerate the ultimate decision on disclosure being in the hands of an independent merits review tribunal, but should be entitled to reserve that ultimate decision to itself, notwithstanding that accountability of the executive branch of government is one of the primary aims of FOI legislation).

As far as I am aware, there have only been two instances in Queensland of the issue of a Ministerial certificate under the FOI Act. (Certainly, only two have ever been the subject of an application for review under Part 5 of the FOI Act.) Accordingly, the limited reliance to date on ss 36(3), 37(3) and 42(3) would not appear to support a case for repeal of those provisions on the grounds that Ministerial certificates are being used to inhibit or reduce, in any significant way, the effectiveness of the FOI Act. On the other hand, the limited nature of the investigation and review which I am empowered to conduct under Part 5 of the FOI Act (as discussed below) does not support a case for any widening of the relevant minister's powers to sign conclusive certificates. Accordingly, with the exception of the recommendations proposed in my first submission (paragraph B11), I do not consider that the ability of the relevant minister to sign conclusive certificates needs to be revisited. (Of course, if my recommendation for the abolition of s.37 of the FOI Act is accepted - see paragraph B8(b) of my first

submission, there would be no basis for the issue of a conclusive certificate under s.37(3) of the FOI Act.)

The issue of a Ministerial certificate means that the nature of the investigation and review which I am empowered to conduct under Part 5 of the FOI Act is more limited, being of a supervisory character, rather than a full review of the merits of the claims to exemption made in the Ministerial certificate. In respect of the categories of decision described in s.71(1) of the FOI Act, I am empowered to conduct a complete review of the merits of the decision, and a formal determination by me in effect substitutes for the decision of the agency or Minister which was under review: see s.88 and s.89 of the FOI Act. While s.71(2) empowers me to investigate and review the grounds for a decision to issue a certificate under s.36, s.37 or s.42 of the FOI Act, s.84 makes it clear that my role is confined to determining whether there were reasonable grounds for the issue of a certificate. My jurisdiction is confined to considering the grounds on which the certificate was given rather than to any wider issues relating to the Minister's decision to issue a certificate. For example, I do not consider that it is within my jurisdiction, in a review under Part 5 of the FOI Act, to assess the reasonableness of an agency's conduct, in a course of conduct culminating in the issue of a Ministerial certificate. Even if I were to decide that there were no reasonable grounds for the issue of a certificate, the Minister is entitled to confirm the certificate, provided the Minister tables in the Legislative Assembly a notice specifying his/her reasons for doing so.

Although the decision to issue, or confirm, a conclusive certificate may well be a political one, the issue of whether the certificate is properly issued in respect of a document is a legal one, which goes to classification. So long as the power to issue conclusive certificates is confined to the Cabinet/Executive Council exemptions, and the law enforcement/public safety exemption, I would not seek to make a case for an expansion of the Information Commissioner's decision-making powers in relation to conclusive certificates.

A9. Should GOCs and LGOCs be excluded from the Act? (DP 25)

In my 3rd, 4th and 5th Annual Reports (1994/1995, 1995/1996 and 1996/1997), and in my first submission (paragraphs B71-B77), I expressed the view that GOCs and LGOCs should be subject to the FOI Act, and that their commercial interests can be adequately protected by the exemptions available to agencies which are subject to the FOI Act.

I also argued (at paragraph B78) that, if it is desired, as a matter of policy, to equate the position of bodies now covered by s.11A and s.11B of the FOI Act with that of private sector corporations, then s.11A, s.11B and Schedule 2 of the FOI Act should be repealed, and those bodies should be named in separate paragraphs of s.11(1). If exclusion of all of the activities of such a body is not considered necessary, then those bodies which operate in a competitive commercial market should be named in separate paragraphs of s.11(1) according to the following verbal formula: "(name of body) in respect of documents in relation to its competitive commercial activities". I consider, however, that even if GOCs and LGOCs are excluded from the application of the FOI Act in relation to their competitive commercial activities, difficult issues of characterisation (i.e., whether a particular document relates to competitive commercial activities) are still liable to arise.

A review application which I received in 1999 neatly illustrates the anomalies I have pointed out in my Annual reports, and the reasons for the concerns I have expressed there. An access application was made to the Environmental Protection Agency (the EPA) for access to annual returns and associated documentation (relating to matters such as air emissions, water quality and ground level concentration monitoring results) provided to the EPA under the *Environmental Protection Act 1994* Qld by four power stations - three of them owned and operated by GOCs, and the other by private sector interests. Under Part 4C of the *Environmental Protection Act*, licensees must submit

such annual returns in order to obtain renewal of their licenses to engage in "environmentally relevant activities" in the subsequent year. (Clearly, there is a strong public interest in disclosure of information about the monitoring of industrial pollutants.) The EPA's FOI Co-ordinator decided to grant access to the requested documents. The three state electricity entity GOCs applied for internal review, arguing that access to all documents should be refused on the basis that they were excluded from the application of the FOI Act by s.11A, read in conjunction with s.256 of the *Electricity Act 1994*, because they were documents received or brought into existence in carrying out activities of the electricity entities conducted on a commercial basis. The argument that was put essentially suggested that all activities conducted by a GOC (which, by definition, will necessarily have a commercial orientation) must be characterised as commercial activities. The EPA's internal review decision upheld those arguments, and access to the documents lodged with the EPA by the three GOCs was refused.

That argument was not available to the private sector interests which operated the fourth power station, and relevant documents held by the EPA which related to that power station were ultimately disclosed to the access applicant.

There is no logical justification for this differential treatment, and no justification for scrutiny of the environmental performance of a GOC being unavailable to interested members of the public, because of the absurdly overreaching breadth of the exclusion conferred by s.11A of the FOI Act.

A10. Government Owned Corporations (DP 27 and 28)

CSOs excluded by regulation

In DP27, the Committee queries whether the government should be able to prescribe by regulation GOC community service obligations in relation to which documents are not accessible under the FOI Act. Given the inherent nature of CSOs, I can see no reason why they should be excluded from the application of the FOI Act. They are public obligations resourced by government, and there should be accountability with respect to their fulfilment. That is not to say that every document created in carrying out CSOs must be made public. Whether or not a particular document should be disclosed can still be judged against the range of exemption provisions set out in the FOI Act, including those concerning adverse effects on the business interests of the GOC. There is, however, no basis for blanket exemption of documents by regulation.

In my 5th Annual Report (p.22), I expressed concerns about exceptions to the operation of FOI legislation being included in other legislation without reference in the FOI Act. To confer exclusions for GOC community service obligations without amendment to the FOI Act would promote confusion and uncertainty among citizens who ought to be able to rely on reference to the FOI Act and the FOI Regulation to ascertain the precise scope of the legislative scheme. The prescription of GOC community service obligations by regulation also fails to direct the attention of Parliament to the significance of granting such a privilege to a public authority, in the manner that seeking an amendment of the FOI Act or FOI Regulation would do.

Controls on LGOCs

In DP28 the Committee queries whether there should be additional controls in respect of documents of LGOCs being excluded from the FOI Act, given the concerns I have expressed in the past regarding the method of creation of LGOCs. In my 5th Annual Report (p.22), I noted the introduction of s.11B of the FOI Act and expressed concern that the provision did not appear to require legislative approval for the creation of an LGOC, merely a series of local authority resolutions. It therefore appeared possible for a local authority to protect many of its functions from

accountability under the FOI Act without the input or overview of Parliament, again in such manner as to put the LGOC in a more protected position, with respect to the application of the FOI Act to documents concerning the carrying out of its activities, than any private sector competitor. I recommended in my first submission (paragraph B78), that s.11B of the FOI Act be repealed and the bodies now covered by s.11B should be named in separate paragraphs of s.11(1). I favour this approach over the imposition of additional controls in respect of documents of LGOCs being excluded from the FOI Act. This approach would better promote the accountability of such bodies to their ultimate owners, the electors and ratepayers of the particular local government authority.

