LEGISLATIVE ASSEMBLY OF QUEENSLAND

LEGAL, CONSTITUTIONAL AND ADMINISTRATIVE REVIEW COMMITTEE

Freedom of Information in Queensland

December 2001

Report No 32

LEGAL, CONSTITUTIONAL AND ADMINISTRATIVE REVIEW COMMITTEE

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COMMITTEE CONTACT DETAILS

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LEGAL, CONSTITUTIONAL AND ADMINISTRATIVE REVIEW COMMITTEE

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The committee also thanks Ms Sarah Lim of the Parliamentary Service and Ms Nicolee Dixon of the Parliamentary Library for their assistance with aspects of the committee's review.

ABBREVIATIONS

ABBREVIATION	DESCRIPTION
1979 Senate Committee	Senate Standing Committee on Constitutional and Legal Affairs which authored the report *Freedom of Information: Report by the Senate Standing Committee on Constitutional and Legal Affairs on the Freedom of Information Bill 1978 and aspects of the Archives Bill 1978*
AIA	*Acts Interpretation Act 1954* (Qld)
ALRC	Australian Law Reform Commission
ALRC/ARC review	Joint review of the Commonwealth FOI Act by the Australian Law Reform Commission and the Administrative Review Council resulting in the report *Open government: A review of the federal Freedom of Information Act 1982*
ARC	Administrative Review Council
CSO	community service obligation
DJAG	Department of Justice and Attorney-General (Queensland Government)
EARC	Electoral and Administrative Review Commission (now defunct)
FLPs	fundamental legislative principles
FOI	freedom of information
FOI Act	*Freedom of Information Act 1992* (Qld)
FOI Act (Cth)	*Freedom of Information Act 1982* (Cth)
Commonwealth FOI Act	*Freedom of Information Act 1982* (Cth)
FOI Act (ACT)	*Freedom of Information Act 1989* (ACT)
FOI Act (NSW)	*Freedom of Information Act 1989* (NSW)
FOI Act (SA)	*Freedom of Information Act 1991* (SA)
FOI Act (Tas)	*Freedom of Information Act 1991* (Tas)
FOI Act (Vic)	*Freedom of Information Act 1982* (Vic)
FOI Act (WA)	*Freedom of Information Act 1992* (WA)
FOIALD	Freedom of Information and Administrative Law Division
FOIDERS	Freedom of Information Data Entry and Recording System
FOI Regulation	*Freedom of Information Regulation 1992* (Qld)
Former committee	Legal, Constitutional and Administrative Review Committee of the 49th Parliament
GBEs	government business enterprise
GOC	government owned corporation
IS42	*Information Standard 42: Information privacy*
LCARC	Legal, Constitutional and Administrative Review Committee of the Queensland Legislative Assembly
LGOC	Local Government Owned Corporation
MEPPC	Members' Ethics and Parliamentary Privileges Committee of the Queensland Legislative Assembly
NZLC	New Zealand Law Commission

ABBREVIATION	DESCRIPTION
OIA	*Official Information Act 1982* (NZ)
PCEAR	Parliamentary Committee for Electoral and Administrative Review (now defunct)
QCC	Queensland Crime Commission
QIC	Queensland Information Commissioner
QLRC	Queensland Law Reform Commission
QPS	Queensland Police Service
Strategic management review report	Report on the strategic review of the Queensland Information Commissioner conducted by The Consultancy Bureau Pty Ltd (commissioned by the Queensland Government). See the *Report of the Strategic Management Review of the Offices of the Queensland Ombudsman and the Information Commissioner*.
SLC	Scrutiny of Legislation Committee of the Queensland Legislative Assembly
the Minister	Attorney-General and Minister for Justice
UK	United Kingdom

CHAIR'S FOREWORD

Freedom of Information legislation, and the systems that support its effective implementation, are fundamental to open, accountable government. A healthy democratic system is one where citizens are able to effectively scrutinise, debate and participate in government decision-making and policy development.

In our FOI review sufficient evidence was revealed to establish that the FOI Act has contributed to open and accountable government and enhanced participation by citizens in government in Queensland. However, a number of areas to strengthen and improve the FOI regime in Queensland have been identified through the review.

We have recommended a range of significant reforms and more technical amendments to the FOI Act to enhance its effectiveness. We are confident that the FOI Act can balance the public interest in disclosure of government-held information with the need to protect other specific public and private interests.

The major reforms and recommendations in our report include the following.

- The establishment of an independent entity (a Queensland 'FOI monitor') with the general responsibility of:
  - monitoring compliance with, and administration of, the FOI regime; and
  - promoting community awareness and understanding of the FOI regime and providing advice and assistance to agencies and members of the public about the regime.
- The development of a whole-of-government strategy to promote the greater disclosure of government-held information outside the FOI Act, including the introduction of administrative access schemes.
- Legislative provisions to facilitate a flexible and consultative approach to processing FOI applications. Such an approach has the potential to allow better focussed applications, reduce processing time and cost and, at the same time, improve outcomes for applicants.
- The ongoing implementation of practices within the Office of the Information Commissioner that balance the need for legal precision in handling FOI reviews and decisions, with the need for timely and responsive service to the public.
- Mechanisms to require agencies and ministers to focus on the harm which would result from disclosure of a document, rather than on the class of documents to which the relevant document belongs. In relation to the Cabinet exemption, we recommend that a purposive test be incorporated into s 36(1) to limit the Cabinet exemption to documents created for the purpose of being submitted to Cabinet.

Given the recent implementation of a new fees and charges regime, we propose to conduct a comprehensive review of this regime in a year.

Finally, throughout the report we identify a number of areas which warrant further consideration but are outside the terms of reference of this review.

The work of LCARC would have been restricted and less relevant without the efforts of the individuals and organisations who have made submissions to this review. I would also like to commend the members and staff of the LCARC of the 49th Parliament for their initial groundwork in undertaking extensive public consultations and preparation of an FOI Discussion Paper in February 2000.

The LCARC research staff, Kerryn Newton, Veronica Rogers and Tania Jackman, have devoted many weeks to the analysis of issues and formulation of reform options for the committee to consider. They have been outstanding.

The members of the current LCARC 'received the baton' from the previous committee in May 2001 with the determination to finalise the report this year, and to recommend constructive reforms to the FOI Act. I thank members for their co-operation and active participation in this review.

We believe that we have presented a comprehensive package of reforms—a package that will advance public access to government-held information and public accountability. We welcome detailed consideration of these reforms by the government and the public of Queensland.

Karen Struthers MP
Chair

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1. CHAPTER 1 – INTRODUCTION

1.1 THE REFERENCE

The Legal, Constitutional and Administrative Review Committee ('LCARC' or 'the committee') is a multi-party committee of the Queensland Parliament with responsibilities including legal, constitutional, administrative review and electoral reform.[1] The committee's area of responsibility about administrative review reform includes considering legislation about access to information. In addition, the committee is to 'deal with' issues referred to it by the Legislative Assembly or under another Act.[2]

On 11 March 1999, the Queensland Legislative Assembly referred the *Freedom of Information Act 1992* (Qld) ('the FOI Act' or 'the Act') to the LCARC of the 49th Parliament ('the former committee') for review. The terms of reference of the inquiry as set by the Legislative Assembly were as follows.

> *That, having regard to:*
>
> ***(a)*** *the basic purposes of, and benefits intended to be conferred by the provisions of the Freedom of Information Act 1992, (the FOI Act) as identified in:*
>
> ***(i)*** *the Electoral and Administrative Review [Commission] report on freedom of information;*
>
> ***(ii)*** *the report of the Parliamentary Committee for Electoral and Administrative Review on Freedom of Information for Queensland; and*
>
> ***(iii)*** *sections 4, 5 and 6 of Part 1 Division 2 of the FOI Act;*
>
> ***(b)*** *the principles and provisions of the various Commonwealth, State and Territory Freedom of Information Acts;*
>
> ***(c)*** *the philosophical and political foundations of the concept of freedom of information as identified in the report of the Senate Standing Committee on Constitutional and Legal Affairs on Freedom of Information (1979); and*
>
> ***(d)*** *current and emerging technology for information management and maintenance.*
>
> *The following matters be referred to the Legal, Constitutional and Administrative Review Committee for inquiry and report:*
>
> ***A.*** *Whether the basic purposes and principles of the freedom of information legislation in Queensland as set out above have been satisfied, and whether they now require modification.*
>
> ***B.*** *Whether the FOI Act should be amended, and in particular:*
>
> ***(i)*** *whether the objects clauses should be amended;*
>
> ***(ii)*** *whether, and to what extent, the exemption provisions in Part 3 Division 2 should be amended;*
>
> ***(iii)*** *whether the ambit of the application of the Act, both generally and by operation of section 11 and section 11A, should be narrowed or extended;*
>
> ***(iv)*** *whether the FOI Act allows appropriate access to information in electronic and non-paper formats;*
>
> ***(v)*** *whether the mechanisms set out in the Act for internal and external review are effective, and in particular, whether the method of review and decision by the Information Commissioner is excessively legalistic and time-consuming;*

1 *Parliamentary Committees Act 1995* (Qld), ss 9-13.
2 *Parliamentary Committees Act 1995* (Qld), s 8(2).

(vi) *the appropriateness of, and the need for, the existing regime of fees and charges in respect of both access to documents and internal and external review;*

(vii) *whether amendments should be made to minimise the resource implications for agencies subject to the FOI Act in order to protect the public interest in proper and efficient government administration, and in particular:*

- *whether section 28 provides an appropriate balance between the interests of applicants and agencies;*
- *whether data collection and reporting requirements, which inform the parliamentary and public understanding of how well the FOI Act is operating in Queensland, exceed what is necessary to achieve their legislative purpose;*
- *whether time limits are appropriate.*

(viii) *whether amendments should be made to either section 42(1) or section 44(1) of the Act to exempt from disclosure information concerning the identity or other personal details of a person (other than the applicant) unless its disclosure would be in the public interest having regard to the use(s) likely to be made of the information;*

(ix) *whether amendments should be made to the Act to allow disclosure of material on conditions in the public interest (for example, to a legal representative who is prohibited from disclosing it to the applicant);*

C. *Any related matter.*

These broad terms of reference clearly required the former committee to conduct a comprehensive review requiring not only an assessment of whether the FOI Act has achieved the purposes and objectives it was designed to achieve, but also an examination of procedural aspects of the Act.

1.2 THE FORMER COMMITTEE'S WORK

The former committee decided from the outset that its inquiry process would involve extensive public consultation given that the committee's inquiry was the first public review of the FOI Act and given the nature of the Act. The former committee's inquiry process involved the following steps.

- In March 1999, the committee called for public submissions on the inquiry terms of reference by advertising in newspapers state-wide and by directly writing to some 700 identified stakeholders. The committee received 110 submissions in response to this call.
- In June 1999, the committee examined first-hand New Zealand's unique approach to accessing government-held information during a study tour of New Zealand. The committee met with numerous persons involved with, and interested in, the operation of that country's freedom of information legislation, the *Official Information Act 1982* (NZ). The *Official Information Act* takes a different approach in many respects to the FOI legislation of Australian jurisdictions and is highly regarded by many. The committee's report to Parliament on its study tour[3] details the persons with whom the committee met and the issues the committee discussed.
- In February 2000, the committee released a discussion paper, *Freedom of Information in Queensland*, to stimulate a second round of public input to its inquiry.[4] The discussion paper was based on the committee's analysis of its research, the submissions it had received and the material gathered on its New Zealand study tour. The committee advertised this second call for public submissions in *The Courier-Mail* and distributed some 750 hard copies and numerous electronic copies of its discussion paper to identified stakeholders.

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3 LCARC, *Report on a study tour of New Zealand regarding freedom of information and other matters: From 31 May to 4 June 1999*, report no 15, Goprint, Brisbane, July 1999.

4 LCARC, *Freedom of Information in Queensland*, Discussion paper no 1, Brisbane, February 2000.

The committee's discussion paper summarised the broad positions taken in submissions received to that date and invited further submissions on 75 discussion points which had emerged and were, in the committee's view, apt for further, specific public comment. The discussion points were generally in the nature of broad policy or FOI 'design principles'[5] rather than technical matters.

The committee received 63 submissions in response to this second call for public input, making a total of 173 submissions the committee received for the inquiry.

A list of the persons and organisations that made submissions to the committee's inquiry appears as **appendix A** of this report. Those submissions that the committee has authorised for publication and tabled can be viewed at the Bills and Papers Office, Parliament House, Brisbane.[6] The Queensland Information Commissioner (the 'QIC' or 'commissioner') made two extensive submissions to the committee's inquiry. The QIC's first submission (in response to the committee's March 1999 call for submissions) and his supplementary submission (in response to the committee's February 2000 discussion paper) can be viewed via the committee's website.

- On 17 March 2000, the committee met with numerous FOI coordinators from a range of state government departments and agencies and local governments. The purpose of this informal meeting was to enable the committee to gain a better appreciation of how the FOI Act operates at the departmental and agency decision-making level in practice and whether any provisions of the Act could be improved from an administrative perspective.
- On 11 May 2000, the committee visited a selection of FOI units—the FOI units of the Brisbane City Council, Queensland Police Service and Queensland Health—to see systems and processes first-hand.
- On 11 and 12 May 2000, the committee held public hearings in Brisbane in relation to its review. A list of the persons who gave evidence at those public hearings appears as **appendix B** of this report.

  The committee has also authorised the publication of, and tabled in Parliament, the Hansard transcript of the public hearings. A copy of this transcript can be viewed at the Bills and Papers Office, Parliament House, Brisbane and via the committee's website.

  The committee had initially planned to undertake regional hearings regarding its inquiry but decided that the cost of undertaking such travel could not be justified in light of the relatively small number of submissions received from regional areas. Instead, so that regional submitters were not disadvantaged (compared to Brisbane submitters), the committee invited all regional submitters who wished to contribute further to the committee's inquiry to either contact a committee member directly or provide a further direct submission to the committee by tele-conference or via some other mutual arrangement.

Further, in June 2000, a report on a strategic management review of the offices of the Queensland Ombudsman and QIC conducted by The Consultancy Bureau was handed down.[7] This review, initially focussed on the Ombudsman's office, was extended to encompass the QIC's office following agreement by the Premier, the Attorney-General and the committee that it was prudent and cost effective to do so. Both offices are managed by the same accountable officer, are combined for budgetary purposes and are supported by a single Corporate and Research Division.

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5 This term is used by Snell, R in 'Rethinking administrative law: A redundancy package for FOI?', Paper presented at the 1998 Administrative Law Forum, Melbourne, June 1998 at 11.

6 As is general committee policy, the committee did not authorise for publication and table submissions, or deleted parts of submissions, where the committee considered publication might, for example, affect individuals' privacy or adversely affect the reputation of third parties or otherwise be unfair to them.

7 The Consultancy Bureau Pty Ltd (commissioned by the Queensland Government), *Report of the Strategic Management Review of the Offices of the Queensland Ombudsman and the Information Commissioner*, ('strategic management review report'), volume 1 (Ombudsman) and volume 2 (Information Commissioner), The Brisbane Printing Place, June 2000.

The former committee considered that a management review of the QIC's office would be timely as it would enable the committee to consider the review outcomes before handing down its report on its review of the Act.

The strategic management review focussed on management approaches and practices used within the QIC's office in a bid to form a view about the office's effectiveness, efficiency and economy. The reviewers' approach included consideration of the terms of reference for the committee's review of the Act.[8]

1.3 THIS COMMITTEE'S WORK

Due to an intervening reference with a short reporting deadline, the former committee was unable to finalise its review of the FOI Act prior to the dissolution of Parliament for the 2001 general state election.

The LCARC of the 50th Parliament was appointed on 3 May 2001. On 15 May 2001, this committee resolved to finalise the review of the FOI Act on the same terms of reference given to the former committee, and utilising the submissions and material gathered by that committee.

This committee subsequently:

- reviewed the extensive amount of material gathered by the former committee including submissions, evidence in public hearings, notes of meetings with relevant persons in New Zealand and Queensland FOI coordinators;
- met with the new Information Commissioner, Mr David Bevan, on 7 November 2001 to discuss the review in general and invite Mr Bevan to provide a further written submission on areas relating to the review where he might take a different view to the former QIC;[9] and
- held a FOI coordinators' forum on 16 November 2001 similar to that held by the former committee.

Mr Bevan subsequently provided the committee with some comments on aspects of the review.[10] All references in this report to the QIC's submission refer to the two submissions made by the former QIC. Specific reference is made to the 'current QIC' where the current QIC has made a particular submission to the committee.

While the committee decided to give the FOI inquiry some priority, a considerable amount of time was required for the new committee to become familiar with the extensive amount of submissions and other research collected by the former committee, and to consider the varied and complex issues relevant to Queensland's FOI regime in light of that material.

1.4 BROAD THEMES OF CONSULTATION

1.4.1 The need for FOI legislation

The essential objective of FOI legislation is to provide citizens with a right of access to government-held information in order to enhance democratic and representative government by making government more open, accountable and participatory.

FOI legislation has become an integral part of Australia's democratic framework. Since the introduction of the Commonwealth FOI Act in 1982, all states and the ACT have introduced FOI

8 The committee refers to the strategic management review report throughout this report, particularly in chapter 4 (Enhancing the effective of Queensland's FOI regime) and chapter 8 (External Review).

9 Mr Fred Albietz retired as QIC on 13 August 2001 and Mr David Bevan commenced in the position on 17 September 2001.

10 Letter to the committee dated 29 November 2001. A copy of this letter is accessible via the committee's website.

legislation largely based on the Commonwealth model. The Queensland Parliament passed FOI legislation for this state in 1992 as part of a raft of legislation aimed at improving public administration in Queensland.[11]

During the course of its review, the committee did not receive any submission that the FOI Act should be repealed.

1.4.2 Criticisms of Queensland's FOI regime

While the committee agrees that FOI legislation is now an integral part of Queensland's statute book, public consultation made it clear that aspects of Queensland's FOI regime require reform. (The committee uses the term 'FOI regime' to describe all systems and processes encouraging the public accessibility of government-held information. The FOI Act is one, important component of this regime.)

Criticisms which came through during the course of the review include:

- while personal information access works reasonably well, access to non-personal or policy information has not operated effectively. Furthermore, as the sensitivity of the policy information increases and the level of government at which the information is generated or used increases, the chance of successfully accessing the information greatly decreases. (Some suggested that this was accentuated by the 1993 and 1995 amendments to the Cabinet and Executive Council exemptions.);
- the culture of some government agencies is not as supportive of open government as it should be;
- the Act too formally prescribes how information should be released and retards the government's discretionary release of information;
- the public is not sufficiently aware of the existence of the FOI Act, and when members of the public do use the Act, the process can be mysterious, cumbersome, overly technical and complex;
- there is no one entity responsible for: overseeing administration of the FOI regime; monitoring agency compliance with the FOI Act; providing advice to agencies and applicants; and raising community awareness about the Act's existence;
- the breadth of the Act is insufficient—certain entities are inappropriately excluded from the operation of the Act, particularly agencies that have been corporatised or privatised, and it needs to be clear that the Act applies to traditional government services that have been outsourced;
- the Act is inappropriately being used for 'fishing expeditions' in relation to actual or potential litigation;
- exemptions are invoked too quickly—the exemptions should not be based on technical considerations but should be based on considerations of consequential harm;
- the meaning of 'the public interest', a concept pivotal to the interpretation of the Act, is undefined and mysterious;
- some particular exemptions are being invoked too often, for example:
  - the Cabinet documents exemption, in its current form, is too broad and undermines the fine balance of the original Act; and
  - the government's overuse of the commercial exemptions needs to be addressed;
- it takes too long for agencies to process FOI applications and for external reviews to be completed, at times rendering the information that is sought worthless;

[11] A short history of FOI legislation in Australia and Queensland in particular is contained in chapter 2 (Background).

- review mechanisms are cumbersome;
- the reporting requirements imposed by the Act on agencies should be reviewed;
- the fee structure should be revisited as:
  - FOI can be too expensive for community groups wishing to obtain documents in the public interest; and
  - conversely, FOI is too costly for agencies to administer (especially small agencies and local governments);
- a disproportionate amount of agencies' resources are expended in processing vexatious applications.

The committee addresses these criticisms and other issues in this report.

1.5 THIS REPORT

1.5.1 Format

The structure of this report does not follow the terms of reference. Rather:

- chapter 2 provides a short history leading to the introduction of FOI legislation in Queensland and a brief outline of FOI legislation in comparable jurisdictions;
- chapter 3 assesses whether the purposes and principles of the FOI Act have been satisfied and suggests a new objects clause for the Act;
- chapter 4 recommends, among other matters, two key measures to enhance the effectiveness of Queensland's FOI regime: an entity to monitor the FOI regime and to provide advice and raise awareness about the regime, and a whole of government strategy aimed at the greater disclosure of information outside the Act;
- chapter 5 discusses in broad terms the three matters which the Act provides for: access to documents, amendment of personal affairs information and the availability of information;
- chapter 6 concerns those provisions of the FOI Act which relate to the processing of FOI applications for access to documents, including time limits for processing initial FOI applications and dealing with vexatious and serial applicants;
- chapters 7 and 8 deal with internal and external review of FOI applications;
- chapter 9 examines the current fees and charges applicable under Queensland's FOI regime;
- chapters 10 and 11 examine the circumstances where matter should be exempt from disclosure under the Act, in terms of the Act's general approach to exemptions and the specific exemption provisions respectively;
- chapter 12 examines the scope of the Act; and
- chapter 13 concludes the report by recommending that the Attorney-General prepare a draft of a new Act incorporating the committee's recommended amendments for final consultation purposes.

Appendix C indicates which sections of this report relate to particular terms of reference.

1.5.2 Submissions and recommendations

In coming to the conclusions and recommendations in this report the committee has:

- examined an extensive amount of submissions and other research and studied the FOI regimes operating in various Australian and overseas jurisdictions for features apt and desirable for introduction in Queensland;[12] and
- drawn heavily from written and oral submissions to the committee's inquiry.

Given the comprehensive nature of the committee's review and the large number of submissions considered the committee has, in most cases, not directly referred to specific submissions in the discussion in this report. The submissions relevant to each section, including paragraphs of the QIC's submissions, are listed in a footnote to the section heading.

Unless otherwise stated, all recommendations in this report are directed to the Attorney-General and Minister for Justice who is the minister responsible for administering the FOI Act.

[12] Comparative tables of Australian FOI legislation are available on the committee's website.

2. BACKGROUND

2.1 THE ORIGINS OF THE FOI CONCEPT AND ITS INTRODUCTION IN AUSTRALIA

The FOI concept, while consistent with modern Western notions of democracy, is not inherent in Westminster-style governance inherited by Australia. Rather, the origins of FOI lie in 18th Century Swedish legislation. Indeed, Westminster-style governance has traditionally focused on the need for 'official secrecy' rather than open, transparent government. However, in the 1960s there emerged in Australia a push for FOI legislation propelled by the passage of the United States FOI Act in 1966 and a growing awareness of the need for greater public sector accountability, which the Westminster system was seemingly unable to deliver.[13]

FOI legislation was introduced into the Commonwealth Parliament in 1978 following inquiries by two interdepartmental committees (in 1974 and 1976). The bill was then referred to the Senate Standing Committee on Constitutional and Legal Affairs (the '1979 Senate Committee'), for consideration and report.[14] That committee rejected that FOI legislation was at odds with the Westminster notion of 'responsible government' and saw three justifications for FOI legislation in Australia:

- individuals have a right to know and access what information government holds about them;
- when government is more open to public scrutiny it is more accountable and this should, in turn, foster competency and efficiency; and
- public access to information should lead to increased public participation in policy making and government processes.[15]

The federal government subsequently introduced a revised FOI bill in April 1981, though this bill did not incorporate the majority of the 1979 Senate Committee's recommendations. The bill was passed with some minor amendments and the Commonwealth FOI Act commenced on 1 December 1982.

FOI legislation largely modelled on the Commonwealth FOI Act has subsequently been passed in all other Australian states and the ACT.[16]

2.2 FOI LEGISLATION IN QUEENSLAND

Queensland's FOI Act was passed in 1992.[17] The legislation emanated from recommendations made in the 1989 'Fitzgerald report'[18] which formed the basis for a more substantial FOI inquiry by the now defunct Electoral and Administrative Review Commission (EARC).

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13 See Australian Law Reform Commission report no 77 and Administrative Review Council report no 40, *Open government: A review of the federal Freedom of Information Act 1982*, ('ALRC/ARC review report'), AGPS, Canberra, 1995, chapter 3; Bayne P, *Freedom of Information*, The Law Book Company, Sydney, 1984, chapter 1; Terrill G, *Secrecy and publicity: The federal government from Menzies to Whitlam and beyond*, Melbourne University Press, Melbourne, 2000, chapter 6; NSW Parliamentary Library, *Freedom of Information and Open Government*, Background paper no 3/2000 at 3-7.

14 Senate Standing Committee on Constitutional and Legal Affairs, *Freedom of Information: Report by the Senate Standing Committee on Constitutional and Legal Affairs on the Freedom of Information Bill 1978 and aspects of the Archives Bill 1978*, ('1979 Senate Committee report'), AGPS, Canberra, 1979.

15 1979 Senate Committee report, n 14 at paras 3.3-3.5.

16 *Freedom of Information Act 1989* (NSW); *Freedom of Information Act 1991* (SA); *Freedom of Information Act 1991* (Tas); *Freedom of Information Act 1982* (Vic); *Freedom of Information Act 1992* (WA); *Freedom of Information Act 1989* (ACT). There is no FOI legislation in the Northern Territory.

17 For an annotated version of the FOI Act see Gilbert C and Lane W, *Queensland Administrative Law*, looseleaf, The Law Book Company, Sydney, 1994. For basic information on the FOI Act including the processing of FOI applications, see the Department of Justice and Attorney-General's website at: <http://www.justice.qld.gov.au/>.

18 Fitzgerald G E (Chair), *Report of the commission of inquiry into possible illegal activities and associated police misconduct*, Goprint, Brisbane, 1989.

EARC's 1990 *Report on Freedom of Information*,[19] which included a draft Freedom of Information Bill, was subsequently reviewed by the parliamentary committee responsible for overseeing EARC's work, the Parliamentary Committee for Electoral and Administrative Review (PCEAR). That committee largely endorsed EARC's report and its draft legislation.[20]

In accordance with the EARC blueprint, Queensland's FOI Act provides for three significant matters.

Firstly, the Act confers on persons a legally enforceable **right of access** to 'documents of an agency' and 'official documents of a minister' subject only to specific exemptions considered necessary to protect public and private interests. The Act also establishes a right of review both internally and externally where access is denied.

An 'agency' includes not only departments and public authorities but also, unlike some of its interstate counterparts, local governments. (EARC recommended that local governments be fully subjected to the statutory right of access, although in recognition of the difficulties they might face in preparing for the legislation, commencement of the Act in relation to local governments and Aboriginal and Islander Councils was deferred.[21])

Secondly, the Act confers on persons a right to make an application for **amendment of information** of a personal nature held by an agency or minister which might be inaccurate, incomplete, out-of-date or misleading.

Thirdly, the Act requires agencies to **make available information** about their structure and functions, ways in which members of the community can participate in the agency's policy formulation process, the kinds of documents usually held by the agency and how members of the community can access (and amend) the agency's documents.

Since its introduction, the FOI Act and the *Freedom of Information Regulation 1992* (the 'FOI Regulation') have been amended on a number of occasions. The more significant changes have included:

- amendments to expand the scope of the Cabinet and Executive Council exemptions: *Freedom of Information Amendment Act 1993* (Qld) and *Freedom of Information Amendment Act 1995* (Qld);
- amendments to the secrecy provisions exemption (contained in s 48) as a result of a review of the provision by Queensland Law Reform Commission:[22] *Freedom of Information (Review of Secrecy Provision Exemption) Amendment Act 1994* (Qld);
- the exclusion of government owned corporations and their local government equivalents from the scope of the Act: *Queensland Investment Corporation Amendment Act 1994* (Qld) and *Local Government Legislation Amendment Act 1997* (Qld);
- inclusion of mechanisms to enhance the accountability of the QIC and the QIC's office: *Parliamentary Committees Act 1995* (Qld) and *Parliamentary Commissioner and Freedom of Information Amendment Act 1999* (Qld); and

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19 Electoral and Administrative Review Commission, *Report on Freedom of Information*, ('EARC FOI report'), Goprint, Brisbane, December 1990.

20 Parliamentary Committee for Electoral and Administrative Review, *Freedom of Information for Queensland*, ('PCEAR FOI report'), Goprint, Brisbane, April 1991.

21 Parts 1 (Preliminary) and 2 (Publication of certain documents and information) of the Act commenced on the date of Royal Assent, 19 August 1992. Parts 3 (Access to documents) and 4 (Amendment of information) commenced three months later for all agencies except local governments and Aboriginal and Islander Councils. In the case of the latter, Parts 1 and 2 came into effect on 19 February 1993 and Parts 3 and 4 on 19 May 1993.

22 Queensland Law Reform Commission, *The Freedom of Information Act 1992: Review of secrecy provision exemption*, report no 46, The Print People, Brisbane, March 1994.

- the introduction of charges for processing applications to access documents not concerning the applicant's personal affairs: *Freedom of Information Amendment Act 2001* (Qld).

The rights conferred by the FOI Act, the provisions giving effect to these rights, and the impact of the above amendments are discussed in detail in this report.

Although both EARC and the PCEAR recommended that a review of the FOI Act be undertaken two years after its commencement, such a public review did not eventuate. An interdepartmental working group was established in 1995 to review the Act.[23] However, this group's report was not considered by the then incumbent government before the 1996 state election resulted in a change of government. That group's recommendations remain largely unimplemented.

2.3 OTHER REVIEWS OF AUSTRALIAN FOI LEGISLATION

The Commonwealth FOI Act has been reviewed on a number of occasions. In 1987, the Senate Standing Committee on Legal and Constitutional Affairs reported on its review of the operation and administration of the Commonwealth FOI Act.[24] In June 1999, the Commonwealth Ombudsman conducted an own motion investigation into the administration of the Commonwealth FOI Act in Commonwealth agencies. This review identified widespread problems in FOI administration and made recommendations for improvement.[25]

In 1994/1995, the Australian Law Reform Commission and the Administrative Review Council conducted a comprehensive joint review of the Commonwealth FOI Act ('the ALRC/ARC review'). While describing the Commonwealth FOI Act as an '*integral part of Australia's democratic framework*',[26] the review identified deficiencies in the regime and made 106 recommendations for reform. The review's report, which followed extensive consultation and research, is an important source document for this committee's review given that Queensland's FOI Act is modelled on the Commonwealth legislation.

Most of the recommendations of the ALRC/ARC review remain unaddressed by the Australian Government. This prompted Australian Democrats Senator Andrew Murray in September 2000 to introduce a private Senator's bill which would implement the ALRC/ARC proposals. Senator Murray's bill—the Freedom of Information Amendment (Open Government) Bill 2000 (Cth)—was referred to the Senate Legal and Constitutional Legislation Committee. That committee reported in April 2001.[27]

Other Australian jurisdictions—including Victoria,[28] Tasmania,[29] Western Australia[30] and South Australia[31]—have also reviewed their FOI legislation.[32]

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23 Interdepartmental Working Group, *Report on the two year review of the Freedom of Information Act 1992*, Department of Justice and Attorney-General (Chair), Brisbane, February 1996.

24 *Freedom of Information Act 1982—Report on the operation and administration of the Freedom of Information Act 1982*, AGPS, Canberra, December 1987. However, this review did not re-examine the basic principles underlying the Commonwealth FOI Act. The review's recommendations mainly related to processing FOI applications, and the Commonwealth FOI Act was amended in 1991 to implement the committee's recommendations: Australian Law Reform Commission and Administrative Review Council, *Freedom of Information*, Issues Paper 12, ('ALRC/ARC issues paper'), AGPS, Canberra, September 1994 at paras 2.14-2.15.

25 Commonwealth Ombudsman, *Needs to Know: Own motion investigation into the administration of the Freedom of Information Act 1982 in Commonwealth agencies*, June 1999.

26 ALRC/ARC review report, n 13 at para 1.3.

27 Senate Legal and Constitutional Legislation Committee, *Inquiry into the Freedom of Information Amendment (Open Government) Bill 2000*, Senate Printing Unit, Department of the Senate, Canberra, April 2001.

28 Legal and Constitutional Committee (Victorian Parliament), *Report upon Freedom of Information in Victoria*, 38th Report, Government Printer, Melbourne, November 1989.

29 Legislative Council Select Committee (Tasmanian Parliament), *Freedom of Information*, Hobart, February 1997.

There has also been renewed interest in FOI in a number of Australian jurisdictions in recent years.

- Soon after its election in 1999, the Bracks Government in Victoria introduced amending legislation to, among other things, narrow the exemptions relating to Cabinet documents and commercial confidentiality, and remove provisions which prevented access to documents that identify any person, including public servants, named in those documents.[33]
- In its March 2000 report on 'commercial-in-confidence' material, the Victorian Parliament's Public Accounts and Estimates Committees made recommendations for amendment to that State's FOI Act.[34]
- In May 2000, the NSW Leader of the Opposition introduced the Freedom of Information Amendment (Open and Accountable Government) Bill 2000 (NSW) aimed at increasing access to government information. This follows numerous calls by the NSW Ombudsman for a comprehensive review of the NSW FOI Act.[35]

The committee has studied and, in many cases, drawn on the above reviews and other developments in FOI legislation in Australia.

2.4 FOI LEGISLATION IN OVERSEAS JURISDICTIONS

Jurisdictions worldwide (including many emerging democracies) either now have, or are in the process of implementing, FOI legislation.[36]

The approach to FOI in overseas jurisdictions has provided fertile ground for the committee's review.[37] In particular, the committee has examined proposed and actual FOI legislation in the following countries.

- The United States which has had FOI legislation since 1966. Recent amendments to FOI legislation in the United States have addressed contemporary technological issues in FOI.
- Canada which, first at a provincial and then federal level, started introducing FOI legislation in the late 1970s.
- New Zealand, where the *Official Information Act 1982*, which was introduced following the report of the Danks Committee,[38] takes a different approach to that of the Australian jurisdictions in exempting information from release. The New Zealand Law Commission reviewed the *Official Information Act* in 1997.[39]

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30 Ministry of Justice (Western Australia), *Review of the Freedom of Information Act 1992 (WA)*, Perth, October 1997.

31 South Australian Legislative Review Committee (South Australian Parliament), *Report of the Legislative Review Committee concerning the Freedom of Information Act 1991*, Adelaide, September 2000.

32 See also the following reports by the Standing Committee on Justice and Community Safety of the Australian Capital Territory Legislative Assembly, *The Executive Documents Release Bill 2000,* report no 15, Canberra, June 2001 and *The Freedom of Information (Amendment) Bill 1998*, report no 17, Canberra, August 2001.

33 Freedom of Information (Miscellaneous Amendments) Bill 1999 (Vic).

34 Public Accounts and Estimates Committee (Victorian Parliament), *Commercial in confidence material and the public interest*, thirty-fifth report to Parliament, Government Printer, Melbourne, March 2000 at chapter 7.

35 NSW Ombudsman, *Special report to Parliament by the Office of the NSW Ombudsman proposing amendments to the Freedom of Information Act 1989 (Made public under section 27 of the Ombudsman Act)*, report no 1/94, Sydney, March 1994 at 1; NSW Ombudsman, *1998/99 Annual Report*, Bloxham & Chambers Pty Ltd, Sydney, 1999 at 110.

36 For links relating to FOI legislation in other jurisdictions see the QIC's website at <http://www.slq.qld.gov.au/infocomm/>. See also the ALRC/ARC review report, n 13 at paras 3.22-3.26.

37 For a concise overview of FOI legislation in the United States, New Zealand and the United Kingdom see the NSW Parliamentary Library's background paper, n 13 at 68-77.

38 Danks A (Chair), Committee on Official Information, *Towards Open Government*, Wellington, 1980.

39 New Zealand Law Commission ('NZLC'), *Review of the Official Information Act 1982*, report 40, Wellington, October 1997.

- Ireland which passed its FOI Act in 1997. The Irish legislation follows the approach taken in Queensland and Western Australia of a separate Office of the Information Commissioner.
- The United Kingdom—home of Westminster governance—which in 2000 passed FOI legislation in accordance with a pre-election commitment by the Blair government to introduce a statutory access to information regime.[40] (Previously, the only means by which citizens could access government-held information in the UK was via a discretionary Code of Practice.)

2.5 OTHER RELEVANT QUEENSLAND REGIMES

Any examination of FOI legislation should be considered in conjunction with other regimes relating to the keeping of, and access to, information in the public sector.

The effectiveness of Queensland's FOI regime is, to a large extent, dependent on good record keeping practices and obligations to preserve records. Consistency between regimes which grant citizens access rights is also important.