A11. Extending the Act to the private sector (DP 29)

This is a wide-ranging policy issue which extends well beyond questions of accountability and use of public resources. It may be appropriate, as a first step, to give consideration to extending information access rights to particular areas of private sector service provision, where there is likely to be clear public demand for, and demonstrable public benefit flowing from, access to information. (It may be possible to draw an analogy with the extension of privacy legislation to credit providers by the Commonwealth.) One possible area is patient access to personal medical records held by private hospitals and other private sector health service providers. Another possibility would be non-public educational institutions and service providers. No doubt there would be a considerable outcry about the imposition of a substantial cost burden on private sector service providers, which presumably they would have to pass on to clients.

My personal view is that the whole topic raises issues so complex and controversial that it deserves to be the subject of a separate inquiry in its own right, with relevant stakeholders and interest groups more fully involved and focussed on issues of detail.

A12. Contractors (DP 30)

The Committee seeks my views on what 'appropriate solutions' can be implemented in the short term so that the FOI Act applies to information held by private contractors and government agencies. I favour the approach suggested by the ARC in its Report No. 42, *The Contracting out of Government Services - Access to Information*, namely, that the FOI Act be amended to include an express provision deeming documents in the possession of the contractor, that relate directly to the performance of their contractual obligations, to be in the possession of the relevant government agency. Information of that type would then be accessible, subject to relevant exemption provisions.

The success of such an approach would be dependent on all contracts imposing obligations on the contractor to create appropriate records and to provide them to the government agency, either as a matter of course or on demand, with periodic auditing of the contractor's adherence to its record-keeping obligations. Consequential amendments to that effect could also be made to the government purchasing policy and standard tender documentation.

This approach sits comfortably with s.7 of the FOI Act which defines *'document of an agency'* to mean a document in the possession or under the control of an agency, including a document to which the agency is entitled to access. Further, this approach does not impose onerous administrative or processing obligations on contractors (a concern which was raised in submission 122), which might result if a contractor was deemed to be an agency for the purposes of the FOI Act (see submission 157).

A13. 'Commercial in Confidence' claims (DP 31 and 32)

The increasing trend of governments to outsource, or contract out, the performance or delivery of government services raises difficult issues as to the appropriate balance to be struck between claims that the public interest favours the disclosure of information relating to government, and claims that such information ought to remain confidential.

I endorse the view that *'scrutiny of outsourcing agreements at all levels of government is a good thing. If this means that private industry must adapt to new ways of doing business it will not be the first time that private interests have given way to public policy. Increased scrutiny of contractual arrangements is part of the risk of doing business with government……There will be some situations where confidentiality is necessary but the threshold is high. Where individuals in executive government are entering into contractual obligations on behalf of the people behind closed doors, those individuals incur a fiduciary obligation to act in the best interests of the real parties to those contracts, the people for whom they act and whom they serve.'* (Corcoran and MacPherson, "Disclosure and the Public Interest: Confidentiality Claims in Outsourcing Agreements", The Australian Law Journal, April 2000, Volume 74, pp 259-266).

The Committee specifically sought my comments on:

- *how often my office has allowed access to documents which agencies have determined to be exempt under s.45 and s.46* - My office deals with a significant number of cases concerning claims for exemption of 'commercial in confidence' material under s.45 and/or s.46. In many of those cases, large parts, if not the whole, of the matter in issue has been disclosed following negotiation or decision. In earlier cases, it often appeared that some agencies based their decision to exempt matter under s.45 largely or solely on the fact that the relevant third party objected to disclosure, regardless of whether there was any basis for a reasonable expectation of an adverse effect . On numerous occasions, when asked to explain to my staff how disclosure could reasonably be expected to have an adverse effect, neither the agency nor the third party could give an explanation beyond the bald comment that it would have an adverse effect. Additionally, decisions to exempt matter have often been made with respect to entire categories of documents, without any consideration to the effect of disclosure of particular documents or parts of documents. I should stress that there are cases where claims under s.45(1) or s.46(1) are justified. However, I have experienced many cases where sufficient consideration has not been given to which parts (if any) of requested documents really do qualify for exemption.

- *whether I believe there is merit in my office or some other body issuing guidelines or otherwise having a monitoring role in relation to agencies invoking the s.45 and s.46 exemptions* - In line with the recommendation in my first submission that an appropriate body undertake a central coordinating role in the administration of the FOI Act, I consider that the facilitation of training courses and the publishing of guidelines on how to interpret and administer the commercial exemptions in the FOI Act, would further promote the appropriate use of these exemption provisions.

- *whether s.45 should be amended along the lines of the recent Victorian amendment* -Recently, the Victorian Government introduced legislation to narrow the ambit of that state's FOI commercial information exemption (which previously had been extremely wide). Under the proposed amendments, documents will be exempt only if disclosure of information relating to business, commercial or financial matters would be likely to expose a business organisation *unreasonably* to a disadvantage. In line with the majority view in the ARC's Report No. 42, *The Contracting out of Government Services - Access to Information*, (which considered that the commercial exemption provisions in the Commonwealth FOI Act were appropriate), I consider that the commercial exemptions in the FOI Act are appropriate, and that, if applied

appropriately by agencies, do not prevent the disclosure of information about commercial or business affairs that should be available for public scrutiny. Based on my experience of cases that have proceeded to external review, I do not consider that amendments to s.45(1) or s.46(1) of the FOI Act are necessary to more appropriately balance the competing interests of disclosure of information in the public interest, and the protection of legitimate business interests.

However, I do consider that the new s.34 of the Victorian FOI Act also strikes a fair and appropriate balance in that regard, and I would have no objection, in principle, to a suitably modified version of it being enacted in Queensland in place of s.45(1) of the FOI Act.

A14. Internal review (DP 38)

The concept of internal review can be an important demand management tool in large organisations over a wide variety of client service functions. The idea that an organisation should have an opportunity to review specific cases internally, and remedy any deficiencies in the initial process, prior to some external body conducting a review, theoretically provides a useful opportunity for the organisation to monitor and improve on its own performance of the particular function.

Given the exigencies of processing FOI access applications at the primary decision-making level, the application for internal review will frequently represent the first opportunity for an applicant to put arguments to an agency as to why requested documents do not qualify for exemption, or should be disclosed in the public interest. It is valuable for the agency to directly engage and address the applicant's concerns, rather than have them expounded for the first time at external review. The process of internal review might therefore be more effective if s.52(2) of the FOI Act required the application for internal review to specify the particular aspects of the initial decision that are challenged, and to set out a succinct statement of the grounds on which they are challenged.

A15. Guidance on the interpretation and application of the Act (DP 42)

a. Plain English succinct decisions

I discussed this issue at paragraphs B151-B169 of my first submission. The FOI Act is a complex piece of legislation that seeks to balance many competing interests and incorporates complex areas of the general law such as breach of confidence (s.46; s.38), trade secrets (s.45(1)(a)), legal professional privilege (s.43), contempt of court and contempt of parliament (s.50).

I appreciate the difficulty that lay people may have in understanding the legal intricacies inherent in the application of some exemption provisions in written reasons for decision. I have undertaken, in response to the review and report by The Consultancy Bureau, to explore avenues to improve the comprehensibility of written communications. I accept that written communications should be tailored to suit their intended audience. One difficulty in this regard, however, is that decisions under s.89 of the FOI Act always have a multiple audience (or potential audience). They are written not only for the applicant and any third party participants, but for agency administrators who are expected to pick up and apply relevant principles in future primary-level decision-making, for lawyers who wish to ascertain relevant principles in order to provide advice to clients (in both the public and private sectors) on how the FOI Act is liable to be interpreted and applied, and for the potential audience of a judge exercising a judicial review function in respect of the IC's decision. Moreover, there are legal obligations as to the substantive content of reasons for decision given by a tribunal, as explained in paragraphs B157-B158 of my first submission.

In addition, it is an accepted function of a merits review tribunal to assist to improve standards of primary decision-making (in the case of the IC, by providing authoritative guidance on the correct interpretation and application of key provisions of the FOI Act). The OIC has always regarded it as valuable and important to go to some extra trouble in decisions, and in preliminary views letters to agencies, to provide guidance that would assist agencies to correctly interpret and apply the FOI Act in future cases. This accords with best practice, as observed by the Commonwealth Administrative Review Council in its report "Better Decisions: Review of Commonwealth Merits Review Tribunals", Report No. 39, August 1995 (at p.68):

> *... certain factors generally lead to tribunal decisions being more lengthy and detailed than other administrative decisions. Among these factors are that .. tribunals are expected to make a particular contribution to improved government decision-making through their illumination of legal principles and good administrative practices.*

I cannot claim any great familiarity with decisions of the New Zealand Ombudsman (the NZO). A selection only of NZO decisions are published occasionally as case notes. I am well acquainted with decisions of the Western Australian Information Commissioner (the WAIC). For the most part, I consider her published decisions to be similar in length, style and content to my unpublished decisions, i.e., decisions given by way of a letter to the participants only. The fact that my published decisions tend to be less succinct than those of the WAIC may be accounted for by the fact that my published decisions represent one of the few opportunities available to the OIC to expound upon issues for the purpose of providing authoritative guidance to FOI administrators, whereas the WAIC has an ongoing, statutorily prescribed advice and awareness function. I also have reservations about whether some of the WAIC's decisions, which incorporate by reference the contents of preliminary views letters previously conveyed to one participant, strictly comply with the obligations on tribunals, under Australian law, as to the content of reasons statements for tribunal decisions.

Within the constraints of those legal obligations, I have for some time been endeavouring to produce more succinct decisions, and I will continue to do so, although I do not believe that opportunities to expound on a difficult issue, for the purpose of providing guidance to FOI administrators and users of the FOI Act, should be lightly passed over.

I will, however, take steps to ensure that the outcome of a review decision is properly explained to participants in comprehensible language (by separate correspondence, if necessary, in the case of published decisions).

b. Summaries of decisions

I publish summaries of both formal and letter decisions in my Annual Reports, and those summaries are also available on the Information Commissioner's website. Summary head notes of my published decisions are provided in the Queensland Administrative Reports. As well, the Information Commissioner website has a searchable index of my published decisions. If anything further is required, such a function could be undertaken by whatever body is responsible for, and resourced to undertake, the central co-ordinating office function in respect of the FOI Act.

c. Publishing letter decisions

Decisions by way of a letter to the participants in an external review are used when the formal resolution of an external review application involves the application of settled principles to the facts of a particular case, and the formal decision has little or no broader educative value that would warrant its wider dissemination as part of the Information Commissioner's formal decision series.

These decisions deal with a range of factual circumstances to which the established principles are usually concisely applied, and some of them may be of interest to some FOI administrators. But, considered as a body of work, they are highly repetitive and I frankly do not consider the resource costs that would be involved for my office in publishing the 70-80 letter decisions that are prepared each year to be worth the minimal benefits that might be available to some FOI administrators. There are also technical issues related to the availability of space for the Information Commissioner's website, which is hosted by the State Library of Queensland. Letter decisions are published to the particular respondent agency, and there is no embargo on networks of FOI administrators exchanging letter decisions that they consider might be helpful to each other (e.g., the Criminal Justice Commission might obtain a decision that would be of interest to the Queensland Police Service and *vice versa*; a local government authority might obtain a decision thought to be of interest to other councils and it could be circulated, perhaps via the LGAQ website). I consider that some self-help arrangements on the part of FOI administrators should be all that is necessary in this regard. Summaries of letter decisions are available in the Annual Reports and on the IC's website. Letter decisions are available for purchase in accordance with the policy set out in the Information Commissioner's Statement of Affairs which is published on the website.

A16. Time limits for external review (DP 43 and 44)

Statutory time limit generally

I ask the Committee to have regard to relevant material concerning this issue that is contained in -

(a) the document previously provided to the Committee's Research Director titled "Comments by Information Commissioner on the Second Progress Report of the Management Review of the Office of the Information Commissioner", and the attachments to it;

(b) paragraphs 3-17 of my response to Part 2 of the report by The Consultancy Bureau, which is published immediately prior to the attachments in Volume 2 of The Consultancy Bureau report; and

(c) paragraphs B144-B149 and B170-B175 of my first submission.

In what circumstances might a statutory time limit on tribunal decision-making actually work? My answer would be: only where -

(a) there is a realistic assessment of an appropriate upper time limit having regard to -

  (i) the difficulties involved in the more complex cases received by the tribunal; and

  (ii) whether the tribunal is expected to adopt procedures that are resource-intensive for tribunal staff but cheap for participants (the Information Commissioner model) or resource-intensive and expensive for participants (the AAT model of neutral arbitration of a case prepared and presented by the participants); and

(b) there is a guarantee of government funding for the resources necessary to ensure compliance with the statutory time limit (even if the statutory promise of fast and efficient dispute resolution leads to greater demands for use of the tribunal's service).

The plain fact is that statutory time limits do not work, unless resources sufficient to provide the relevant service within the specified time limit are available to meet the extent of the demand for that service.

The statutory time limits in s.27(4) and s.27(7) of the FOI Act do not work where that equilibrium is not present in an agency's FOI Unit. That is clearly happening in several Queensland agencies, since there have been large increases in the numbers of "deemed refusal" applications received by the OIC in the last 2 years. To my knowledge, several agencies have been running months behind in their processing of quite routine access applications, and it is only their requests for patience and forbearance from applicants that has kept the number of "deemed refusal" applications from being higher. Moreover, there is little incentive for agencies to comply with those statutory time limits when the only sanction for non-compliance is that the work may get passed on to a review tribunal. This does, however, cause considerable resentment among applicants who complain to my staff that agencies don't feel obliged to comply with the law in this respect, but citizens may be subjected to all manner of penalties for failing to comply with statutory time limits e.g., late lodgment of tax returns.

The statutory time limit imposed on the Western Australian Information Commissioner (the WAIC) does not work, because it is grossly unrealistic (even allowing for the provision which the WAIC has interpreted as permitting her to "stop the clock" while attempts to resolve a case by conciliation or negotiation are undertaken: see s.71(1) of the FOI Act), given that a substantial proportion of cases that proceed to external review involve complex legal issues and/or the adjustment of delicately balanced interests telling for and against information disclosure. Thus (notwithstanding that the WAIC had the considerable resource advantages of average file loads of 10 cases per case officer, and an officer of chief executive calibre able to devote 100% of her time to FOI matters), the WAIC still took more than 200 days (range: 218-292 days) to resolve 4 of the 25 cases that proceeded to a decision in 1998/9, and more than 100 days (range: 107-182 days) to resolve another 10 of those 25 cases.

Administration of the FOI Act within agencies is comparatively easy in the approximately 90% of cases where no exemption claims are made. But application of the exemption provisions, especially where there are third party interests involved, can be complex. Many agencies, struggling to meet their time limits for primary decision-making, simply do not have the capability to do the job properly; for example, they rarely do more than read the documents in issue - they rarely obtain or test collateral evidence that is relevant to the application of many of the more complex exemption provisions, and they do not give the applicant a chance to be heard on whether or not matter qualifies for exemption before they give their decision. From their submissions, it appears that many hard-pressed agency FOI administrators believe that the IC should be subject to a time limit, simply because they are. However, there has to be one place in the system where applicants who wish to assert the right conferred by s.21 of the FOI Act, can go to obtain a full and fair hearing and assessment, in the light of all relevant and available evidence, of their cases that the information they have requested does not qualify for exemption under the terms of the FOI Act. Moreover, the legitimate concerns of agencies and third parties who oppose access to information must be ascertained and assessed to arrive at a fair and balanced decision.