In this regard, the main regimes in Queensland are those relating to privacy and the managing of public records. These regimes are discussed further in section 5.7 *Relationship with other laws*.

[40] The introduction of FOI legislation in the UK followed the release in 1997 of a white paper *Your right to know: The government's proposal for a Freedom of Information Act* ('UK White Paper'), December 1997. The FOI legislation introduced into the UK Parliament was criticised for substantially watering down many of the proposals contained in the white paper. For information on FOI in the UK and links to the UK FOI Act see: <http://www.cfoi.org.uk/>.

3. FOI PURPOSES AND PRINCIPLES

3.1 INTRODUCTION

Term of reference A asks whether the basic purposes and principles of the FOI Act have been satisfied and whether they now require modification. Term of reference B(I) asks whether the objects clauses of the Act should be amended.

The committee addresses these issues in this chapter, after first outlining basic FOI purposes and principles.

3.2 FOI PURPOSES AND PRINCIPLES

The primary objective of FOI legislation is to enhance certain key principles underpinning democratic government—openness, accountability and public participation. In a healthy democracy, citizens should be able to effectively scrutinise, debate and participate in government decision-making and policy formulation in order to ensure government accountability and to make informed choices. Information plays a key role in so empowering the citizen. As noted in the Fitzgerald report: '*Information is the lynch-pin of the political process. Knowledge is, quite literally, power. If the public is not informed, it cannot take part in the political process with any real effect*'.[41]

Representative democracy, such as exists in Australia, signifies government by the people through their elected representatives. These representatives exercise the power vested in them on behalf of the people and are therefore accountable to the people for their actions. In this light, information created and held by government might be viewed as a state resource which the state, its agencies and officials collect and hold on trust for the people.[42]

The recent political 'free speech' cases[43] which recognise that Australia's Constitution includes an implied freedom of political communication have acknowledged the importance of information in a representative democracy.

By providing citizens with a legally enforceable right to access government-held information, FOI legislation can be seen as an important safety net for democracy. In this regard, FOI legislation complements other sources of information about government such as Parliament (and parliamentary committees), judicial and merits review of administrative decisions, and government departments and agencies, for example, through annual reporting requirements.

It is a general tenet of FOI legislation that disclosure under the legislation is to 'the world at large'. It follows that, generally, an applicant does not have to show a special interest or 'standing' to obtain information, and the identity and motives of an applicant are irrelevant to the rights granted.[44]

Some jurisdictions have enshrined a right to access government-held information in their constitutions and/or bills of rights.[45] New Zealand's FOI legislation has been described by the New Zealand Court of Appeal as of '*such permeating importance*' that '*it is entitled to be ranked as a constitutional measure*'.[46]

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41 Fitzgerald G E (Chair), *Report of the commission of inquiry into possible illegal activities and associated police misconduct*, n 18 at 126.

42 See the QIC, first submission no 56 at paras A1-A15 and, in particular, his reference to the work of Justice Finn of the Federal Court of Australia. See also the ALRC/ARC review report, n 13 at para 4.9.

43 See *Australian Capital Television Pty Ltd v Cth* (1992) 177 CLR 106; *Nationwide News Pty Ltd v Wills* (1992) 177 CLR 1; *Theophanous v Herald & Weekly Times Ltd* (1994) 182 CLR 104 and subsequent cases.

44 EARC FOI report, n 19 at para 7.51; ALRC/ARC issues paper, n 24 at paras 5.21-5.23. This is reflected in the FOI Act, s 21 and s 28(4).

45 See, for example, the Constitution of the Republic of South Africa 1996, s 32.

46 *Commissioner of Police v Ombudsman* [1988] 1 NZLR 385 at 391 per Cooke J.

The basic purposes and principles of FOI legislation might therefore be summarised as promoting democracy and representative government by:

- increasing the openness and accountability of government by making it more subject to, and more committed to, public scrutiny;
- enabling citizens to understand government decision-making processes;
- enabling citizens to access information that will allow them to effectively participate in the processes of policy making and government; and
- improving the quality of decision-making and record keeping and management systems of government agencies.

A further, important purpose of FOI legislation deriving from these democratic principles is to enable citizens to access government-held information about them personally so they know the basis on which decisions about them are made and they can correct any inaccuracies in that information.

3.3 FOI PURPOSES AND PRINCIPLES AND WESTMINSTER GOVERNANCE[47]

A perennial argument against FOI legislation since its introduction in Australia has been that the FOI concept is incompatible with a system of government based on the Westminster model.

This traditional argument has been refuted in submissions to the committee and elsewhere for reasons including the following.

- FOI legislation does not relate to any specific system of government.[48] There is also an argument that there is a category of 'higher order' democratic rights, including '*the right to receive information which is relevant to public political decisions which one is entitled to make or influence*'.[49] Such 'higher order' rights would presumably transcend any particular system of democracy.
- Westminster governance is a 'living' concept capable of adaptation to the times and new ideas. Open government—which FOI legislation seeks to achieve—might require the modification of other ideas about government which rely on secrecy and enduring confidentiality.[50] Indeed, effective FOI legislation, far from being incompatible with a Westminster system, might actually strengthen it.[51]
- FOI legislation does not threaten fundamental Westminster principles, such as the principle of collective Cabinet responsibility, because FOI expressly recognises and protects such principles.

The recent passage of FOI legislation in the United Kingdom, the home of Westminster-style governance, further weakens the argument that this system of governance is incompatible with FOI purposes and principles.

In principle, the committee believes that FOI legislation is compatible with a Westminster system of government, as the objects of FOI legislation are fundamentally compatible with any system of government based on representative democracy.

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47 Relevant submissions: 23, 48, 113, 119, 120, 134, 138, 142, 151, 152, 154, 160, 161, 162 and 167. QIC, supplementary submission no 173 at 1.

48 1979 Senate Committee report, n 14 at para 4.63.

49 See the QIC, first submission no 56 at para A2 where, in turn, the QIC refers to the work of an English legal academic, David Feldman.

50 Snell R and Tyson N, 'Back to the drawing board. Preliminary musings on redesigning Australian freedom of information', *Freedom of Information Review*, no 85, February 2000 at 5, referring to comments by New Zealand's Danks Committee.

51 1979 Senate Committee report, n 14 at para 4.2.

This might require some minor modification of traditional aspects of the Westminster system in accordance with the notion of Westminster governance being a 'living' concept. For example, FOI legislation has an impact on the traditional concept of individual ministerial responsibility, that is, a minister is responsible for his or her department, and public servants are shielded from criticism. As the QIC submitted:

> *… 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.*[52]

However, it is important that FOI legislation gives due recognition to some enduring principles of Westminster governance. In particular, our system of government requires that members of Cabinet, the peak government decision-making body, must be able to freely discuss matters while maintaining the principle of collective responsibility.[53] The FOI Act, like its counterparts in other Westminster-style governments, recognises this by the Cabinet matter exemption (s 36). The committee discusses s 36 in section 11.4 *Cabinet matter: s 36*.

It might also be said that FOI legislation plays a particularly important role as an additional accountability measure in a unicameral jurisdiction such as Queensland.

COMMITTEE FINDING 1—CONCLUSION

In principle, FOI legislation is compatible with a Westminster system of government, as the objects of FOI legislation are fundamentally compatible with any system of government based on representative democracy.

3.4 SATISFACTION OF FOI PURPOSES AND PRINCIPLES IN QUEENSLAND[54]

The first part of term of reference A asks whether the basic purposes and principles of the FOI Act have been satisfied. A definitive response to this question is difficult, if not impossible. The benefits of FOI legislation—essentially, making government more open, accountable and participative—are intangible, not susceptible to measurement and not quantifiable in monetary terms.[55]

Further, there has not been a comprehensive audit of the operation of Queensland's FOI Act as has been undertaken in other jurisdictions. Such an audit would provide valuable information on agencies' compliance with the letter and spirit of the Act.[56]

Some assessment of the performance of the FOI Act can be gleaned from indicators such as the number and type of applications lodged with agencies, the time taken to deal with applications, and rates of access and refusal. Much of this data can be obtained from the annual reports on the operation of the Act prepared by the Attorney-General under s 108 of the Act.

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52 QIC, supplementary submission no 173 at 1.

53 As the ALRC/ARC review noted, '*To breach the "Cabinet oyster" would be to alter our system of government fundamentally*': ALRC/ARC review report, n 13 at para 9.8.

54 All submissions were taken into account in coming to conclusions on the issue of whether FOI purposes and principles have been satisfied in Queensland. Specific submissions by the QIC are noted where relevant.

55 The QIC and WA Information Commissioner agree: see the QIC, first submission no 56 at para A20 and the WA Information Commissioner's submission no 70 at 7. See also comments in the ALRC/ARC review report, n 13 at para 2.8.

56 For example, in June 1999, the Commonwealth Ombudsman reported on the Ombudsman's own motion investigation into the administration of the Commonwealth FOI Act by Commonwealth agencies. The report, *Needs to know* pointed to various deficiencies in the administration of the Act in the agencies that were audited: see n 25. In section 4.2.2 *The FOI monitor's specific functions*, the committee recommends that a similar audit be conducted in Queensland.

However, there are critics of the type of data that is required to be collected under s108. Further, inconsistencies in the definitions and methods used by agencies in collecting statistics for s 108 purposes detracts from the reliability and usefulness of much of the data. These issues are discussed in section 4.8 *The data collection and reporting requirements*.

Other indicators of the Act's success can be gleaned from media reports, journal articles, decisions of the QIC, the QIC's comments in annual reports, commentary in jurisdictions with comparable legislation and comments made in public consultation during the course of this review.

A substantial number of submitters (largely agencies), expressed the view that the FOI Act's purposes and principles have been satisfied, although some suggested that specific and general modifications to the Act were overdue. Other submitters (mainly non-agency) felt that the basic principles had not been satisfied, or that they would be satisfied only after stipulated modifications were implemented.

The QIC submitted that the purposes have only been partly satisfied, concluding that the FOI Act *'has been effective, but not as effective as it could be'* and that '*FOI still has a great untapped potential to perform the role of catalyst in bringing public administration to a stage where it places a high value on the public availability of information*'.[57]

The committee's assessment of whether the Act's purposes and principles have been satisfied (outlined below) is based on the various sources referred to above.

3.4.1 FOI usage and outcomes

Appendix D summarises key information contained in the annual reports prepared under s 108. Despite apparent inconsistencies in data collection, the information contained in s 108 reports is the most comprehensive statistical information about the operation of the Act currently available and does provide useful insight into trends in FOI. (The data collection and reporting requirements are discussed further in section 4.8.)

The following observations can be made from the data in **Appendix D** and s 108 reports.[58]

Number of access applications: There has been a steady increase in the number of access applications across all categories (that is, personal and non-personal, state government and local government) since the Act's commencement (with a spike in the figures for 1999/00 from the previous year).

Type of applications: While the total number of access applications to *state government agencies* has remained at a high, reasonably consistent level, the number of applications relating to the applicant's personal affairs has generally decreased,[59] and the number of non-personal affairs applications has generally increased. From 1992/93 until 1996/97, the number of personal affairs applications outweighed the number of non-personal affairs applications. In recent years, the number of personal affairs and non-personal affairs applications have been roughly equivalent. (This 50:50 ratio occurred again in 1999/2000 despite the 34% rise in both types of applications.)

In contrast, the vast majority of FOI applications to *local government agencies* have consistently concerned non-personal affairs information. There is anecdotal evidence that at least part of the reason for this is that some local government information which is personally relevant to the applicant is technically non-personal affairs information. Accordingly, these statistics do not necessarily demonstrate that the rate of access to policy-type documents is higher in relation to local governments than state government agencies.

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57 QIC, first submission no 56 at para A40.

58 The most recent s 108 report relates to 1999/00.

59 This trend might be attributable to agencies increasingly enabling access to personal information through other access schemes: DJAG, *Freedom of Information Annual Report 1997/98,* Brisbane, 1999 at 21.

Nature of users: The s 108 reports provide no specific information on who is using the FOI Act. This accords with the principle that the motive of an FOI applicant, which in many cases would reveal their identity, is irrelevant. However, the QIC has in his last three annual reports provided a statistical profile of *external review* applicants. These reports[60] reveal the following.

- There is a low number of 'general public interest' applications (that is applications by politicians, journalists, citizens, lobby groups and individuals seeking information about public health and safety issues). The number of such applications increased from 9% of external review applications finalised in 1998/99 to 16% in 1999/00. In 2000/01 the proportion was 14%.
- One of the largest category of external review applicants is public servants (or former public servants) seeking information about workplace disputes, for example, grievance, disciplinary and termination of employment matters: 19% of applications finalised in 2000/01; 10% in 1999/00; and 25% in 1998/99. The QIC considers that a figure of 10% is more accurate given that figures for 2000/01 and 1998/99 were considerably inflated by one or two individuals making multiple applications.
- Only a small proportion of external review applications finalised involve applications by individuals or business organisations seeking information for use in pending or proposed legal proceedings: 6% in 2000/01; 5.6% in 1999/00 and 3% in 1998/99.
- The vast majority of external review applicants are citizens seeking access to documents about matters of personal concern to them.

Outcomes: Relatively high rates of documents are fully released under FOI (generally above 80% for state government agencies, and 70% for local governments).

Unfortunately, s 108 reports do now show release rates of documents sought in personal affairs applications compared with documents sought in non-personal affairs applications. Submissions suggested lower release rates in relation to non-personal affairs documents than applications for personal affairs documents.

Response times—initial access applications: On average, 70% of access applications to state government agencies and 80% of access applications to local governments have been processed within the standard time period of 45 days. No dramatic changes or observable trends are apparent in relation to the proportion of applications processed within the standard time period.

Number of amendment applications and outcomes: The number of amendment applications has been reasonably low since the inception of the FOI Act. With the exception of 1999/00 regarding state government agencies, these applications appear to have been decreasing over time.

Number of external reviews upheld by the QIC: The number of external reviews upheld by the QIC might be seen as an indicator of agencies' (non)compliance with the letter and spirit of the Act.[61] Although, in some cases external review might result in a different outcome to the original decision because circumstances have changed in the intervening period.

For the years 1995/96 to 1999/00, the number of QIC decisions which varied or set aside the decision under review exceeded the number of QIC decisions affirming the decision under review. In 2000/01, the number of QIC decisions which varied or set aside the decision under review almost equalled the number of decisions affirming the decision under review.

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60 QIC, *1998/99 Annual Report*, Goprint, Brisbane, 1999, table 6 at 15; QIC, *1999/00 Annual Report*, Goprint, Brisbane, 2000, table 5 at 15; QIC, *2000/01 Annual Report*, Goprint, Brisbane, 2001, table 6 at 20 and paras 3.25-3.29.

61 Roberts, A, working paper, *Monitoring Performance by Federal Agencies: A tool for enforcement of the Access to Information Act*, School of Policy Studies, Queen's University, Canada, March 1999.

3.4.2 Factors influencing the success of Queensland's FOI regime

A number of factors, in isolation and in combination, potentially affect why and how often FOI legislation is used including:

- the legislation itself, for example, the number and width of exemption provisions, the exclusion of certain agencies, the level of fees and charges;
- how the legislation is administered, for example, the timeliness of obtaining access, what the application process entails;
- the level of public education and awareness about FOI including community interest in, or attitude to, particular issues; and
- other factors such as a reticence by some citizens to lodge FOI applications about issues unless they are directly affected by those issues, the availability of information from alternative sources, whether an applicant's previous experience in making FOI applications was positive or negative.[62]

Government attitude to revealing information and the culture of specific agencies is also highly relevant to whether FOI legislation will achieve its objectives. Ultimately, the fulfilment of FOI objectives comes not only from the text of FOI legislation but from a commitment within government to the principles of open government.

In terms of government commitment to FOI, a view often expressed to the committee was that the current form of the Cabinet (and Executive Council) exemption and the circumstances and manner in which that exemption has been amended is such that it:

- undermines the very notion of open and accountable government; and
- potentially detracts from community confidence in the government's commitment to the FOI Act's objectives of open, accountable and participatory government.

Agency culture and administrative practices also have a significant impact on whether an FOI regime is effective in practice.

The (then) Attorney-General in introducing Queensland's FOI bill stressed that the bill '*…will effect a major philosophical and cultural shift in the institutions of Government in this State. The assumption that information held by Government is secret unless there are reasons to the contrary is to be replaced by the assumption that information held by Government is available unless there are reasons to the contrary*'.[63]

Evidence to the committee suggested that a 'culture of secrecy' might still exist in some agencies. Comments to the committee in this regard included the following.

- Agencies sometimes focus too much and too quickly on the exemptions rather than focussing on the *possibility of disclosure*—so long as no harm would result. In this regard, the QIC submitted that:

> *Again, in my experience (based on the sample of cases I see at external review level), some agencies appear reluctant to disclose information of a policy/decision-making character. They frequently claim exemption from disclosure in respect of such information, even though much of it seems to me to be innocuous or uncontroversial. I find that the s.36, s.37 and s.41(1) exemptions are widely overused by agencies to protect even the most routine and seemingly innocuous information. It appears from my unsuccessful attempts to persuade agencies to exercise the discretion permitted to them by s.28(1) of the FOI Act in favour of disclosing much harmless or innocuous information that happens to qualify for exemption*

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62 For a further discussion on these issues see QIC, first submission no 56 at paras A8 and A23-A26.

63 Hon D Wells MLA, Attorney-General, Second Reading Speech, Freedom of Information Bill 1991, *Queensland Parliamentary Debates (Hansard)*, 5 December 1991 at 3850.

> *under the broad reach of s.36(1) of the FOI Act, that agencies may be (or may have been) under some kind of central instruction to maintain a claim of exemption under s.36(1) of the FOI Act whenever it is available.*[64]

The suggestion that agencies are reluctant to release government information and rely heavily on the exemption provisions to conceal documents from release was specifically refuted by some agencies. In some cases, it is important for agencies to refuse applications in order to protect legitimate interests, such as that of third parties. The nature of documents held by agencies also varies.

- A culture resistant to FOI is evident in some agencies by persisting beliefs of agency or departmental 'ownership' of documents.
- Some agencies use deliberate delaying or frustration tactics in relation to FOI (for example, 'losing' documents; routinely taking the full statutory time period to process applications regardless of whether the full time is necessary; taking material sought under FOI to Cabinet meetings for the sole purpose of invoking the Cabinet documents exemption).
- Some FOI decision-makers are hesitant to make decisions which could lead to embarrassment of the agency, or a minister or other official.

In his 2000/2001 annual report, the QIC also noted that, although in the vast majority of external reviews FOI decision-makers and agencies have acted in a positive and cooperative way, there have been '*some recent instances of obstructive or uncooperative behaviour, inconsistent with the standards of the "model litigant" which should be observed by government agencies and officials*'.[65]

Factors which it was suggested negatively impact on agency attitude to FOI include:

- the negative attitudes of just one officer, particularly a senior officer, or the departmental officer/s from whom a FOI decision-maker is seeking to obtain documents; and
- the nature of the applicants to an agency, and the nature of agencies. Support for FOI appears to be adversely affected where agencies perceive that applicants are increasingly difficult, demanding or rude, or where the nature of one or a number of applications are vexatious or frivolous. This is exacerbated in smaller, less resourced agencies which spend a proportionately greater amount of time on FOI (and therefore are further diverted from devoting time to performing core functions).

The committee recognises that some applicants might *perceive* a culture of secrecy because they are not granted full access to documents sought, despite the fact that one or more of the exemptions genuinely apply.

The committee is satisfied that generally agencies have made substantial progress since 1992 in embracing the notion of open government. However, a number of the above comments indicate the need for: more FOI training for *all* departmental staff; a re-examination of ways to deal with the few applicants who might be rude, vexatious or frivolous; and measures to be implemented to reduce the resource implications of FOI for agencies. These issues are all dealt with later in this report.

3.4.3 Measuring the success of Queensland's FOI regime

The committee has drawn from the FOI principles and purposes listed at the outset of this chapter yardsticks which might be used to assess whether Queensland's FOI regime is achieving its wider democratic goals of creating more open, accountable and participative government. In this section, the

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64 QIC, first submission no 56 at para A25. At para A33 of his first submission the QIC also stated that he is aware of a direction to Queensland government departments that the legal professional privilege exemption is to be claimed wherever it is available, unless consent to the waiver of privilege is obtained from the Attorney-General.

65 QIC, *2000/2001 Annual Report*, n 60 at para 3.18.

committee assesses the FOI regime against these yardsticks by reference to the above data on FOI usage and outcomes and specific comments made to the committee during public consultation.

Government more accountable and more open to public scrutiny?

It is difficult to ascertain the particular contribution of the FOI Act in making government more accountable and open since it is one of a range of post-Fitzgerald measures aimed at improving State administration and accountability. However, high disclosure rates indicate that a substantial amount of information is in the public domain as a result of the Act.

The QIC also submitted that the Act has one of the highest rates of usage of FOI legislation of any Australian jurisdiction on a *per capita* basis.[66] This high usage rate could indicate a high public awareness and acceptance of the Act or, until recently, Queensland's comparatively moderate fees and charges regime. Alternatively, a high usage rate could indicate an over-reliance on the Act by agencies when information could possibly be released in other, less formal ways.

However, while the Act appears to be working reasonably well in relation to applications where an applicant seeks to access documents relating to their own *personal affairs*, the Act is not working so well in relation to accessing *non-personal affairs* documents, particularly documents concerning government decision-making and policy development ('policy documents'). Arguably, providing access to personal affairs documents does not enhance citizens' participation in government or government accountability (apart from providing a mechanism to check on the collection and use of citizens' personal affairs information).

It could be that this reflects: (a) little demand for 'policy documents' beyond that already available; (b) a lack of public awareness about the legislation as a means of obtaining 'policy documents'; (c) that the Act is not considered by individuals and community or interest groups as a viable means of obtaining 'policy documents' (perhaps because of past frustration at trying to obtain 'policy documents'); and/or (d) a low level of public confidence that worthwhile information will be released. High usage of exemptions to protect information about government decision-making processes, in particular the Cabinet exemption, detracts from community confidence that worthwhile information will be released.

Better understanding by citizens of decision-making processes?

The committee did not receive direct evidence that citizens have a better understanding of decision-making processes as a result of the introduction of FOI legislation in Queensland. However, access to non-personal affairs documents, particularly documents concerning government decision-making and policy development, as opposed to personal information, would be likely to enhance citizens' understanding of government decision-making processes. Again, the impact of the current form of s 36 is significant in this regard.

Nevertheless, access to personal information might inform a citizen about how particular decisions are made by government.

Greater participation in government?

While there is probably greater informed citizen participation in government in Queensland than before the FOI Act's introduction, it is difficult to discern how much of the increase is attributable to FOI legislation and how much to agencies adopting consultation procedures independent of FOI.

[66] QIC, first submission no 56 at para A9. The QIC adds though that 8,000-odd applications is not excessive given the State's population.

Access to non-personal affairs documents, particularly documents concerning government decision-making and policy development, are more likely to enhance citizens' participation in government. Accordingly, the recent increase in applications for non-personal affairs documents is encouraging.

Better decision-making and records management?

The committee was presented with substantial evidence that the FOI Act has had a significant positive impact on: the quality of agency decision-making and the provision of reasons for decisions; the quality of agency documentation; the deterrence of impropriety; and the performance of functions and duties generally.

However, the QIC placed a 'significant caveat' on these conclusions. He stated that *'the benefit of this prophylactic effect is lost or diminished in the case of officials working on material that will, or can readily be, insulated from public scrutiny under s.36 or s.37 of the Act* [the Cabinet documents and Executive Council documents exemptions]'.[67]

The committee was also provided with some anecdotal evidence of specific situations where there is a reluctance to provide or record information because of the fear of disclosure under FOI legislation. If this is occurring, it has ramifications beyond FOI. This demonstrates the need to ensure that the FOI Act protects the confidentiality of information in certain cases. Provided the Act affords appropriate protection, a reticence to provide or record information might be assisted by a better understanding of how Queensland's FOI regime operates and the provision of a point of contact and advice. (In this regard, see the discussion in section 4.2 *Independent monitoring of Queensland's FOI regime*.)

Citizens are able to access and amend personal information held by government?

As noted above, citizens are making use of the right to access documents concerning their own personal affairs. However, citizens apparently have made very little use of the provisions which enable them to apply for amendment of personal affairs information held by government. There could be a number of reasons for this including a lack of community awareness of the existence of the statutory right or, where people are aware of the right, a reticence to exercise it due to the processes involved. Alternatively, the low rates of amendment of information might reflect that there is limited need for such provisions. During the course of public consultation very few people made submissions to the committee about the amendment provisions in the FOI Act.

3.4.4 Committee analysis

The above observations—essentially that some aspects of the Act appear to be working well while others are not working as well—leads the committee to the conclusion that the FOI Act has contributed to open and accountable government and participative democracy in Queensland. The Act has enabled the community to access a range of government-held information. Many citizens have successfully utilised the Act to access information held by government about themselves. The Act has also contributed to improvements in aspects of public administration such as record keeping and decision-making.

Yet, there is room for improvement to Queensland's FOI Act. In particular, the committee is concerned that the Act is not working as effectively as it should in relation to citizens and community and interest groups accessing documents likely to be of some public interest, such as those documents containing information associated with government decision-making and policy development. Access to such documents is more likely to indicate that the Act is fulfilling its key objective, namely, more open, accountable and participative government. It is evident that this is at least partly a result of low community confidence in the Act which, in turn, seems largely attributable to the current form of the Cabinet and Executive Council exemptions (contained in ss 36 and 37 and discussed further in sections 11.4 and 11.6).

[67] QIC, first submission no 56 at para A30.

Later in this chapter and in chapter 4, the committee makes broad recommendations to improve the FOI regime's ability to promote open, accountable and participatory government primarily through:

- amending the objects clause of the Act to make it clear to agencies that the Act is to be interpreted with the concept of pro-disclosure at the fore;
- ensuring greater oversight and coordination of the operation and administration of the Act; and
- encouraging greater disclosure of information outside the FOI Act.

In addition, specific operational criticisms of the FOI regime need to be addressed. Much of this report from chapter 5 onwards is about making those types of improvements.

COMMITTEE FINDING 2—CONCLUSION

While it is difficult to quantify the effect of FOI legislation in Queensland, there is sufficient evidence to establish that the FOI Act has contributed to open and accountable government and participative democracy. However, it is apparent that there is room for improvement. In this report the committee makes recommendations which, if implemented, aim to improve the extent to which Queensland's FOI regime achieves fundamental FOI purposes and principles.

3.5 THE NEED FOR MODIFICATION OF FOI PURPOSES AND PRINCIPLES[68]

The second part of term of reference A asks whether the basic purposes and principles of the FOI Act now require modification.

The basic purposes and principles of FOI legislation are inextricably interwoven with the notion of representative democracy. For this reason, the committee believes that the basic purposes and principles of Queensland's FOI Act are as relevant today as when the Act was first introduced. The overwhelming majority of submitters who addressed this point, including the QIC,[69] stated that the FOI Act's basic purposes and principles remain relevant and important and do not require modification.

However, as the committee noted in its discussion paper, a number of significant developments have taken place since the introduction of FOI legislation in Australia.

First, there have been significant advances in information technology (notably the Internet) enabling the access, collection, storage, exchange and use of information in ways never envisaged when FOI legislation was first drafted.

Secondly, and particularly within the last decade, there has been a change in the role and structure of the 'state' as Australian governments have shifted from a regulatory to market-orientated approach to government activity. This shift, propelled by competition policy reform, has seen governments turn to competitive markets to bring about economic efficiency and effectiveness in the use of public resources and the provision of public services. Using private sector models, the structure and practices of government entities have undergone significant change—evidenced by the increasing commercialisation, corporatisation, privatisation and contracting out of government services. The resulting blur in demarcation between the public and private sectors poses challenges for administrative law generally given its traditional focus on the relationship of citizen and state. It has been suggested that the implications for FOI specifically are more profound given the '*already perilous state of FOI*'.[70]

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68 Relevant submissions: 8, 29, 47, 25, 45, 58, 162, 167, 100A, 100C and 101. QIC, first submission no 56 at para A36.

69 QIC, first submission no 56 at paras A1 and A36.

70 Snell R, 'Rethinking administrative law: A redundancy package for FOI?', n 5 at 11.

Increased consultation in law making and policy making and growing national and international influences on the making of law and public policy, have also changed the context within which FOI legislation operates.[71]

The committee does not believe that the above developments require the basic purposes and principles of Queensland's FOI Act to be altered. However, they do have a substantial impact on how those principles can be effectively implemented and realised. Throughout this report, the committee addresses and makes recommendations about a number of features of Queensland's FOI regime to ensure its relevance and efficacy today.

COMMITTEE FINDING 3—CONCLUSION

The basic purposes and principles of the Act do not require modification. However, technological progress, changes in the structure of the 'state' and other developments since the introduction of FOI legislation in Australia have a substantial impact on how those purposes and principles can be effectively implemented and realised. These developments require a rethink of a number of features of Queensland's FOI regime.

3.6 THE OBJECTS CLAUSES[72]

Term of reference B (I) asks whether the objects clauses of the FOI Act should be amended.

Extensive objects clauses are a notable feature of Australian and New Zealand's FOI legislation. FOI objects clauses essentially emphasise the move from official secrecy to open government and briefly explain the purposes and principles behind the statutorily-created right of access, usually in terms of the link between information and citizens' participation in government and government accountability. FOI objects clauses potentially have a significant impact on whether an FOI regime is interpreted and applied in a way that promotes disclosure.

Objects clauses generally are important because they can, at times, be used to resolve legislative ambiguity.

The object of the FOI Act is to '*extend as far as possible the right of the community to have access to information held by Queensland government*': s4. This is enhanced by s5(1) which provides that Parliament recognises that, in a free and democratic society:

- the public interest is served by open discussion of public affairs and enhancing government accountability;
- the community should be kept informed of the government's operations; and
- citizens should have access to information held by government relating to their personal affairs and should be given ways to ensure that such information is accurate.

Section 5(2) recognises that there are competing interests in that the disclosure of particular information could be contrary to the public interest: disclosure can sometimes harm 'essential public interests' or persons' private or business affairs. Section 5(3) provides that the FOI Act intends to '*strike a balance between these competing interests'* by giving people a right of access to information held by government as far as possible with 'limited exceptions' for the purpose of preventing harm to these competing interests.

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71 NZLC, n 39 at chapter 1.

72 Submissions relevant to the issues discussed in section 3.4 are: 3, 8, 16, 18, 27, 29, 43, 45, 46, 47, 48, 51, 52, 53, 54, 58, 59, 60, 61, 62, 63, 64, 65, 66, 67, 77, 87, 90, 92, 93, 98, 100A, 100B, 101, 101M, 103, 104, 106, 107, 113, 119, 120, 122, 127, 128, 133, 134, 136, 138, 142, 144, 150, 153, 154, 160, 161, 162 and 168. QIC, first submission no 56 at paras B1-B4. QIC, supplementary submission no 173 at 3-4.

3.6.1 Possible broad amendments to the objects clauses

The objects clauses (ss 4 and 5) of Queensland's FOI Act differ substantially from those in other Australian jurisdictions which are mainly based on the objects clause of the Commonwealth FOI Act: see Table 1 (Objects Clauses) on the committee's website.[73] In particular, the FOI Act is unique because it has: (a) an 'objects' clause: s 4 *and* a 'reasons for enactment' clause: s 5; and (b) no equivalent to s 3(2) of the Commonwealth FOI Act which proclaims Parliament's intention that the Act be interpreted so as to further the Act's stated objects, and that any discretions conferred by the Act be exercised as far as possible to facilitate and promote, promptly and at the lowest reasonable cost, the disclosure of information.

Possible changes to Queensland's objects clauses can be drawn from changes recommended by the ALRC/ARC review to the Commonwealth FOI Act objects clause. Those recommended changes would amend the Commonwealth objects clause to, among other matters:

- state that providing the right of access will:
  - enable people to participate in the policy, accountability and decision-making process of government (a matter not currently stated in Queensland's objects clauses);
  - open the government's activities to scrutiny, discussion, comment and review (Queensland's objects clauses currently state that '*the public interest is served by promoting open discussion of public affairs*'); and
  - increase the accountability of the Executive (Queensland's objects clauses currently state that '*the public interest is served by…enhancing government's accountability'*).
- state that Parliament's intention in providing a right of access is to underpin Australia's constitutionally guaranteed representative democracy (Queensland's objects clauses are prefaced with a recognition that '*in a free and democratic society…*');
- delete s 3(1)(a) [Queensland has a similar provision in s 5(1)(b)];
- delete the current reference to the limitations on the general right of access imposed by exclusions and exemptions;
- acknowledge that the information collected and created by public officials is a national resource (there is no equivalent in Queensland's objects clauses); and
- state the right of access to personal information separately from the general right of access to government-held information.[74]

Senator Murray's Freedom of Information Amendment (Open Government) Bill 2000 implements the ALRC/ARC review's recommendations in this regard. The Senate Legal and Constitutional Legislation Committee endorsed Senator Murray's proposed new objects clause on the basis that '*given the concerns raised in both the* [ALRC/ARC review] *report and the Needs to Know report, and the insistence by experts in the field that, if nothing else, this particular amendment should be passed'*.[75] Senator Murray's proposed objects clause is attached as **Appendix E**.

The QIC proposed new objects clauses for Queensland's FOI Act which amend ss 4 and 5. A copy of these proposed clauses are reproduced in **Appendix F**.

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73 This difference is seemingly explained, in part at least, by a close examination of EARC's and the PCEAR's FOI reports on this point: see Gilbert and Lane, n 17 at paras 2.400 and 2.410.

74 ALRC/ARC review report, n 13 at paras 4.7-4.9 (Recommendations 1 to 5).

75 Senate Legal and Constitutional Legislation Committee, n 27 at para 3.11.

3.6.2 Committee analysis

In general terms the committee believes that:

- the Act's current objects clause is too general to ascertain with any specificity the purpose of the Act;
- it is preferable that Parliament's 'reasons for enactment' (s 5) are not separated from the 'objects' (s 4) ;
- the objects clause should refer to the three key objectives of FOI legislation, namely:
  - openness of government;
  - accountability of government which extends to enhancing the accountability of individual officials for the performance of their duties of office;
  - public participation in the processes of government; and
- the objects clause should refer to the three matters provided for in the Act, namely, the right to access documents, the right to amend personal affairs information, and the availability of information.

The FOI Act's objects clause should also have an important symbolic and educative purpose and should underscore an interpretation of the Act that promotes openness, facilitates disclosure and hence furthers FOI purposes and principles. As a result, the committee has come to the following conclusions on various possible broad amendments to the objects clauses.

- ***A statement on how the Act is to be interpreted:*** An equivalent to s 3(2) of the Commonwealth FOI Act should be inserted in Queensland's FOI Act to show Parliament's clear intention that the Act be interpreted in a way that promotes disclosure, promptly and at the lowest reasonable cost. Such a provision is particularly important in light of the recent changes to the fees and charges regime in the Act.[76]

  The committee does not propose that any further 'presumption of disclosure' (to be displaced only by the clear application of a relevant exemption) be included in the objects clause at this stage. The *Acts Interpretation Act 1954* (Qld), s 14A(1) provides that: '*In the interpretation of a provision of an Act, the interpretation that will best achieve the purpose of the Act is to be preferred to any other interpretation*'.

  However, this issue should be revisited in the first review of the Act following inclusion of the committee's proposed objects clause.

- ***Reference to competing interests:*** While the objects clause should emphasise the right of access, there should also be some recognition at the outset of the competing interests which must be considered when determining whether to disclose information. In particular, the objects clause should recognise the importance of protecting individuals' privacy.

  A failure to recognise these competing interests might give applicants a false impression that all government-held information is accessible.

- ***A link between FOI and representative democracy:*** The committee supports inclusion of a statement in the objects clause that Parliament's intention in providing a right of access to government-held information is to underpin Australia's constitutionally guaranteed representative democracy. It is important that the objects clause explains the underlying purpose of the right of access—to ensure open and accountable government—and its relevance to representative democracy.

[76] This point was made by the QIC in his letter to the Attorney-General dated 29 October 2001 concerning the Freedom of Information Amendment Bill 2001 (Qld).

- ***Information as a public resource:*** An acknowledgment that information collected and created by government is held on behalf of the people of Queensland is important. As the QIC has noted,[77] the information which public officials acquire is not acquired for their own benefit but for public purposes. Public officials and governments are, in this sense, trustees of information for the people.

  This does not mean that information provided to government in confidence and personal information collected by government will always be made public. The recognition of the competing interests to be considered in deciding whether to disclose information makes this clear.

The committee embodies these conclusions in a proposed new objects clause which combines ss 4 and 5 and adopts a number of aspects of the QIC's proposed objects clause.[78] The committee has endeavoured to ensure that its proposed objects clause is not too lengthy or difficult to understand. A precise and clear objects clause has the potential to be more easily assimilated into FOI decision-makers' thinking.