If an unrealistic statutory time limit is set, it will tend to bring the law, as well as the tribunal, into disrepute. [EDITED BY THE COMMITTEE.]

There is no doubt that times for resolution of a substantial proportion of cases have, in the past, been too lengthy. I and my staff have shared the frustration of applicants and agencies in not being able to give timely attention to every case, due to the large backlog of cases and the heavy workloads that this has meant for individual officers. However, those delays have reduced significantly in most cases, and will be reduced further as the remaining backlog is eliminated.

Although there has been concern expressed about the length of external reviews, particularly those that deal with complex issues and are the subject of a formal decision, it does not appear that a statutory time limit for external has widespread support. Only five of the second round submitters supported a statutory time limit unconditionally. A further two submitters gave it support subject to a significant increase in resources.

Imposing a statutory time limit for every case would mean:

- loss of flexibility - frequently it can take time for participants to reach a point where they are prepared to accept an informal resolution - on occasion an applicant may simply wish to put their application on-hold for a time to see whether they can achieve their aims in another way, while keeping open their options under FOI - a statutory time limit would put pressure on case officers to go through all the formal stages up to decision, in order to meet the statutory deadline, when a little patience may have resolved the dispute with use of a bare minimum of resources;
- reduction of quality of decisions (particularly in cases where there are complex legal issues to resolve, multiple parties to consult or large numbers of documents to examine) which could lead to more frequent judicial review applications involving greater expense and delay for those affected;
- reduced capacity to provide personalised service, particularly for unrepresented applicants;
- greater resources being applied to applicants depending on how many applications they have lodged - if all applications must be dealt with within a certain time, an applicant with 10% of applications before me must have them all dealt with, with equal priority, thus using up 10% of the resources of the office.

In simple terms, the best and most efficient way to resolve each case must be judged according to the circumstances of the case. Forcing each case to be dealt with within a single timeframe would not produce efficient or effective resolution of disputes.

In my view, it should be sufficient that a tribunal has established realistic targets, and internal and external performance indicators, in respect of timeliness of performance, and is conscientiously striving to meet them with appropriate case management strategies. I consider that my response to the report by The Consultancy Bureau makes it clear that that is the case in respect of the OIC. There is already a clear trend line demonstrating improvement in terms of timeliness of performance for new cases received since 1 July 1998. I consider that the introduction of a statutory time limit would have not appreciable advantages, but would have considerable disadvantages.

Order of receipt of application

With respect, the suggestion in some submissions to the Committee that the OIC deal with all applications for review in strict date order of receipt, is impracticable and rather naive. For example, I can think of 4 cases received during the first 4 months of operations of the OIC which, if dealt with under the suggested stricture (at a time when the OIC had only 4 professional staff) would probably have meant that the OIC achieved less than a third of the file closures it actually recorded in the period up to 30 June 1994.

Initially, applications for review are processed by my office in order of receipt for a period of 3 weeks, during which initial assessment, and application of early informal resolution strategies, are undertaken. However, in light of the results of that process, differential case management strategies are thereafter applied. Case management requires decisions to be made at particular stages of a review about the nature of a file, the most appropriate strategy to effect resolution, and which files deserve priority attention (see Attachment 9 published in Volume 2 of The Consultancy Bureau report). While my office maintains a commitment to active case management then allocating priorities in this way is a necessary and a completely appropriate part of the process.

The guiding principle that is reinforced to staff of the OIC, and governs the assessment of priorities, is that the OIC should endeavour to ensure that an applicant gets all that the applicant is entitled to under the FOI Act, as quickly as practicable. Hence, priority is given to cases in which the staff of the OIC make a preliminary assessment that the applicant has been denied information to which he or she appears to be entitled. (If the respondent agency makes concessions in that regard, so that the only matter remaining in issue is clearly exempt matter, the case would not retain that priority status.) Likewise, priority is given to 'reverse FOI' cases which have been pursued to delay an applicant for access from obtaining that to which an agency has decided he or she is entitled.

It is logical, in light of the objects of the FOI Act, that priority be given to cases where a person has been refused access to that to which the person appears to be entitled, in preference to cases where a person has quite properly been refused access to that to which the person is not entitled. Provided persons in the latter category have had the view of the Information Commissioner or his delegate, in that regard, clearly communicated to them, I can see no compelling social utility in striving to resolve cases in the latter category on the basis of their order of receipt, and especially not in preference to pursing cases in the former category.

A17. Reduce Agency time limit from 45 to 30 days (DP 60 and 61)

The reasons that agencies have difficulty in complying with the statutory time frames set out in the FOI Act are many and varied. They can include lack of adequate training of FOI administrators, but most commonly they involve the failure by an agency to allocate sufficient resources to cope with demand, or the refusal by an agency to divert staff resources from core functions to cope with temporary or semi-permanent surges in demand in the FOI area. (Historically, the agencies that have experienced most difficulty in this regard have been the Department of Corrective Services, the Queensland Police Service, Queensland Health, and the Department of Families, Youth and Community Care, all of which have experienced and professional FOI administrators, indicating that the problem is essentially a resourcing one.) Moreover, there is no doubt that the generous charging regime in Queensland, plus the limited grounds for refusing an application under s.28(2), give far greater encouragement to the making of extremely wide access applications, than is the case in other Australian jurisdictions. It is virtually impossible for an agency to deal properly with an application for thousands of documents, requiring consultation with multiple third parties, and consideration of multiple exemption claims, within 30, 45 or 60 days.

There has been a knee-jerk reaction of protest by agencies to my suggestion for reducing the basic time limit from 45 to 30 days, while increasing the "additional" time for consultation (where required under s.51 of the FOI Act) from 15 days to 30 days. Agencies have failed to appreciate that my recommendation was made in conjunction with another important recommendation (see paragraphs B265, B266 and B269C of my first submission) for dealing with the more complex and time-consuming cases. If both recommendations are implemented together, Queensland agencies should be able to cope (and especially so if there are increases to fees and charges, which will inevitably moderate demand).

A18. Disclosure on conditions in the public interest (DP 72 and 73)

At paragraph B286 of my first submission, I indicated that without more details of the proposal, I was inclined to the view that it would create more problems than it might solve. I have not been able to gain from the further submissions in response to the Discussion Paper, any clear indication of how such a provision might be made to work effectively. In the circumstances, I can only reiterate the concerns I expressed at paragraphs B281-B285 of my first submission.

A19. Independent monitoring of Queensland's FOI regime (DP 74 and 75)

Most of the additional comments I might wish to make in respect of this topic are adequately set out at pp.9-11 (paragraphs 33-39) of my response to Part 2 of the report by The Consultancy Bureau (which appears before the attachments in the published volume 2 of that report). If you require further clarification, please feel free to contact the Deputy Information Commissioner or myself.

One aspect that has not yet been addressed, however, is whether an expanded role for the OIC might extend to greater involvement in policy issues relating to the FOI Act. Even if no expanded role is ultimately recommended for the OIC, it has concerned me for some time that virtually every amendment proposed by government to the FOI Act or the FOI Regulation is aimed at reducing the coverage of the FOI Act and/or making it harder for citizens to obtain ready access to government information. Some significant erosions of the coverage of the FOI Act appear to have been introduced almost by stealth, as in the case of a new exemption provision inserted by an amending provision contained in a schedule to the *Coal Mining Safety and Health Act 1999* Qld. There seems to be no voice within government that is prepared to stick up for the fundamental objects of FOI legislation, and cast a critical eye over proposals for further erosion of the Act's coverage. Since I am an officer of Parliament and independent of the executive government, my office is not "in the loop" for receiving information about proposed amendments to the FOI Act or FOI Regulation, and having the chance to comment on them (including the detail of the drafting, which has frequently extended a far greater scope of exclusion from the Act's coverage than was necessary to deal with the alleged mischief which was claimed to have warranted an amendment to the FOI Act or the FOI Regulation).