To assist readers, the committee has footnoted its draft provision to indicate the source of relevant aspects of it.

COMMITTEE FINDING 4—RECOMMENDATION

Section 4 (Object of Act) and section 5 (Reasons for enactment of Act) should be replaced with a provision along the following lines.

Object of Act

4. (1) The object of this Act is to extend as far as possible the right of the community to have access to information[79] held by the Queensland Government:[80]

(a) to open the Government's activities to scrutiny, discussion, comment and review;[81]

(b) to enable people to participate in an informed manner in the policy, accountability and decision-making processes of government; [82] and

(c) to increase the accountability of the Executive Government of the State[83] and public officials.[84]

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77 *Re Eccleston and the Department of Family Services and Aboriginal and Islander Affairs* (1993) 1 QAR 60 at 73.

78 However, the committee's dause does not adopt the approach of providing for *obligations* on agencies and ministers that correspond with the rights specified in the objects clause, a feature of the objects clause suggested by the QIC.

79 The committee received submissions that the objects clauses should refer to 'documents' rather than 'information' to accord with the terminology used in the Act. The committee does not believe that such consistency in necessary in this broad context.

80 This does not incorporate a suggested amendment that the clause refer to 'Queensland government *and its agencies*'. While the *Acts Interpretation Act 1954* (Qld) does not provide a definition of 'Queensland Government', it is probably not necessary to include 'and its (ministers and) agencies' here to be clear about the Act's intent given proposed clause 4(2)(a) and (b).

81 This is drawn from the objects clauses of the ALRC/ARC review, n13 at para 4.7, Senator Murray's Bill, cl 3(1)(b) and the QIC, cl 4(1)(a)(i).

82 This is drawn from the objects clauses of the ALRC/ARC review, n13 at para 4.7, Senator Murray's Bill, cl 3(1)(a) and the QIC, cl 4(1)(a)(ii). In particular, the committee believes the QIC's phrase '*informed public participation*' is important.

83 See the definition of 'state' in s 47A of the *Acts Interpretation Act 1954* (Qld).

84 This is drawn from cl 4(1)(a)(iii) of the QIC's objects clause.

(2) The object of this Act is achieved by:

(a) creating a general right of access to documents of an agency and official documents of a minister;

(b) creating a right of access to information relating to the personal affairs of an applicant contained in documents of an agency and official documents of a minister;[85]

(c) creating a right to bring about the amendment of documents containing information relating to the personal affairs of an applicant that is inaccurate, incomplete, out-of-date or misleading;[86] and

(d) requiring that certain information and documents concerning the operations of the Queensland Government be made available to the public.[87]

(3) In creating the right of the community to have access to information held by the Queensland Government, Parliament:

(a) gives effect to the principles of representative democracy;[88]

(b) recognises that information held by the Queensland Government is held on behalf of the people of Queensland;[89] and

(c) recognises that, in some cases, there are competing interests because disclosure of information could be contrary to essential public, business or private interests including personal privacy.[90]

(4) It is the intention of Parliament that the provisions of this Act shall be interpreted so as to further the objects set out in subsection (1) and that any discretions conferred by this Act shall be exercised as far as possible so as to facilitate and promote, promptly and at the lowest reasonable cost, the disclosure of information.[91]

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85 The ALRC/ARC review recommended a separate reference to the right of access to personal information of the applicant: n 13 at para 4.10. This is modified to refer to FOI Act 'personal affairs' terminology.

86 This is drawn from the objects clauses of Senator Murray's Bill, cl 3(1)(f) and the QIC, cl 4(1)(c).

87 This is drawn from cl 5(1)(c) of the QIC's objects clause.

88 This is drawn from the objects clauses of the ALRC/ARC review, n 13 at para 4.7, Senator Murray's Bill, cl 3(2) and the QIC, cl 4(1).

89 The committee uses the phrase 'held on behalf of the people of Queensland' rather than 'public or State resource' which was the terminology recommended by the ALRC/ARC review, n 13 at para 4.9 and incorporated in Senator Murray's Bill, cl 3(1)(e). The committee has adopted a different drafting approach to that in Senator Murray's Bill.

90 This is an abridged version of the FOI Act (Qld), s 5(2) and the QIC's cl 4(2).

91 This clause essentially replicates the FOI Act (Cth), s 3(2). See also the objects clauses of Senator Murray's Bill, cl 3(2) and the QIC, cl 5(2).

4. ENHANCING THE EFFECTIVENESS OF QUEENSLAND'S FOI REGIME

4.1 INTRODUCTION

In this chapter the committee proposes a number of mechanisms to engender a more accessible, efficient and affordable regime of access to government-held information, and to address any residual culture of secrecy in agencies. Two key recommended mechanisms are:

- establishment of an entity with the broad dual role of: (a) monitoring agencies' compliance with, and administration of, the FOI regime (including the release of information outside the Act); and (b) promoting an awareness of the FOI regime and providing advice and assistance to agencies and members of the community about the FOI regime; and
- development of a whole of government strategy designed to facilitate the greater disclosure of information outside the Act.

Broadly, the committee's approach via these and the other suggested mechanisms is to make the legally enforceable statutory right of access a (necessary) 'legislative backstop'. The community would not need to rely as much on the statutory right and the formal FOI Act procedures to obtain the information it desires. Such procedures would largely be reserved for applications for information of more a 'one-off' or personal nature, or for information that is particularly sensitive.

4.2 INDEPENDENT MONITORING OF QUEENSLAND'S FOI REGIME[92]

There is currently no entity with an ongoing responsibility to monitor the operation of the FOI Act and agencies' compliance with it, or to provide advice and raise awareness about the FOI Act. None of these responsibilities fall on the QIC.[93]

Statutory oversight of Queensland's FOI regime is limited to the s108 requirement that the Attorney-General report annually to Parliament on the operation and administration of the FOI Act—see the discussion on s 108 in section 4.8 *The data collection and reporting requirements*.

Initially, some functions associated with implementation and administration of the FOI Act were performed by the Freedom of Information and Administrative Law Division (FOIALD) established within the then Department of the Attorney-General in October 1991.[94] The FOIALD performed functions such as: assessing legislative impact and designing administrative systems; training and disseminating information to agencies and the public; collecting data about FOI implementation; and answering FOI inquiries from agencies and the public.[95]

However, the FOIALD no longer exists. The only activities the (now) Department of Justice and Attorney-General (DJAG) performs regarding FOI is answering FOI inquiries from agencies and the public and preparing s108 reports.[96] Agency training regarding the FOI regime is currently limited to that provided by Crown Law and external entities. A number of reviews of FOI legislation in other

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92 Submissions relevant to one or more of the issues discussed in section 4.2 are: 9, 24, 27, 33, 43, 45, 46, 54, 62, 64, 67, 69, 70, 77, 81, 82, 89, 92, 93, 98, 100A, 101, 103, 113, 114, 115, 119, 120, 125, 127, 128, 130, 133, 134, 135, 136, 138, 142, 146, 150, 154, 160, 161, 162, 163, 164, 167, 168 and 171. QIC, first submission no 56 at paras C146-173.

93 The QIC advised that his office receives a considerable number of inquiries regarding FOI from members of the public and agency decision-makers. However, the QIC generally takes the view that, by virtue of his statutory role as the independent external review body under the Act, it would be inappropriate in most cases for him to provide the specific advice and assistance sought. As a result, the QIC refers most inquiries back to the DJAG.

94 This unit was established in accordance with an EARC recommendation: EARC FOI report, n 19 at para 20.37.

95 DJAG, *Freedom of Information Annual Report 1992/93*, Brisbane, 1993 at 8.

96 DJAG, *Freedom of Information Annual Report 1997/98*, n 59 at 5. Some basic, though valuable, information regarding FOI is also available on DJAG's website at: <http://www.justice.qld.gov.au/publications.htm#6>.

jurisdictions have stressed the importance of systemic oversight of FOI administration.[97] The ALRC/ARC review attributed many of the shortcomings in the operation and effectiveness of the Commonwealth FOI Act to the absence of a *'constant, independent monitor of and advocate for FOI'*.[98] Hence, the review recommended the creation of a statutory office of FOI Commissioner (Cth) to have the dual role of: monitoring agencies' compliance with, and administration, of the Act; and promoting the Act and providing advice and assistance to agencies and members of the public.[99]

The ALRC/ARC's recommendation was taken up in Senator Murray's Freedom of Information (Open Government) Bill 2000 (Cth).

The Commonwealth Ombudsman in his *Needs to Know* report likewise noted that the culture of resistance or indifference to disclosure found amongst Commonwealth agencies is unlikely to be overcome while there is no entity charged with responsibility for overseeing and monitoring FOI administration.[100]

4.2.1 The need for an independent FOI monitor

Critical to the effectiveness of Queensland's FOI regime is an independent body (an 'FOI monitor') to be responsible for (a) monitoring agencies' compliance with, and administration of, the FOI regime; and (b) promoting awareness of the FOI regime, and providing advice and assistance to agencies and members of the community about the FOI regime.

Independent monitoring of agencies' FOI administration should heighten agencies' attention to how they implement the Act, enable the FOI monitor to develop an understanding of each agency's situation and the types of applications it receives, and draw on this in developing and promoting government-wide best practice in FOI administration. Further, it should promote consistent decision-making across government and enable remedial action to be taken where warranted.

An awareness function has the potential to: engender a pro-disclosure attitude within agencies based on a better understanding by agencies' officers of the purpose and philosophy of FOI legislation; and increase citizens' awareness of their FOI rights.

Further, by providing agencies and (potential) applicants with advice, significant resource savings might be achieved by agencies (by answering potential applicants' queries, assisting applicants to better draft their applications, and diverting repetitive work) and applicants (as potentially fewer applicants and people consulted under s 51 should need legal advice).

The need for an FOI advice and awareness function was made clear in the recent report on the strategic management review of the QIC. In that report, the reviewers noted that:

- functions which the office could undertake in this regard include: training of agency FOI decision-makers, development and implementation of practice guidelines, advice and assistance services for agencies and the community, provision of information in plain English and a bulletin or newsletter for FOI decision-makers designed to alert them to important decisions;
- the FOI process throughout the public sector could be improved significantly by the introduction of more advice, awareness and demand management strategies; and
- an advice and awareness role is a necessary adjunct to the QIC's review function and vitally necessary in managing demand for service.[101]

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97 See also the comments of the NZLC in its review of that country's *Official Information Act*: NZLC, n 39 at paras 38-50.

98 ALRC/ARC review report, n 13 at para 6.2.

99 ALRC/ARC review report, n 13 at paras 6.4-6.5. As to the commissioner's more specific functions, see paras 6.6-6.21. The review did not propose that the commissioner review agency decisions and make binding decisions. This role was to remain with the Administrative Appeals Tribunal: para 6.20.

100 Commonwealth Ombudsman, *Needs to Know*, n 25 at para 5.10.

101 Strategic management review report, n 7 at iv, 27, 36 and 40.

Hence, the review recommended that an advice, awareness and demand management initiative be established and that the FOI Act be amended to enable this function to be undertaken.[102]

Given the importance of an FOI monitor, this entity and its functions should be provided for by statute. It is also critical that the FOI monitor be adequately resourced to perform its functions effectively. (The committee comments further on this issue in section 4.2.2 *The FOI monitor's specific functions*.)

COMMITTEE FINDING 5—RECOMMENDATION

An independent entity (an 'FOI monitor') should be established by statute and adequately resourced to perform the general responsibilities of:

- monitoring agencies' compliance with, and administration of, the FOI regime; and
- promoting awareness of the FOI regime, and providing advice and assistance to agencies and members of the community about the FOI regime.

The committee makes recommendations about the FOI monitor's specific functions in section 4.2.2 *The FOI monitor's specific functions* and throughout this report.

4.2.2 The FOI monitor's specific functions

Below the committee suggests specific functions the FOI monitor might perform under the broad headings of monitoring agencies' compliance with, and administration of, Queensland's FOI regime, and conducting advice and awareness about the regime. These specific functions are drawn from:

- comments by EARC;[103]
- the WA Information Commissioner's advice and awareness functions;[104]
- Ireland's Information Commissioner's functions (apart from the commissioner's external review functions);[105]
- functions which the ALRC/ARC review recommended for its proposed FOI Commissioner (Cth);[106] and
- suggestions made to the committee during public consultation.

In fulfilling these functions, the FOI monitor should, where and when appropriate, consult with representatives from business, media, consumer, and civil liberties groups. This will assist in ensuring that FOI issues arising in a wide range of areas are noted and addressed, and potentially improve FOI awareness and understanding in the wider community.

Diagram 4.1 at the end of this chapter explains the role of the FOI monitor in the processing of FOI access applications.

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102 Strategic management review report, n 7 at 41 (recommendation 12).

103 EARC FOI report, n 19 at para 20.23. EARC recommended that the Attorney-General's Department would be the appropriate department to administer FOI legislation.

104 FOI Act (WA), s 63(2)(d)(e) and (f), and s 111.

105 *Freedom of Information Act 1997* (Ireland), ss 35-40.

106 ALRC/ARC review report, n 13 at paras 6.5-6.21. Senator Murray's bill proposed similar functions for the Commonwealth FOI Commissioner. The Senate Legal and Constitutional Legislation Committee, in its April 2001 report on the bill, endorsed the need for an entity to perform these functions although concluded that, on balance, the functions should be conferred on the Commonwealth Ombudsman: n 27 at paras 3.113-3.114.

Monitoring functions

❑ *Conducting agency audits*

An audit function would enable the FOI monitor to:

- gain an understanding of the types of applications received by agencies and specific difficulties which particular agencies might face, for example, due to resourcing issues, the nature of documents held by the agency and the applicants usually encountered;
- examine agencies' FOI practices and administration (including compliance with the statutory obligations that apply with respect to the content of statements of reasons[107] and the manner in which they are administering the fees and charges regime) to identify any systemic problems;
- identify particular documents, or classes of documents, which could be made available outside the scope of the FOI Act, either through administrative schemes, or routine access via an agency website or reading room (see the discussion in section 4.3 *Greater disclosure outside the Act*);
- encourage agencies to exercise the s 28(1) discretion to release documents where an exemption technically applies but no harm would result from so releasing the documents; and
- where deficient procedures are found, provide advice and assistance to remedy those deficiencies.

The FOI monitor should be able to decide to conduct an audit on his or her own motion, following a complaint or upon the request of an agency, and should be appropriately empowered to effectively fulfil an audit function (via, for example, the power to demand the production of documents, and enter and search agency premises).

As noted in section 3.4 *Satisfaction of FOI purposes and principles in Queensland,* there has not been a comprehensive audit of all agencies' compliance with, and administration of, Queensland's FOI regime. The FOI monitor should conduct such an audit as a matter of priority.

❑ *Preparing annual and other reports on the operation of Queensland's FOI regime*

Currently, the Attorney-General as the minister responsible for the FOI Act, is required to prepare an annual report on the operation of the Act: s108. This report is a compilation of information provided by agencies, rather than the result of independent audit or consideration of agencies' FOI practices.

It is logical that the responsibility for collecting, collating and analysing this data, and reporting on it, be transferred to the FOI monitor given that that entity will be responsible for monitoring compliance with, and administration of, the Act. The FOI monitor should also be empowered to require agencies to provide statistics on their FOI administration. (In section 4.8 *The data collection and reporting requirements,* the committee discusses what data should be collected for the purposes of these reports, and recommends further functions for the FOI monitor in facilitating collection of this data.)

The FOI monitor's annual report should additionally include commentary on:

- the adequacy of agencies' FOI administration, deficiencies in agency practices, and any regular or consistent failure to comply with the Act or failure to respond suitably to an audit;[108]
- the extent to which agencies have disclosed information outside the Act;[109]
- broader policy issues which might require legislative action;
- agencies' compliance with the s 18 requirement to produce a statement of affairs, and the s19 requirement to make agency policy documents available; and

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107 See section 6.20.1 *Content of statement of reasons.*

108 In this regard the committee endorses the 'report card' approach taken by the WA Information Commissioner in a number of her annual reports.

109 See section 4.3 *Greater disclosure outside the Act.*

- agencies' pricing policies regarding documents for purchase by the public as overpricing of such documents will in effect make them inaccessible to the community, and thus be contrary to the spirit of the Act.[110]

The FOI monitor should also be empowered to report to Parliament on other issues as and when the need arises.

❑ *Identifying and commenting on legislative policy issues*

The FOI monitor should give the Attorney-General advice on: problems with Queensland's FOI regime; suggestions to overcome these problems and otherwise improve the FOI regime (both legislative and administrative); the impact of proposed legislative amendments; and the interrelationship of the FOI Act with other legislation concerning access to information. This advice might be via comment in the FOI monitor's annual report or otherwise.

The QIC has also pointed out the need for an independent entity to be routinely consulted about proposed amendments to the FOI Act and FOI Regulation (or other legislation which affects the Act), particularly in light of recent *'erosions of the coverage of the FOI Act'*.[111] The QIC suggested that the LCARC perform this role and consult the QIC for technical advice. Alternatively, the FOI monitor could perform this role.

Given its express jurisdiction regarding FOI legislation,[112] the committee proposes to correspond with the Attorney-General regarding an administrative arrangement whereby the Attorney-General provides the committee with advance notice of, and the opportunity to provide detailed comment on, any proposal for amendment of the FOI Act or the FOI Regulation. In considering such proposed amendments, the committee will, in appropriate cases, consult with the QIC (and the FOI monitor should that person be separate from the QIC) regarding those proposed amendments.

Advice and awareness functions

❑ *Providing a general point of contact and central resource for agencies and citizens*

It is apparent that there is a need for an entity independent of government to:

- assist citizens who want to gain access to government-held information (not only by advising them of their rights under the FOI Act but also by directing them to other avenues through which their concerns might be addressed); and
- assist ministers and agencies in their administration and interpretation of the Act and with other matters such as providing them with advice regarding:
  - dealing with difficult applicants;
  - administration of the fees and charges regime under the Act;
  - maximising information technology to provide better access to information; and
  - appropriate arrangements for access to information about services and functions provided to the public on behalf of the Queensland Government by organisations other than agencies.[113]

The strategic management review saw such assistance as being, among other matters, integral to demand management in the QIC.[114]

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110 In this context the FOI monitor should have regard to *Information Standard 33: Information Access and Pricing* which provides, among other matters, that where government information is being provided, it should be done so at no cost to the citizen or at a price not exceeding what is necessary to recover the cost of provision unless there is a statutory charge applying to the provision of the information.

111 QIC, supplementary submission no 173 at 19.

112 *Parliamentary Committees Act 1995* (Qld), s 10.

113 See cl 95 (new s 66M) of the Freedom of Information Amendment (Open Government) Bill 2000 (Cth).

❑ *Promoting community awareness and understanding of the FOI regime*

Citizens need to be aware of Queensland's FOI regime if they are to make use of it and benefit from it. Citizens also need to be educated as to when the Act applies to information they provide to government, and the exemptions which might be relevant. This might avoid situations where information might not be recorded or provided for fear of disclosure under FOI.

The FOI monitor should prepare a coordinated program aimed at publicising the Act through outlets including public libraries, government departments and agencies, community groups, newspapers, and secondary and tertiary education institutions. The FOI monitor might consider disseminating this information via media such as posters, pamphlets, information kits, radio spots, public speaking engagements and educational resource kits. The FOI monitor should also establish a website through which much of this material is accessible.

Civics education programs should stress the importance of FOI to democratic, open and accountable government.

The FOI monitor should have regard to access and equity issues in publicising the Act.

❑ *Providing guidance on how to interpret and administer the Act*

Currently, agencies are provided with little assistance in administering and interpreting the Act. The FOI monitor should provide this assistance. In particular, the FOI monitor should prepare non-binding guidelines to assist agencies and applicants to understand, interpret and administer the Act. These guidelines should: refer to the QIC's decisions and that of other FOI tribunals where appropriate; be readily accessible; and be written in plain English. The QIC's information sheets provide a useful basis for more detailed guidelines in some areas.

Throughout this report, the committee identifies matters which would appropriately be the subject of guidelines issued by the FOI monitor.

As these guidelines will need to be constantly updated and are not intended to determine or alter the law, the committee believes that their status should be administrative guidelines rather than delegated legislation. Consideration might be given to including in the FOI Act a provision such as clause 66L of the Freedom of Information (Open Government) Bill 2000 (Cth) which provides that decision-makers must take any relevant guidelines issued by the Commissioner into account.

The FOI monitor should also be responsible for developing and maintaining a FOI Policy and Procedures Manual such as initially developed by the FOIALD for use by agencies and applicants.[115]

❑ *Educating and training agencies and community groups*

The FOI monitor should coordinate and conduct FOI training for agencies and citizens. The benefits for agencies potentially include:

- better quality FOI decision-making (especially given turnover in decision-makers);
- consistent advice across government regarding the interpretation and application of the Act;
- an agency-wide understanding and acceptance of the Act's objectives as the attitudes of staff, particularly senior staff, significantly influence agency culture.

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114 Strategic management review report, n 7 at 40.

115 The QIC submitted that with sufficient additional resourcing, his office would be able to produce and maintain an up-to-date annotated version of the FOI Act with commentary on procedural matters, and references to key principles established in the commissioner's published decisions and in relevant decisions of courts and other tribunals: QIC, first submission no 56 at para C163.

This function should extend to the FOI monitor:

- coordinating central forums for FOI officers where information and ideas can be exchanged, issues discussed, and training regarding matters such as recent developments can take place; and
- producing a regular newsletter canvassing matters such as significant FOI decisions and other relevant developments.

The FOI monitor might also hold information sessions for other interested groups such as public advocacy groups, journalists and lawyers, similar to those held by Queensland's Anti-Discrimination Commissioner in relation to the *Anti-Discrimination Act 1991* (Qld). This would further promote community awareness and understanding of FOI.

❑ *Acting as a facilitator in communications between applicants, agencies and third parties*

The Western Australia Information Commissioner advised the committee that problems between agencies and applicants can often be resolved informally at an early stage when agencies and applicants seek assistance from her advice and awareness sub-program.[116]

The FOI monitor might therefore play a role in facilitating communication between applicants, agencies and, where appropriate third parties consulted under s51, so as to avoid, as far as possible, matters turning into protracted, adversarial disputes. For example, the FOI monitor might provide an independent opinion on the facts and applicability of relevant provisions. However, in performing this role the monitor will need to be careful that they not be, or be seen to be, an advocate for any one party to a dispute.

COMMITTEE FINDING 6—RECOMMENDATION

The entity to perform the role of FOI monitor should be adequately resourced to perform the following functions (which should be provided for by statute):

- auditing agencies' compliance with, and administration of, the FOI regime;
- preparing annual and other reports on the operation of Queensland's FOI regime;
- identifying, commenting on and making recommendations about FOI policy issues;
- providing a general point of contact and central resource for agencies and citizens;
- promoting community awareness and understanding of the FOI regime;
- providing guidance on how to interpret and administer the FOI Act;
- educating and training agencies and community groups; and
- acting as a facilitator in communications between applicants, agencies and third parties.

The committee recommends further specific functions for the FOI monitor relating to encouraging greater disclosure outside the Act in section 4.3.2 *A whole of government strategy*

COMMITTEE FINDING 7—RECOMMENDATION

The FOI monitor should be appropriately empowered to fulfil the above functions including, in particular, the power to:

- enter and search agency premises;
- demand the production of documents; and
- require agencies to provide statistics on their FOI administration.

116 WA Information Commissioner, submission no 70.

COMMITTEE FINDING 8—RECOMMENDATION

In accordance with these functions and powers, the FOI monitor should conduct and report on a comprehensive audit of agencies' compliance with, and administration of the FOI regime, as a matter of priority.

If an FOI monitor is not established as recommended by the committee, then the Attorney-General should appoint another appropriate entity to conduct such an audit.

COMMITTEE FINDING 9—RECOMMENDATION

Section 108(1) should require the FOI monitor, rather than the Minister administering the FOI Act, to prepare and table an annual report on the operation of the Act.

4.2.3 The entity to perform the role of FOI monitor

The committee believes that there would be considerable benefits in the QIC performing the role of FOI monitor in addition to the QIC's current external review functions.

Both Ireland's and Western Australia's Information Commissioners have external review and advice and awareness functions. The WA Information Commissioner sees a distinct advantage to having both a 'review and complaint resolution' and 'advice and awareness' role in that problems between agencies and applicants can often be resolved informally by the intervention of staff from the 'advice and awareness' sub-program before the matter comes within the formal review process as a complaint and, conversely, the advisory function is enhanced by ready reference to the Information Commissioner's interpretations and decisions.[117] Thus, fewer matters proceed to external review than might otherwise.

Other advantages of the QIC having a dual role are:

- as a consequence of performing the review function for some time now, the QIC would be in the best position to become aware of difficulties in administration of the Act and agencies' non-compliance and to issue guidelines;
- the QIC's independence from the executive government: see the discussion in section 8.2.3 *Ensuring the independence of the Information Commissioner*; and
- the QIC's office already has various links throughout the public sector and from its existing role it would be able to take a principled and systemic approach to issues.

The primary argument against the QIC also having an advice and awareness role is a potential conflict of interest. There is no difficulty with staff of the QIC giving advice and assistance to agencies and applicants in relation to procedural aspects of the FOI Act, nor assisting agencies in an educative and explanatory manner with respect to substantive issues that must be addressed by staff of the QIC in dealing with an external review application. However, the more difficult issue arises if an officer of the QIC gives advice to an agency and is later required to review that agency's decision—essentially a question of reasonable apprehension of bias at common law.

In his submission, the QIC advised that his office has the necessary expertise to fulfil the functions of a body such as the FOI monitor if provided with the additional resources necessary to discharge that role, but that both legislative amendments and practical arrangements would have to be implemented to overcome any real or perceived conflict of interest between the external review of decisions and advisory input at the primary decision-making stage.[118] The current QIC endorses these comments.[119]

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117 WA Information Commissioner, *Annual Report 1993-94*, Perth, 1994 at 6.

118 QIC, first submission no 56 at paras C169-C173.

The QIC expanded on how any potential conflict of interest might be avoided in his response to the strategic management review report stating:

- legislation should provide that an officer of the QIC who has been involved in giving advice or assistance at primary decision-making stages is not to be involved in any functions of the QIC undertaken in response to an application for review of the relevant agency decision; and
- provided that rule is observed, it shall not be a ground for judicial review of a decision of the QIC, or for disqualification of the QIC from dealing with an application for review of an agency decision, that a member of staff of the QIC became involved in giving advice or assistance during the making of the agency decision under review.[120]

While there are no legislative safeguards in Western Australia's FOI Act, the WA Information Commissioner has put in place a number of mechanisms to ensure that the advisory function does not adversely affect the integrity and independence of the external review process. For example, staff are allocated responsibilities in either the 'review and complaint resolution' or the 'advice and awareness' sub-programs. Staff in the 'advice and awareness' sub-program do not provide advice or assistance at the primary decision-making stages. Rather, they provide advice on procedures, identify options for dealing with problem applicants and problem applications and point agencies in the direction of previous decisions that might be relevant or on point. Moreover, advisory staff do not make decisions for agencies, do not see documents and do not become involved with the decision–making process either at agency level or at external review level.

The WA Information Commissioner advised the committee that in the seven year existence of that office there has been no conflict of interest identified to the commissioner and the suggestion that there might be such a conflict of interest has never arisen.[121]

On balance, the committee believes that the QIC is best placed to perform the monitoring and advice function envisaged by the committee provided that appropriate legislative and practical safeguards, along the lines suggested by the QIC and adopted by the WA Information Commissioner, are also put in place.

As recommended above, the QIC's role in this regard should be provided for in statute. Further, the office should be granted additional resources to enable it to effectively fulfil the functions outlined in section 4.2.2 *The FOI monitor's specific functions*. The LCARC's role in developing the office's budget will act as some safeguard in this regard.[122]

The committee considered the appropriateness of other bodies to carry out the functions of the FOI monitor and discounted the following alternatives for the reasons outlined below.

The Ombudsman. The strategic management review recommended that a demand management unit be established within the Ombudsman's office, and that this unit eventually provide FOI advice and awareness functions.[123] This approach accords with the strategic management review recommendation regarding possible integration of the Ombudsman's and Information Commissioner's review functions,[124] a suggestion which the committee rejects in section 8.2.2 *The Ombudsman as Information Commissioner*.

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119 Letter from Mr David Bevan to the committee dated 29 November 2001.

120 Strategic management review report, n 7, QIC's response at paras 37-38.

121 E-mail to the committee's research director dated 17 April 2001.

122 As discussed further in 8.2.3 *Ensuring the independence of the Information Commissioner*, the Treasurer is required to consult with the Legal, Constitutional and Administrative Review Committee in developing the QIC's budget.

123 Strategic management review report, n 7 at 61-63 and recommendation 24.

124 Strategic management review report, n 7 at 61-63 and recommendation 25.

The committee agrees with the QIC that this demand management unit would not be the appropriate unit to perform an FOI monitoring, advice and awareness role.[125] What is needed is a properly resourced body conferred with the specific statutory functions outlined by the committee in section 4.2.2. The yet to be established demand management unit of the Ombudsman's office should be dedicated to addressing demand management issues in that office.

A unit within the DJAG. The committee does not believe that a unit within the DJAG would be in the best position to perform the monitoring and advice role envisaged by the committee because:

- to be an effective monitor the entity must be independent of government departments and agencies. On occasions, it might be necessary for the monitor to criticise executive government regarding matters such as administration of the Act, resourcing that administration, and amendments to the Act;
- there would be a conflict of interest for an entity within the DJAG to monitor the DJAG's (and its statutory authorities') compliance with the Act. This would also affect public perception of the FOI monitor's impartiality; and
- if the FOI monitor is placed with government, it is more likely to be affected by changing government policies. This has already been seen with the demise of the FOIALD.

Another existing entity. Other possible existing entities might include a parliamentary committee, the State Archivist or the Auditor-General. Given their nature and existing responsibilities, none of these bodies are appropriate for the task.

A new entity. The primary argument against creating a new entity is cost. Further, there should be a general trend towards streamlining rather than expanding the already existing plethora of entities within Queensland's administrative system.

COMMITTEE FINDING 10—RECOMMENDATION

The Act should:

- confer on the Information Commissioner the functions recommended in this report for the FOI monitor;
- provide that an officer of the Information Commissioner who has been involved in giving advice or assistance at primary decision-making stages must not be involved in any functions of the Commissioner undertaken in response to an application for review of the relevant agency decision; and
- provide that if the above rule is observed, it shall not be a ground for judicial review of a decision of the Information Commissioner, or for disqualification of the Commissioner from dealing with an application for review of an agency decision, that a member of staff of the Commissioner became involved in giving advice or assistance during the making of the agency decision under review.

The Information Commissioner should also put in place necessary practical safeguards to ensure there is no conflict of interest between the FOI monitor and external review functions.

[125] Strategic management review report, n 7, QIC's response at para 35. The QIC went on to state (at para 39) that the reviewers' proposal ought to be regarded as a fallback position only, in the event that this committee's review, and the government's response to it, does not result in a statutorily prescribed, and properly resourced, specialised FOI Advice and Awareness Unit.

4.3 GREATER DISCLOSURE OUTSIDE THE ACT[126]

The committee supports and encourages agencies to adopt strategies that promote the greater disclosure of government-held information outside the Act. The FOI Act is not intended to prevent or discourage agencies publishing information or providing access to documents (including exempt documents or documents containing exempt matter) where that disclosure can properly be done or is permitted or required to be done by law: s 14.[127]

The QIC made the following comment to the committee:

> *I think it is important to remember that the FOI Act does not purport to prevent or discourage disclosure of government information outside the framework of the FOI Act (see s.14 of the FOI Act) - a fact often forgotten by agencies … Perhaps there would be less emphasis on the FOI Act itself, if agencies were to reassess their approach to disclosure of information to members of the public, with a view to establishing agency policies which will positively encourage disclosure, except in cases where it is essential that disclosure be restricted. Ideally, the FOI Act should be a last resort mechanism to gain information from a government agency. Wherever possible, agencies should release information quickly and informally. I consider that agencies could deal with many requests for information much less formally than they do currently, and in a way that, in the long run, would be less administratively burdensome for them.*[128]

The ALRC/ARC review[129] similarly recommended that Commonwealth agencies review procedures with the aim of disclosing information outside the Commonwealth FOI Act.

4.3.1 What is currently being done[130]

A number of mechanisms require the publication of documents which enable the public to be more informed about the background, issues and competing interests relevant to government decision-making and policy development.

Section 18 of the Act requires agencies to prepare an annual 'statement of affairs' which describes matters including the agency's structure and functions, ways in which members of the community can participate in the agency's policy formulation process, the kinds of documents usually held by the agency and how members of the community can access and amend the agency's documents.

Section 19 of the Act requires agencies to make copies of their most recent statement of affairs and each of their 'policy documents' available for inspection and purchase by members of the community. 'Policy documents' is defined to include documents containing interpretations, guidelines, statements of policy, practices or precedents, and particulars of administrative schemes. However, this category is limited to documents that impact on members of the community in the ways described in the definition.[131]

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126 The following submitters made general comments regarding the following issues: 16, 54, 55, 62, 67, 69, 70, 72, 73, 81, 90, 91, 92, 96, 100A, 107, 113, 115, 118, 119, 122, 127, 128, 133, 134, 136, 137, 138, 142, 144, 146, 149, 150, 152, 153, 154, 156, 157, 158, 159, 160, 161, 162, 163, 167 and 171. QIC, first submission no 56 at A29. Sections of the QIC's submissions are referred to in the relevant sections below.

127 As the ALRC/ARC review stated regarding the Commonwealth FOI Act, which contains a provision equivalent to s 14, the Act *'prescribes when information must be disclosed. It does not prescribe when information is permitted to be disclosed':* review report, n 13 at para 4.17.

128 QIC, first submission no 56 at para A29.

129 ALRC/ARC review report, n 13 at paras 4.17-4.21. See also the comments of the Commonwealth Ombudsman, *Needs to Know*, n 25 at para 5.9.

130 QIC, supplementary submission no 173 at 4.

131 See the definition of 'policy document' in the FOI Act, s 7. Gilbert and Lane describe 'policy documents' as *'documents constituting an agency's "internal law" used in respect of its decision-making processes'*: n 17 at para 2.520.

Agencies also publish information through mechanisms such as annual reporting requirements, consultation and publication practices, government media units, administrative law requirements, and statutory access to information schemes other than the FOI Act.

In addition, a number of agencies appear to be giving effect to s 14 and are increasingly:

- publishing 'policy information' on the Internet (which accords with the aims of the Community Engagement Division of the Department of the Premier and Cabinet);[132] and
- employing a range of measures to release information other than by utilising formal FOI processes.

In particular, a number of agencies have established administrative access schemes that allow citizens to readily access certain types of information (particularly personal information) in an expedited or specialised manner without the need for a formal FOI application.[133] The advantage of such schemes is that, where there is no dispute over access, the disclosure process can be less formal than the FOI Act procedures, and quicker and less costly for agencies to administer.

Where access to information is 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 that Act.[134]

Examples of current administrative access schemes include the following.

- Queensland Health since March 1994 has had an Administrative Access to Health Records Policy as the preferred mechanism for access to health records. This policy enables individuals to view their own health records (and be provided with photocopies) under the supervision of a health professional who can explain or clarify information in the record. Queensland Health submitted that the scheme has been very successful, with thousands of access applications processed though it annually. For example, the Princess Alexandra Hospital processed 947 administrative access applications in 1998/99.[135]
- The Department of Primary Industries has developed an administrative access scheme in relation to a certain career progression scheme. The DJAG FOI annual report for 1998/99 states that since the introduction of administrative access there have been significantly fewer FOI applications made by staff adversely affected by decisions made under the career progression scheme.[136]
- The Department of Employment, Training and Industrial Relations has introduced administrative release schemes in respect of accident reports and marked examination papers for TAFE students, and extends the right of access to personal files to former employees.[137]
- The Education Queensland has a policy that sets out guidelines to facilitate parental and student access to student records at schools, with the exception of guidance-type files.[138]
- Administrative access schemes utilised or being developed by Families, Youth and Community Care and Disability Services Queensland include:
  - a unit established in response to the findings of the Commission of Inquiry into Abuse of Children in Queensland Institutions (the Forde Inquiry) to provide information to former residents of children's institutions;

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132 Community Engagement Division, *Directions Statement*, October 2001.

133 In this regard see DJAG, *Freedom of Information Annual Report 1999/2000*, Brisbane, 2000 at 8.

134 QIC, supplementary submission no 173 at 4.

135 Queensland Health, submission no 100A and DJAG, *Freedom of Information Annual Report 1998/99*, Brisbane, 1999 at 10-11. The Queensland Nurses' Union, submission no 54, also praised Queensland Health's efforts in this regard: *'In the vast majority of cases it is no longer necessary to utilise FOI legislation to obtain access to personal medical records.'*

136 DJAG, *Freedom of Information Annual Report*, 1998/99, n 135 at 11.

137 Department of Employment, Training and Industrial Relations, submission no 162.

138 Education Queensland, submission no 163.

- the position of Information Review Officer has been established in the Office of Child Protection to both provide direct access to documents to current and recent service users and provide advice and support to area offices regarding administrative release of material;
- Disability Services Queensland is currently developing policy and procedures on administrative access by service users and the parents/nearest relatives of adults with an intellectual disability.[139]

♦ The University of Queensland has administrative access arrangements in place which allow the university's clients, students and staff to access mainly personal information concerning the individual's own contact or interactions with the university.[140]

Some agencies have established administrative release teams within their FOI units to facilitate access to documents outside the FOI process.[141]

4.3.2 A whole of government strategy[142]

It appears to the committee that there is a need to bring together and build on the various proactive and administrative release measures already employed by agencies so as to result in greater disclosure outside the FOI Act. As the QIC submitted:

> *I acknowledge that many agencies have established administrative access schemes. However, the wider use of those schemes should be actively encouraged within agencies. Many agencies have established internet websites. By studying patterns evident in prior requests for access to agency information (under the FOI Act or otherwise), agencies could anticipate the kinds of information which could be routinely made available for public access via an agency website (with possible attendant resource savings).*[143]

The recent strategic management review of the QIC similarly stated:

> *A number of agencies made the point that FOI should be the "last resort" and that administrative access should be provided to the greatest possible range of government information. Without active encouragement, there is doubt that this will occur. Currently, some larger Departments have developed processes to provide administrative access to a range of information, but the approach does not appear to have gained wider acceptance.*[144]

More particularly, the committee proposes the development of a whole of government strategy pursuant to which agencies and ministers:

♦ put in place systems which identify documents likely to be of some public interest, such as those containing information associated with government decision-making and policy development, and routinely make them accessible to the public, especially via the Internet;

♦ deal with requests for documents likely to be of some public interest, such as those containing information associated with government decision-making and policy development, whether or not made under the Act, as much as possible outside the formal procedures of the Act; and

♦ monitor the types of personal affairs information being sought by the public and introduce administrative access schemes which enable people to access information specifically relevant to them outside the Act.

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139 Department of Families, Youth and Community Care and Disability Services, submission no 122.

140 University of Queensland, submission no 96. The Queensland University of Technology also strongly encourages the use of administrative access arrangements where possible, submission no 137.

141 DJAG, *Freedom of Information Annual Report 1999/2000*, n 133 at 8.

142 QIC, supplementary submission no 173 at 4-5.

143 QIC, first submission no 56 at para A29.

144 Strategic management review report, n 7 at 50.

The aim of this 'greater disclosure' strategy should be to:

- reserve the formal access procedures under FOI legislation for *'the most sensitive information that requires a careful and considered assessment of the competing interests'*.[145] Thus, in practice, FOI legislation should exist only as a 'legislative backstop';
- work to the advantage of both applicants (quicker, less administratively burdensome) and agencies (a reduction in the number of requests for information both generally and under the FOI Act specifically);[146] and
- increase the accessibility of information relating to government decision-making and policy development to enable members of the public to more effectively participate in the democratic process.

As the ALRC submitted to this committee:

> *A systematic early release program, identifying records with no sensitivity and making them accessible to the public with minimal interaction and procedural requirements, could benefit agencies by reducing the number of FOI applications. With improvements to electronic record management and access to the Internet, agencies could make use of these technologies to provide access to documents in the most cost effective manner. This would then leave FOI resources focussed upon those potentially sensitive records requiring individual examination.*[147]

The FOI monitor should be responsible for developing this 'greater disclosure' strategy and providing assistance to, and monitoring, agencies in their administration of the strategy. This is because the FOI monitor will be in a better position to:

- identify what information agencies are currently releasing outside the FOI Act;
- suggest what additional or amended proactive release measures agencies might introduce and monitor agencies' practices generally;
- issue relevant guidelines; and
- identify those agencies not facilitating the release of information outside the Act, and take remedial action.

Moreover, the FOI monitor can educate the community about how to access information through such measures and use feedback from the community in improving implementation of the strategy.

Experience in other jurisdictions has shown that without a monitoring entity, recommendations for greater, non-legislative disclosure are not implemented.[148]

The committee does not propose that this strategy have a legislative basis at this stage. The FOI monitor should make any necessary recommendations in this regard after observing the strategy in operation. In particular, the FOI monitor should consider whether s 19 and the definition of 'policy document' needs to be amended.

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145 WA Information Commissioner, submission no 70 at 10.

146 Section 22 currently envisages agencies making documents available for purchase. Therefore, agencies should be able to impose reasonable fees for providing access outside the Act. However, in accordance with *Information Standard 33: Information Access and Pricing*, any cost imposed should be no more than the cost of provision.

147 Australian Law Reform Commission, submission no 16 at 8.

148 The need for a central agency to assist government bodies to release government-held information outside FOI legislation was recognised by the ALRC in its submission to this inquiry (submission no 16 at 8): *'Agencies require assistance to identify potential benefits of discretionary release, and to develop appropriate programs for identifying such records and making them accessible*'.

Given that the intent of s 14 (Act not intended to prevent other publication of information etc) is so central to this strategy, s 14 should be repositioned so that it appears immediately after the objects clause.

COMMITTEE FINDING 11—RECOMMENDATION

The Queensland Government should endorse a whole of government strategy which promotes the greater disclosure of government-held information outside the Act. Pursuant to this 'greater disclosure strategy', agencies and ministers should:

- put in place systems which identify documents likely to be of some public interest, such as those containing information associated with government decision-making and policy development, and routinely make them accessible to the public, especially via the Internet;
- deal with requests for documents likely to be of some public interest, such as those containing information associated with government decision-making and policy development, whether or not made under the Act, as much as possible outside the formal procedures of the Act; and
- monitor the types of personal affairs information being sought by the public and introduce administrative access schemes which enable people to access information specifically relevant to them outside the Act.

COMMITTEE FINDING 12—RECOMMENDATION

The FOI monitor should be responsible for developing the whole of government strategy which promotes the greater disclosure of government-held information outside the Act, and providing assistance to, and monitoring, agencies in their administration of the strategy.

COMMITTEE FINDING 13—RECOMMENDATION

Section 14 (Act not intended to prevent other publication of information etc) should appear immediately after the objects clause.

4.3.3 Guidelines regarding information suitable for routine release

One of the most important guidelines which the FOI monitor will have to issue relates to the type of information suitable for proactive or routine release. This incorporates consideration of the costs involved in so releasing information and how the interests of third parties who might be affected by the release of information should be protected.

Government generates a tremendous amount of documentation. It would be a waste of public resources to attempt to make every document available on the Internet. However, there needs to be a consistent, across the board commitment by agencies to identify and routinely publish documents likely to be of some public interest, such as those containing information associated with government decision-making and policy development.

Guidelines in this regard should take into account the following factors.

- Information released should be information likely to be of interest to the wider community as opposed to just a few members and should be information which members of the public are likely to want, rather than just what agencies want to release.
- Agencies should not be required to specifically create documents for public release (although, in some cases it might be possible to easily excise confidential parts of documents and publish the remainder).
- Requirements to proactively disclose information should be prospectively and progressively implemented rather than a retrospective imposition on agencies (although, agencies should be encouraged to publish existing documents where possible).

- The level at which any charges to be imposed are set will have an impact on accessibility. (Inflated pricing policies will have the effect of imposing unreasonable barriers to the accessibility of government information.[149])
- The type of policy documents already available under s 19 of the Act.
- Appropriate disclosure media. Advances in information technology, especially the Internet, should greatly assist agencies to publish information at relatively little cost and to make such information highly accessible provided websites are easy to navigate and contain user-friendly search facilities.[150] Further, the concept accords with moves by the Queensland Government, through its 'Access Queensland' policy, to achieve integrated (online) service delivery across the whole-of-government.

  Other possible media for routine disclosure of information includes public registers, tabling in Parliament and publishing in hard copy.
- The timing of release of different types of information (for example, before or after a Cabinet decision has been finalised or legislation tabled) and maintenance of information (including how long information should remain on the Internet given space/cost implications).
- The importance of ensuring appropriate protection is given to third parties who might be affected by the proactive release of information. In this regard, the type of information to be proactively released should be general and non-personal in nature and should not inappropriately disclose information concerning confidential business affairs, personal affairs or other 'essential public interests'. Personal and confidential information should not be published to the world at large.

  The FOI monitor might include in this guideline some sort of test for release or non-release. For example, a threshold test of harm to personal, commercial or State interests that would conceivably result because of the release. Information which, if sought as part of an FOI application, would require consultation to be conducted pursuant to s 51 would not generally be appropriate for pro-active release (unless the relevant parties have consented).

COMMITTEE FINDING 14—RECOMMENDATION

The FOI monitor should issue guidelines regarding the type of information suitable for proactive or routine release by agencies pursuant to the committee's recommended strategy promoting the greater disclosure of government-held information outside the Act. These guidelines should address matters such as protection of third parties' interests, appropriate disclosure media, and the timing of release of information.

4.3.4 Section 22 (Documents to which access may be refused)

Section 22 provides that an agency or minister may refuse access to a number of types of documents including documents reasonably open to public access under another enactment.

In section 5.3.5 *Documents to which access may be refused: s 22(a) and (b),* the committee recommends that this section should be amended to provide that agencies can refuse access to matter which is reasonably accessible under not only statutory schemes but also administrative access arrangements approved by the FOI monitor. Without such a complementary amendment, arguably

[149] In this context, the FOI monitor should have regard to *Information Standard 33: Information Access and Pricing* which provides, among other matters, that where government information is being provided, it should be done so at no cost to the citizen or at a price not exceeding what is necessary to recover the cost of provision unless there is a statutory charge applying to the provision of the information.

[150] The number of Australian households with Internet access is rapidly increasing: Australian Bureau of Statistics, *Household Use of Information Technology Australia*, 8146.0, 2000. Further, the State Library's Online Public Access in Libraries (OPAL) project has given Internet access to almost every public library in Queensland.

there is no real incentive for agencies to identify the possibilities for, and implement, administrative access schemes. There is also a risk that: different processes will be used (resulting in staff needing to be trained in two processes or different staff processing essentially the same thing); different applicants will be treated differently; and applicants could use both processes (which would be an inefficient use of agency resources).

The requirement for the FOI monitor's approval will ensure that agencies do not seek to take advantage of such a provision by introducing administrative access schemes which in essence attempt to frustrate FOI objectives.[151]

4.3.5 Statutory protection for officers

The fear of litigation has the potential to make agencies reluctant to release information outside the FOI Act.[152]

Section 102 of the FOI Act provides statutory protection to public officers against actions for defamation or breach of confidence where:

- the access was required or permitted by the FOI Act to be given; or
- the access was authorised by a minister or by an officer having authority under s 33 (Persons who are to make decisions for agencies and ministers) to make decisions in relation to applications, in the genuine belief that the access was required or permitted to be given by the FOI Act.

In addition, neither the person authorising the access nor any other person concerned in the giving of the access commits a criminal offence (s 103) or incurs civil liability (s 104) because the access was given.

The statutory protection in ss 102-104 should be extended to cover disclosure under administrative access schemes approved by the FOI monitor.

A more difficult issue is determining the proper breadth of the indemnity where information is released outside the Act as part of a strategy of greater disclosure outside the Act.

The QIC submitted that s 102 could be extended to apply to access, whether or not access was granted under the FOI Act and, if not granted under the FOI Act, whether or not access was granted in response to a specific request. The QIC continued:

> *However, it may well be 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, eg, the re-publication of maliciously defamatory material, or publication in wilful or reckless disregard of a binding obligation of confidence.*[153]

The ALRC/ARC review recommended that s 91 of the Commonwealth FOI Act (the equivalent of ss 102 and 103 of the FOI Act) should be amended to extend the indemnity against action for defamation, breach of confidence or infringement of copyright to an authorised officer who releases a document other than under the FOI Act provided the document would not have been exempt had it been released under the Act.[154]

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151 This might be achieved by schemes that are more expensive, have longer timeframes, or are otherwise more difficult for applicants.

152 This has been acknowledged by the: 1997 review of the Western Australian FOI Act, n 30 at para 4.31; Commonwealth Ombudsman, *'Needs to know'*, n 25 at para 3.20; ALRC/ARC review report, n 13 at paras 4.20-4.21.

153 QIC, supplementary submission no 173 at 5.

154 ALRC/ARC review report , n 13 at para 4.20 (recommendation 10).

To encourage disclosure of non-sensitive exempt documents, the review further recommended that the indemnity be extended to an authorised officer who:

- releases an exempt document under the FOI Act pursuant to a bona fide exercise of discretion not to claim an exemption; or
- releases a document other than under the FOI Act and the release, had it been made under the FOI Act, would have been a bona fide exercise of discretion not to claim an applicable exemption.[155]

While the committee leaves the specific drafting of appropriate amendments to the Attorney-General (in conjunction with the QIC and Parliamentary Counsel), the ALRC/ARC review recommendations appear to provide an appropriate solution to this issue.

COMMITTEE FINDING 15—RECOMMENDATION

The indemnities currently contained in ss 102-104 of the Act should be extended to those officers of ministers and agencies who release:

- a document other than under the Act provided the document would not have been exempt had it been released under the Act;
- an exempt document under the Act pursuant to a bona fide exercise of the discretion not to claim an exemption; or
- a document other than under the Act and the release, had it been made under the Act, would have been a bona fide exercise of the discretion not to claim an applicable exemption.

4.4 A CENTRAL GOVERNMENT DIRECTIVE REGARDING DISCRETIONARY DISCLOSURE[156]

The FOI Act is about balancing the public interest in disclosure of government-held information with the public interest in protecting certain other public and private interests. The exemptions in the Act reflect Parliament's attempt to identify these other interests (for example, interests relating to law enforcement, commercial activities, and personal affairs).

Chapters 10 and 11 relating to the exemption provisions are about changing the FOI *law*. However, one of the themes of this chapter is that government should ideally see the FOI Act as a legislative backstop only. Agencies should be encouraged to strive to achieve the FOI Act's objectives of open government through means and practices that recognise the existence of the FOI Act but that are not necessarily steeped in the minutiae of the legislative scheme.

One way in which this might occur is if FOI decision-makers make access decisions with regard to a general principle that information should be withheld only if it is evident that its disclosure would result in 'harm' to legitimate interests. In other words, access to information should not be denied merely because it might technically or arguably fall within an exemption.[157] This approach accords with s28(1) of the Act which gives agencies and ministers the *discretion* to refuse access to exempt matter or an exempt document. In section 10.2 *Alternative approaches to the exemption provisions*, the committee recommends that the Act continue to give agencies and ministers this discretion.

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155 ALRC/ARC review report, n13 at para 4.21 (recommendation 11). Clauses 96 and 97 of the Freedom of Information Amendment (Open Government) Bill 2000 respectively give effect to ALRC/ARC review recommendations 10 and 11. See also later comments by the ALRC in *Australia's Federal Records; A Review of Archives Act 1983*, report no 85, Ligare Pty Ltd, Sydney, 1998 at paras 18.18-18.24.

156 Relevant submissions: 48, 82, 104 and 142. QIC, first submission no 56 at paras A32-A33 and B229.

157 The Commonwealth Ombudsman has called this a '*minimalist approach to disclosure through the inappropriate application of exemptions*': Commonwealth Ombudsman, *Needs to know*, n 25 at para 3.20.

The Commonwealth Attorney-General in 1985 issued a memorandum urging agencies not to claim exemptions unless disclosure will cause harm. A later FOI memorandum from the Attorney-General states:

> *In June 1985 the Government issued directions (see FOI Memo No. 77, para. 6) that agencies should not refuse access to non-contentious material only because there are technical grounds of exemption available under the Act. Proper compliance with the spirit of the FOI Act requires that an agency first determine whether release of a document would have harmful consequences before considering whether a claim for exemption might be made out. For example, the fact that an exemption may be claimed under section 42 (legal professional privilege) should only lead to a claim for exemption where disclosure will cause real harm. …Note also that a … statement of reasons should include the reasons for not exercising the discretion to grant access to documents outside the FOI Act….*[158]

The US Attorney-General in 1993 issued a similar memorandum which in part states:

> *In short, it shall be the policy of the U.S. Department of Justice to defend the assertion of a [Freedom of Information Act] exemption only in those cases where the agency reasonably foresees that disclosure would be harmful to an interest protected by that exemption. Where an item of information might technically or arguably fall within an exemption, it ought not to be withheld from a [Freedom of Information Act] requester unless it need be.*
>
> *It is my belief that this change in policy serves the public interest by achieving the Act's primary objective -- maximum responsible disclosure of government information -- while preserving essential confidentiality. Accordingly, I strongly encourage your [Freedom of Information Act] officers to make "discretionary disclosures" whenever possible under the Act …*
>
> ***[Attorney-General] Janet Reno***[159]

The QIC has, on a number of occasions, urged the Queensland Government to issue similar guidelines for agencies on the exercise of the discretion conferred by s 28(1).[160]

There would be considerable merit in the Queensland Premier issuing a directive similar to that issued at the Commonwealth level to assist in inculcating a culture of pro-disclosure in the Queensland Government. Decision-makers should approach FOI applications from a starting point that the information being sought should be released unless harm would result. It is important that agencies and ministers resist automatically denying access to information merely because exemptions are technically applicable.

A directive from the highest level of government would not only be a clear statement of the government's commitment to openness but also displace any other subtle within-agency 'directives' that information be withheld if possible.

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158 Commonwealth Attorney-General, New FOI Memorandum No. 19, December 1993, Commonwealth Attorney-General's Department, Canberra, at para 2.6. Available at <www.law.gov.au/foi/memos/memo19.html>.

159 Clinton Memorandum on Administration of FOI Act, 4 October 1993. Available at <www.eff.org/pub/Activism/FOIA/foia_clinton_reno_93.memos>.

160 QIC, *1994/95 Annual Report*, Brisbane 1995 at para 3.11; QIC, *1995/96 Annual Report*, Brisbane, 1996 at paras 3.19-3.20; QIC, *1996/97 Annual Report*, Brisbane, 1997 at para 3.13.

COMMITTEE FINDING 16—RECOMMENDATION

The Premier should issue a directive to all agencies and ministers restating the Government's commitment to FOI principles of open, accountable and participatory government, and directing agencies and ministers to:

- approach applications for access to documents under the Act with a spirit of presumption of disclosure; and
- invoke exemptions only where there is a reasonable expectation that disclosure would result in harm (and not where matter might technically or arguably fall within an exemption).

4.5 A CHANGE IN NAME OF THE ACT[161]

The committee considered the suggestion that it would be both symbolically and conceptually beneficial to change the title of the FOI Act to the *Access to Information Act* in order to, among other things: prevent confusion with freedom of speech and expression; make the purpose of the Act more readily apparent; and focus on allowing access to information rather than on '*an often futile adversarial conflict over exercising FOI rights*'.[162]

Arguments opposing this change included: administrative cost; 'FOI' indicates a wider or more positive concept than 'access to information'; the gains already won in promoting an awareness of FOI would be unnecessarily lost; confusion; and inconsistency with the title of the same legislation in other (at least Australian) jurisdictions.

On balance, the committee has decided against changing the name of the Act. Any symbolic benefits of changing the name of the Act to the *Access to Information Act* would not outweigh the loss in community recognition of the term 'FOI', and the administrative costs that would result from such a change.

COMMITTEE FINDING 17—CONCLUSION

The name of the Act should not be changed.

4.6 A RIGHT TO GOVERNMENT-HELD INFORMATION AS AN EXAMPLE OF AN FLP[163]

The *Legislative Standards Act 1992* (Qld) requires that legislation must have regard to fundamental legislative principles (FLPs), namely, *'principles relating to legislation that underlie a parliamentary democracy based on a rule of law'*.[164] These principles include requiring that legislation *'has sufficient regard to rights and liberties of individuals'* and the Act goes on to list examples of whether legislation has such regard. While the examples do not define 'rights and liberties of individuals' they do provide an important guide and ready reference source as to rights and liberties to which legislation should have sufficient regard.

The committee considered whether sufficient regard to 'the right to access government-held information' should be included as an example of an FLP (to expressly draw FOI issues to the

161 Relevant submissions: 93, 113, 115, 119, 120, 127, 130, 134, 135, 136, 138, 142, 144, 146, 149, 150, 153, 154, 160, 161, 162, 163 and 169. QIC, supplementary submission no 173 at 7.

162 R Snell and P Walker, submission no 93 at 5.

163 Relevant submissions: 92, 119, 122, 127, 133, 134, 138, 142, 146, 150, 154, 158, 160, 161, 162 and 165.

164 *Legislative Standards Act 1992* (Qld), s 4.

attention of departmental officers and drafters at the critical junctures when policy is formulated and legislation is drafted, particularly when secrecy provisions are being contemplated).

The committee has decided against the suggestion on the basis of evidence that the right to access government information as already provided in the FOI Act is sufficient to direct departmental officers' attention to access issues when formulating policy and drafting legislation. Further, the Scrutiny of Legislation Committee of the Queensland Parliament (SLC)—which monitors compliance with the FLPs—advised that:

- the SLC currently has the scope to comment, where appropriate, on issues related to accessing government-held information;
- however, except in the context of bills which authorise the 'outsourcing' of government activities (with consequent possible loss of access to usual public sector accountability mechanisms), the SLC has seldom encountered provisions which appeared to it to require comment; and
- in the circumstances, the SLC does not consider there is a pressing need for insertion of the example as suggested.

The committee has recommended the creation of an independent FOI monitor with functions including educating departmental officers about FOI, and identifying and commenting on legislative policy issues. This should address any residual concerns that FOI objectives are not given sufficient regard when policy is formulated and legislation drafted.

COMMITTEE FINDING 18—CONCLUSION

The 'right to access government-held information' should not be included as an express example of a 'fundamental legislative principle' in section 4 of the *Legislative Standards Act 1992* (Qld).

4.7 PERFORMANCE AGREEMENTS[165]

The ALRC/ARC review reasoned that cultural changes within agencies would be more likely to occur if senior officers were given tangible incentives to pay greater attention to, and improve, an agency's FOI practices and performance. Hence, the review recommended 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.[166]

The QIC submitted that the ALRC/ARC review recommendation about performance agreements should be considered for implementation in Queensland.[167]

The committee believes that, in principle, there is scope for performance agreements of senior public officers to impose a responsibility to ensure efficient and effective practices and performance in respect of community access to government-held information (whether that access is granted under the FOI Act or otherwise).

Accordingly, performance agreements could include indicators in respect of, for example: initiatives introduced to promote administrative access to documents; initiatives introduced to improve access to documents under and outside the FOI Act, the proportion of FOI applications dealt with in accordance with the time frames set in the FOI Act, the proportion of FOI decisions which proceeded to internal

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165 Relevant submissions: 54, 113, 115, 119, 127, 128, 134, 136, 142, 149, 150, 154, 159, 160, 162 and 163. QIC, first submission no 56 at para A34. QIC, supplementary submission no 173 at 6.

166 Note 13 at para 4.16 (recommendation 8).

167 The QIC further stated (first submission at para A28) that: '*It is imperative that officials who hold information and power within the executive branch of government recognise that they do so on behalf of the people of Queensland, and tailor their management practices with respect to government information accordingly.*'

review, and the proportion of agency FOI decisions which proceeded to external review and which were affirmed as correct (or substantially correct) by the QIC. (Care would have to be taken in using statistical indicators such as the amount of matter claimed as exempt and the number of applications received given the vast differences in the type of information held by agencies.)

FOI users' perception that a culture of openness is being promoted within agencies would be enhanced by the whole-of-government introduction of performance appraisals for senior officers.

However, the committee is reticent, at this stage, to recommend particular performance criteria for information access responsibilities. Rather, the proposed FOI monitor will, in due course, be in a better position to assess the particular performance indicators to apply.

COMMITTEE FINDING 19—RECOMMENDATION

In principle, performance agreements of senior public officers should impose a responsibility to ensure efficient and effective practices and performance in respect of community access to government-held information whether that access is granted under the Act or otherwise.

The FOI monitor should consider and make recommendations to the Attorney-General about the particular performance indicators to apply.

4.8 THE DATA COLLECTION AND REPORTING REQUIREMENTS[168]

To be effective and efficient Queensland's FOI regime should be subject to continual monitoring, evaluation and review. The FOI monitor will play a critical role in this regard. However, to perform this role the FOI monitor will need timely and accurate information as to the regime's usage and operation. An important source of this information will be the s 108 annual reports on the operation of the Act. (Section 108 requires the Attorney-General to prepare an annual report on the operation of the Act. In section 4.2.2 *The FOI monitor's specific functions*, the committee recommends that the FOI monitor be responsible for the preparation of these reports.)

Section 108 reports are intended to inform Parliament and the community about use and administration of the FOI Act and thus accord with the FOI principles of openness and accountability. However, to the extent that s 108 reports contain meaningless material or material of dubious accuracy, they are a waste of valuable agency resources. The lack of guidance on the current s 108 requirements has apparently led to inconsistency in reporting practices by agencies. This is a matter of concern given that, if this is the case, the reliability and usefulness of the data produced is reduced. There have also been substantial delays in tabling s 108 annual reports after the end of each financial year.

4.8.1 The data to be collected under s 108

Currently, the Attorney-General's annual report on FOI is to include two things. Firstly, it must include details of difficulties (if any) encountered during the year by agencies and ministers in the administration of the FOI Act: s 108(2). This is an appropriate requirement and should be retained. Secondly, it must include particulars of the operations of each agency and minister as per 10 categories of information set out in s 108(4).

These categories of information are:

(a) the number of applications made to each agency and to each minister;

[168] Submissions relevant to one or more of the issues discussed in section 4.8 are: 3, 8, 16, 21, 27, 29, 42, 43, 45, 46, 54, 57, 59, 61, 62, 66, 67, 69, 73, 76, 77, 87, 92, 100A, 100B, 103, 104, 107, 113, 124, 136 and 150. QIC, first submission no 56 at paras B253-B262.

(b) the number of decisions not to give access to a document, the provisions of the Act under which matter was classified as exempt and the number of times each provision was invoked;

(c) the name and designation of each officer with authority to make a decision in relation to an application, and the number of decisions made by each officer that an applicant was not entitled to access to a document on an application;

(d) the number of applications under ss 52 and 60 for internal review of a decision, and in relation to each application for review—

(i) the name of the officer who made the decision under review;

(ii) the name and designation of the officer who conducted the review and the decision of the officer;

(iii) if the officer conducting the review confirmed (in whole or part) a decision classifying matter as exempt matter—the provision of the Act under which that decision was made;

(e) the number of external review applications to the QIC and in relation to each application—

(i) the decision of the QIC;

(ii) the details of any other decision made by the QIC;

(iii) if the decision in respect of which the application was made was a decision that an applicant is not entitled to access to a document in accordance with an application—the provision of the Act under which the matter was classified as exempt matter; and

(f) the number of notices served upon the principal officer of the agency under s 20(1) and the number of decisions by the principal officer which were adverse to the person's claim;[169]

(g) particulars of any disciplinary action taken against an officer in relation to the administration of the Act;

(h) the amount of charges collected by the agency or minister;

(i) particulars of any reading room or other facility provided by the agency or minister for use by applicants or members of the community, and the publications, documents or other information regularly on display in that reading room or other facility;[170] and

(j) any other facts that indicate an effort by the agency or minister to implement and administer the Act.

A number of submitters, including the QIC, considered that the categories should be reviewed for reasons including that the current reporting requirements:

- require more information than is appropriate, necessary or useful;
- are difficult, costly and resource-intensive to comply with;
- include some matters which are of little or no interest to the general public and which do not assist the public to understand how and with what degree of success the FOI Act is being administered in Queensland; and
- are more onerous than similar requirements in other Australian jurisdictions.[171]

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169 One of the functions the committee proposes for its FOI monitor is to monitor agencies' compliance with the ss 18 and 19 requirements (to which s 20 relates). If this monitor is established, then the need for this category of data is reduced.

170 In section 5.5 *Availability of information: ss 18 and 19*, the committee recommends that this information should be included in agencies' statements of affairs.

171 The categories of information to be included in the s 108 report are similar to those in Victoria's FOI Act. However, the Commonwealth, Western Australia, Tasmania and the ACT require agencies to report on no more

In the committee's opinion, data collected by agencies should at least reveal:

- the number of access applications received by agencies and ministers and whether such applications relate to personal or non-personal affairs documents;
- what action agencies have taken on access applications received, that is: (a) the percentage of applications where the agency negotiated an alternative means of addressing the applicant's request for information resulting in an application being withdrawn; and (b) where the agency has made a decision on an application, the percentage of documents to which access was refused, granted in full and in part;
- where access is refused, the exemptions, if any, relied on and the number of times each exemption was invoked each year;
- the number of amendment applications received and results of such applications;
- the name and designation of each decision-maker and internal review officer and the number of decisions made by each officer refusing access;
- in relation to internal review applications (both access and amendment), the number of applications for review, whether the initial decision was upheld in whole or part, and the exemptions, if any, relied on to exempt material from disclosure;
- in relation to external review applications (both access and amendment), the number of applications for review, whether the internal review decision was upheld in whole or part, and the exemptions, if any, relied on to exempt material from disclosure;
- the amount of fees and charges collected by each agency and minister;
- agencies' timeliness in processing access and amendment applications including time taken to consult third parties as required by s 51, and reasons for non-compliance with time limits; and
- any other issues which agencies or ministers believe impact on the proper administration of the Act.

While these observations should be taken into account in revising the s108(4) categories of data, a final recommendation in this regard should be made by the FOI monitor as part of a coordinated monitoring and evaluation strategy and following consultation with a person/s experienced in designing program evaluations.[172] The FOI monitor should then issue guidelines regarding the interpretation of the final categories to ensure that agencies take a consistent approach in the collection of data.

This process should not only ensure that meaningful data is recorded but also ensure that the data collection and reporting requirements are not imposing an unnecessary resource burden on agencies.[173]

than 5 or 6 of these categories. In South Australia and New South Wales, no information is specified. In South Australia, the information provided is at the discretion of the minister. In New South Wales, the information can be prescribed by regulation.

[172] This will mean that amendment to s 108(4) will need to be delayed pending establishment of the FOI monitor by statute. As an interim measure, the FOI monitor should issue guidelines regarding interpretation of the current categories.

[173] Term of reference B(vii) asks whether the data collection and reporting requirements exceed what is necessary to achieve their legislative purpose.

COMMITTEE FINDING 20—RECOMMENDATION

The FOI monitor should make final recommendations about the categories of information required to be included in s 108 reports:

- in light of the committee's observations in this regard; and
- after consulting with (a) person/s experienced in designing program evaluations.

The FOI monitor should issue guidelines regarding the interpretation of the categories to ensure that agencies take a consistent approach in the collection of data.

4.8.2 Prescription of the s 108 data

The categories of information required to be included in s 108 reports could be prescribed by regulation.[174] This would enable the categories to be more readily amended as needed. However, in the committee's view the data collection requirements are significant and should be retained in primary legislation.

COMMITTEE FINDING 21—CONCLUSION

The categories of information required to be included in s108 reports should continue to be provided for in primary legislation.

4.8.3 Collection of s 108 data

Agencies keep detailed records for the s 108 reporting requirements and other purposes. To assist agencies in recording necessary data, a software package, FOIDERS (Freedom of Information Data Entry and Recording System), was produced by the then Department of Justice and supplied to agencies in early 1993.

A number of agencies submitted that FOIDERS has not been updated to incorporate amendments to the Act and that the software is antiquated, not user-friendly, inefficient and without an on-going support system. It was suggested that a windows based system which allows integration with file management systems, and therefore avoids the need for double entry of data, would increase efficiency and reduce cost.

There is clearly an urgent need for someone to update the software used by agencies to collect s 108 data, and provide agencies with ongoing training and help desk support in using this software. More user-friendly software should greatly alleviate the administrative burden of collecting data and enable agencies to extract information to assist management in their functions under the Act and external assessment of the operations of the Act.

The committee understands that Queensland Treasury, and more recently the DJAG, have been working on replacement software to be made available to all agencies. The responsibility for managing and updating this software and providing necessary training and help desk support to agencies should be transferred to the FOI monitor upon that office's establishment.

174 See, for example, the FOI Act (NSW), s 68(6).

COMMITTEE FINDING 22—RECOMMENDATION

There is a clear need for someone, as a matter of urgency, to develop in consultation with the state's FOI coordinators software to update/replace FOIDERS. In particular, this new software should:

- take into account the current categories of information required to be included in s108 reports and be able to adapt to changes to those categories;
- be capable of operating in a windows based environment compatible with departmental systems; and
- be more user-friendly.

The committee understands that the Department of Justice and Attorney-General is currently developing such software. The responsibility for managing and updating this software and providing necessary training and help desk support to agencies should be transferred to the FOI monitor upon that office's establishment.

4.9 A REVIEW CLAUSE FOR THE ACT[175]

EARC recommended that the PCEAR undertake a review of the FOI Act two years after its commencement.[176] The PCEAR subsequently endorsed this recommendation.[177] However, despite these recommendations, this committee's review has been the first public review of the Act. It was initiated seven years after the Act's commencement.

As noted in section 3.5 *The need for modification of FOI purposes and principles*, there have been significant developments in the way governments perform their functions and the factors which influence government policy making since the introduction of FOI legislation in Australia. The context within which FOI legislation operates will continue to change. Accordingly, it is essential that the law and practice of Queensland's FOI regime is constantly reviewed so that it remains relevant in a changing environment.

An independent and properly-resourced FOI monitor as recommended by the committee will mean that Queensland's FOI regime is, in effect, under constant review. This monitor should regularly report on matters including recommended improvements (both legislative and administrative) to the FOI regime. An identified need for legislative reform which has a significant impact on the operation or administration of the Act (regardless of whether it is identified by the FOI monitor or otherwise) should be implemented as soon as practicable.

In addition, the committee believes that there should be a statutory requirement that the minister administering the Act ensures that an independent body conducts a comprehensive review of the operation and effectiveness of the FOI regime including the Act at least every five years.

The independent entity to conduct this review should be sufficiently-resourced with experience in conducting law reform projects. Bodies which might conduct a review include the Legal, Constitutional and Administrative Review Committee,[178] given its specific statutory responsibilities in relation to legislation concerning access to information, and the Queensland Law Reform Commission.

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175 Relevant submission: 142.

176 EARC FOI report, n 19 at para 20.37.

177 PCEAR FOI report, n 20 at para 3.15.2.

178 Given the LCARC's statutory responsibilities, this committee might conduct a review of the Act at any time regardless of the insertion of a specific review provision in the Act.

If an entity other than the LCARC conducts a review, then the LCARC should be consulted regarding the appointment of the reviewer and the terms of reference for the review (such as occurs with 'strategic reviews' of the QIC: see s 108A).

While the FOI monitor and the QIC would have substantial input into these regular reviews given their ongoing functions, the committee does not believe that it is appropriate that the FOI monitor or the QIC be the reviewer as: (a) the review should include an assessment of their role and performance of their statutory and other functions; (b) they are not law reform bodies and therefore do not have experience in law reform processes; and (c) their resources should be fully employed in fulfilling their functions.

The reviewer's report should be tabled in Parliament and, to ensure that the recommendations are duly considered by government, the minister administering the Act should also be required to table in Parliament a ministerial response to the report within three months or, if the minister cannot table a final response within three months, within six months of the review report being tabled. (Such requirements will automatically apply if the LCARC conducts the review.)