I consider that there is a role here for the Legal, Constitutional and Administrative Review Committee of the Legislative Assembly (especially in light of the enhanced expertise in FOI principles, law and practice acquired by Committee members and research staff through the conduct of the current review) to make administrative arrangements with the executive government for the Committee to receive advance notice, and the opportunity to provide detailed comment on, any proposal for amendment of the FOI Act or the FOI Regulation. The Committee could, in turn, consult the OIC for technical advice (e.g. in respect of how proposed amendments are liable to be interpreted, and how they might impact on the present scheme of the Act) in respect of any proposed amendments that caused concern.

Part B - My comments on other issues raised in Discussion Paper No. 1 or on additional issues relevant to the Committee's review of the FOI Act.

B1. Should any current exemptions be removed? (DP 14)

I note that I have previously argued a case for the removal of the s.37 exemption (see paragraph B8(b) of my first submission).

In Chapter 3 of my 7th Annual Report (1998/99), I expressed concern about the introduction of a new exemption provision in the FOI Act, namely s.42(1A). The background to the introduction of this provision is that the *Coal Mining Safety and Health Act 1999* Qld was passed by the Legislative Assembly on 19 August 1999. Section 229 of the Act provides that Schedule 1 to the Act amends the Acts mentioned in it. Schedule 1 is titled "Consequential Amendments". However, it makes an amendment to the FOI Act which is substantive, not consequential, in nature. It amends s.42 of the FOI Act to introduce a significant new exemption provision, of general application, as follows:

> ***(1A)*** *Matter is also exempt matter if—*
> *(a) it consists of information given in the course of an investigation of a contravention or possible contravention of the law (including revenue law); and*
> *(b) the information was given under compulsion under an Act that abrogated the privilege against self-incrimination.*

As I said in my Annual Report, if the new s.42(1A) of the FOI Act had been drafted in terms which confined it to investigations under the *Coal Mining Safety and Health Act* , and to information given under compulsion under the provisions of the *Coal Mining Safety and Health Act* that abrogated the privilege against self incrimination, then perhaps it could properly have been described as a consequential amendment to the FOI Act. However, the new s.42(1A) is framed in broad terms, and clearly introduces a significant new exemption provision of general application.

I expressed the view that it is not appropriate that a substantive change to the FOI Act, introducing a new exemption provision of broad and general application, should be made in a Schedule of "consequential amendments" to an Act of Parliament that the casual reader would assume was confined to matters relating to the regulation of health and safety for workers in the coal-mining industry. I would suggest that s.42(1A) of the FOI Act be repealed (and any necessary consequential amendments be made to the *Coal Mining Safety and Health Act*), pending proper consideration (by introduction in a *Freedom of Information Act Amendment Bill*) of the implications and consequences of the proposed amendment.

I also expressed concerns as to the appropriateness of parts of the new exemption provision. As paragraph (b) is presently drafted, it is arguable that the exemption extends to any information (falling within the terms of paragraph (a)) that was given under compulsion pursuant to a statutory provision which also provided for the abrogation of the privilege against self-incrimination, irrespective of whether or not the information is actually of a kind that would have entitled the information-provider to invoke the privilege against self-incrimination. A great deal of information may be given to law enforcement or regulatory agencies pursuant to statutory coercive powers, with no issue as to privilege against self-incrimination ever arising. The new s.42(1A) appears to me to be an example of a provision that confers exemption over a considerably wider ambit of information than is necessary to correct the mischief claimed to justify its enactment.

That claimed mischief would be adequately covered by an exemption provision of narrower scope, framed in the following terms:

> *Matter is also exempt matter if it consists of information -*
>
> *(a) given in the course of an investigation of a contravention or possible contravention of the law (including revenue law); and*
>
> *(b) given under compulsion under an Act that abrogated the privilege against self-incrimination; and*
>
> *(c) in respect of which the giver of the information would otherwise have been lawfully entitled to assert the privilege against self-incrimination.*

Recommendation:

> ***(a) That s.42(1A) be repealed.***
> ***(b) Alternatively, if repeal is unacceptable to the legislature, that s.42(1A) be amended, in the form set out above.***

B2. Whether the Information Commissioner adopts an excessively legalistic approach (DP41)

It was a matter of some disappointment to me that item B(v) of the Terms of Reference given to the Committee was framed in such loaded terms. Rather than simply invite comment on whether the procedures of the OIC are efficient and effective, the practical equivalent of a 'leading question' was employed. In light of this, it is perhaps more noteworthy that the 'leading' proposition put in this term of reference was not endorsed by a substantial proportion of submitters, including most of those who attempted to address this term of reference in any detail. Many submitters merely endorsed the proposition that the method of review and decision by the Information Commissioner is excessively legalistic, without any analysis or justification. Queensland Treasury, for example, was critical of excessive legalism (submission no. 69), yet this was the same agency which brought judicial review proceedings arguing that one of my decisions should be overturned for legal error because, in some findings relevant to the application of s.40 and s.42(1)(c) of the FOI Act, I used the words "would not" rather than the statutory language of "could reasonably be expected to": see *State of Queensland v Albietz* (1996) 1 Qd R 215 at p.220.

It may be possible for a tribunal to adopt procedures that are "excessively legalistic", but that is not the case with the OIC, which endeavours to use informal resolution methods wherever practical, and, where that fails, defines for the benefit of a participant the issues on which that participant will have to persuade the IC in order to obtain a favourable decision. The OIC endeavours to avoid the use of intimidating oral hearings, and to keep the costs for all participants as low as possible.

I am more dubious about whether it is possible to say that a tribunal's decision-making is "excessively legalistic". Where attempts at informal resolution have failed, a tribunal has a legal duty to endeavour to establish the material facts that are relevant in a particular case, and to arrive at the correct decision required by law. The tribunal can only make a decision that is legally correct or legally incorrect, not one that is "excessively legalistic".

I have previously acknowledged (see paragraphs B151-B169 of my first submission) that in my earlier "leading case" decisions, I deliberately endeavoured to include more explanatory material than may have been strictly necessary to decide the instant case, for the purpose of assisting FOI administrators to understand and apply the relevant law correctly in future cases. I still occasionally

do that where I consider that there is some educative value in doing so, and I consider that that is a legitimate function of a merits review tribunal, as explained in my comments relative to item A15(a) above.

B3. Should the IC have a power to order disclosure of otherwise exempt matter in the public interest? (DP 46)

There are two main points to be made in respect of any proposal for a general, overriding public interest balancing test:

1) such a test would be otiose in respect of any exemption provision that already incorporates a public interest balancing test; and

2) to apply a public interest balancing test to information which has traditionally had the benefit of class protection under the general law, e.g., cabinet documents, trade secrets, documents subject to legal professional privilege or parliamentary privilege, would require careful consideration and strong justification. Even if it were thought appropriate for agencies and Ministers to lose the benefit of those 'class' protections in particular instances where countervailing public interest considerations favour disclosure of particular information for the benefit of the community generally, different considerations may apply to information entitled to the benefit of 'class' protection under the general law, that has been provided to government by private individuals or business interests.

An alternative means of addressing this issue would be to remove the restriction imposed on the Information Commissioner by s.88(2) of the FOI Act. If that occurred, the Information Commissioner would have to go through the two stage process that agencies should go through at primary decision-making levels in light of the discretionary decision required under s.28(1) of the FOI Act, *viz*, first determine whether a particular document does or does not qualify for exemption, and if it does, then determine whether or not to exercise the discretion to disclose it anyway. This would give the flexibility to take into account an overriding public interest in disclosure of information that qualified for exemption under a provision containing no public interest balancing test (although I consider that such cases would be extremely rare), but also the flexibility to disclose technically exempt matter in particular circumstances where no harm could be done, or where that appears to be the appropriate course of action, but it is not legally possible to say that there is an overriding public interest in disclosure (e.g., disclosure of matter that is technically exempt because it has been submitted to Cabinet, but the matter is already in the public domain; disclosure to a grieving parent of information concerning the personal affairs of a deceased child).