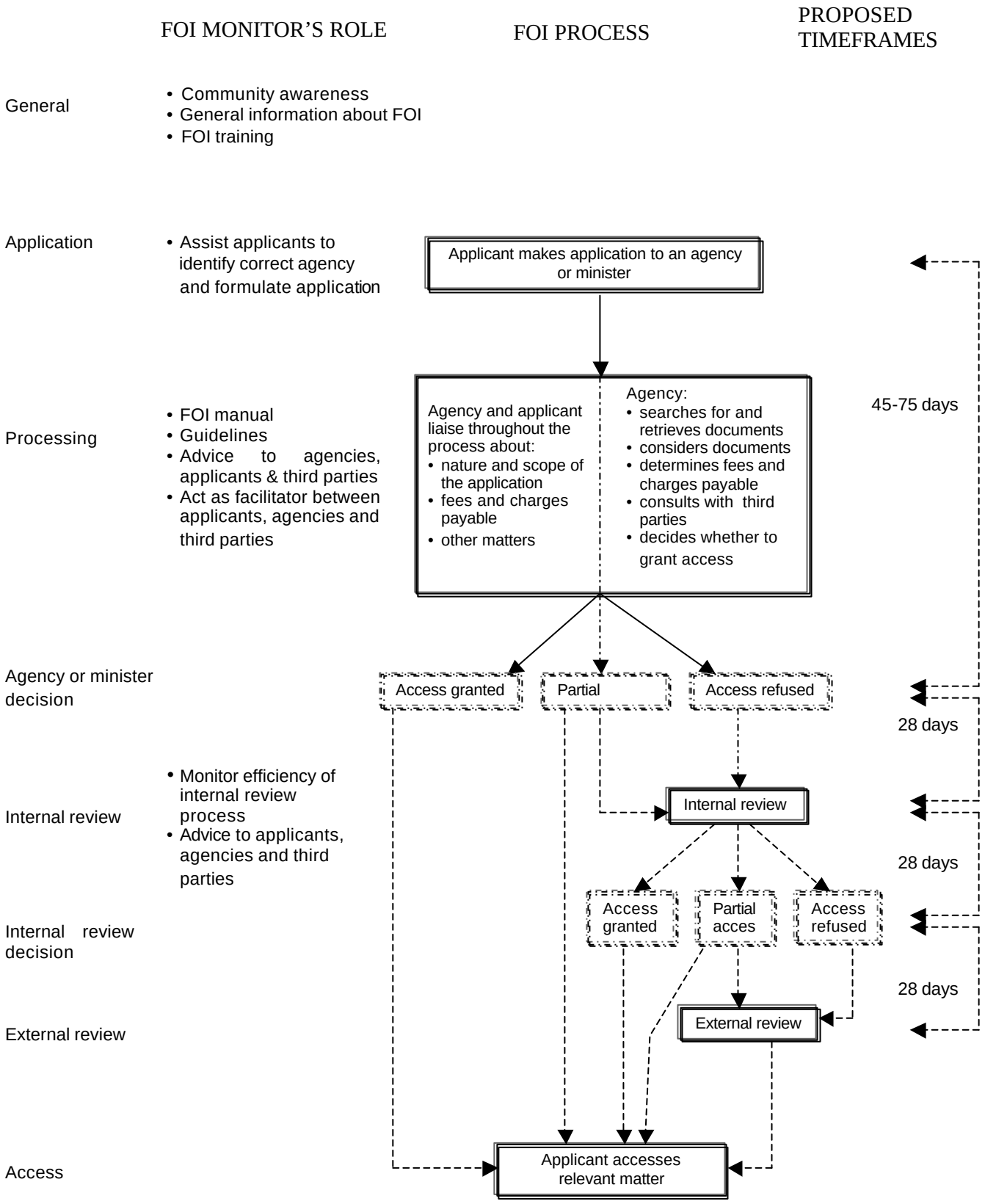
COMMITTEE FINDING 23—RECOMMENDATION

The Act should require the Minister administering the Act to ensure that an independent reviewer conducts a formal review and reports on the operation and effectiveness of the FOI regime including the Act and on further or alternative ways to achieve the objectives of the Act, at least every five years.

The relevant provision should also require that:

- if an entity other than the Legal, Constitutional and Administrative Review Committee conducts such a review, then the Legal, Constitutional and Administrative Review Committee be consulted regarding the appointment of the reviewer and the terms of reference for the review;
- the reviewer's report be tabled in Parliament; and
- the Minister administering the Act table in Parliament a ministerial response to the report within three months or, if the minister cannot table a final response within three months, within six months of the report being tabled.

Diagram 4.1: The role of the FOI monitor in the processing of FOI access applications



5. WHAT THE FOI ACT PROVIDES FOR

5.1 INTRODUCTION

The FOI Act provides for three significant matters: access to documents; amendment of personal affairs information; and availability of information.

In this chapter the committee addresses issues raised regarding each of these matters and also discusses how the rights conferred by the FOI Act interrelate with other legislation conferring the same or similar rights.

5.2 THE DEFINITION OF 'AGENCY'[179]

The FOI Act applies to 'agencies' and ministers. 'Agency' is defined in s 8(1) to mean a department, local government or public authority. 'Public authority' is defined in s 9.

The same terms are used in ss 8 and 9 of the *Ombudsman Act 2001* (Qld). Consistency between the two pieces of legislation to the greatest extent possible is desirable.[180] Therefore, the committee's recommended amendments to these provisions might require consequential amendment of the *Ombudsman Act.*

5.2.1 Meaning of 'agency': s 8

Section 8(2) of the Act provides that a reference to an agency includes a reference to a body that: (a) forms part of the agency; or (b) exists mainly for the purposes of enabling the agency to perform its functions.

There is some uncertainty as to the intent of s 8(2).[181] It could be interpreted as making bodies of the kind mentioned in s 8(2)(a) and (b) subject to the Act in their own right. This would mean that all sub-parts of agencies are required to comply with the obligations under the Act.

An alternative interpretation, and the one adopted by the QIC, is that s 8(2) requires agencies to discharge the obligations under the Act on behalf of bodies which have a relationship to them described by s 8(2)(a) and (b). On this interpretation, s 8(2) has the same effect as s 9(2) relating to public authorities.

Section 8(2) should be clarified to clearly give effect to the latter interpretation.

COMMITTEE FINDING 24—RECOMMENDATION

Section 8(2) should make it clear that its intent is to require agencies to discharge the obligations under the Act on behalf of bodies which have a relationship to them described by s 8(2)(a) and (b).

5.2.2 Meaning of 'public authority': s 9

'Public authority' is defined in s 9. Two issues arise regarding the definition of 'public authority'.

Firstly, s 9(1)(a)(ii)—which provides that a public authority includes a body established by government for a public purpose under an enactment—is ambiguous. It is not clear whether the words 'under an enactment' qualify the word 'established' or the words 'for a public purpose' or both. The

179 Submissions relevant to one or more of the issues discussed in section 5.2 are: 24, 43, 44, 90, 91, 103, 113, 119, 127, 133, 134, 138, 150, 153, 154, 156, 160, 163, 167 and 172. QIC, first submission no 56 at paras C25-C34.

180 The explanatory notes to the Ombudsman Bill 2001 expressly state that the definitions of 'agency' and 'public authority' used in the bill draw on the similar definitions in the FOI Act.

181 *Re McPhillimy and Gold Coast Motor Events Co* (1996) 3 QAR 376 at paras 36-41.

QIC submitted that the most logical interpretation of the provision is that it was intended to cover bodies established by government under an enactment, for a public purpose that need not be prescribed under an enactment.[182] Section 9(1)(a)(ii) should be amended to remove this ambiguity.

Secondly, the QIC raised an issue regarding the qualifying words appearing at the end of s 9(1)(e).

> *In s.9(1) as originally enacted (see p.1804 of Queensland Acts, 1992, Volume II), the qualifying words which appear at the end of s.9(1) - "but does not include a body that, under subsection (2), is not a public authority for the purposes of this Act" - were so positioned as to make clear that they were intended to qualify each subparagraph of s.9(1). In subsequent reprints of the FOI Acts, those words were repositioned in such a way as to make it appear that they were only intended to qualify s.9(1)(e). This appears to have been an error in the process of reprinting the FOI Act, as the relevant words make no sense as a qualification to s.9(1)(e) alone.*[183]

Section 9(1) should be redrafted to remove any ambiguity that might arise because of the positioning of the qualifying words appearing at the end of s 9(1).

COMMITTEE FINDING 25—RECOMMENDATION

The intent of s 9(1)(a)(ii) should be clarified.

COMMITTEE FINDING 26—RECOMMENDATION

Section 9(1) should be redrafted to remove any ambiguity that might arise because of the positioning of the qualifying words appearing at the end of s 9(1).

5.2.3 Entities declared by regulation to be public authorities

EARC considered that persons or bodies funded by government or subject to its control should be continually assessed to determine whether they should be made subject to FOI legislation.[184]

Section 9(1)(c) defines 'public authority' (and therefore 'agency') to include a body (whether or not incorporated), that is declared by regulation to be a public authority for the purposes of the Act, and is:

- supported directly or indirectly by government funds or other assistance or over which government is in control; or
- established by or under an enactment.

The FOI Regulation does not contain any bodies which are subject to the Act pursuant to a regulation made under s 9(1)(c).

The committee has considered and rejected the notion that this provision should be expanded to broaden the scope of the FOI Act, for example, by removing the requirement for prescription by regulation.

It is important that organisations which obtain government funding are accountable for those funds. However, many organisations which receive government funding are community organisations and often are only partially government funded. A blanket expansion of the Act to all such organisations could impose an unreasonable burden on many of these organisations, and unjustifiably divert them from their core functions.

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182 The QIC submitted that the meaning of s 9(1)(a)(i) is relatively straightforward. See also now *Local Government Association of Queensland Inc v Information Commissioner and Price* [2001] QSC 52.

183 QIC, first submission no 56 at para C33.

184 EARC FOI report, n 19 at para 8.7.

A preferable approach is that provided for by s 9(1)(c) which allows a case by case consideration of whether an entity should be subject to the Act. Thus, consideration can be given to other accountability mechanisms in place such as conditions and reporting requirements attached to government grants and subsidies.

However, in providing government funding to bodies outside government, the government should, as a matter of course, assess whether it is appropriate to bring the organisation within the scope of the FOI Act. In those cases where it is appropriate to do so, a regulation pursuant to s 9(1)(c) should be made.

COMMITTEE FINDING 27—RECOMMENDATION

Section 9(1)(c) should be retained in its current form. However, the Attorney-General should ensure that procedures are in place so that consideration is given to whether particular bodies which are: (a) supported directly or indirectly by government funds or other assistance, or over which the government is in control; or (b) are established by an Act; should be prescribed pursuant to s 9(1)(c).

5.3 ACCESS TO DOCUMENTS

The FOI Act grants persons with a legally enforceable right to be given access to 'documents of an agency' and 'official documents of a minister' subject to specific exemptions necessary to protect certain public and private interests.

Various issues arise as to what sort of 'documents' or 'information' should be accessible and when access might be refused.

5.3.1 The focus on documents[185]

The right of access conferred in s 21 of the Act is expressed as a right to information contained in the form of certain *documents*.[186] This means that persons do not have a legally enforceable right to compel an agency to: answer a series of questions; extract answers to questions from its documents; or create a document in order to supply information in which an applicant is interested.[187] (Although, as the QIC has pointed out, this does not mean that an agency should not do any of these things if it is prepared to do so in the interests of assisting a member of the public.)

Arguably, a modern FOI regime should provide a right of access to *information* in order to direct focus on the content of information rather than on the medium of its storage. Changing the focus of the Act to information would presumably not only incorporate what is encompassed by the definition of document (see section 5.3.2) but also enable access to information actually known to officials but never recorded in official documents, or recorded but 'lost'.

However, the committee does not support a change in focus in the Act to 'information' primarily because it would be impractical and unlikely to improve FOI.[188] In particular:

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185 Relevant submissions: 4, 8, 70, 113, 114, 115, 119, 126, 127, 128, 130, 133, 134, 135, 136, 138, 142, 146, 149, 150, 154, 157, 160, 161, 162 and 168.

186 This is despite use of term 'information' in the title of the Act and the objects clause (s 4). As noted in footnote 79 the committee does not have difficulty with the use of the term information in these contexts.

187 *Re Hearl and Mulgrave Shire Council* (1994) 1 QAR 557 at paras 29-32.

188 EARC preferred the term 'document': EARC FOI report, n 19 at paras 10.1-10.22. All Australian FOI legislation except that of Tasmania's also provides a right of access to documents. Tasmania's legislation provides a right of access to 'information contained in records': FOI Act (Tas), s 7. New Zealand's *Official Information Act* focuses on 'information'.

- obliging agencies to create information from raw data or from unrecorded information would be unreasonable,[189] resource intensive and make it difficult for an agency to satisfy itself as to the accuracy of the information;
- the definition of document in the Act as expanded upon by the *Acts Interpretation Act* is very wide and includes information stored in electronic and other non-paper media;
- information is likely to be in documentary form anyway;
- the term 'information' is unclear and open to wide interpretation; and
- there would be practical difficulties in enforcement. For example, it would be difficult for applicants to be sure that they were given access to all undocumented information, and for agencies to definitively establish that its employees do not 'have' some requested information.

Further, the committee was not presented with evidence of a widespread practice of people not recording information because of fear of disclosure under the FOI Act.[190]

There might be some value in changing the terminology from 'documents' to 'records' or 'information held in a record'. Use of the term 'record' might:

- avoid any misconception that 'document' refers to something which is paper based, despite the broad definition of the term in the *Acts Interpretation Act*; and
- potentially, enable greater consistency with archives/public records legislation.

The now lapsed Public Records Bill 1999 (Qld) defined 'record' as follows:

> ***"record"*** *means recorded information created or received by an entity in the transaction of business or the conduct of affairs that provides evidence of the business or affairs and includes—*
>
> *(a) anything on which there is writing; or*
>
> *(b) anything on which there are marks, figures, symbols or perforations having a meaning for persons qualified to interpret them; or*
>
> *(c) anything from which sounds, images or writings can be reproduced with or without the aid of anything else; or*
>
> *(d) a map, plan, drawing or photograph.*[191]

Should any new public records legislation be passed using this terminology, the Attorney-General might consider whether the FOI Act should similarly focus on records.

COMMITTEE FINDING 28—CONCLUSION

The Act should continue to provide for a general right of access to *documents* and not be changed to provide a right of access to *information*. However, should any new public records legislation be passed using the definition of 'record' as it appeared in the now lapsed Public Records Bill 1999 (Qld), the Attorney-General might consider whether the FOI Act should similarly focus on records.

189 See the ALRC/ARC review report, n 13 at para 7.3.

190 Although, as noted in section 3.4.3 *Measuring the success of Queensland's FOI regime*, the committee was provided with some anecdotal evidence of specific situations where there is a reluctance to provide or record information because of the fear of disclosure under FOI legislation.

191 See the definition in schedule 2 of the bill.

5.3.2 The definition of 'document'[192]

Section 7 of the FOI Act provides that 'document' includes a copy of a document, and a part of or extract from a document and copies thereof. Section 36 of the *Acts Interpretation Act 1954* (Qld) ('the AIA') provides that in an Act 'document' includes:

(a) any paper or other material on which there is writing; and

(b) any paper or other material on which there are marks, figures, symbols or perforations having a meaning for a person qualified to interpret them; and

(c) any disc, tape or other article or any material from which sounds, images, writings or messages are capable of being produced or reproduced (with or without the aid of another article or device).

The term 'document' would therefore include:

- drafts of documents;
- something whose purpose is to record or convey information, sounds, images et cetera;
- a wide variety of electronic or non-paper formats such as audio and video tapes, cine-film, microfilm and microfiche, x-rays, and data disks (hard disks, floppy disks and CD-ROMs); and
- information stored in a computer, either as discrete documents or as disparate segments of data, and any information derived from such discrete documents or segments of data.

The definition of document in s 7 of the FOI Act should be amended to clarify that it includes data (raw or unprocessed inputs).[193] The committee leaves it as a matter for the Attorney-General as to whether the s 36 AIA definition should be amended in this regard.

The QIC also pointed out that the term 'document' would include system back-up tapes kept by agencies for 'disaster recovery' purposes. The QIC queried whether back-up tapes should be caught by the definition of document given the purpose for which such tapes are created, and the manner in which the information they contain is recorded.

The QIC referred to comments by the Information and Privacy Commissioner of British Columbia, Canada that:

> *[T]he purpose of systems backup for any digital records is the recovery of a system from a major crash, the electronic equivalent of trying to get an office operating again after an earthquake or a fire. It recreates the system to the point in time when the disaster occurred. Such backup for disaster recovery … is not like the normal filing drawers of a public body and should not be accessible under the Act in the same way as a filing cabinet, hard-copy, or computer tape records stored in off-site storage.*[194]

On this basis, the QIC recommended that consideration should be given to excluding back-up tapes from the definition of document for the purposes of the FOI Act.

The committee does not feel that it has sufficient knowledge of the way in which back-up systems operate to make a recommendation on this issue. It was suggested to the committee that the lifespan of back-up tapes could be shortened by overuse if frequently accessed for FOI purposes. This might compromise the integrity of the back up system's primary purpose of system recovery. It could also be a very resource intensive way of retrieving documents.

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192 Relevant submissions: 16, 90, 92, 101, 101H, 107, 113, 115, 119, 127, 128, 130, 133, 134, 135, 136, 137, 138, 142, 146, 150, 154, 157, 160, 161, 162 and 163. QIC, first submission no 56 at paras B88-B92 and B101-B103.

193 The ALRC/ARC review made the same recommendation in relation to the Commonwealth FOI Act definition of document (which is similar to the Queensland definition): review report, n 13 at para 7.2 and recommendation 28.

194 QIC, first submission no 56 at para B101.

By the same token, exclusion of system back-up tapes from the scope of the Act could result in applicants being denied access to matter which has been deleted either intentionally or unintentionally from an agency's main information technology system.

Finally, the committee does not agree with the suggestion that the s 36 AIA definition of document should be incorporated in the FOI Act definition of document. To do so would potentially undermine one of the purposes of the AIA which is to provide consistency in terms used in Queensland legislation. However, for the sake of clarification and ease of reference, the definition of document in s 7 of the FOI Act should explicitly refer to the AIA definition and replicate the AIA definition in a footnote to the section.

COMMITTEE FINDING 29—RECOMMENDATION

The definition of document in s 7 of the FOI Act should:

- explicitly refer to the definition of document in s 36 of the *Acts Interpretation Act 1954* (Qld) (which should be replicated in a footnote to s 7); and
- include a reference to data.

The FOI monitor should consider, and make recommendations about, whether the definition of 'document' should include back-up tapes kept for disaster recovery purposes.

5.3.3 'Document of an agency'[195]

'Document of an agency' means a document in the possession or control of an agency and includes: (a) a document to which the agency is entitled to access; and (b) a document in the possession or under the control of an officer of the agency in the officer's official capacity: s 7.

Agencies (or, in practice, their solicitors) can be required to search their solicitors' files for documents potentially responsive to an FOI application.[196] It was submitted that the imposition of these very expensive processing costs on agencies is a concern. (The issue of FOI fees and charges is discussed further in chapter 9.)

The committee does not believe that the definition of 'document of an agency' warrants amendment because of the possible inconvenience or cost to agencies of having to retrieve documents from persons into whose possession they have placed a document. Such an amendment could enable agencies to subvert the purposes of the Act by placing documents into the possession of an agent. Agencies can overcome the concern discussed above to a large degree by keeping a copy of all documents provided to external parties.

COMMITTEE FINDING 30—CONCLUSION

The definition of 'document of an agency' does not require amendment.

5.3.4 'Official document of a Minister'

The definition of 'official document of a minister' in s 7 provides that documents held by minsters which 'relate to the affairs of an agency' are accessible. Thus, documents held by ministers relating to their duties as members of Parliament and as members of a political party are excluded.

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195 Relevant submissions: 76, 100C, 110, 113, 115, 119, 127, 128, 132, 133, 134, 136, 142, 146, 150, 154, 160, 161, 162 and 163.

196 *Re Price and Nominal Defendant*, QIC, Decision No 99003, 30 June 1999, unreported.

However, on one interpretation, an FOI access application to a minister could cover all documents falling within its terms held by both the minister's office and the minister's department. While this has apparently not caused any administrative problems, the QIC suggested that the Act might be amended to clarify whether this was intended.[197]

The committee believes that the FOI Act was drafted with the intention that applicants apply to a minister for documents held in a minister's office and make a separate application for documents held by the minister's department. The Act should be amended to clarify this position.

COMMITTEE FINDING 31—RECOMMENDATION

The definition of 'official document of a minister' should clarify that it does not include documents held by the minister's department.

5.3.5 Documents to which access may be refused: s 22(a) and (b)[198]

Section 22 provides that an agency or minister may refuse access to a document that:

(a) is reasonably open to public access (whether or not as part of public register) under another enactment, whether or not the access is subject to a fee or charge; or

(b) is reasonably available for purchase by members of the community under arrangements made by an agency.

The QIC[199] and other submitters suggested the following improvements to s 22(a) and (b):

- s 22(a) would be more appropriate if it clearly provided that it applies to access schemes where the relevant documents are available to the applicant, whether or not they would be available to any member of the public. That is, it should be sufficient that a document be reasonably available for purchase by some members of the community, provided that the particular applicant for access under FOI is one of them;
- s 22(a) should be extended to documents available under administrative arrangements or reasonably available from another source as well as documents available under statutory access schemes;[200] and
- s 22(b) should be clarified to include a document that is available free of charge, rather than only by purchase by members of the community under arrangements made by an agency.

These suggestions have merit. However, only administrative access arrangements approved by the FOI monitor should qualify under s 22. The FOI monitor's approval would ensure that agencies do not seek to take advantage of such a provision by introducing administrative access schemes which in essence attempt to frustrate FOI objectives.[201]

In making decisions about whether to approve an administrative access scheme, the FOI monitor should ensure that:

- timeframes involved in the scheme are reasonable;

197 QIC, first submission no 56 at paras C23-C24.

198 Relevant submissions: 55, 67, 73, 76, 87, 100A, 101, 101E, 101F, 106, 124 and 137. QIC, first submission no 56 at paras C52-C53.

199 See also *Re JM and Queensland Police Service* (1995) 2 QAR 516 at 525-7.

200 It is necessary that agencies be able to refuse access to material available under an administrative access scheme to complement the strategy of disclosure outside the Act recommended by the committee in section 4.3.

201 This might be achieved by schemes which are more expensive, have longer timeframes, or are otherwise more difficult for applicants.

- there are no fees or charges for information which is personal affairs information under the Act, unless a fee or charge can be justified in the circumstances;[202] and
- the scheme provides for waiver of fees in circumstances where the fees would cause the applicant hardship.

An applicant who is refused access under an administrative access scheme and is dissatisfied with that result should be able to pursue their rights through the formal FOI process.

An agency which refuses an applicant access to information because it is available under another legislative or administrative scheme should provide the applicant with details of the scheme, including contact details of the administering body of the scheme.

COMMITTEE FINDING 32—RECOMMENDATION

Section 22(a) and (b) should be incorporated into one provision which provides that an agency or minister may refuse access under the Act to documents which are reasonably available to the applicant under an administrative access scheme approved by the FOI monitor or a legislative requirement or statutory access scheme, whether or not the access is subject to a fee or charge.

The provision should contain a requirement that when an agency or minister refuses access under the provision, the agency must give the applicant details of the alternative arrangements to assist the applicant to obtain access.

5.3.6 Documents to which access may be refused: s 22(e)

Section 22(e) provides that an agency or minister may refuse access under the Act to adoption records maintained under the *Adoption of Children Act 1964 (*Qld).

Part 4A of the *Adoption of Children Act* contains provisions concerning access to identifying information on adoption records. Further, the list of secrecy provisions in the schedule of the Act—for the purposes of s 48—includes s59(3) of the *Adoption of Children Act.* Section 59(3) prohibits an officer of the Department of Families, Youth and Community Care or other officer engaged in giving effect to the *Adoption of Children Act* from disclosing identifying information other than in certain circumstances.

The QIC submitted that these provisions contain the following deficiencies.[203]

- It is not clear whether the scope of 'adoption records maintained under the *Adoption of Children Act 1964*' is intended to include only those documents held by the Adoptions Branch of the department responsible for the *Adoption of Children Act*, or whether it is intended to apply more broadly, to any record concerning an adoption held by that Department, or by other agencies, including District Health Services, which hold medical records concerning the birth of children who are subsequently adopted.
- Section 22(e) is not an exemption and is worded so as to permit refusal of access to 'records' rather than 'matter' or 'information'. Accordingly, s 32 cannot be relied upon to permit the deletion, from a document which could otherwise be disclosed, of information relating to a person's adoption.

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202 In this context, the FOI monitor should have regard to *Information Standard 33: Information Access and Pricing* which provides, among other matters, that where government information is being provided, it should be done so at no cost to the citizen or at a price not exceeding what is necessary to recover the cost of provision unless there is a statutory charge applying to the provision of the information.

203 QIC, first submission no 56 at paras C54-C56. Queensland Health (submission no 100A) also submitted that health agencies have experienced considerable difficulties regarding applications for access to documents that concern an adoption but are not maintained under the nominated Act.

- Section 59(3) of the *Adoption of Children Act* would not appear to preclude the publication of information which is in the records of agencies other than the Department of Families, Youth and Community Care, such as District Health Services, where that information has originated from a birth parent.

The QIC recommended that s 22(e) be reframed as an exemption provision and moved into Part 3, Division 2 of the FOI Act, perhaps as a new s44(5), and reworded in line with the broader adoption provisions contained in other Australian FOI Acts.[204] This would maintain consistency with the strict requirements of the *Adoption of Children Act* and enable s32 of the FOI Act to apply in relevant cases.

Access to information relating to adoptions should be provided pursuant to the regime prescribed by adoption legislation. Accordingly, s 22(e) should be redrafted as an exemption.

COMMITTEE FINDING 33—RECOMMENDATION

Section 22(e) should be reframed as an exemption in Part 3, Division 2 of the Act. The Attorney-General should consult with the Information Commissioner, the Minister for Families and other relevant stakeholders in drafting an appropriate exemption.

5.3.7 An 'obstructing access' provision[205]

While s 61(2) of the *Libraries and Archives Act 1988* (Qld) creates an offence in respect of improper disposal of public records,[206] the possibility exists for agency or ministerial personnel to take other steps, short of disposal, which may act to the detriment of a person seeking access to documents under the Act.

Section 96 of the Act provides that at the completion of a review, if the QIC considers it justified, the QIC must bring to the notice of the principal officer of the relevant agency (or if the principal officer is involved, the minister) evidence that an agency's officer has committed a breach of duty or misconduct in the administration of the Act. The principal officer or minister might commence disciplinary action on being notified by the QIC under this provision. However, there is no offence created by the Act for such breach of duty or misconduct in the administration of the Act.

A provision should be inserted in the Act which makes it an offence to 'obstruct access' to information held by a government agency.[207] Such a provision is consistent with the principles of the Act, and reflects the seriousness of interfering with records of a government agency. Establishing the offence might, in practice, be difficult as one of the elements of the offence would be an intent to prevent an agency being able to give access. However, the committee does not consider that this is sufficient reason to not include a similar provision in the Act.

In section 8.6.1 *The offence provisions* the committee recommends that the maximum penalty for the offence provisions in the Act be 100 penalty units.

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204 QIC, first submission no 56 at para C56.

205 Relevant submissions: 8, 22 and 51. QIC, first submission no 56 at paras B140-B141.

206 The maximum penalty under s 61(2) is 100 penalty units (currently $7,500). Clause 13 of the now lapsed Public Records Bill 1999 (Qld) provided for a maximum penalty of 165 penalty units for unauthorised disposal of public records.

207 For example, see s 110 of the FOI Act (WA). The penalty for breach of the WA provision is $5,000 or 6 months imprisonment.

COMMITTEE FINDING 34—RECOMMENDATION

The Act should include a provision that makes it an offence to obstruct access to a document held by an agency or minister.

5.3.8 Reasons for an application[208]

It is a general tenet of FOI legislation that the identity and motives of an applicant are irrelevant to the rights granted.[209] This is reflected in s 21 and s 28(4) of the Act.

A number of submitters implied that an applicant's motive in making an application should be relevant in some cases in that there should be restrictions on the use of the Act for purposes such as marketing, negotiation under the land acquisition process, and debt recovery.

Several submitters also stated that there should be some restriction on applicants using the FOI Act as a 'fishing expedition' for litigation purposes, that is, to obtain information on which a claim might be based or as an alternative to using court processes to obtain information in a law suit ('discovery'). These submitters generally objected to the transfer of the cost of discovery from applicants to agencies, and argued that a balance is required between allowing such access and the administrative burden on agencies.

It is difficult to assess the extent to which Queensland's FOI Act is being used for litigation purposes. Statistics on the number of *initial* FOI applications for use in litigation is not available as applicants need not disclose their motives for seeking information.[210] In terms of *external review* applications, only a small percentage of cases involve applications by individuals or business organisations seeking information for use in pending or proposed legal proceedings: in 1998/99—3%; in 1999/00—5.5%; in 2000/01—6%.[211] This might be because court procedures, while more expensive, are usually faster and more effective than FOI processes.

The QIC has 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.[212] The courts have taken a similar view.[213]

The use of the FOI Act either as a prelude to or during litigation is, at least in some cases, a legitimate use of FOI and should not necessarily be discouraged or prevented. A prohibition on using the FOI Act for litigation purposes would require departure from the fundamental principle that an applicant's right of access is not affected by their motives.

The rights conferred by the FOI Act should be in addition to rather than as an alternative to other rights of access which might exist.[214] It would be unfair to deny a person the right of access under the FOI Act merely because the person has, or might have if they started legal proceedings, an alternative

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208 Relevant submissions: 14, 21, 33, 45, 48, 69, 75, 80, 81, 99, 101, 101E, 105, 106, 109, 118, 122, 124, 153 and 162. QIC, supplementary submission no 173 at 1-3.

209 EARC FOI report, n 19 at para 7.51; ALRC/ARC issues paper, n 24 at paras 5.21-5.23.

210 Although, the Queensland Police Service (submission no 124) stated that the majority of FOI applications received by the QPS relate to current or proposed litigation. The Department of Employment, Training and Industrial Relations (submission no 162) advised that applicants seeking information to support personal injury claims arising from workplace incidents accounted for 303 of the department's 557 FOI applications in 1998/99 (that is, 52.5%). However, the department stated that such applicants should not be barred from using FOI, and suggested that perhaps another form of legislation may be preferable.

211 QIC annual reports, *1998/99*, n 60 at 15; *1999/00*, n 60 at 15; *2000/01*, n 60 at 20.

212 The ALRC/ARC review reached the same conclusion: review report, n 13 at para 7.20.

213 *Johnson Tiles Pty Ltd v Esso Australia Ltd* (2000) FCA 212; *Sobh v Police Force of Victoria* (1994) 1 VR 41.

214 In this regard see the QIC's comments 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 at para 19.

means of obtaining information through the discovery process. This alternative is not only an expensive one but would restrict the applicant's use of the information obtained to the purposes of the particular litigation.

It would be particularly unfair to applicants who have not yet commenced legal proceedings. In some cases, the FOI Act right of access might be the only avenue at a citizen's disposal to enable them to discover information on which they can base court action. This court action might relate to a matter of significant public policy interest, for example, the underpayment of wages on the basis of discrimination or the compulsory acquisition of property without adequate compensation given relevant land valuations.

As the QIC pointed out, a number of practical issues would also arise including: the need for agency decision-makers to identify the reasons for which information is sought; the outcome where documents are sought for two purposes, only one of which is litigation; and determining whether the documents in issue are relevant to the particular court action. These practical problems suggest that additional burdens would be placed on agencies if documents that are, or might be, available by discovery are excluded from the Act.

A particular suggestion made to the committee was that the discrepancy between obtaining information through the discovery process—particularly s 134A of the *Evidence Act 1977* (Qld)—and through FOI should be addressed. Section 134A is only available to a 'party to a civil proceeding' and provides such persons with a simplified procedure for obtaining third party discovery from a government agency.

The committee does not believe that there is any merit in making s 134A of the *Evidence Act* and the FOI Act consistent. Section 134A has the same focus as discovery, that is, ensuring that litigation is conducted, and disputes are adjudicated by the courts, in light of all relevant evidence. The provision is irrelevant to the general right of access under the FOI Act.

As the QIC submitted, it might be possible to steer litigants towards the use of s 134A of the *Evidence Act* rather than the use of the FOI Act to obtain access to information from government agencies by amending s 22 of the FOI Act so as to enable an agency or minister to refuse access under the Act to a document available to the applicant pursuant to s 134A of the *Evidence Act.*

However, such a provision might easily be circumvented by a litigant arranging for another person to apply for access under the FOI Act on their behalf. A number of the practical considerations outlined above would also bear on whether such a provision would be worthwhile.

Similarly, it is not appropriate to attempt to prevent the Act from being used for any other specific purpose.

COMMITTEE FINDING 35—CONCLUSION

A person's motive in making an FOI application should remain irrelevant. In accordance with this principle, there should not be a prohibition on applicants using the Act either as a prelude to, or in the course of, litigation.

5.4 AMENDMENT OF INFORMATION[215]

The accuracy of personal information held on government files is important given that such information may be used by government as a basis for decision-making. Part 4 of the FOI Act (ss 53-60) enables a person who has had access to a document from an agency or minister (whether or not

[215] Submissions relevant to one or more of the issues discussed in section 5.4 are: 10, 12, 22, 67, 90, 91, 96, 109, 116 and 117. QIC, first submission no 56 at paras B131-B134 and C85-C99.

under the Act) containing information relating to their personal affairs to apply to the agency or minister to have that information amended if they believe that it is inaccurate, incomplete, out of date or misleading.

A person can also make an application to amend a document containing information relating to the personal affairs of a deceased person to whom the person is next of kin: s 53(b). In section 6.15 the committee discusses and makes recommendations about the need for amendment to the provisions regarding deceased persons.

The committee discusses the provision regarding internal review, that is, s 60 in chapter 7.

5.4.1 Person may request amendment of information: s 53

The QIC submitted that the wording of s 53 appears to presuppose that a determination has been made that the information in question '*is inaccurate, incomplete, out-of-date or misleading*'. The QIC suggests that s 53 should be re-drafted along the lines that are contemplated by s 59(2), that is, replace '*is inaccurate* etc' with '*claimed to be inaccurate* etc'.[216]

The committee agrees that s 53 should be so amended as it reflects the object of the section and is in line with the counterpart provision in the Commonwealth FOI Act.

COMMITTEE FINDING 36—RECOMMENDATION

Section 53 (Person may request amendment of information) should apply to documents that are *claimed to be* inaccurate, incomplete, out of date or misleading.

5.4.2 Transfer of applications

Section 53 provides that once an applicant has had access to a document from an agency or minister, the applicant is entitled to apply to 'the' agency or minister (that is, from which the applicant had access to the document, either under the FOI Act or otherwise) for amendment or correction of information in the document. However, the QIC advises that there have been cases in which applicants have obtained from agencies documents which they seek to amend, but which have originated from an agency other than the agency from which the applicant obtained access.

The QIC suggested that Part 4 of the Act be amended so as to allow transfer of such applications in much the same way as transfer of applications for access is permitted under s 26 of the Act. Because it is not possible merely to adopt s 26 due to the language used, the QIC recommended s 51C of the Commonwealth FOI Act as an appropriate solution. The test for transfer which has been adopted in that provision is that transfer may occur where the subject matter of the document in issue is more closely connected with the functions of the proposed transferee agency than the receiving agency.

The committee supports the amendment recommended by the QIC.

COMMITTEE FINDING 37—RECOMMENDATION

Part 4 (Amendment of information) should allow for the transfer of applications to amend information. The provision should be modelled on s 51C of the *Freedom of Information Act 1982* (Cth).

[216] QIC, first submission no 56 at paras C85-C86.

5.4.3 Form of application for amendment of information: s 54

Part 4 essentially obliges agencies and ministers to maintain accurate records given the effect that inaccurate information in documents held by agencies can have on individual citizens. However, applicants are not required to provide any reasons in support of a claim that documents are inaccurate, incomplete, out-of-date or misleading. Agencies are obliged to conduct their own inquiries regarding the accuracy of documents.

In contrast, s51A(c) of the Commonwealth FOI Act requires an applicant to provide their reasons for claiming that information is incomplete, incorrect, out-of-date, or misleading and such other information as would make the information complete, correct, up-to-date or not misleading.

Such a statutory requirement is reasonable and could result in a significant saving of valuable agency resources.[217]

COMMITTEE FINDING 38—RECOMMENDATION

Section 54 (Form of application for amendment of information) should require an applicant to provide their reasons for claiming that information is inaccurate, incomplete, out-of-date, or misleading and such other information as would make the information complete, correct, up-to-date or not misleading.

5.4.4 Acknowledgment and notification of review rights

The QIC submitted that Part 4 should be amended so that:

- the requirements for acknowledgment of an application for access to information (specifying what an applicant's review rights are) are also inserted into Part 4, that is, an equivalent of s 27(1) as amended as recommended by the committee in section 6.5.1; and
- the notification requirements under Part 4 extend to notifying applicants of their right to seek external review in the event that there is a deemed refusal by the agency to amend, once the 30 day time limit in s 57 expires.[218]

The committee endorses this submission.

COMMITTEE FINDING 39—RECOMMENDATION

Part 4 (Amendment of information) should include an acknowledgment provision equivalent to s 27(1) (amended as recommended in section 6.5.1 of this report).

5.4.5 Agency or minister may amend information: s 55

Section 55 provides for two things. Firstly, it gives agencies and ministers a discretion to amend information to which an application relates. Secondly, where an agency or minister has decided to amend information, s 55 provides that amendment can be effected by either alteration or notation.

Given that the provision deals with two discrete issues, it should be redrafted into two separate sections.

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[217] A similar provision to s51A(c) of the Commonwealth FOI Act was recommended by the QIC in his first submission no 56 at paras C93-C95.

[218] The committee endorses this approach in relation to access applications in section 6.5.11 *Deemed refusal*.

While *prima facie* it appears incongruent for agencies and ministers to have the *discretion* to amend information, there is a good case for the discretion. On rare occasions it will be impractical, perhaps even impossible, to amend information even though the agency or minister might have found it to be inaccurate, incomplete, out-of-date or misleading (for example, where information exists solely in 'read only' format). A mandatory amendment requirement might also be subject to abuse by applicants seeking amendment to documents which are no longer functional, that is, documents which are not going to be used by an agency in any real sense.

The discretion must also be considered in light of s 59 which enables applicants to require an agency or minister to make a notation to information which an agency or minister refuses to amend.

However, the provision should be amended to clarify the basis on which an agency or minister can exercise the discretion to refuse to amend information by including a non-exhaustive list of grounds.[219] This list should include:

- where the agency is not satisfied that the document is inaccurate, incomplete, out of date or misleading;
- where to amend the information would amount to an unreasonable and substantial diversion of agency resources, that is, an equivalent to s 28(2);
- where to amend the information would involve an unreasonable cost to the agency (for example, the information is held in technology no longer accessible to the agency); and
- where the information is not recorded in a functional record.

The FOI monitor should issue guidelines regarding the exercise of this discretion.

COMMITTEE FINDING 40—RECOMMENDATION

Section 55 (Agency or minister may amend information) should be redrafted into two separate provisions: one relating to the discretion to amend and the other relating to the form of amendment.

The provision relating to the discretion to amend should include a non-exhaustive list of grounds on which an agency or minister can refuse to amend information. These grounds should include:

- where the agency or minister is not satisfied that the document is inaccurate, incomplete, out of date or misleading;
- where to amend the information would amount to an unreasonable and substantial diversion of agency resources, that is, an equivalent to s 28(2);
- where to amend the information would involve an unreasonable cost to the agency (for example, the information is held in technology no longer accessible to the agency); and
- where the information is not recorded in a functional record.

5.4.6 Time limits: s 57

An agency or minister is required to take all reasonable steps to enable an applicant to be notified of a decision on an amendment application as soon as practicable, but in any case not later than 30 days, after the day on which the application is received: s 57.[220]

In the absence of any compelling contrary argument, the committee considers that this time limit is appropriate and should remain unchanged. Nevertheless, the committee encourages agencies to deal with amendment applications as soon as possible.

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219 This should address the issues raised by the QIC in his first submission no 56 at paras B131-B134 and C87-C88.

220 This time limit accords with EARC's initial recommendation: EARC FOI report, n 19 at para 14.17.

COMMITTEE FINDING 41—CONCLUSION

The 30 day time limit for dealing with applications for amendment of personal affairs information should remain unchanged.

5.4.7 Certain notations required to be added: s 59

If an agency or minister refuses to amend information, the applicant may require the agency or minister to add a notation to the information specifying the respects in which the applicant believes the information to be inaccurate, incomplete, out of date or misleading: s 59.

The QIC expressed concern as to the current drafting of s 59.

> *Based on the first eight words of s 59(2) of the FOI Act, it is arguable that an applicant may require an agency to add a notation to information that does not concern the applicant's personal affairs, since one of the reasons that an agency may refuse to amend information is that the information does not relate to the applicant's personal affairs. I think the better view is that the word "information" in s 59(2) must be read as confined to information of the kind referred to in s 53. However, if the intention of s 59 is that an applicant's right to require a notation should only exist in respect of information relating to the applicant's personal affairs, it is preferable that this should be made clear.*[221]

The committee agrees with the QIC's recommendation that s 59(2) be amended to make clear that it applies only to information of a kind referred to in s 53.

COMMITTEE FINDING 42—RECOMMENDATION

Section 59(2) should make it clear that it applies only to information of a kind referred to in s 53.

5.4.8 Notification of amendment

Sometimes, copies of documents which an agency has decided to amend will be in the possession of persons and entities other than the agency.

In the interests of procedural fairness to applicants, agencies and ministers should be required to forward an amended copy of such a document to all previous recipients of the document where it is reasonable in all the circumstances for the agency or minister to do so. The obligation should apply to both governmental and non-governmental recipients of the documents in issue.[222]

COMMITTEE FINDING 43—RECOMMENDATION

Part 4 (Amendment of information) should include a provision that requires an agency or minister that amends a document to take reasonable steps to forward an amended copy of that document to all other previous recipients of the document.

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221 QIC, first submission no 56 at para C98.

222 The QIC recommended this amendment: QIC, first submission no 56 at paras C96-C97.

5.5 AVAILABILITY OF INFORMATION: SS 18 AND 19[223]

Part 2 (Publication of certain documents and information) of the Act (ss 18-20) aims to make citizens aware of their rights of access and assist them to exercise those rights by requiring certain information to be made available.

Section 18 requires agencies to publish an annual statement of affairs containing information including a description of their structure and functions, how members of the community can participate in the agency's functions and policy formulation, and a description of the kinds of documents usually held by the agency, and how members of the community can access (and amend) the agency's documents.

It would make sense for agencies to also include in their statements of affairs information about the availability of reading rooms or other facilities. This information is currently required as part of the FOI annual report: see s 108(4)(i).

An agency must make a copy of its most recent statements of affairs and each of its 'policy documents'[224] available for inspection and purchase by members of the community: s 19.

A person may serve an agency's principal officer with written notice that the agency has failed to publish a statement of affairs, or its published statement fails to comply with the Act. The principal officer is then required to undertake remedial action: s 20.

Submissions to the committee regarding the ss 18 and 19 requirements revealed that:

- a number of agencies have only ever received a very limited number of requests for their statement of affairs;
- agencies have a mixed attitude to the s 18 requirement: while some felt the s18 statement was costly to produce and, due to minimal demand, unnecessary,[225] other agencies viewed the statement as a useful guide for those seeking access to information but recognised that it needed to be more accessible, for example, on-line;
- the process could be improved if compliance with s 18 was independently monitored (such as occurs in Western Australia by the Information Commissioner[226]); and
- there was substantial support for agencies to have the option of publishing their statement of affairs in their annual report.

The committee believes that statements of affairs have the potential to serve an important function and therefore should be retained. The fact that a number of agencies have stated that there is minimal demand for these statements could be indicative of a lack of community awareness about the FOI Act generally and the statements specifically, rather than their lack of usefulness. Strategies which increase public awareness about the FOI Act generally and the availability of statements of affairs specifically should be encouraged. This issue is discussed in more detail in section 4.2.2 *The FOI monitor's specific functions*, under the heading of *Advice and awareness functions*.

So as to maximise the potential of the ss 18 and 19 requirements, the FOI monitor should:

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223 Relevant submissions: 46, 66, 87, 92, 106, 113, 118, 127, 133, 134, 135, 136, 146, 150, 153, 154, 160 and 162. QIC, first submission no 56 at para B257.

224 See the definition of 'policy document' in s 7.

225 The necessity to produce a 'statement of affairs' given little demand and cost was also raised in DJAG, *Freedom of Information Annual Report 1997/98*, n 59 at 13.

226 Section 97 of the WA FOI Act provides that copies of 'information statements' (which are equivalent to statements of affairs) must be provided to the Information Commissioner when they are published. The Information Commissioner then reports on these in the annual report of the Office of the Information Commissioner.

- conduct an audit of compliance with the ss 18 and 19 requirements (the committee has not had the resources to conduct such an audit);
- monitor compliance with the ss 18 and 19 requirements on an ongoing basis (in terms of content, timeliness and compliance with the Act): see the committee's previous discussion in this regard in section 4.2.2 *The FOI monitor's specific functions*, under the heading of *Preparing annual and other reports on the operation of Queensland's FOI regime*;
- provide guidance to agencies regarding not only the information which *must* be included in statements of affairs but also information which agencies *might* include, for example, guidance on the form of an FOI application;
- encourage agencies to publish their statements of affairs on their websites (both to increase accessibility and reduce publication costs to agencies) as part of a wider FOI awareness strategy; and
- in due course, consider and make recommendations regarding the need for agencies to publish hard copies of their statements of affairs when they have already published an electronic version.

Agencies should also be required to provide a copy of their statement of affairs to the FOI monitor when they are published.

Section 18(3) provides that statements must be published in a way approved by the minister. The committee understands that in 1993 the then Attorney-General approved agencies to publish their statements in their annual reports. The current Attorney-General should reiterate that agencies have this option. Publishing statements of affairs in annual reports could result in greater compliance with the requirement (if compliance is indeed a problem), cost savings, timely publishing of statements, and ensure that statements are widely circulated. Some agencies might not choose this option. Larger agencies might find that it would result in bulky and more costly annual reports. The committee would prefer that such agencies prepare separate statements of affairs rather than reduce the content of their statement.[227]

In section 4.3 the committee recommends development of a whole of government strategy aimed at ensuring greater disclosure of information outside the FOI Act. As part of its strategy, the committee recommends that the FOI monitor prepare guidelines regarding the type of information suitable for proactive or routine release and consider whether s 19 and the definition of 'policy document' needs to be amended.

COMMITTEE FINDING 44—RECOMMENDATION

Section 18(2) should require an agency's statement of affairs to also include particulars of any reading room or other facility provided by the agency for use by applicants or members of the community, and the publications, documents or other information regularly on display in that reading room or other facility.

[227] The committee does not recommend that Queensland adopt the approach of a whole of government directory of information rather than each agency publishing a separate document, such as in the New Zealand *Official Information Act*, s 20. This approach would be administratively cumbersome.

COMMITTEE FINDING 45—RECOMMENDATION

So as to maximise the potential of the requirements in s 18 (Publication of information concerning affairs of agencies) and s 19 (Availability of certain documents), the FOI monitor should:

- conduct an audit of agencies' compliance with the ss 18 and 19 requirements;
- monitor compliance with the ss 18 and 19 requirements on an ongoing basis;
- provide guidance to agencies regarding not only the information which *must* be included in statements of affairs but also information which agencies *might* include;
- encourage agencies to publish their statements of affairs on their websites as part of a wider FOI awareness strategy; and
- in due course, consider and make recommendations regarding the need for agencies to publish hard copies of their statements of affairs when they have already published an electronic version.

The Act should require agencies to provide a copy of their statement of affairs to the FOI monitor when they are published.

Agencies should be able to publish their statement of affairs in their annual report if they so choose. In accordance with s 18(3), the Attorney-General should reiterate that agencies have this option.

5.6 THE IMPORTANCE OF GOOD RECORDS MANAGEMENT[228]

An effective FOI regime is dependent on good records management practices in agencies. Without good records management, agencies will be unable to identify, locate and retrieve all documents responsive to an FOI application efficiently (if at all), and providing assurances that searches are thorough and complete becomes impossible. Moreover, documents which ought to be retained might be destroyed.

FOI applicants should not be disadvantaged because of any deficiencies in an agency's record management systems. This is particularly important where charges under an FOI regime are calculated on the basis of time spent processing an application (as has been the case in Queensland since 23 November 2001.)

The achievement of archives and privacy regime objectives are also dependent on good records management.

5.6.1 Current and proposed record keeping obligations

Currently, the obligation on 'public authorities'[229] to create and preserve complete and accurate records of their activities is contained in the *Libraries and Archives Act 1988* (Qld).[230] The State Archivist may make recommendations to public authorities concerning the making and preservation of public records.[231] Chief executive officers are required by the Act to take all reasonable steps to implement those recommendations.

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228 Submissions relevant to one or more of the issues discussed in section 5.6 are: 3, 8, 9A, 16, 21, 27, 29, 42, 43, 45, 46, 47, 48, 51, 53, 54, 58, 59, 61, 63, 64, 67, 69, 73, 77, 79, 81, 84, 87, 95, 100A, 104, 106, 113, 114, 115, 119, 127, 128, 130, 133, 136, 137, 142, 150, 154, 162, 163 and 164. QIC, first submission no 56 at paras B93-B103.

229 'Public authority' is defined in the *Libraries and Archives Act 1988* (Qld), s 2 to include government departments, boards, commissions, statutory bodies and local governments.

230 *Libraries and Archives Act 1988* (Qld), s 58(1)(a). The Public Records Bill 2001 (Qld) was introduced into the Legislative Assembly on 12 December 2001, the same date that the committee adopted this report.

231 *Libraries and Archives Act 1988* (Qld), s 58(1)(b). For policies, guidelines and standards which have been issued under s 58 see <http://www.archives.qld.gov.au/index_govserv.html>.

In addition:

- s 51(1)(g) of the *Public Service Act 1996* provides that a chief executive's responsibilities include ensuring maintenance of proper standards in the creation, keeping and management of public records under the chief executive's control; and
- various information standards assist government agencies to effectively manage their communication and information resources and processes.[232]

5.6.2 Issues posed by electronic documents

Rapid advances in information technology since the commencement of the FOI Act impact on many facets of FOI administration including how agencies document information, and store, identify, locate, retrieve and provide access to documents. Access applications which relate to electronically stored information will become increasingly common as government agencies make greater use of information technology, and move from paper-based systems and processes to electronic ones.[233]

A number of difficulties might arise for agencies in *identifying* all electronic and non-paper documents responsive to an FOI access application. Agencies will need to ensure that there are formalised processes for storage and identification of electronic data, and that officers are sufficiently familiar with these processes. Conversely, applicants who are unfamiliar with the way in which an agency organises its non-paper records will be unlikely to be in a position to determine whether the agency has undertaken a reasonable search.[234]

Increasing use of electronic mail and voice mail also poses problems for FOI in that often no lasting record of communications made via these media is kept.

The QIC submitted that agencies:

- should be encouraged to utilise database software and other indexing tools to improve the efficiency and thoroughness of searches for information stored electronically for the benefit of all concerned; and
- need to implement protocols regarding document naming, storage and archiving, and educate their staff about the applicable provisions of the *Libraries and Archives Act* (and relevant agency record retention and disposal schedules made thereunder), in order to maximise the efficiency with which documents falling within the scope of an FOI access application can be identified and located.

Problems in *retrieving* documents may also be exacerbated in the case of information held in electronic form. For example, an agency might have upgraded its hardware and no longer be able access the relevant information, or information might have been password protected or encrypted by an individual who is no longer employed by the agency. Such examples highlight the need for agencies to identify records of continuing value and migrate those records into subsequent systems.[235]

The development and maintenance of guidelines and information standards that address issues regarding storage, identification, and retrieval of electronic records is significant to the FOI regime.

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232 These standards are accessible via: <http://www.iie.qld.gov.au/comminfo/guidelines.html>.

233 The committee discusses in a number of areas of this report whether the FOI Act adequately takes into account the particular considerations which arise in the context of electronic and non-paper documents. For example, see the definition of 'document' discussed in section 5.3.2 and the current form of access provision discussed in section 6.13.

234 Review of 'sufficiency of search' issues is also made more difficult. In this regard, see section 8.5.2 *Power to enter premises and inspect documents*.

235 Clause 14 of the now lapsed Public Records Bill 1999 (Qld) addressed the issue of the disposal of hardware or software necessary to produce information in a useable form by obliging public authorities to take all reasonable action to ensure that the information which can be produced or made available only with the use of particular equipment or information technology remains able to be produced or made available.

5.6.3 The need for a review of agency record management practices

In a 1998 review of the Commonwealth *Archives Act 1983*, the ALRC discussed federal government record keeping practices and the increasing problems related to inadequate consideration of managing electronic records. The ALRC noted that while most Commonwealth records are now created electronically, in many cases this merely means that they are created on a personal network within a work group or agency. The record keeping system to which a record belongs is often no more than a server filled with an unstructured mass of records which are difficult to locate and subject to intermittent purges. The ALRC also noted that the present position is complicated by the fact that there are wide variations in the extent to which Commonwealth agencies have adopted electronic record keeping technologies.[236]

The Australian National Audit Office's subsequent audit to assess the efficiency, effectiveness and accountability of data management by Commonwealth government agencies identified deficiencies in the records and data management in some Commonwealth agencies.[237]

An audit to assess the current standard of records management (both paper and non-paper) in Queensland agencies is outside the inquiry terms of reference and beyond the committee's resources. However, the committee considers that Queensland's FOI regime would benefit greatly from such an exercise, particularly given the recent introduction of a charging regime based on agencies' 'time spent' in processing applications. Such a review would also complement recent introduction of an administrative privacy regime in Queensland.

COMMITTEE FINDING 46—RECOMMENDATION

Agencies should be encouraged to improve the quality of their records management practices and standards, including management of electronic records. To assist agencies in this regard, the Attorney-General should liaise with appropriate entities regarding the conduct of an audit to assess the efficiency, effectiveness and accountability of agencies' records management practices. Such an audit should particularly focus on how agencies are operating mixed paper and electronic record keeping systems.

5.7 RELATIONSHIP WITH OTHER LAWS[238]

The FOI Act should be considered in conjunction with other regimes relating to access to government-held information. In Queensland, these other regimes are predominantly archives legislation and an administrative privacy regime.[239] Consistency and coordination between these regimes is highly desirable.

5.7.1 Archives legislation

The *Libraries and Archives Act 1988* (Qld) aims to promote the making and preservation of 'public records' in Queensland.[240] The Act does this by establishing the office of Queensland State Archives[241] and providing for matters concerning the making, preservation, custody and disposal of

236 Note 155 at para 3.28

237 *Data management in the APS*, report no 48, Canberra, June 1998. Although, that audit focussed mainly on data collected by departments and agencies from non-departmental organisations and institutions.

238 Submissions relevant to one or more of the issues discussed in section 5.7 are: 16, 46, 54, 63, 67, 70, 81, 82, 87, 104, 130, 133, 137, 164 and 169.

239 Although, other laws are relevant. Some laws oblige officials to disclose specified types of information. For example, the *Judicial Review Act 1991* (Qld) requires certain decision-makers to give reasons for their decisions on request by a person affected. Further, the *Electronic Transactions (Queensland) Act 2001* (Qld), among other things, allows for the storage of records in electronic format.

240 'Public records' is defined in the *Libraries and Archives Act 1988* (Qld), s 2.

241 *Libraries and Archives Act 1988* (Qld), s 56(1).

public records. A person in possession of public documents more than 30 years old must deposit them with the Queensland State Archives.[242]

The *Libraries and Archives Act* also establishes a right of access to public records after the expiration of specified restricted access periods. Under the *Libraries and Archives Regulations 1990*, a public record may be accessed after 30 years from the date of the 'last dealing' of that document.[243] Personal and staff files of public officers of a 'public authority'[244] are generally open to access and inspection after 65 years from the date of last dealing. Information can be exempted from access during the 'open access' periods.[245]

The right of access conferred by the FOI Act should integrate with the rights of access in archives legislation.[246] As EARC noted:

> *An individual seeking access to government documents should be able to comprehend, easily, and without the need to engage legal advice, all rights of access conferred by legislation, and any restrictions placed upon that access. Accordingly, although the exemptions from disclosure for archival documents must reflect the different objectives of archives legislation, they must nonetheless integrate easily and efficiently with those exemptions provided for in FOI legislation.*[247]

Moreover, it is important that provisions regarding document management and preservation (the primary focus of archives legislation) are comprehensive, of wide application and readily understood and adhered to by public officers. As noted in section 5.6, good records management is essential to effective FOI legislation.

In 1992, EARC recommended that separate archives legislation be enacted in Queensland as soon as practicable.[248] The committee understands that such public records legislation is soon to be introduced. In preparing this legislation, the responsible minister should liaise with the QIC and the Attorney-General as the minister responsible for the FOI Act to ensure that both pieces of legislation interrelate harmoniously and complement each other. Likewise, the State Archivist should be consulted in implementing the committee's recommended amendments to the FOI Act.

COMMITTEE FINDING 47—RECOMMENDATION

The Minister responsible for administering Queensland's public records legislation should liaise with the Information Commissioner and the Attorney-General to ensure that proposed public records legislation and the FOI Act interrelate harmoniously and complement each other. Likewise, the State Archivist should be consulted in implementing the committee's recommended amendments to the FOI Act.

5.7.2 *Information standard 42: Information privacy*

In September 2001, the Queensland Government endorsed *Information Standard 42: Information Privacy* (IS42) and complementary Information Privacy Guidelines. This administrative privacy

242 *Libraries and Archives Act 1988* (Qld), s 63.

243 *Libraries and Archives Regulations 1990*, s 22(a).

244 'Public authority' is defined in the *Libraries and Archives Act 1988* (Qld), s 2.

245 See the *Libraries and Archives Regulations 1990*, s 23 which enables the chief officer of a public authority to impose conditions and restrictions on access to public records of that authority in the possession of Queensland State Archives.

246 A number of provisions of the FOI Act expressly recognise the interrelationship of the two pieces of legislation: s 17 (Operation of Libraries and Archives Act), s 23 (Non-official documents in Queensland State Archives etc), s 24 (Official documents in Queensland State Archives).

247 EARC FOI report, n 19 at para 5.31.

248 EARC, *Report on review of archives legislation*, Goprint, Brisbane, June 1992. See also PCEAR, *Archives legislation*, Goprint, Brisbane, November 1992.

scheme requires public sector agencies to comply with eleven information privacy principles regarding the collection and handling of 'personal information'. The scheme is based on the information privacy principles contained in the Commonwealth *Privacy Act 1988*.[249]

Information privacy principles 6 and 7 of IS42 relate to access and amendment of information held by government about an individual. In this regard, the standard overlaps with the FOI Act. IS42, like the Commonwealth information privacy principles, uses the term 'personal information'. However, for the purposes of principles 6 and 7 'personal information' is limited to information concerning an individual's 'personal affairs' as the phrase 'personal affairs' has been interpreted in the FOI Act. The term 'personal affairs' is generally recognised as not being as broad in scope as the term 'personal information' which is used in the Commonwealth FOI Act equivalent of s 44 (Matter affecting personal affairs) and in the Commonwealth *Privacy Act.*[250]

Coordination of FOI and privacy regimes as far as practicable is desirable to prevent confusion and unnecessary complexity. Further, consistency in procedural matters such as fees, time frames and review mechanisms will minimise duplication of effort, confusion and incongruous outcomes.

This being said, there are arguments for utilising different terminology in FOI and privacy regimes. The scope of a privacy regime is restricted by full or partial use of the narrower term 'personal affairs'. In contrast, the use of the term 'personal information' in the context of the s44 exemption results in the exemption of more information than a 'personal affairs' exemption, and therefore reduces the availability of information through the FOI Act.

The Government intends to review IS42 within two years of implementation and, at that time, consider the need for specific privacy legislation. In section 11.13.1 *Personal affairs v personal information* the committee recommends that any review of IS42 should again consider which terminology is most appropriate for a privacy regime, and the interrelationship of Queensland's privacy and FOI regimes. Any move to introduce a *statutory* privacy regime in Queensland should consider the desirability of provisions regarding access and amendment to personal information being contained solely in such privacy legislation.[251]

The introduction of privacy legislation might also generate debate about whether FOI, archives and privacy legislation should be rationalised into a single Act to enhance consistency between the regimes and to assist users.[252]

COMMITTEE FINDING 48—CONCLUSION

If there is a move to introduce a *statutory* privacy regime in Queensland, the Attorney-General in conjunction with the Minister for Innovation and Information Economy should consider the desirability of provisions regarding access and amendment to personal information being contained solely in such privacy legislation. Such a review should be undertaken in consultation with the Information Commissioner and the FOI monitor.

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249 The LCARC of the 48th Parliament recommended that a consistent set of information privacy principles, modelled on those contained in s 14 of the *Privacy Act 1988* (Cth), relating to personal information collected and held by Queensland government departments and agencies be implemented in legislation: *Privacy in Queensland*, report no 9, Goprint, Brisbane, April 1998.

250 'Personal information' means information or an opinion (including information forming part of a database), whether true or not, and whether recorded in a material form or not, about an individual whose identity is apparent, or can reasonably be ascertained, from the information or opinion: Commonwealth FOI Act, s 4 and IS42 at 13.

251 In this regard, see the former LCARC's comments in its report *Privacy in Queensland*, report no 9, n 249 at 80-88.

252 The ALRC/ARC review considered but dismissed this suggestion on the basis that there was insufficient benefit in the proposal to outweigh the disadvantage in disturbing the legislative frameworks in place: review report, n 13 at para 5.6.

6. THE FOI PROCESS—ACCESS APPLICATIONS

6.1 INTRODUCTION

This chapter examines the legislative provisions regarding making and processing FOI applications and in doing so addresses a number of the specific terms of reference.[253] Some of the discussion in this chapter is relevant to the fees and charges regime under the Act. For background information in this regard, see section 9.2 *Current fees and charges*.

The procedural provisions in the FOI Act greatly influence the extent to which the philosophy underpinning the Act translates into practice. From an applicant's perspective, a simple application process which enables them to gain the information they want in a timely manner at little cost with maximum assistance is paramount. However, it is also important that procedural requirements prescribed by legislation do not impose an unreasonable burden on agencies, and reflect the realities faced by agencies in processing FOI applications. The procedural requirements of the FOI Act must appropriately balance these practical considerations.

6.2 A FLEXIBLE AND CONSULTATIVE APPROACH[254]

The objectives of Queensland's FOI regime are best met by an Act that recognises the value and importance of agency/applicant consultation and negotiation. A flexible and consultative approach to processing FOI applications should reduce FOI processing time and cost for agencies and, at the same time, reduce frustration and delay for applicants and better enable them to access the information they seek.

6.2.1 Consultation and assistance

If applicants do not have access to information about the structure of, and records held by, an agency it will sometimes be necessary for them to make broad applications that encompass more information than the applicant is in fact seeking. Such applications unnecessarily consume agency resources, without contributing to the objectives of the FOI regime.

Providing information to applicants about the type of apparently relevant information available and the records held by the agency will assist applicants to define their application in a way which meets their needs, without requiring the agency to process irrelevant material. The ss 18 and 19 requirements, which require agencies to publish certain information, assist applicants to some extent in this regard. Although, as discussed in section 5.5 *Availability of information: ss 18 and 19*, the committee has some reservations as to how many applicants are aware of the information made available pursuant to these provisions. Even if ss 18 and 19 are more regularly used, applicants will often need further, more specific information to be able to formulate appropriately refined applications.

The FOI Act currently contains three specific provisions requiring consultation with an applicant.

- Section 25(3) requires an agency or minister to assist a person to make an application in a way that complies with the requirements relating to applications for access (if the person has made an application which does not comply with the requirements of the Act), or direct the application to the appropriate agency or minister (if the applicant has made the application to the wrong agency or minister.)

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253 In particular, the following terms of reference are addressed in this chapter: B(iv)—whether the Act allows appropriate access to information in electronic and non-paper format; B(vii)—whether s28 provides an appropriate balance between the interests of applicants and agencies; and B(vii)—whether time limits are appropriate.

254 Submissions relevant to one or more of the issues discussed in section 6.2 are: 9A, 58, 73, 92 and 100B.

- Section 28A requires an agency or minister to give an applicant a reasonable opportunity to consult where the agency or minister proposes to refuse access on grounds relating to the impact of processing the application on the agency's resources.
- Section 29A(2)(c), which applies if an applicant is required to pay a charge in relation to an application for access, requires an agency or minister to give the applicant a written notice stating that the applicant may consult with an officer in the agency or a specified member of the staff of the minister with a view to making an application in a form that would reduce the charge.

As a matter of practice, agencies and ministers should consult with, and assist, applicants at all stages of the application process.

In circumstances where the Act does not require a formal consultation process, this consultation should generally take place through telephone conversations and meetings with the applicant. Although, the committee recognises that in some cases it might be preferable to deal with an applicant by written correspondence for a variety of reasons.

The routine release of information by agencies (encouraged by the committee in section 4.3 *Greater disclosure outside the Act*) accords with this approach. Not only will it remove the need for FOI applications in relation to information already released, but it should also help applicants frame appropriate FOI applications by enabling them to identify types of documents available and subject matters dealt with by an agency.

COMMITTEE FINDING 49—CONCLUSION

Agencies and ministers should consult with, and provide assistance to, applicants throughout the FOI process whether or not specifically required by the Act.

6.2.2 Negotiation

While the FOI Act should provide procedures to be followed in processing FOI applications, it should also expressly recognise that divergence from these procedures, by agreement between the applicant and agency, is acceptable. Specific recognition of the right of the parties to negotiate would expressly authorise parties to agree on extended timeframes, or other innovative arrangements which balance the competing interests of the applicant and the agency. For example:

- an arrangement might be entered into whereby an application which requires the processing of numerous, complex documents is instead met by the agency preparing an additional document which provides specific information sought by the applicant, or by officers of the agency with particular expertise meeting the applicant to provide information which meets the applicant's needs;
- in agreeing to extend the timeframe for consideration of their application, an applicant might identify the relative priority the agency should give to processing relevant documents and agree on interim timeframes with the agency (see also section 6.5.5 *Extension by agreement between the parties*); and
- an agency and applicant might agree to suspend an application pending a certain event (see also section 6.5.10 *Suspension of an application pending outcome of particular proceedings*).

This ability to negotiate should also extend to:

- internal review procedures, including the timeframe for internal review; and
- fees and charges provisions, especially in cases where the agency and the applicant have made an arrangement which involves activities other than standard processing arrangements.

However, an agency and applicant should not be able to agree to remove the availability of internal review or external review.

If such a provision were introduced, the provisions of the FOI Act would continue to apply in the majority of applications, and where an agency and applicant are not able to agree on alternative, mutually acceptable processes.

Negotiation is currently possible to some degree under the FOI Act, and is already conducted in some circumstances.[255] The committee's recommendation would give legislative recognition to such practices.

Where deviations from the Act are negotiated, agencies as a matter of practice should provide the applicant with written confirmation of the agreement and its effect.

COMMITTEE FINDING 50—RECOMMENDATION

The Act should contain a general provision authorising divergence from the requirements of the Act where an agency or minister and applicant agree to such divergence, and subject to such conditions as form part of the agreement between the agency or minister and the applicant.

The provision should not allow the availability of internal or external review to be the subject of negotiation.

6.3 HOW APPLICATIONS FOR ACCESS ARE MADE: S 25[256]

6.3.1 What an application must address

Section 25(1) provides that a person who wishes to obtain access to a document of an agency or an official document of a minister under the Act is entitled to apply to the agency or minister for access to the document. The application must be in writing and provide such information concerning the document as is reasonably necessary to enable a responsible officer of the agency or the minister to identify the document: s 25(2). The applicant's motive, reasons or purpose for making an FOI application are irrelevant.

There is no provision for agencies to accept oral applications in some circumstances (for example, from persons who are sight impaired), although the committee understands that this happens in practice. Agencies should be expressly allowed to waive the requirement for a written application in appropriate circumstances.[257]

COMMITTEE FINDING 51—RECOMMENDATION

Section 25(2) should enable agencies and ministers to waive the requirement for a written application in appropriate circumstances.

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255 In *Hearl and Mulgrave Shire Council* (1994) 1 QAR 557 at para 31, the QIC commented '*… there is no impediment in the scheme of the FOI Act to an agency negotiating with an applicant for access under the FOI Act with a view to creating a new document to provide the information which the applicant seeks, where that would be more convenient for either or both of the applicant and the agency*. A number of submitters stated that negotiation between agencies and applicants occurs in practice.

256 Submissions relevant to one or more of the issues discussed in section 6.3 are: 66, 76, 92 and 100A.

257 See the *Ombudsman Act 2001* (Qld), s 20 (Complaints) which enables the Ombudsman to receive oral complaints.

6.3.2 Requirement to provide contact details

For agencies to process an FOI application it is often necessary that they be able to contact the applicant. For example, agencies must: notify an applicant of receipt of their application [s 27(1)]; assist an applicant who has made an application which does not comply with the requirements of the Act [s 25(3)]; and notify an applicant of the decision about whether access is to be granted and any fees and charges the applicant must pay (s 34). Accordingly, it is appropriate to require applicants to provide an address at which they can be contacted as part of the application.

A postal address should not be mandatory. Further, it should not be necessary for the address to be in Australia. An e-mail address should be sufficient. (The committee makes similar comments in 7.4.2 regarding internal review.)

COMMITTEE FINDING 52—RECOMMENDATION

Section 25(2) should require an applicant to include in an application an address at which the applicant can be contacted.

6.3.3 Proof of identity

If an FOI application is made for documents that relate to the personal affairs of the applicant and the documents contain matter that would be exempt matter if the application was made by a person other than the applicant, an agency or minister, among other things, must not give *access* to the information unless the agency or minister is satisfied of the identity of the applicant: s 105.

The committee considered whether s 25 should be amended to provide that proof of identity is required as a precondition to an application for documents concerning the applicant's personal affairs being regarded as valid. This would avoid agencies unnecessarily processing FOI applications only to discover at the access stage that the applicant does not have proof of identity.

At this stage, the committee does not recommend that applicants for documents concerning the applicant's personal affairs be required to produce identification prior to their application being processed. The committee was not presented with evidence that there is currently a widespread problem with proof of identity, and does not have the resources to make an independent assessment in this regard. Further, there would be a number of practical difficulties for some people to provide proof of identity, for example, people living in rural areas and people with disabilities. Nevertheless, the FOI monitor should monitor the extent to which proof of identity is a problem and recommend any necessary reforms.

COMMITTEE FINDING 53—CONCLUSION

At this stage the Act should not contain a requirement that applicants making an application for documents which concern their personal affairs produce identification prior to their application being processed. Nevertheless, the FOI monitor should monitor the extent to which proof of identity is a problem and recommend any necessary reforms.

6.3.4 The desirability of a prescribed application form

The FOI Act does not prescribe a specific form for an FOI application and nor does the committee see a benefit in the Act so doing. However, some agencies prepare FOI application forms to assist applicants. This approach enables agencies to tailor their forms to suit the nature of the documents

they hold.[258] Agencies that develop such forms should ensure the forms are readily accessible, including via an agency's webpage, and where possible include a facility for electronic lodgement.

As discussed in section 6.2.1 *Consultation and assistance*, agencies should assist applicants in framing their FOI applications. More readily available information on the nature and types of documents held by agencies will also assist applicants in framing their application.

The FOI monitor should also assist individual applicants to frame FOI applications, identify which agency is most likely to hold the information they seek, and publish information sheets to provide general guidance to citizens about formulating FOI applications.

COMMITTEE FINDING 54—RECOMMENDATION

The Act should not require applications to be made using a prescribed application form. However, the FOI monitor should:

- assist individual applicants to frame applications and identify which agency is most likely to hold the information they seek; and
- publish information sheets to provide general guidance to citizens about formulating FOI applications.

6.3.5 The obligation on agencies to assist applicants

Section 25(3) requires an agency or minister to assist an applicant to make an application that complies with s 25 if the applicant has made a non-compliant application, or direct the application to the appropriate agency or minister if an applicant has directed their application to the wrong agency or minister.

This provision accords with the committee's recommendation in section 6.2.1 *Consultation and assistance* that agencies and ministers assist applicants throughout the application process.

To ensure that this assistance is provided in a timely manner, agencies and ministers should be required to:

- ♦ advise an applicant who makes a non-compliant application of what would be required to make it compliant; and
- ♦ take other reasonable steps to commence consultation to assist an applicant to make a compliant application;

as soon as practicable, but at least within 14 days of receiving a non-compliant application.

This is consistent with the s27(1) requirement that agencies respond to applicants within 14 days to acknowledge receipt of an application. In practice, this recommendation would require specially tailored acknowledgment letters to applicants whose applications do not comply with the requirements of the Act. Ideally, agencies would contact an applicant informally before sending such a letter.

[258] While the committee supports the development of such agency specific forms, agencies are, and should be, required to accept applications that comply with s 25, whether or not they use an agency's form.

COMMITTEE FINDING 55—RECOMMENDATION

The Act should require agencies and ministers to:

- notify an applicant who makes a non-compliant application, what would be required to make it compliant; and
- take other reasonable steps to commence consultation to assist an applicant to make a compliant application;

as soon as practicable, but at least within 14 days of receiving a non-compliant application.

6.3.6 The need for an accompanying fee

The committee considered whether the Act should be amended to clarify that persons applying for access to non-personal affairs documents are required to provide any prescribed application fee before the application is regarded as being valid.

If an application fee is payable, an agency or minister should not be required to process an application until any prescribed fee is paid. This is consistent with s 29D relating to processing charges. Otherwise, an agency might expend considerable resources processing an application unnecessarily. (Although, if only part of the application relates to non-personal affairs documents, that part of the application which relates to the applicant's personal affairs should be processed immediately.) An agency or minister should be required to notify an applicant, as soon as practicable, but at least within 14 days of receiving an application, that an application fee is payable.