Whatever the outcome of the broader issue, I suggest, in line with the recommendation I made at paragraphs B41-B44 of my first submission, that a public interest balancing test should be incorporated in s.45(3) of the FOI Act. I also reiterate my comments at paragraphs B14-B18 of my first submission, that I can see no basis for having a differently worded public interest balancing test in respect of s.39(2) and s.48(1) of the FOI Act.

B4. Level and extent of fees/waiver (DP 54)

Difficulties posed by differential fees and charges for personal and non-personal access applications (DP 48 and 49)

Agencies are required to assess whether an application fee is payable, under s.6 of the *Freedom of Information Regulation 1992* Qld (the FOI regulation), in respect of every access application they receive (although I suspect they rarely do so when an application fee is tendered with the relevant access application, even though that fee should be refunded if it transpires that each responsive document held by the agency contains some information concerning the applicant's personal affairs). The same would be true in respect of the OIC if a similar differential application fee were to be imposed on the lodgment of an application for review under Part 5 of the FOI Act (as to which, see my comments below).

The legal test for the imposition of an application fee under s.6(1) of the FOI Regulation is whether at least one of the documents responsive to the terms of the relevant access application contains no information which can be properly characterised as information concerning the personal affairs of the access applicant: see *Re Price and Surveyors Board of Queensland* (1997) 4 QAR 181 at p.190. If so, an application fee is payable.

Unfortunately, many users of the FOI Act (including some well-educated non-lawyers) have had considerable difficulty in understanding, or accepting:

(a) the fact that dividing lines have been drawn, in relevant decisions of the superior courts, between the affairs of an individual that comprise his/her "personal affairs" (as that term is used in the context of the FOI Act) and those which do not; and

(b) the fact that a document of general application, which has been applied in such a manner as to affect an individual's affairs, does not thereby become a document that concerns that individual's personal affairs.

Many applicants believe that if a document is about any aspect of their affairs, or is a document of general application that has been applied in a way that has personally affected them, they should be entitled to access the document free of charge, and many are determined to pursue this issue to the point of requiring a decision from the Information Commissioner, even when it has been carefully explained to them that the law is against them.

Unfortunately, there are also a good many cases which fall into the rather substantial grey area between the categories of information that have been held by courts to clearly be information concerning an individual's personal affairs, and the categories of information that have been held by courts not to be information concerning an individual's personal affairs.

In my view, it is a poor design principle that puts users of the FOI Act, agencies, and external review authorities through such a burden of decision-making and disputation, over relatively small sums of money per individual case, in so many cases.

One solution is to have uniform application fees. If that is not palatable because of the policy considerations which were thought to warrant the introduction of a differential charging regime, then I consider it is time to break the nexus between the imposition of fees and charges, and the frequently difficult-to-apply concept of information concerning the "personal affairs" of the

applicant. The basis for imposing a fee or charge should be clearly defined and easy to apply. For example, s.6 of the FOI Regulation could be amended to provide as follows (with like amendments to s.7):

> ***6.(1)*** *An individual who applies for access to a document that contains no information about his or her affairs must pay an application fee of $** at the time the application is made.*
>
> ***(2)*** *An individual who applies for access to a document that contains some information about his or her affairs is not required to pay an application fee in respect of that document.*
>
> ***(3)*** *A person other than an individual who applies for access to a document must pay an application fee of $** at the time the application is made.*

By virtue of the definitions of "person" and "corporation" in s.36 of the *Acts Interpretation Act 1954* Qld, the proposed subsection (3) would apply to any body corporate or body politic. The only substantial concession on the present charging regime that would be involved in making this amendment would be that an individual could obtain access to information concerning his/her business affairs (provided the business was not conducted through a corporation), or employment affairs, at no charge. But there would be compensation in the reduced resource demands for agencies to administer a more simple and more certain charging regime.

Whether or not an amendment of this kind is recommended by the Committee, I wish to make a further suggestion to reduce the demand on the resources of agencies, and of the OIC, posed by applications for review by the Information Commissioner of agency decisions on fees and charges. Notwithstanding that relatively small amounts of money are involved under the present charging regime (e.g., an application fee of $31), Parliament has seen fit to confer an entitlement to seek review by the Information Commissioner of the merits of an agency decision to impose an application fee or access charge. The OIC cannot refuse to deal with such cases, and they must ordinarily be accorded priority, since the decision on a fee or charge may be holding up access. While $31 may be a significant sum of money to some applicants, the resource costs for the OIC and the respondent agency in conducting a review of the decision to impose an application fee or access charge will inevitably exceed the amount at stake. Under the prevailing legal test explained above, examination of the relevant documents (or a sample of them) is the quickest and surest method of verifying that an application fee or charge is properly payable.

It is annoying and wasteful of resources when an applicant refuses to accept a preliminary view from the OIC, based on examination by the OIC of the documents in issue, thereby forcing the matter to a formal decision. I suggest that consideration be given to alleviating the problem through a legislative amendment that would permit the IC to elect, in such cases, to merely issue a written certification that, based on an examination of the documents in issue, an application fee or charge is or is not properly payable, without having to give reasons for decision. The IC should still be able to elect to give written reasons for decision where some educative/normative purpose would be served by doing so.

Fees for internal and external review (DP53 and 54)

I adhere to the comments I made in paragraphs B212 - B219 of my first submission. I only wish to add some further comments in defence of three principles (which I advocated in the event that, contrary to my submission, it was proposed to introduce a requirement for payment of a fee for seeking internal or external review) that attracted some criticism in submissions to the Parliamentary Committee.

I discussed the issue of fees and the current distinction between personal and non-personal information in relation to access application fees in paragraphs B186-B187 of my first submission. I expressed the view that if fees were to be imposed as a demand management strategy, then they should be imposed uniformly to information that is characterised as personal affairs as well non-personal affairs. The arguments for excluding personal affairs applications from fees centre on the desirability of citizens obtaining ready access to information about them held by government. Indeed, access to that information is a prerequisite for seeking correction or amendment of inaccurate, incomplete, out-of-date or misleading government records, under Part 4 of the FOI Act. I acknowledge the force of the principle which underpins the current practice of excluding personal affairs information from the imposition of fees and charges. I also note that proposals for removing that exclusion did not receive widespread support in the submissions received by the Committee.

However, it remains my view that if Parliament decides that it is desirable to reduce the number of applications for internal and/or external review, and imposes an application fee for internal and/or external review as the strategy to achieve that objective, that strategy will have only limited effect if personal affairs applications are excluded from the fees regime. Indeed, to exclude personal affairs applications will give rise to a number of threshold disputes over whether or not a filing fee is payable (which would have to take precedence over the substantive issues in dispute), presumably based on whether the documents in issue do or do not concern the personal affairs of the applicant (which, in many instances can involve difficult questions of characterisation - see my comments above in respect of DP 49). The net effect may be to create more work at external review level, rather than less.

With respect to the issue of waiver of fees and charges, I refer the Committee to paragraph B216 of my first submission. A number of submissions to the Committee expressed the view that lack of access to financial resources ought not to prohibit citizens from accessing their rights and I agree with those sentiments, which is why I strongly support the maintenance of the current fee regime. However, from my experience, sufficient numbers of applicants for external review would satisfy a hardship test, as to seriously limit the impact of the imposition of fees as a demand management or cost recovery strategy.