In some cases it will not become clear whether an application relates only to documents which contain information about the applicant's personal affairs until the agency or minister has at least partially processed the application. In such cases, the agency or minister should not require the fee to be paid until they have ascertained that a fee is payable. At that time, the agency or minister should, within 7 days, notify the applicant that an application fee is payable and delay processing documents which do not relate to the personal affairs of the applicant until the fee has been paid.

Further, the Act should contain a provision enabling an agency or minister to refund an application fee if an applicant pays a fee and it subsequently becomes apparent that the fee was not required for the particular application. This would ensure that an applicant is not penalised where an agency mistakenly requires a fee to be paid, or an applicant pays the fee to ensure the processing of the application is not delayed pending determination of whether a fee is payable.

COMMITTEE FINDING 56—RECOMMENDATION

In section 9.5.2 *Application fees*, the committee recommends that if an agency or minister decides that an applicant is liable to pay an application fee under s 29(1), the agency or minister must notify the applicant in writing of the decision to require payment of the application fee.

The Act should also provide the following.

- Where an agency or minister has ascertained that an application fee is payable, the agency or minister should not be required to process, or further process, the application until the fee is paid.
- An agency or minister should be required to notify an applicant within 14 days of receiving an application or 7 days of ascertaining that a fee is payable, that a fee is payable and that the application will not be (further) processed until the fee is paid.
- An application fee should be refunded f it becomes apparent that the fee was not required to be paid.

6.4 TRANSFER OF APPLICATIONS: S 26[259]

Section 26 provides for the transfer of applications from one agency to another in whole or in part where the other agency consents to the transfer and the documents to which the application relates are either held by the other agency, or are more closely related to the functions of the other agency.

The Act is unclear about whether, in the event of a *part* transfer of an application for *non-personal affairs* documents, an additional $31 application fee is payable to the agency that accepts the part transfer (the other agency), in addition to the $31 fee payable to the agency to which the applicant applied and which must process the remainder of the application.[260] (If an agency transfers a whole application they should transfer the application fee or refund it to the applicant.)

Where an agency transfers part of a non-personal affairs application to another agency, the applicant should be required to pay an additional $31 application fee to the other agency. If the access applicant had made proper inquiries, the applicant would have appreciated the necessity to apply to each agency for the required documents thereby incurring a $31 fee for each application. Further, if there is no requirement for an applicant to pay another fee on a part-transfer, an applicant could abuse the system to evade the imposition of application fees which multiple applications would otherwise incur.

A related issue is the possibility of part-transfers to other agencies leading to *de facto* extensions of the time limits in which agencies have to process applications. Each agency receiving a part-transfer of a non-personal affairs application would have to notify the applicant of the requirement to pay an application fee. Between the time of notification and the time the fee was paid, the time limit for dealing with the application would cease to run.[261]

The other agency should be required to treat the transfer as a new application. Accordingly, the other agency should not be required to consent to the transfer, and they should write to the applicant within 14 days of receiving the part-transfer advising that part of their application has been transferred and, if necessary, providing advice about what steps the applicant needs to take to ensure that the application complies with the requirements of the Act. The 45 day time limit should run from the time the agency receives the transfer, or the time the applicant took the necessary steps to make the application compliant, (for example, paid the necessary application fee) whichever occurs later. Because the provision allowing the transfer of applications is discretionary,[262] any alternative approach would create a disincentive for agencies to transfer an application because it would impose a greater burden on the other agency.

Finally, s25(3) currently requires an agency to assist an applicant to make an application in a range of circumstances, including when the applicant has directed an application to the wrong agency or minister. This provision should make it clear that the requirement also applies where only part of an application has been directed to the wrong agency or minister.

COMMITTEE FINDING 57—RECOMMENDATION

Section 26 (Transfer of applications) should provide that:

- an agency or minister has a discretion to transfer the whole or part of an application to another agency or minister where the documents to which the application relates are either held by the other agency or minister, or are more closely related to the functions of the other agency or minister; and

259 Relevant submissions: 43, 46, 55, 76, 77, 87 and 106. QIC, first submission no 56 at paras C57-C60.

260 The issue does not arise in relation to applications for documents concerning the *personal affairs* of the applicant because no application fee is payable.

261 See *Re Allanson and Queensland Tourist and Travel Corporation* (1997) 4 QAR 220 at para 18.

262 The agency which originally received the application could alternatively advise the applicant that they do not have the documents required, and advise the applicant as to which agency to make a further application.

- where an agency or minister transfers the whole or part of an application to another agency or minister, the other agency or minister should treat the application as a fresh application.

COMMITTEE FINDING 58—RECOMMENDATION

Section 25(3) should make it clear that the requirement to assist an applicant to make an application when the applicant has directed an application to the wrong agency or minister also applies where only part of an application has been directed to the wrong agency or minister.

6.5 TIME LIMITS: S 27[263]

Term of reference B(vii) asks whether time limits in the Act are appropriate. Section 27 sets out the following time limits regarding access applications.

- An agency or minister must take all reasonable steps to ensure that an applicant is notified that their application has been received as soon as practicable, but in any case not later than 14 days, after the application is received: s 27(1).
- An agency or minister has 45 days after an application is received to consider the application. The time limit is extended to 60 days in the case of documents which came into existence more than 5 years before the commencement of Part 3 (that is, before 19 November 1987) and do not concern the personal affairs of the applicant. An additional 15 days is allowed where consultation with third persons is required under s 51: s 27(4) and (6).
- If an agency or minister fails to decide an application and notify the applicant of the decision and reasons (under s 34) within these time frames, the agency or minister is taken to have refused access: s 27(4).

Below, the committee considers a number of issues regarding time limits for access applications. The committee discusses the time limits for amendment applications in section 5.4.6 and time limits for internal and external review in sections 7.4.5 and 8.2.6 respectively.

At the outset, the committee recognises that issues relating to time limits are inextricably linked with agency resources. Further, requirements to consult with third parties are significant in considering the appropriate time frame.

6.5.1 Acknowledgment letter: s 27(1)

The acknowledgment letter required by s27(1) is an opportunity for agencies and ministers to provide applicants with information which will assist them understand the FOI process and better enable them to exercise their rights under the Act. Agencies should include in these letters any relevant brochures published by the FOI monitor.

As discussed in section 6.3.5 *The obligation on agencies to assist applicants*, an acknowledgment letter should also be sent to persons whose applications do not comply with the requirements of the Act. In these cases, the letter should detail what is necessary to make the application compliant.

Further, while the Act explicitly confers review rights on access applicants who do not receive a decision from the agency or minister concerned within the appropriate time period, [see section 6.5.11 *Deemed refusal: s 27(4)*] there is no mechanism in the Act for applicants to be *advised* of their review rights in such situations.

[263] Submissions relevant to the issue of time limits generally are: 3, 8, 21, 27, 33, 38, 39, 41, 45, 46, 51, 53, 54, 63 and 73. Submissions relevant to specific issues regarding time limits are footnoted to the relevant level 3 headings in this section.

Agencies should be required to notify applicants of the applicable time limit for determination of the application in question, and the applicant's rights of review in the event of a deemed refusal. This notice should advise the applicant of the possibility of alteration of the time limits which an agency considers applicable at the time of receipt of an application, and advise the applicant to contact the agency to establish the correct time limit, before seeking to invoke the rights conferred by s 79 (Applications where decisions delayed).[264]

COMMITTEE FINDING 59—RECOMMENDATION

Section 27(1) should require agencies and ministers, upon receipt of an application under part 3 (Access to documents), to notify applicants:

- of the applicable time limit for determination of the application in question and the applicant's rights of review in the event of a deemed refusal;
- that the time frame might be subject to alteration and that the applicant should contact the agency or minister to establish the correct time limit before an applicant seeks to invoke the rights conferred by s 79(1) of the Act.

Agencies and ministers should send any brochure prepared by the FOI monitor outlining the FOI process to all applicants with the acknowledgment letter required by s 27(1).

6.5.2 The commencement of time limits and calculation of time[265]

The committee received submissions that the time limit on agencies to process applications should not commence until an application complies with the s 25(2) requirements, that is, the application is in writing and provides such information concerning the document as is reasonably necessary to enable a responsible officer of the agency or minister to identify the document.

There is some scope for clarification as to the commencement and calculation of time periods. Calculating the time frame from the date that a non-conforming application is received fails to recognise that, in practice, it might take some time to clarify the request. (Matters are also complicated where an agency only needs to clarify part of an application.)

Where possible, an agency should separate an application into those matters which are clear, and those which are not. An agency should proceed to process the application so far as it relates to documents which are sufficiently identified. The time frame for processing the application in relation to these documents should run from the date of the receipt of the initial application.

With respect to those parts of the application which are not clear, the agency should notify the applicant as soon as possible, but at least within 14 days, that further information is necessary to identify the documents sought in part of the application. The letter of acknowledgment of receipt of the application should confirm (or, if previous telephone contact has not been made, advise) what would be necessary to make that part of the application which is unclear, compliant. The time frame for processing the part of the application which does not comply with the Act should cease to run until the applicant provides sufficient information to clarify the request.

If the request is clarified in the course of a telephone conversation between an officer of the agency and the applicant, the time frame should commence from the date of the telephone conversation. Although this creates the potential for a misunderstanding between the agency and applicant which it would be difficult to adjudicate on review, this is preferable to the cumbersome alternative of requiring clarification in writing before the application is regarded as valid. The agency could confirm the telephone conversation in the acknowledgment letter or subsequent correspondence.

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264 QIC, first submission no 56 at paras C61-C63.

265 Relevant submissions: 43, 45, 76, 77 and 87.

The issue of time also needs to be considered where fees are payable in relation to part of an application. Where part of an application relates to non-personal affairs documents (and therefore a fee applies) the time between when an applicant is informed a fee is payable and payment of the fee should not be included in the time limit. (This approach is consistent with s 29D relating to processing charges.) However, the agency should continue to process those documents which relate to the personal affairs of the applicant and in relation to which no fee is payable.

Where it is necessary to split an application because part of the application does not comply with s 25, or because an application fee is payable for part of the application, the applicant should be entitled to seek review of those parts of the application which can be processed from the time a decision is given in relation to the part of the application. However, the time limits on the applicant to seek review should commence from the time the whole application is processed and the applicant has been notified of all decisions.

COMMITTEE FINDING 60—RECOMMENDATION

The Act should clarify that time limits cease to run:

- for applications, or parts thereof, which relate to documents that are not sufficiently identified, during the period between when the agency or minister notifies the applicant that further information is required for the application to comply with s 25 and the time the agency or minister receives sufficient information to clarify the application; and
- for applications, or parts thereof, in relation to which a fee is payable, during the period between when the agency or minister notifies the applicant that a fee is payable and the time the agency or minister receives the application fee.

Time limits imposed within which an applicant may seek internal and external review should commence from the date that a decision is made regarding the final document that falls within an application. However, an applicant should have the discretion to seek review of decisions regarding part of their application as they are made.

6.5.3 A requirement to process as soon as practicable[266]

Some submitters expressed concern that some agencies use the full 45 days to process applications, regardless of whether the full period is necessary. These submitters suggested that s 27 be redrafted to require agencies to process applications 'as soon as reasonably practicable', but within the maximum time limits set by s 27.[267] This suggestion accords with EARC's intention[268] and would be consistent with FOI legislation in the majority of Australian jurisdictions and New Zealand.[269]

It is desirable that all agencies process all FOI applications 'as soon as practicable' regardless of any time limit. It appears that this already occurs to a large degree. However, it would be consistent with the objectives and philosophy underpinning the Act to expressly include such a requirement in the provisions of the Act relating to timeframes.

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266 Relevant submissions: 97, 119, 113, 124, 125, 127, 128, 142, 150, 154, 160 and 162.

267 This general principle is consistent with s 38(4) of the *Acts Interpretation Act 1954* (Qld) which provides that if no time is provided or allowed for doing anything, the thing is to be done as soon as possible.

268 EARC FOI report, n 19 at para 14.17.

269 See the Freedom of Information Acts of: the Commonwealth, s 15(5)(b); Victoria, s 21; the Australian Capital Territory, s 18(1)(d); Tasmania, s 16; New South Wales, s 18(3); South Australia, s 14(2). See also the *Official Information Act 1982,* (NZ), s 15(1). In its recent review of the *Official Information Act*, the NZLC stressed that the 20 working day limit is an *outside* limit and therefore this basic obligation on agencies should remain: n 39 at paras 155-158.

COMMITTEE FINDING 61—RECOMMENDATION

All provisions in the Act relating to time frames should provide that an agency or minister must carry out the relevant activity 'as soon as practicable' but, in any case, no longer than the relevant time limit.

6.5.4 Time limits for processing FOI access applications[270]

Generally, agencies have 45 days to process an access application: s 27(6)(b). This period is extended by 15 days where third party consultation is required pursuant to s 51: s 27(4)(b).

The time limits set out in s 27 for processing FOI applications have not varied since the Act was introduced. However, EARC recommended that these time limits be reviewed two years after the Act's commencement, noting that as agencies become more familiar with FOI legislation there might be opportunity to reduce the relevant time limits.[271]

The basic time limit in Queensland for processing an access application (45 days) is greater than that in the Commonwealth, Tasmania, and the ACT (30 days)[272] and NSW[273] (21 days); and the same as Victoria, South Australia and Western Australia. In New Zealand, the relevant limit is 20 working days.[274] Though, some of these jurisdictions also allow extra time for consultation (the Commonwealth—30 days, NSW—14 days, ACT—15 days, and New Zealand—a 'reasonable period').[275]

Recent FOI annual reports show that approximately 70% applications to state government agencies and 80% of applications to local government agencies are processed within 45 days.[276]

The committee considered whether the basic time limit of 45 days should be reduced and, if so, whether the extension of time where consultation is necessary should be increased.[277]

Arguments in support of reducing the basic time limit include:

- advances in information technology and records management should make it easier for agencies to identify and retrieve information;[278]
- matters of public concern often need to be published at the earliest available opportunity, particularly where FOI is used for journalistic purposes; and

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270 Relevant submissions: 16, 42, 43, 46, 55, 58, 59, 61, 62, 66, 67, 69, 73, 87, 90, 92, 93, 100A, 100B, 102, 104, 113, 119, 122, 123, 125, 127, 128, 135, 136, 138, 142, 144, 145, 146, 150, 153, 154, 155, 158, 161, 162, 163, 168 and 171. QIC, first submission no 56 at paras B263-B269. QIC, supplementary submission no 173 at 18.

271 EARC FOI report, n 19 at para 14.16.

272 See the Freedom of Information Acts of: the Commonwealth, s 15(5)(a); Tasmania, s 16; the Australian Capital Territory, s 18(1)(d).

273 FOI Act 1989 (NSW), s 18(3).

274 *Official Information Act 1982* (NZ), s 15(1) and *Local Government Official Information and Meetings Act 1987* (NZ), s 13(1).

275 See the Freedom of Information Acts of: the Commonwealth, s 15(6)(a); New South Wales, 59B; the Australian Capital Territory, s 18(3). See also the *Official Information Act 1982* (NZ), s 15A.

276 This statistic is based on all applications: see table D.3 in **appendix D**. The normal time limit for processing is 45 days, however this is extended in some circumstances.

277 The QIC recommended that the basic time limit be reduced to 30 days, and the extension for consultation under s 51 be increased from 15 to 30 days. Although, the QIC recognised that in some circumstances it will be virtually impossible for an agency to deal properly with an application within 30, 45 or 60 days and made recommendations to address this issue as discussed at 6.5.5 *Extension by agreement between the parties* and 6.5.6 *Extension of time with the leave of the Information Commissioner*. See QIC, first submission no 56 at para B268 and QIC, supplementary submission no 173 at 18.

278 ALRC/ARC review report, n 13 at para 7.10 and NZLC, n 39 at para 170.

- agencies have now had a number of years of experience in the administration of the FOI Act.

In contrast, the arguments against reducing the basic time frame include:

- reduction in the time frame could affect the capacity of an agency to fulfil its other functions, especially in small agencies, or where the application is for 'active documents';
- to reduce the timeframe without increasing resources could reasonably be expected to impact adversely on the quality of decision-making;
- the task of identifying and accessing documents in a large, decentralised agency can be a significant logistical exercise;
- it would have implications for the QIC's office as many applications would become 'deemed refusals';
- agencies' ability to fully explore the possibility of providing partial access to documents would be adversely affected and could result in more 'global' exemption claims for documents; and
- while the Act has been in force for nearly a decade, there is a high turnover rate of FOI decision-makers within agencies and some smaller agencies receive only a few applications per year.

The committee considers that the basic 45 day time limit should not be reduced at this stage. In section 4.3 the committee recommends that agencies should more proactively and routinely release information outside the Act. This approach should result in the formal processes under the Act being reserved for more complex or contentious applications. It would be unfair to agencies to reduce the time frame within which such applications were to be processed.

In terms of additional time for consultation, the committee does not have any data about the number of applications in relation to which consultation under s 51 is necessary, and the impact that s 51 consultation has on the time taken to finalise applications.

Given that the initial time limit of 45 days is already comparatively generous, the committee considers that there is no justification for increasing the 15 day extension where consultation is necessary.

Although the committee does not recommend amending the basic time limits at this stage, the committee envisages that:

- the FOI monitor's activities will include: monitoring agencies' compliance with the stipulated time limits (and whether agencies are deciding applications 'as soon as practicable'); investigating why any particular agencies are consistently failing to meet these time limits; and providing guidance as to how such agencies might remedy their non-compliance; and
- these functions will assist in an assessment of the appropriateness of time limits in the Act in the next review of the Act.

COMMITTEE FINDING 62—CONCLUSION

No change should be made to:

- the basic time limit for processing an access application of 45 days, set out in s 27(6)(b); and
- the additional time for consultation of 15 days, set out in s 27(4)(b).

6.5.5 Extension by agreement between the parties[279]

There will always be complex or contentious applications or resourcing issues which make it difficult or impossible for an agency or minister to make a properly considered decision within the required time limits.

The QIC suggested that agencies and applicants should be able to negotiate mutually acceptable extensions of time in which to complete large or complex applications, with a stipulation that interim decisions be made within the statutory time limit(s) on as many documents or parts of documents as possible. This proposal would enable an applicant to access at least some of the documents he or she requires, while permitting the agency to deal with the remaining, more complex parts, of the application.

Such negotiation apparently already takes place on an informal basis, however, there should be an express provision in the FOI Act enabling agencies and applicants to agree to extend the statutory time frames.[280] In section 6.2.2 *Negotiation*, the committee recommends a broad provision enabling agencies or ministers and applicants to agree about certain procedural matters. This should include, amongst other things, capacity to agree about the time frame within which an application will be processed. Such a provision attempts to balance applicants' needs and practical limitations on agencies' capacity to process applications, and accords with the consultative approach encouraged by the committee.

The committee also supports the proviso that agencies be required to make an interim decision within the statutory time limit(s) on as many documents or parts of documents as possible. Such a stipulation reflects the fact that agencies' primary objective should be to comply with statutory time limits to the greatest degree possible, even if an applicant agrees to an extension in relation to the more difficult documents to process. There might also be some potential for agencies and applicants to negotiate the order in which the agency should consider documents in an attempt to ensure the earliest release of documents of the highest priority to the applicant.

In cases where documents are released on an interim basis, an applicant should have the discretion to immediately apply for review of an interim decision. This is particularly important where there might be some urgency in accessing the documents. However, time limits for an applicant to seek internal and external review should run from the date of the final decision, even in respect of documents which were subject of the interim decision. This would enable an applicant to: postpone seeking review if there was some concern that to seek review immediately would cause further delay in considering the remainder of the application; or await the final decision before deciding whether review of matters the subject of the interim decision is necessary and then include all matters in the same review application.

There will be situations where time limits cannot be met for a variety of reasons. However, such circumstances would be difficult to appropriately define in legislation. Accordingly, the committee does not support a statutory provision for extension of time limits in prescribed circumstances. This issue is better resolved by provision for parties to extend time frames by agreement. In the hopefully rare circumstance where it is not possible for an agency to finalise an application *and* the applicant does not agree to an extension of time, the matter is best dealt with by the existing deemed refusal and consequent review procedures available under s 27(4) and s 79(2). The committee's recommendation in section 6.5.6 *Extension of time with the leave of the Information Commissioner* will also assist in these situations.

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279 Relevant submissions: 47, 53, 113, 119, 125, 127, 128, 134, 136, 138, 142, 146, 150, 154, 160, 162, 163 and 168. QIC, first submission no 56 at paras B266-B269.

280 Section 28A, which was inserted by the *Freedom of Information Amendment Act 2001* (Qld), allows an agency and applicant to agree on the time limit in circumstances where the agency is proposing to rely on s 28(2) which enables an agency to refuse to process an application if it would substantially and unreasonably divert the agency's resources.

COMMITTEE FINDING 63—RECOMMENDATION

In section 6.2.2 the committee recommends that the Act contain a general provision authorising divergence from the requirements of the Act where an applicant and agency or minister agree to such divergence.

This provision should expressly recognise that the time frame for processing an access application can be extended by agreement between the parties, subject to requirements that the agency make a decision within the statutory time frame in relation to as many documents or parts of documents as possible (and, where possible, with priority being given to documents of a higher priority to the applicant).

Time limits within which an applicant may seek internal and external review of decisions relating to access applications should commence from the date that a decision is made regarding the final document which falls within an application. However, an applicant should have the discretion to seek review of decisions regarding part of their application as they are made.

6.5.6 Extension of time with the leave of the Information Commissioner

Currently, the Act contains no express provision which allows agencies and applicants to apply to the QIC before an external review application is made for an extension of time for the agency to make its initial decision in response to an FOI access application.[281]

Such a provision would reduce the number of deemed refusals received by the QIC. The committee supports inclusion of such a provision, which would allow an applicant or agency to apply to the QIC for an extension of time in which to make a decision if the parties have failed to negotiate an extension of time.

COMMITTEE FINDING 64—RECOMMENDATION

The Act should include a provision giving the Information Commissioner authority to grant an extension of time for an agency or minister to make an initial decision, on the application of the agency (or minister) or the applicant. This provision should apply at all times including when an external review application has not yet been made.

6.5.7 Provision for expedited processing of access applications[282]

Timeliness is a critical aspect of the effectiveness of an FOI regime. As one commentator has noted: '*Timely delivery of information is one of the most critical benchmarks for the efficacy of an access regime. Most applicants, not only journalists, are seeking information whose immediate value is extremely time sensitive. Days, weeks or months taken to resolve an FOI request can substantially erode the value and utility of the requested information'*.[283] However, the reality is that properly processing FOI applications can be time consuming.

The committee considered whether there should be provision in the Act for the processing of applications to be expedited in circumstances where compelling need exists.[284] For example, where there is an overwhelming public interest in information being made available quickly.

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281 Section 79(2) of the FOI Act provides that *'If an application is made under this section the commissioner may, on the application of the agency or the Minister concerned, allow further time to the agency or Minister to deal with the application*'.

282 Relevant submissions: 70, 92, 113, 119, 127, 128, 134, 142, 146, 150, 153, 154, 162 and 168.

283 Snell, R 'Rethinking administrative law: A redundancy package for FOI?', n 5 at 27.

284 See, for example, s 12(3) of the New Zealand *Official Information Act 1982*.

As noted in section 4.3, the committee considers it desirable that information of public interest is released on a routine basis without the need for a formal FOI application. Where that does not occur, ideally agencies should expedite the processing of access applications which concern 'public interest' information.

It is open to Queensland FOI applicants to mark applications as urgent and provide reasons for the urgency. In the spirit of the Act, agencies should consider such requests for expedited processing and take steps to comply with the request to the extent that it is possible and appropriate to do so. In some circumstances this apparently already occurs.

The FOI monitor should issue guidelines regarding responding to urgent applications and circumstances where the processing of applications should be expedited.[285] However, it would not be practical to draft and enforce a legislative requirement that agencies expedite the processing of particular applications.

COMMITTEE FINDING 65—RECOMMENDATION

The FOI monitor should issue guidelines regarding agencies and ministers responding to urgent applications and circumstances where the processing of applications should be expedited.

6.5.8 Working days v calendar days[286]

Some submitters recommended that time limits in the Act should be expressed in working days, rather than calendar days, to prevent days lost due to public holidays decreasing the time available for an agency to consider an application.

The committee does not support this recommendation. No other Australian jurisdiction expresses time limits in working days[287] and to do so would increase the time an applicant must wait for a decision as public holidays would not be included in reckoning the time period. Given that in section 6.5.4 *Time limits for processing FOI access applications*, the committee recommends the continuation of time frames which are more generous to agencies than any other time frames in Australia, the committee does not consider this amendment to be justified.

COMMITTEE FINDING 66—CONCLUSION

The time limits in the Act should continue to be expressed in calendar days.

6.5.9 Non-personal affairs documents created before November 1987[288]

Agencies and ministers have 60 days, instead of the usual 45 days, to process applications for *non-personal affairs* documents which came into existence before 19 November 1987, being more than five years before the commencement date of part 3: s 27(6)(a)(i).

The committee received submissions suggesting that this provision should relate to documents created more than five years before the *application date*, rather than five years before the commencement of part 3 because documents more than five years old are often held in secondary or archival storage, and their retrieval can take longer than for documents in current use.

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285 Some guidance in this regard is available from the NZ Ombudsmen guidelines for responding to urgent requests: NZLC, n 39 at para 162.

286 Relevant submissions: 21, 28, 38, 67, 100C, 128, 135 and 138.

287 Although, New Zealand's *Official Information Act* refers to working days: s 15(1).

288 Relevant submissions: 16, 66, 69, 100A and 136.

The committee does not believe that the extended time limit should apply to applications for documents created more than five years before the date of the application. Since the commencement of the FOI Act, agencies should have been ensuring that their document management, storage and retrieval systems enable them to readily process FOI applications. Further, the time limits on agencies to process FOI applications are already one of the most generous in Australian FOI legislation.[289]

COMMITTEE FINDING 67—CONCLUSION

The extension to time limits in s27(6)(a)(i) for applications relating to documents that do not concern the personal affairs of the applicant should continue to relate to documents that came into existence more than five years before the commencement of part 3, and not relate to documents created more than five years before the application date.

6.5.10 Suspension of an application pending outcome of particular proceedings[290]

The committee considered whether there should be provision to suspend an application with the agreement of the applicant pending the outcome of particular proceedings. For example, if a matter is under investigation or the subject of court proceedings at the time of the application it is likely to be exempt. However, in some circumstances matter would cease to be exempt once the investigation or court proceedings are finalised. The applicant might prefer to put the application on hold until the proceedings are finalised rather than have it refused.

The committee has proposed in section 6.2.2 *Negotiation* that a provision be inserted in the FOI Act specifically recognising that agencies and applicants can agree to diverge from the requirements of the Act. This provision will provide a mechanism by which agencies and applicants can agree to suspend an application pending a certain event if it is appropriate in the circumstances. Where no agreement can be reached, the agency and applicant will need to revert to the usual procedures in the Act, that is, the agency must finalise the application within the relevant time period, and review rights will be available to the applicant.

COMMITTEE FINDING 68—CONCLUSION

There should be no provision authorising the suspension of an application pending the outcome of particular proceedings. The general provision recommended in section 6.2.2 authorising divergence from the requirements of the Act where an applicant and agency or minister agree to such divergence should adequately provide for relevant situations.

6.5.11 Deemed refusal: s 27(4)[291]

If an agency or minister fails to decide an application and notify the applicant under s34 within the required period, the agency or minister is taken to have refused access to the document to which the application relates at the end of the period: s27(4). Section 79 (Applications where decisions delayed) enables the QIC to extend the time within which an agency or minister can deal with an application where an applicant's application is deemed refused pursuant to s 27(4).

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289 No other jurisdiction extends time frames for processing documents of a certain age, although access to certain documents created prior to a particular date is substantially restricted in some jurisdictions. For example, see the Freedom of Information Acts of: the Commonwealth, s 12(2) to (4); Tasmania, s 8; and the Australian Capital Territory, s 11(2).

290 Relevant submission: 87.

291 Relevant submissions: 28, 90, 113, 115, 119, 125, 127, 128, 142, 146, 150, 154, 160, 162 and 168. QIC, supplementary submission no 173 at 29.

The committee considered whether the deemed refusal provision should be replaced with a deemed access provision, that is, a provision deeming that if the agency or minister fails to decide an application and notify the applicant within the required period the agency or minister is deemed to have granted access to the document or matter.

In the committee's view, a deemed access provision would create an unacceptably high risk of inappropriately releasing information, and causing harm to, for example: the privacy of third parties; the doctrine of collective ministerial responsibility; current criminal investigations; and public safety. The committee has not been able to identify safeguards which would adequately overcome this risk, without establishing a complicated *de facto* appeal process which would divert resources from the application and appeal processes already provided.

In addition, a deemed access provision could:

- encourage agencies to make a decision against disclosure if they are concerned the deadline may not be met to prevent the inappropriate release of information;
- create an avenue for applicants to abuse the process by making applications broader than necessary in an attempt to make it impossible for the agency to meet the time limits; and
- remove the incentive for applicants to negotiate suitable time frames for processing large applications with agencies and detract from a flexible and consultative approach by both agencies and applicants.

Accordingly, the committee considers that deemed refusal continues to be more appropriate than deemed access.

However, necessary amendments should be made to ensure that a deemed refusal does not occur before the expiry of a time limit agreed between an applicant and an agency in accordance with the new provision recommended by the committee in section 6.2.2 *Negotiation*.

Additionally, the committee notes that there is no mechanism in the Act for an applicant to be *advised* of their right to seek external review where the applicant has not been notified of a decision within the necessary timeframe.

All parties should be fully informed about the FOI process and their rights in that process. This philosophy applies equally to ensuring that applicants are informed about their rights in circumstances where agencies fail to decide an application and notify the applicant. Ensuring an applicant is informed about their rights is an essential safeguard on the formal authority to negotiate timeframes.

In section 6.5.1 *Acknowledgment letter: s 27(1)*, the committee recommends that applicants be advised of the relevant time limits and their rights in the case of deemed refusal in the acknowledgment letter.

As a further safeguard, where an agency fails to meet a statutory timeframe (or where the agency and applicant have agreed to an extended timeframe, that agreed timeframe), agencies should be required to provide written advice to the applicant:

- advising that the agency will not finalise consideration of the application within the required timeframe;
- providing a brief outline of the reasons for the delay;
- providing an indication of the timeframe within which the agency expects to finalise consideration of the application;
- identifying an officer to contact if the applicant wishes to discuss the application; and
- advising the applicant of their rights under the Act to treat the agency's failure to make a decision as a deemed refusal and seek review.

The committee hopes that in situations where an agency is unable to meet the statutory timeframe, the applicant will have been consulted substantially prior to the expiry of the timeframe. Accordingly, by the time the time limit expires the applicant should understand the status of the application. However, a requirement to notify the applicant as outlined above should assist the applicant to make informed decisions regarding seeking review.

Similarly, the committee hopes that the circumstances in which an agency is unable to comply with an agreed timeframe will be rare. However, in such circumstances advice to the applicant informing them of the reasons why, and the extent of the anticipated delay, will assist the applicant to decide their appropriate course of action.

COMMITTEE FINDING 69—RECOMMENDATION

The Act should:

- continue to contain a 'deemed refusal' provision—such as s 27(4)—as opposed to a 'deemed access' provision where an agency or minister fails to comply with a stipulated time frame;
- ensure that a deemed refusal does not occur before the expiry of a time limit agreed between an applicant and an agency or minister in accordance with the new provision recommended by the committee in section 6.2.2 *Negotiation*; and
- require an agency which is unable to meet a statutory or agreed timeframe to advise the applicant of the delay, including the reasons for the delay, the anticipated timeframe for finalisation of the application, details of a contact officer, and the applicant's review rights.

6.5.12 A penalty on agencies for failure to comply[292]

The committee considered whether agencies that exceed time limits without the agreement of the applicant should be subject to penalties where the delay causes prejudice to the applicant. The committee does not support such a provision on the bases that:

- the committee is confident that generally FOI units seek to perform their functions as well as possible within the resources available to them;
- in many cases the agency will be able to negotiate an extension with the applicant; and
- breaching the statutory limits amounts to a deemed refusal.[293]

Further, as noted in section 6.5.4 *Time limits for processing FOI access applications*, the committee envisages that the FOI monitor should: monitor agencies' compliance with the stipulated time limits (and whether agencies are deciding applications 'as soon as practicable');[294] investigate why any particular agencies are consistently failing to meet these time limits; and provide guidance as to how such agencies might remedy their non-compliance. Where necessary, the FOI monitor should also report on agencies which are unnecessarily tardy in processing FOI applications.

This approach is a more constructive way of dealing with any delay than imposing penalties on agencies for failure to comply.

COMMITTEE FINDING 70—CONCLUSION

The Act should not impose a penalty on agencies for failure to comply with statutory time limits.

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292 Relevant submission: 92.

293 Similarly, the ALRC/ARC review did not recommend that such penalties be introduced into the Commonwealth FOI Act: review report, n 13 at para 7.12.

6.6 IRRELEVANT MATERIAL: S 27(3)[295]

Section 27(3) enables agencies and ministers to withhold material not relevant to an application in some cases. Section 27(3) provides:

> *If it is apparent from the terms of the application that the applicant seeks information of a certain kind contained in documents of an agency or official documents of the Minister, the agency or Minister may, with the agreement of the applicant, deal with the application as if it were an application relating only to those parts of the documents that contain information of that kind.*

Apparently, s 27(3) is causing some difficulties for agencies especially as it fails to provide for situations where the applicant's agreement cannot be obtained. The current drafting of the provision might also be improved.

There are a number of circumstances where a document relates to a variety of matters, only one of which will be relevant to a particular application. It would clearly contribute to the expeditious handling of applications if agencies had authority to deal with only relevant parts of a document.

On this basis, s 27(3) should be amended to expressly empower agencies to grant access to documents subject to the deletion of irrelevant material without having to consult with the applicant. This should be subject to an applicant having rights of internal review and external review if the applicant is not satisfied that disregarded matter was irrelevant, having regard to the terms of the FOI access application.[296]

COMMITTEE FINDING 71—RECOMMENDATION

Section 27(3) should:

- be redrafted to more clearly explain its intention; and
- expressly empower agencies and ministers to deal only with relevant parts of a document without having to consult with the applicant, provided that an applicant has rights of internal review and external review if the applicant is not satisfied that the disregarded matter was irrelevant, having regard to the terms of the FOI access application.

6.7 DISCRETION TO REFUSE ACCESS TO EXEMPT MATTER OR DOCUMENT: S 28(1)

Section 28(1) enables an agency or minister to grant access to documents even where exemptions apply.

In section 4.4 *A central government directive regarding discretionary disclosure*, the committee recommends that the Premier issue a central government directive that agencies and ministers exercise this discretion in favour of release where no harm will result from disclosure, whether or not exemptions technically or arguably apply. In section 10.2.4 *Mandatory v discretionary exemptions: s 28(1)*, the committee discusses the importance of retaining this discretion.

The committee believes that the s 28(1) discretion should be contained in a separate stand alone section of the Act to emphasise the significance of the discretion.

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294 In many cases this monitoring of compliance with time limits will occur through the monitoring of data required under s 108 and consequent discussion with the agency concerned.

295 Relevant submissions: 14 and 66. QIC, first submission no 56 at paras C14-C17.

296 QIC, first submission no 56 at para C17. The QIC also recommended that the FOI Act be amended to adapt the 1991 amendments to s 22 of the FOI Act (Cth).

COMMITTEE FINDING 72—RECOMMENDATION

Section 28(1) should be contained in a separate section headed along the lines of: 'Discretion to release exempt matter or an exempt document'.

6.8 AN UNREASONABLE AND SUBSTANTIAL DIVERSION OF AGENCY RESOURCES: S 28(2)[297]

Section 28(2) essentially enables agencies and ministers to refuse to process applications that relate to a large number of documents ('voluminous applications'). The provision empowers an agency or minister to refuse access to documents where the work involved in dealing with the application would substantially and unreasonably divert the resources of the agency or interfere substantially and unreasonably with the performance by the minister of the minister's functions. Section 28(2) is about balancing applicants' access rights with efficient government. Unnecessarily complex or unreasonably onerous FOI applications have the potential to unduly tie up agency resources. Term of reference B(vii) asked whether the then s28 provides an appropriate balance between the interest of applicants and agencies.

Section 28(2) was recently amended by the *Freedom of Information Amendment Act 2001*. This amendment, amongst other things, expanded the matters to which agencies and ministers can give regard in determining whether an application substantially and unreasonably diverts their resources (in the case of an agency), or substantially and unreasonably interferes with their functions (in the case of a minister).

It was apparent from submissions that prior to this amendment a small number of voluminous applications were consuming a disproportionately large amount of agencies' time.