In my first submission at paragraph B218, I expressed the view that if an application fee was introduced for external review, that fee should apply to applications for review based on a 'deemed refusal' by an agency, provided a refund was payable if the applicant was successful in whole or in part. I sympathise with the views expressed in submissions to the Committee which point to the apparent inequity of requiring applicants to pay a fee for the external review of a 'deemed refusal' by an agency (which occurs only when the applicant has not received notification of a decision from the agency within the statutorily prescribed time frame). However, many access applicants do not, at present, exercise their right to seek external review on the basis of a 'deemed refusal' as soon as the statutory time period for notification of an agency decision has elapsed. It is common for agencies, which are experiencing difficulties in complying with statutory time limits, to negotiate with the applicant for additional time in which to make a decision. Many agencies are simply not prepared to shift staff resources from core functions to assist with temporary (or even semi-permanent) backlogs in the processing of FOI applications. If a fee were imposed on applications for external review, and provision made to waive that fee for applications for review of 'deemed

refusal' decisions, applicants would have no incentive to co-operate with agencies in their efforts to negotiate additional time in which to consult third parties, or locate and examine each requested document, *et cetera*. Indeed, the applicant would have a positive incentive to lodge an application for external review at no charge, rather than wait for the agency to notify its decision, and perhaps then lodge an application for external review that was subject to payment of a fee. It would be virtually impossible in such circumstances to implement the recommendations of The Consultancy Bureau at pp.22-25 of its Report, in respect of persuading applicants to withdraw 'deemed refusal' applications, so that they can be dealt with by agencies within an agreed timeframe.

B5. Section 28(2) (DP 55)

I refer the committee to paragraphs B230-B237 of my first submission, in which I discussed s.28(2) of the FOI Act. I consider that the preferable course of action is that which I suggested in paragraphs B236-237 of my first submission. However, if the Committee is minded to follow up the suggestion made in DP55(a), I would caution against merely deleting the word 'only' from the existing s.28(2)(b). It would be preferable to specify the additional factors that an agency is permitted to take into account in exercising the discretion conferred by s.28(2).

With respect to DP55(b), I can see no reason for, or advantage to be gained by, requiring agencies to consult with the Information Commissioner prior to applying s.28(2) of the FOI Act. If the OIC is to be given an expanded role, including an advice and awareness function, it should be open to agencies to consult that advice and awareness unit of the OIC, prior to applying s.28(2) of the FOI Act, if they choose to do so, and it should be open to an applicant to consult that unit if an agency proposes to apply s.28(2) against the applicant's wishes. There may be scope for facilitated negotiation to achieve an agreed compromise at that stage.

B6. Refusing applications by frequent or malicious applicants (DP 57 and 58)

[EDITED BY THE COMMITTEE]

I had the unsettling feeling in reading some agency submissions that their descriptions of the kinds of conduct they complained of could equally have been applied to -

- the use made of the Commonwealth FOI Act in the period 1983 - 1987 by Mr Jack Waterford, a journalist with the *Canberra Times*, whose many applications and test cases are now seen as having had a salutary effect in opening up Commonwealth administration to greater public scrutiny (indeed, many classes of information which the Commonwealth Administrative Appeals Tribunal found in the 1980s to be exempt from disclosure under the Commonwealth FOI Act are now routinely and voluntarily released into the public domain)

- the use made of the Victorian FOI Act by several legally-qualified Oppositions MPs whose names (Birrell, Perton, Thwaites) recur throughout the reports of FOI decisions given by the Victorian Administrative Appeals Tribunal, in respect of their attempts to access information on aspects of public administration that had attracted political or public controversy.

It has been an important design principle of Australian FOI legislation, and it is well established by judicial decision, that there is no test of standing to gain access to documents under the FOI Act, i.e., an applicant for access is not required to demonstrate a special interest in obtaining the information which the applicant seeks, and the motives of a particular applicant for seeking the documents in issue are to be disregarded (except to the extent that they may be relevant to the application of the legal tests imposed by some exemption provisions). Thus, de Jersey J remarked in *State of Queensland v Albietz* [1996] 1 Qd R 215 at p.222: *But the Freedom of Information Act does not confer any discretion on the Information Commissioner, or the Supreme Court, to stop disclosure of information because of any particular motivation in the applicant.*

The primary meaning of "vexatious", in a statutory context such as s.77 of the FOI Act, refers to an application for review instituted without sufficient grounds, for the purpose of causing trouble or annoyance to the defendant: see *Re Hearl and Musgrave Shire Council* (1994) 1 QAR 557 at p.569. It is difficult to say that a challenge to the correctness of an agency's application of the exemption provisions in the FOI Act is vexatious, especially since agencies frequently make errors in the application of the FOI Act to access applications lodged by the very applicants who have prompted the agency concerns now under consideration, and since any citizen is entitled to pursue access to any document in the possession of an agency irrespective of their motive for doing so.

The vexatious provision in s.77(1) of the FOI Act can be (and has been) used when an applicant seeks to pursue multiple concurrent (or even sequential, where there has been no material change in circumstances) applications for review in respect of the same documents. The provision which I recommended at paragraph B249 of my first submission would enable agencies to deal with comparable situations at the primary decision-making level, without introducing a 'vexatious' test which would necessitate examination of an applicant's motive for seeking access to particular information. A 'vexatious' test is, of course, extremely difficult to apply in practical terms (especially with regard to obtaining credible evidence, rather than mere speculation, as to a 'tainted' motive) quite apart from the theoretical/philosophical concerns in terms of the design principles of FOI legislation.

The problem is to identify the real touchstone of concern at the use of the FOI Act that has been made by a few individuals in Queensland, and to work out whether a targeted response can alleviate that concern without infringing important design principles of FOI legislation that operate for the benefit of the vast majority of reasonable users of the FOI Act.

I am afraid I cannot see any easy solution to that conundrum. If a solution which does not infringe important design principles of the FOI Act cannot be found, then I would suggest that it may be the lesser of two evils to tolerate the occasional unreasonable user of the FOI Act, rather than to infringe those important design principles. (The extent of the impact those few individuals have on agency resources would be mitigated by the introduction of a limitation on the scope of access applications of the kind I suggested in paragraph B192 of my first submission, and would be further mitigated in the event that a more onerous charging regime were to be introduced, together with changes to s.28(2) of the FOI Act of the kind that have been urged by many agencies.)

Some agencies have argued that the FOI Act should not be able to be used to conduct a personal vendetta against individual public servants. While I do not seek to diminish the disquiet felt by an individual public servant who has been targeted in this way, the kinds of information about any individual public servant that would actually be disclosed as non-exempt information under the FOI Act (being information that could be disclosed to any interested member of the public) should not of itself be capable of being used to cause any harm to the individual public servant (unless, perhaps, it disclosed some wrongdoing on the part of the particular public servant, in which case accountability considerations may be applicable).

If there were reasonable grounds for expecting disclosure of information to result in harassment of an individual, it could be exempted under the expanded s.42(1)(c) exemption which I recommended in paragraphs B19-B20 of my first submission.

Some of the examples given by agencies of alleged vexatious use of the FOI Act tend to support my concern that giving agencies an uncircumscribed power to refuse to deal with vexatious applications or applicants, could lead to abuse of the power.

I note that the first purported example of a vexatious application given in the Committee's Discussion Paper at p.44 may be an example of annoying conduct on the part of an access applicant (that is insensitive to the resource effort put in by an agency to deal with the access application), but it says nothing about whether the access application itself was vexatious. Some caution has to be exercised in evaluating complaints of this kind from agencies, especially if they are suggesting that a particular applicant be treated as vexatious, and perhaps disbarred from using the FOI Act again, because he/she failed to inspect documents prepared in response to a prior application. I have heard similar complaints from agencies in respect of cases that proceeded to external review, and when the issue was raised with the applicant, it was explained that the documents listed as documents to which the agency was prepared to grant access were all documents that the applicant already had or could obtain from public sources, and the applicant's real interest was in pursuing the documents to which access had been refused. This may indicate a lack of clear communication as to the kinds of documents which the applicant really wanted to obtain, but frequently the applicant doesn't know precisely what documents an agency has and therefore wishes to frame a speculative access application in fairly broad terms.

The second example given on p.44 of the Discussion paper raises the question of whether a substantial and unreasonable diversion of resources test (of the kind presently provided for in s.28(2) of the FOI Act) should be capable of application not just in respect of a particular access application, but in respect of the aggregate of access applications lodged by or on behalf of a particular applicant within a specified period of time.

The third example given on p.44 of the Discussion Paper may be capable of being dealt with under s.25(2) and (4) of the FOI Act. An agency is entitled to refuse to deal with an access application if, after being consulted under s.25(4), the applicant fails to provide such information concerning the requested documents as is reasonably necessary to enable a responsible officer of the agency to identify the requested documents. There have been a few occasions on which I have been prepared to uphold an agency's decision to refuse to deal with an FOI access application on that basis. However, where there is sufficient clarity as to the scope of the access application, and the agency is seeking co-operation to narrow the scope because it places excessive demands on agency resources, it is s.28(2) and s.28(4) of the FOI Act that are applicable. There have been several suggestions by myself and others as to how s.28(2) might be amended, and changes to that provision could mitigate the impact on agency resources of alleged vexatious users of the FOI Act.

As to the fourth example given on p.44 of the Discussion Paper, it is difficult for me to envision any circumstances in which information concerning the personal affairs of a child victim of crime would not qualify for exemption from disclosure under the FOI Act (including disclosure to the perpetrator) under the rulings I have made in respect of the application of s.44(1) of the FOI Act (see, for example, *Re Ferguson and Director of Public Prosecutions* (1996) 3 QAR 324 at p.336), unless, perhaps, the information is contained in the perpetrator's own statement or transcript of evidence. An access application can't be characterised as vexatious merely because it seeks information liable to be exempt.

B7. Deemed access rather than deemed refusal (DP 63)

On its face, this point raises what appears to be a simple means of further motivating agencies to comply with time limits. While superficially attractive because of its apparent simplicity, the proposal could have serious consequences. Many documents dealt with by agencies refer to personal or business information about third parties. It would be inappropriate for them to lose their rights under the FOI Act, merely because an agency was dilatory in making a decision.

I would support the proposal if it was practicable to introduce it in a more circumscribed form, *viz*, a failure by an agency to comply with a prescribed time limit under s.27(4) and s.27(7) of the FOI Act should result in a deemed decision to grant access to any requested matter, other than matter in respect of which consultation is required with an affected third party under s.51 of the FOI Act (unless the affected third party is an agency as defined in s.8 of the FOI Act, or a Minister, or an officer of an agency in his/her capacity as such).

I note that if my recommendations at paragraphs C78-C84 of my first submission are accepted, the extent of the affected third parties who would have an entitlement to be consulted under s.51 of the FOI Act would be considerably reduced.

A proposal for deemed access may be one of the few methods of ensuring that agency CEOs provide adequate resources for the processing of FOI requests in their agencies. I note that there have been alarming increases in the number of deemed refusal applications proceeding to external review in the last two years.

B8. The jurisdiction and powers of the IC to deal with applications for review of agency decisions that matter is exempt from disclosure under s.50(c)(i) of the FOI Act (New issue)

The Parliamentary Criminal Justice Committee (the PCJC) and myself have become embroiled in a dispute over whether or not I have power, under s.76 of the FOI Act, to require the Criminal Justice Commission (the CJC) to produce for my inspection documents which are in issue in a review under Part 5 of the FOI Act, and which comprise correspondence between the PCJC and the CJC that is claimed to be exempt under s.50(c)(i) of the FOI Act. The PCJC has instructed the CJC not to produce the CJC's copies of those documents to me for inspection, because to do so would infringe parliamentary privilege.

I personally entertain no doubt that it is clear from the language and scheme of the FOI Act that Parliament intended that -

(a) the Information Commissioner should have power, on a review of an agency decision under Part 5 of the FOI Act, to decide whether or not disclosure of a document would infringe the privileges of Parliament (and hence qualify for exemption under s.50(c)(i) of the FOI Act), and that Parliament has thereby itself provided for a limited and carefully circumscribed exception to the principle that Parliament is the sole judge of the scope and extent of its privileges; and

(b) the power conferred on the Information Commissioner by s.76 of the FOI Act to require production for inspection of a document or matter claimed to be exempt applies equally to documents or matter claimed to be exempt under s.50(c)(i) of the FOI Act, as it does to other highly sensitive kinds of exempt documents such as Cabinet submissions.

I have obtained an opinion from Mr R W Gotterson QC (a copy of which is attached for your reference) which confirms my views. [THE COMMITTEE HAS NOT AUTHORISED THE PUBLICATION OF THIS OPINION.] However, the PCJC has thus far declined to accept that Mr Gotterson's advice is correct, or to instruct the CJC that it has no objection to the CJC acting in accordance with Mr Gotterson's advice. I understand that the PCJC is acting on legal advice, including advice from the Clerk of the Parliament, which I believe is wrong. That advice appears to me to place unwarranted emphasis (to the exclusion of clear indications of Parliament's intention that are apparent from s.92(1), and the scheme of the FOI Act as a whole) on the fact that s.92(2) of the FOI Act expressly provides that legal professional privilege is not a ground on which an agency can refuse to produce a document to the Information Commissioner, but makes no similar express provision in respect of parliamentary privilege. To obtain the full flavour of the dispute, it might be preferable for you to ask the PCJC to provide you with copies of the complete exchange of correspondence between the PCJC and my office concerning this issue. (The Research Director of the PCJC has been informed that I would be raising this issue with your Committee, and that I would be making the suggestion conveyed in the preceding sentence.)

The last two years have seen a marked escalation in the number of exemption claims made by agencies under s.50(c)(i) of the FOI Act, and I am anxious to have the issues raised by the PCJC put to rest. I have no desire to usurp a function which Parliament wishes to reserve to itself, and if Parliament wishes to devise and implement a scheme whereby it determines for itself the claims for exemption under s.50(c)(i) of the FOI Act that arise under the 8,000 or so access applications made in Queensland each year, both myself and many overworked FOI administrators would no doubt be very grateful. But I do not consider that that was Parliament's intention. I consider that I have a statutory duty to determine exemption claims under s.50(c)(i) of the FOI Act that arise in a review under Part 5 of the FOI Act, and I consider that I do (and I should) have the power to examine a document claimed to be exempt under s.50(c)(i) whenever I believe that to be necessary or desirable to assist my determination as to the validity of the exemption claim.

In order to render the relevant legal position clear beyond doubt, I recommend that s.92(2) of the FOI Act be amended by deleting the word "does" and substituting the words "or parliamentary privilege do".

B9. Desirability of including provision for a 'slip' rule in Part 5 of the FOI Act (New issue)

On two occasions, errors have been detected in 'letter decisions' already issued under s.89 of the FOI Act. In one instance, two lines of a decision were inexplicably dropped out by the word-processor in the final version, and this went undetected by proof-reading. In the other instance, clerical errors were detected in a schedule of exempt documents that was attached to my reasons for decision. In both instances, I purported to issue corrections under the 'slip' rule, as the Commonwealth Administrative Appeals Tribunal (the AAT) had done in similar circumstances (see, for example, *Re Pontin and Repatriation Commission* (1991) 13 AAR 292 at p.295ff) despite the lack of any statutory power to correct slips. However, doubts had been expressed in other AAT decisions as to whether an administrative review tribunal has power to correct slips or omissions in a published decision in the absence of an explicit statutory power to do so, and eventually it was considered desirable to amend the *Administrative Appeals Tribunal Act 1975* Cth (the AAT Act) to confer such a power. Likewise, it is preferable that a power to correct slips or omissions in decisions given under s.89 of the FOI Act be expressly conferred on the Information Commissioner, in terms similar to those of s.43AA of the AAT Act.