A number of the committee's recommendations in this report should contribute to minimising voluminous applications and to narrowing the scope of such applications when they are made. For example, the committee considers that:

- agencies should actively consult with applicants to narrow onerous and unnecessarily complex applications in order to save time processing such applications: see section 6.2.1 *Consultation and assistance*; and
- agencies can alleviate the administrative burden of FOI by otherwise adopting a culture of disclosure (see section 4.3 *Greater disclosure outside the Act*) and practicing good records management (see section 5.6 *The importance of good records management*).

The recent amendments to the FOI fees and charges regime will also encourage applicants to narrow the scope of applications.

Nevertheless, the committee considers that it is appropriate for the FOI Act to include a provision aimed at ensuring that voluminous applications do not unduly consume agency resources.

6.8.1 'Resources of the agency'

The number of staff trained to process FOI applications affects an agency's capacity to process applications but is not reflected in the term 'resources of the agency' in s28(2)(a). It was submitted that 'resources of the agency' should be interpreted as the resources available to an agency to deal with FOI applications, rather than the agency as a whole.

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[297] Submissions relevant to one or more of the issues discussed in section 6.8 are: 3, 8, 21, 27, 42, 43, 46, 47, 53, 55, 60, 61, 62, 63, 64, 67, 69, 73, 77, 84, 87, 90, 92, 95, 96, 100A, 100B, 100C, 104, 107, 111, 113, 114, 118, 119, 124, 127, 128, 132, 134, 136, 137, 138, 142, 143, 144, 146, 150, 153, 154, 157, 158, 160, 161, 162, 163 and 168. QIC, first submission no 56 at paras B184 and B230-B237. QIC, supplementary submission no 173 at 26.

This issue seems to be particularly significant in large organisations, where it is difficult to establish an unreasonable diversion of resources of the agency as a whole when, in many cases, this is the effect in practice for the FOI unit. Difficulties also arise in small agencies where there might be an officer who processes FOI applications part time in amongst other, unrelated aspects of their job.

The committee does not consider that there should be any amendment or clarification of the term 'resources of the agency', either to restrict the term to the resources of the FOI unit rather than the agency as a whole, or to expressly account for situations where the FOI officer has numerous other duties. Such an amendment has the potential to seriously disadvantage applicants who apply to agencies that fail to allocate sufficient resources to dealing with FOI applications, and would provide scope for agencies to avoid their obligations under the FOI Act.

COMMITTEE FINDING 73—CONCLUSION

No attempt should be made to further define 'resources of the agency' in s 28(2)(a).

6.8.2 Matters to which regard may be given

Prior to the November 2001 amendments to the Act, in making an assessment to refuse an application under s 28(2), an agency or minister could 'only' have regard to the number and volume of the documents and difficulties in identifying, locating or collating them.

Section 28(2) no longer limits the range of factors which may be considered.[298] Section 28(3) provides a non-exhaustive list of relevant matters.

The committee considers that the current s 28(2) and (3) present a more flexible and realistic approach to voluminous applications.

Having said this, the s 28(2) power should be used as a last resort after an agency has made every attempt to assist an applicant to narrow their request. Applications potentially involving voluminous material or being time and resource intensive might simply be symptomatic of the importance of the application or the public interest in the application. Agencies should not rely on s 28(2) until they have exhausted all alternatives and have made all reasonable attempts to process an application, for example, under an extended timeframe negotiated between the agency and applicant, or via the agency making progressive decisions on the application.[299]

Section 28A is important in this regard as it requires certain consultation to be undertaken with an applicant before an agency can rely on s 28(2). These requirements, discussed further in section 6.11 are an essential safeguard on the power to refuse to deal with certain applications granted by s 28(2).

Agencies should also not be able to use this power because of poor records and information management systems which cause problems in document identification and retrieval. The FOI monitor should play an important role in preventing misuse of this power on this basis.

The FOI monitor should also issue guidelines on the exercise of the s 28(2) power including examples of what might constitute a substantial and unreasonable diversion of an agency's resources, or a substantial and unreasonable interference with a minister's functions. (The committee notes that the phrase 'substantially and unreasonably divert' agency resources in the Act is a broad term and incapable of definition given the vast range of agencies in terms of size, resources and functions.)

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298 Although s 28(4) clarifies that the applicant's reasons for applying for access to the documents are not relevant.

299 The QIC suggested that as an alternative to expanding the circumstance in which s 28(2) applies, it would be preferable to implement strategies to allow applications to be processed, albeit under extended time frames, rather than refused outright. QIC, first submission no 56 at para B236 and QIC, supplementary submission no 173 at 26.

COMMITTEE FINDING 74—RECOMMENDATION

Section 28(2) should continue to refer to a non-exhaustive list of factors to which agencies and ministers can have regard in refusing to deal with an application because it substantially and unreasonably diverts the resources of an agency, or interferes substantially and unreasonably with the performance by a minister of the minister's functions.

The FOI monitor should issue guidelines regarding the exercise of the s 28(2) power.

6.8.3 Consultation with the Information Commissioner

The committee considered whether s28(2) should be redrafted to require agencies to consult with the QIC before refusing an application under s 28(2).

It would be inappropriate for the QIC to provide advice or assistance regarding a s28(2) refusal and then be asked by an applicant to review the agency's decision to refuse the application.

However, agencies should be able to consult the FOI monitor for advice and assistance regarding the exercise of the s 28(2) power if they consider it appropriate to do so.[300]

COMMITTEE FINDING 75—RECOMMENDATION

The FOI monitor should provide agencies with advice and assistance regarding the exercise of the s 28(2) power.

6.8.4 Combined effect of multiple applications

The terms of s28(2) do not appear to cater for a situation where an applicant lodges multiple access applications with an agency or minister, no single one of which would involve a substantial and unreasonable diversion of the agency's resources or a substantial and unreasonable interference with the minister's functions, as contemplated by s 28(2).

This issue can be addressed by amending s 28(2) to apply to an application, or a number of applications made by the same person, and the subject of consideration by an agency or minister at the same time.

COMMITTEE FINDING 76—RECOMMENDATION

Section 28(2) should apply to situations where the combined effect of multiple applications made by the same person, and the subject of the consideration by an agency or minister at the same time, would be to substantially and unreasonably divert the resources of the agency or to interfere substantially and unreasonably with the performance by a minister of the minister's functions.

300 Similarly, the ALRC/ARC review concluded that agencies should be free to seek the advice or assistance of its (proposed) Commonwealth FOI commissioner before refusing a request under the Commonwealth FOI Act equivalent to s 28(2) but that this consultation should not be compulsory: ALRC/ARC review report, n 13 at para 7.14.

6.9 APPLICATIONS FOR ENTIRE CLASSES OF 'EXEMPT' DOCUMENTS: S 28(5)[301]

Section 28(5) enables agencies and ministers to refuse an application without having identified any of the relevant documents and without specifying grounds for exemption if the application is expressed in a certain, broad manner that makes it apparent that all of the documents sought are exempt.[302]

Arguably, s 28(5) is contrary to the principle that exemption of a document should be determined according to the harm that would flow from its disclosure, and the potential inconvenience to agencies is outweighed by the importance of assessing each document on its individual merits.[303] Further, it would seem that the circumstances that would satisfy s 28(5) only rarely arise.

There is little evidence of the provision being abused. Section s 28(3)—the former version of s 28(5)—was not invoked in 1999/2000 and was invoked by one agency in the 1998/99 financial year, and two agencies in 1997/98.[304] However, s28(5) may be of significant value in saving resources in the rare cases where its use is appropriate.

The most appropriate course of action is to retain s 28(5) but amend it to require agencies to identify:

- the exemption provision(s) relied on; and
- the reasons why the sought documents are exempt.[305]

Further, agencies should be required to consult with applicants under s 28A [What an agency or minister must do before refusing access under s 28(2)] before relying on s 28(5).[306] (This issue is discussed further in section 6.11 *Section 28A*.) The FOI monitor should also emphasise the importance of agencies consulting with applicants before relying on s 28(5).

COMMITTEE FINDING 77—RECOMMENDATION

Section 28(5) should require agencies and ministers to:

- identify the exemption provision(s) relied on; and
- state the reasons why the sought documents are exempt.

6.10 REFUSE TO 'DEAL WITH' AN APPLICATION

Section 28(2) provides that an agency or minister '*may refuse access to documents asked for in an application*' rather than refuse 'to deal with' the application as provided in s 28(2) prior to the November 2001 amendments to the Act. Allowing an agency to refuse 'to deal with' an application is more consistent with the purpose of s28(2), that is, to ensure that agencies' and ministers' resources are not unreasonably diverted in processing particular applications. Using the phrase 'deal with' would distinguish the provision from other provisions which allow agencies to refuse *access* only after the documents have been identified, collated and considered.

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301 Relevant submissions: 16, 66, 69, 92, 100B, 113, 114, 119, 128, 142, 150, 154, 158, 161, 162 and 163. QIC, first submission no 56 at paras B238-B244.

302 Prior to the passage of the *Freedom of Information Amendment Act 2001* (Qld), an equivalent provision was contained in s 28(3).

303 The QIC recommended that the provision should be repealed: QIC, first submission no 56 at paras B238-B244. Similarly, the ALRC/ARC review recommended the repeal of the Commonwealth FOI Act equivalent: review report, n 13 at para 7.16.

304 DJAG, Freedom of Information Annual Reports: 1997/1998, n 59; 1998/99, n 135; and 1999/2000, n 133.

305 This was an alternative position put forward by the QIC: QIC, first submission no 56 at para B244.

306 Prior to the November 2001 amendments to the Act, agencies and ministers were required to consult with an applicant before relying on this provision to refuse access: see the former s 28(4).

The same issue arises in the context of s28(5). Again, the committee considers that 'refuse to deal with' is more appropriate terminology in s 28(5).

Care should be taken in redrafting these provisions to ensure that the QIC retains jurisdiction to review decisions made by agencies pursuant to s 28(2) and (5).

Further, s 28(2) and (5) should be in separate sections, rather than as subsections to a provision authorising access to be refused in certain cases. The heading of these new provisions should reflect that s 28(2) and (5) are broader than merely refusing access.

COMMITTEE FINDING 78—RECOMMENDATION

Section 28(2) and (5) should:

- be drafted in terms allowing an agency or minister to refuse to 'deal with' an application, rather than 'refuse access'; and
- be contained in separate, stand alone sections.

Care should be taken in redrafting these provisions to ensure that the Information Commissioner retains jurisdiction to review decisions made by agencies pursuant to s 28(2) and (5).

Necessary consequential amendments should also be made to s 28A.

6.11 SECTION 28A[307]

Section 28A establishes a consultation process which agencies and ministers must undertake before relying on s 28(2) to refuse access to documents sought.

Communication from agencies is often critical to enable applicants to narrow their applications. An applicant's unfamiliarity with the structure and types of records held by an agency might be the cause of many voluminous applications.

Accordingly, a requirement for the agency to consult with the applicant before utilising s28(2) is an essential safeguard to the provision. Such consultation is consistent with the consultative, flexible approach advocated by the committee.

For the same reasons, agencies and ministers should be required to undertake the consultation process set out in s 28A before relying on s 28(5).

As a matter of practice, agencies and applicants should consider alternative means of meeting applicants' needs in a way which does not unreasonably divert the resources of an agency or relate to documents, all of which are exempt documents. Section 28A establishes a process to undertake this consultation.

COMMITTEE FINDING 79—RECOMMENDATION

Agencies and ministers should be required to comply with the requirements of s28A [What an agency or minister must do before refusing access under s28(2)], before relying on s28(5) to refuse to deal with an application.

307 Relevant submissions: 16 and 100B.

6.12 'VEXATIOUS' AND 'SERIAL' APPLICATIONS[308]

The committee has received substantial anecdotal evidence that a few applicants, who appear to be abusing the FOI process, consume substantial resources of many agencies. To address this problem it was suggested that a provision should be inserted allowing agencies to refuse to deal with 'vexatious' applications and/or 'serial' applications.

At the outset, the committee notes that it is not in favour of the term 'vexatious'. This term focuses on the person involved in contrast to the application. However, in discussing the background it is necessary to discuss 'vexatious' applications because this was the terminology used by the former committee in its discussion paper. The term is also used in legislation in some other jurisdictions, and has previously been used in other reports relating to FOI legislation.

EARC described a vexatious application as one made by an applicant who has an ulterior motive, made to cause waste or inconvenience.[309] 'Serial' applications are repeated access applications by an applicant for the same or substantially the same documents. The FOI Act does not contain a provision empowering agencies to refuse to deal with either vexatious or serial FOI applications, or any other similar provision.[310]

No Australian jurisdiction gives agencies a general right to refuse to deal with an access application on the basis that it is manifestly unreasonable, frivolous or vexatious. Although, both the South Australian Ombudsman[311] and the Western Australian Information Commissioner[312] have recommended that their respective FOI Acts contain such a provision. Victoria is the only Australian jurisdiction whose FOI legislation contains a provision regarding serial applications.[313]

The committee has considered the 'vexatious' and 'serial' provisions which exist in the FOI legislation of Victoria and some overseas jurisdictions,[314] and strategies used to deal with similar issues in other regimes.[315]

Arguments in support of a provision to deal with *vexatious applications* include:

- certain members of the community have, and will continue to, abuse their legal rights to gain access to documents without such a provision; and

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308 Relevant submissions: 2, 8, 26, 42, 45, 47, 50, 51, 55, 56, 57, 59, 63, 80, 85, 90, 96, 100A, 100C, 101, 104, 107, 111, 113, 114, 115, 118, 119, 120, 128, 132, 133, B4, 135, 137, 138, 142, 144, 146, 147, 150, 153, 154, 155, 157, 158, 159, 160, 161, 162, 163, 168 and 170. QIC, first submission no 56 at paras B245-B252 and Attachment B(vii)1. QIC, supplementary submission no 173 at 26-28.

309 EARC FOI report, n 19 at (x).

310 Although, s 77(1) of the Act empowers the QIC to decide not to review an application which is 'frivolous, vexatious, misconceived or lacking in substance'. In *Hearl and Mulgrave Shire Council* (1994) 1 QAR 557 at para 36 the QIC stated the term 'vexatious' is used in the context of s 77(1) in the sense illustrated by the Shorter Oxford Dictionary when it says *'Of legal actions: instituted without sufficient grounds for the purpose of causing trouble or annoyance to the defendant'.*

311 South Australian Ombudsman, *26th Annual Report 1997/98*, South Australia, 1998 at 72.

312 Western Australian Information Commissioner, *Annual Report 1996-1997*, Perth, 1997 at 12. The Western Australian Information Commissioner suggests that an agency should be able to refuse to deal with particular applicants, so long as the agency consults the Information Commissioner and the Information Commissioner—not the agency—is of the opinion that the applicant is making unreasonable and unnecessary demands upon the agency.

313 See the FOI Act (Vic), s 24A (Repeated requests). Similar provisions have been recommended by the NZLC, n 39 at para 108 and the ALRC/ARC review report, n 13 at para 7.18 (recommendation 35).

314 In his fist submission no 56 at paras B250-B251 and attachment B(vii)1, the QIC referred the committee to a number of models giving agencies a general right to refuse to deal with frivolous or vexatious applications. See, for example, the *Official Information Act* 1982 (NZ), s 18(h); *Freedom of Information Act 1997* (Ireland), s 10; *Freedom of Information and Privacy Act 1987* (Ontario), s 10(1)(b) and Regulation 460, ss 5.1(a) & (b); Open Democracy Bill (South Africa), s 40; *Freedom of Information and Protection of Privacy Act*, R.S.B.C 1996, c.165 (British Columbia), s 43; Bill 37: *Freedom of Information and Protection of Privacy Amendment Act*, 1999 (Alberta), s 53; FOI Act 2000 (UK), s 14.

315 For example, the *Vexatious Litigants Act 1981* (Qld).

- the absence of a vexatious application provision has the potential to threaten the effectiveness of the FOI regime and the level of acceptance and support it receives at agency level.

In contrast, arguments against a vexatious applications provision include:

- such a provision would go to an applicant's motive and would therefore be contrary to the aims of FOI legislation;[316]
- 'vexatious' is a vague concept, requiring a subjective assessment and likely to result in unpredictable implementation;
- such a provision may unduly inhibit bona fide applications; and
- a certain number of difficult, time consuming applications that some may describe as vexatious are an inevitable part of any information access regime.[317]

A provision authorising agencies to refuse to deal with *serial applications* is less open to abuse than a provision dealing with vexatious applications. Further, the circumstances in which a serial application provision applies can be defined using largely objective criteria, which do not involve an assessment of the applicant's motive. The QIC suggested a provision regarding serial applications.

Conclusion

Abuse by a small number of people of the rights conferred by the Act has the effect of diverting resources away from other FOI applicants, and more generally from other government priorities. 'Vexatious' applications, or multiple applications for the same or similar information, consume resources and in some cases cause harm or distress to third parties without contributing to FOI objectives. Moreover, such applications have the potential to adversely affect agency attitude to FOI and work against a culture of openness.

However, any attempt to grant a discretion to an agency to classify either a particular applicant, or an individual application as 'vexatious' would, by its very nature, require some analysis of the reasons and motives of the applicant. This would be inconsistent with the underlying philosophy of the FOI Act in which the motives or reasons of applicants are not relevant.

At this stage, the committee believes that steps should be trialed to restrict the abuse of the FOI Act without introducing a general provision dealing with vexatious applications. Specifically, the committee considers that the FOI Act should include a provision authorising agencies to refuse to deal with an application, or part of an application, for the same or substantially similar material as has previously been requested. The application of such a provision would not be contrary to FOI objectives and allocation of resources to processing such applications is not justified.

In this regard, the committee supports in principle the provision recommended by the QIC. Although, the committee's recommendation below is wider than the provision recommended by the QIC. Such a provision should be subject to a proviso that there are not reasonable grounds for making an application again. Further, the provision should not apply to applications which have been withdrawn or deemed to be withdrawn pursuant to s 28A(5) or s 29A(3).

'Reasonable grounds for requesting documents again' would include, for example, the passage of time where it is likely to result in more or different documents being responsive to the application or accessible to the applicant, circumstances where the copy to which access was previously granted has been destroyed, or where the content of a document is likely to have changed. Agencies relying on the provision should be required to provide statements of reasons, and the decision of an agency to refuse access under this provision should be subject to internal and external review.

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316 EARC FOI report, n 19 at para 18.72.

317 ALRC/ARC review report, n 13 at para 7.18. The ALRC/ARC review recommended against a provision allowing an agency to reject an application on the basis that it is vexatious.

This recommended provision should mitigate the need for a provision dealing with vexatious applications if it is implemented in conjunction with:

- s 28(2) as amended by the *Freedom of Information Amendment Act 2001* (see section 6.8 *An unreasonable and substantial diversion of agency resources: s 28(2)*; and
- the committee's recommendation that material be exempt if its disclosure could reasonably be expected to result in serious harassment of any person (see section 11.11.2).

Given the difficulty inherent in developing a mechanism which strikes an appropriate balance between preventing abuse of the system and legitimate use of FOI processes, the issue of vexatious and serial applications and the impact of the committee's recommended provision should be reviewed in the first recommended five yearly review of the FOI regime. Further, as discussed in section 4.2.2 relating to the FOI monitor's advice and awareness function, the FOI monitor should issue guidelines for agencies regarding dealing with difficult applicants. Guidelines should address the circumstances in which it is appropriate to utilise the provision relating to 'serial applicants' to assist in the appropriate and consistent application of the provision.

COMMITTEE FINDING 80—RECOMMENDATION

The Act should include a provision which enables an agency or minister to refuse to deal with an application for access to documents if the agency or minister is satisfied that:

- the application is made by, or on behalf of, a person who has made an application to the agency or minister on at least one previous occasion, including an application in respect of which a decision (including an external review decision) has not yet been made, for access to the same documents or the same matter; and
- there are not reasonable grounds for making the application again.

The provision should not apply to applications which have been withdrawn or deemed to be withdrawn.

This provision should be subject to s 34 (Notification of decisions and reasons), s 52 (Internal review) and Part 5 (External review of decisions).

Further, the FOI monitor should issue guidelines to assist in the appropriate and consistent application of the provision.

6.13 FORMS OF ACCESS: S 30[318]

Section 30 sets out the forms in which access to a document may be given.

6.13.1 Discretion as to form of access

Section 30(2) provides that, subject to s 32 (Deletion of exempt matter), if an applicant has requested access in a particular form, access must be given in that form. Section 30(3) sets out the circumstances where an agency or minister may refuse access in the requested form and give it in another form.

The effect of the provision is that generally an applicant is entitled to inspect original documents at any time after a decision to release them is made. Holding original documents pending an applicant accessing them can create difficulties for agencies, especially if files relate to matters which are currently operational, or if the agency is required to hold the documents for an extended period of time.

[318] Submissions relevant to one or more of the issues discussed in section 6.13 are: 3, 8, 43, 45, 59, 63, 66, 73, 87, 92, 100A, 100B, 102, 104, 106, 113, 114, 115, 119, 125, 127, 128, 130, 133, 134, 136, 137, 142, 145, 150, 153, 154, 158, 162 and 168. QIC, first submission no 56 at paras B104-B130.

Further, in some cases, the requirement to provide access to personal affairs documents in a particular form can involve substantial cost to an agency. (There is no charge for an applicant to access personal affairs documents, although the committee intends to consider the entire issue of access charges in the future: see section 9.5.4 *Access charges*.)

This issue is addressed to some extent by s30(3)(a) which provides that if giving access in the form requested by the applicant would 'interfere unreasonably' with the operations of the agency or the performance by the minister of the minister's functions, access in that form may be refused and given in another form. Section 30(4) provides that if an applicant is given access to a document in a form different to that requested, the applicant must not be required to pay a charge that exceeds what they would have paid if access had been provided in the form they initially requested.

Arguably, the threshold contained in s 30(3)(a) is too high and should be lowered.

An alternative and, in the committee's opinion, preferable approach is to give agencies the discretion to determine the form of access subject to:

- the form being accessible to the applicant (for example, it would not be acceptable to give a computer disc to a person without access to equipment necessary to read it);
- the agency taking into account the applicant's specific requests as to the form of access;
- access being in a form which the applicant can keep (subject to copyright), that is, a form other than inspection, unless inspection is the applicant's preferred form of access. (This proviso is particularly necessary in relation to personal affairs documents to prevent agencies avoiding the current requirement to provide personal affairs documents free of charge.); and
- the cost of access being no greater than the applicant's preferred form of access.

As a matter of practice, an agency should provide access in the form an applicant requests. However, if this would present practical difficulties or would involve substantial cost, then an agency should be able to provide access in an alternative form. The FOI monitor should issue guidelines to assist agencies in identifying circumstances where it would be appropriate not to grant access in the form requested by an applicant.

To a large degree, this would overcome difficulties experienced by agencies in holding original documents. However, difficulties would still arise in situations where, because of copyright issues, it would not be possible to give access to the documents in any form other than by inspection of the original. To address such situations, agencies should have the ability to impose a time limit of no less than 60 days within which applicants can inspect documents to which access has been granted. Such time limits should only be imposed where holding documents pending inspection by an applicant poses operational difficulties for an agency.

As discussed in section 8.3.2, the QIC should have jurisdiction to review decisions regarding form of access.

COMMITTEE FINDING 81—RECOMMENDATION

Section 30 (Forms of access) should give agencies and ministers the discretion to determine the form of access subject to:

- the form being accessible to the applicant;
- the agency taking into account the applicant's specific requests regarding form of access;
- access being in a form which the applicant can keep (subject to copyright), that is, a form other than inspection, unless inspection is the applicant's preferred form of access; and
- the cost of access being no greater than the applicant's preferred form of access.

COMMITTEE FINDING 82—RECOMMENDATION

The FOI monitor should issue guidelines to assist agencies in identifying circumstances where it would be appropriate not to grant access in the form requested by an applicant.

COMMITTEE FINDING 83—RECOMMENDATION

The Act should enable agencies to impose a time limit of no less than 60 days within which applicants can inspect documents to which access has been granted where inspection is the relevant form of access.

6.13.2 Section 30(1)(e)

Section 30(1)(e) provides that access to a document may be given to a person in the following form:

> *(e) if-*
>
> *(i) the application relates to information that is not contained in a written document held by the agency; and*
>
> *(ii) the agency could create a written document containing the information using equipment that is usually available to it for retrieving or collating stored information;*
>
> *providing a written document so created.*

Apart from this requirement, the FOI Act does not oblige agencies and ministers to *create* a document in order to provide information requested by an access applicant—agencies and ministers are only obliged to locate existing documents in their possession or control which fall within the scope of an access application that complies with s25. (Although, in accordance with committee recommendation in section 6.2.2 *Negotiation* it should be open to applicants and agencies to agree to alternative ways of meeting an applicant's needs, for example, by summarising relevant information.)

The purpose of s 30(1)(e) is to cater for situations where information is held in electronic and other non-paper formats but not in any tangible form and rather as segments of data scattered throughout a computer storage device, or across a computer network. As the QIC stated: *'A "document", as such, may not exist without the synthesis of raw data into a comprehensible form, which may require some degree of data programming or manipulation.'*[319] A number of issues arise in relation to s 30(1)(e).

Applicability to a minister: Section 30(1)(e) refers only to an 'agency'. It does not also refer to a minister, thus distinguishing this provision from other provisions of the Act. The provision should be amended to clarify that it relates to a minister as well as an agency.

Interpretation of the phrase 'equipment that is usually available': The effect of s 30(1)(e) is that it must be possible to retrieve or collate the information requested by an applicant using equipment (including computer programs or software) already in place, or otherwise usually available, to perform the agency's functions. Section 30(1)(e) imposes no requirement on an agency to obtain additional equipment or to re-program existing equipment, or (for example) write a specific program to enable a database to be interrogated, in order to respond to an FOI access application.

The QIC submitted that an agency could avoid the obligation to produce a requested written document by divesting itself of certain equipment (either in the course of upgrading its computer hardware or software, or intentionally to avoid providing access to certain data) with the result that the equipment would no longer be 'usually available'.

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[319] QIC, first submission no 56 at para B105.

While the intentional disposal of equipment scenario might be possible, the committee considers it unlikely. This issue would be substantially addressed by a provision equivalent to clause 14 of the now lapsed Public Records Bill 1999 (Qld), which provided that if a public record is an article or material from which information can be produced or made available only with the use of particular equipment or information technology, the public authority controlling the record must take all reasonable action to ensure that the information remains able to be produced or made available.

If such a provision is not included in new public records legislation which the committee understands will be introduced into the Parliament in the short term, such a provision should be included in the FOI Act.[320]

'Usually' available: The committee considered whether s 30(1)(e) should be amended to refer to equipment that is 'readily' available, rather than 'usually' available. The objective of such an amendment would be to address circumstances where the necessary equipment is being used for other purposes, and it would cause difficulty or interfere with the agency's operations to make the equipment available to process the FOI application. The committee supports such an amendment.

Application where agency does not have necessary technical expertise: The QIC recommended that s 30(1)(e) should be limited to circumstances where the agency could create the written document containing the information *using equipment and technical expertise* that is usually available to it for retrieving or collating stored information. This would prevent an agency which does not have personnel with the necessary expertise to create the document from being required to engage such a person.

If the application does not relate to the personal affairs of the applicant, the agency would be entitled to charge the access applicant the reasonable costs incurred in providing a written document under s 30(1)(e).

The committee believes that applicants should have the option to incur the cost of obtaining information in circumstances where it is necessary to engage the services of an individual with the required expertise to undertake the necessary work, in order to produce the required written document.

Conclusion: Therefore, the committee concludes that s 30(1)(e) should be limited to circumstances where the agency could create the written document containing the information *using equipment and technical expertise* that is *readily* available to it for retrieving or collating stored information, unless an applicant agrees to pay the costs associated with obtaining and using equipment and technical expertise not readily available.

COMMITTEE FINDING 84—RECOMMENDATION

Section 30(1)(e) should:

- apply to ministers as well as agencies; and
- apply in circumstances where the agency or minister could create the written document containing the information *using equipment and technical expertise* that is *readily* available to it for retrieving or collating stored information, unless an applicant agrees to pay the costs associated with using equipment and technical expertise not readily available.

320 Also relevant in this regard are the *Electronic Transactions (Queensland) Act 2001* (Qld), s 20 (Keeping written documents) and s 21 (Keeping electronic communications).

There should also be a statutory requirement that if a public record is an article or material from which information can be produced or made available only with the use of particular equipment or information technology, the public authority controlling the record must take all reasonable action to ensure that the information remains able to be produced or made available. If such a provision is not included in new public records legislation which the committee understands will be introduced into the Parliament in the short term, such a provision should be included in the FOI Act.

6.13.3 Electronic access

Section 30(1)(e)(ii) requires an agency to create a 'written document' in specified circumstances. Section 36 of the *Acts Interpretation Act* provides that 'writing' includes any mode of representing or reproducing words in a visible form. It is unclear whether the terms of s 30(1)(e) would extend to the creation of a document in formats other than handwriting, typewriting, or a computer printout (for example, a computer disc, e-mail or CD-ROM).

This raises the wider issue of providing electronic access to documents released under FOI.

Many agencies are increasingly storing information in electronic form, a move which generally accords with the government's push to greater delivery of services on-line. For reasons including convenience and savings in time and expense, the FOI Act should provide for agencies to grant access to documents via electronic means.

The QIC[321] echoed many submissions which identified difficulties with electronic access to documents including the following:

- *Since electronic records are arguably more susceptible to alteration than paper records, it would be possible for an employee who wished to thwart an applicant's right of access to particular information to delete or alter that information prior to the production of a hard-copy of the relevant records for review by the FOI decision-maker.* (See section 5.3.7 *An 'obstructing access' provision* regarding an offence provision to address this situation.)
- *[O]nce a decision has been made in respect of an FOI access application for information held in electronic form, there may be practical difficulties for the agency in identifying which records have been the subject of an FOI access application, and which portions of those records were released, and which were claimed to be exempt from access.*
- *While on-line access to records may be advantageous for an agency in terms of reduced resource implications (i.e., removing the obligation to generate a hard-copy of information held electronically), the countervailing consideration is the practical problem of deleting exempt matter, or matter which does not fall within the terms of an FOI access application, from the material made available for on-line inspection.*
- *[I]nformation stored in electronic form is potentially subject to manipulation and analysis not normally possible with paper records. Thus, information which would not be invasive of personal privacy or otherwise sensitive if made available on an individual basis could arguably be highly sensitive if made available in bulk [particularly in a form which would enable data matching].*

The QIC noted these concerns may provide a valid basis, in certain circumstances, to permit an agency to provide access in the form of its choice. See the committee's recommendation in this regard in section 6.13.1 *Discretion as to form of access*.

321 QIC, first submission no 56 at paras B122-B128.

There are clearly a number of issues in terms of providing electronic access to documents under the FOI Act. However, the committee does not believe these issues are insurmountable.

Section 30 should be amended to make it clear that access to documents can be provided electronically—including in the circumstances set out in s 30(1)(e)—where it is reasonable and practicable to do so and provided that the applicant has, or is given, reasonable access to the resources to read the information in that form. Appropriate safeguards to prevent abuse should be introduced with the provision. In particular, this may require amendment to s30 to overcome the data matching concerns raised by the QIC.

The FOI monitor should issue guidelines regarding electronic access covering issues such as the security and integrity of electronic records, and the deletion of exempt portions of a document. Such access would be a non-standard form of access for the purpose of calculating access charges.

In section 8.3.2, the committee recommends that the QIC have jurisdiction to review decisions regarding form of access.

COMMITTEE FINDING 85—RECOMMENDATION

Section 30 (Form of access) should make it clear that agencies and ministers can provide access to documents electronically—including in the circumstances set out in s 30(1)(e). (This should be subject to the provision recommended in section 6.13.1 *Discretion as to form of access*.)

Safeguards to prevent abuse of the provision and, in particular, to address data matching concerns should be introduced.

The FOI monitor should issue guidelines regarding electronic access covering issues such as the security and integrity of electronic records, and the deletion of exempt portions of a document.

6.14 ACCESS TO DOCUMENTS CREATED AFTER AN APPLICATION IS MADE[322]

The FOI Act does not stipulate a cut off date for documents which must be considered in responding to an FOI application. The committee considers that ministers and agencies should only have to consider documents created or received by the minister or agency on or before the date of lodgement of the original application.

If a later cut-off date is set, the number of relevant documents will continue to expand, more consultation might be required, and it might be difficult to process the request within the statutory time limit. If an applicant requires documents created or received during the period of processing the request, they can lodge a further application at a later date.

While the committee considers that it is appropriate that there be no *requirement* for agencies to consider documents created and received after the date of application, agencies should be flexible in applying this provision, and consider such documents in circumstances where there would not be any significant burden in doing so. Care should be taken in the drafting of the provision to ensure that it is flexible enough to allow this to occur.

COMMITTEE FINDING 86—RECOMMENDATION

The Act should provide that agencies and ministers should only be required to consider documents created or received by the agency or minister on or before the date of lodgement of an access application.

322 Relevant submission: 66.

6.15 PROVISIONS REGARDING DECEASED PEOPLE[323]

Section 51(3) imposes on agencies and ministers an obligation to consult with the 'closest relative' of a deceased person in respect of applications for access to matter which concerns the personal affairs of the deceased and the disclosure of which may reasonably be expected to be of substantial concern to them.

Section 53(b) provides that the 'next of kin' of a deceased person is entitled to apply for amendment of information concerning the personal affairs of the deceased person. [Section 59(4)(a)(i) which relates to adding notations to information also employs the term 'next of kin'.] Neither 'closest relative' nor 'next of kin' is defined in the Act, or in the *Acts Interpretation Act 1954* (Qld). The QIC noted that at common law these terms may not include a deceased person's spouse.

The QIC raised the following concerns regarding the lack of uniformity and specificity in the current provisions:

- difficulties arise for agencies dealing with applications for access to information concerning the personal affairs of a deceased person in determining who is the appropriate person to consult under s 51;
- determining a person's 'closest relative' is particularly difficult where the deceased person's closest surviving relatives are people of the same degree of consanguinity, or where the deceased person's 'closest relative' or 'next of kin' is mentally incompetent or a minor;
- difficulties may arise for agencies in determining whether an applicant for amendment of information under Part 4 of the FOI Act properly qualifies as 'next of kin'; and
- difficulties arise in determining the payment of fees concerning personal affairs information. In particular, it is unclear whether the agency relationship envisaged by s 105 extends to the personal representative of a deceased person's estate and, if so, whether the imposition of a $31 application fee and charges apply to a person acting as agent of the deceased person.[324]

The current lack of certainty in the Act as it relates to access and amendment applications relating to deceased people needs to be addressed. The terms 'next of kin' and 'closest relative' should be standardised to one term and a definition of that term included in the Act. The committee prefers the term 'close relative' which would be a broad term potentially encompassing many people. This term should expressly include a spouse or de facto spouse.

Section 51 should be amended to expressly provide that an agency has the discretion to consult with such close relatives as the agency deems appropriate in the circumstances. All close relatives should have the right to seek review of an agency's decision to disclose the documents.

In the case of s 53, any close relative should be entitled to make an amendment application.

Further, the Act should not require applicants seeking access to documents which contain information relating to the personal affairs of a deceased 'close relative' of the applicant to pay fees and charges. This issue is discussed further in section 9.6.6 *Applications relating to a deceased close relative of the applicant.*

The committee also considered whether there should be any role for personal representatives in the FOI Act.[325] The committee does not believe that the Act should be amended to include the personal

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323 Relevant submissions: 87, 122, 155 and 169. QIC, first submission no 56 at paras C2-C6 and C12.

324 In *Re Turner and Northern Downs Regional Health Authority* (1997) 4 QAR 23 the QIC held that an applicant seeking access to medical records concerning her late husband (in her capacity as next of kin and executrix of the estate) was required to pay the then $30 application fee provided for in s 29(2) of the FOI Act, and s 6 of the FOI Regulation as the matter did not concern her 'personal affairs'.

325 See the Freedom of Information Acts of: the Commonwealth, s 27A and South Australia, s 26(5) which make specific provision for consultation with the personal representative of the deceased person.

representative of a deceased person as a person to be consulted, and a person entitled to seek amendment of personal affairs information, either as an alternative or in addition to 'close relative'.

Other relevant issues are discussed in section 5.4 *Amendment of information* and section 11.13.4 *Special relationship between the applicant and a third party*.

COMMITTEE FINDING 87—RECOMMENDATION

In relation to access and amendment applications concerning deceased people:

- the terminology in s 51(3), s 53(b) and s 59(4)(a)(i) should be standardised to 'close relative';
- the term 'close relative' should be defined to assist agencies in determining the appropriate individual(s) with whom consultation should occur;
- s 51 should expressly provide that an agency or minister has the discretion to consult with such close relatives as the agency or minister deems appropriate in the circumstances; and
- in the case of s 53, all close relatives should have the right to make an amendment application.

6.16 PROVISIONS REGARDING PEOPLE OF IMPAIRED CAPACITY[326]

The FOI Act does not contain explicit provision regarding access to, or amendment of, information about people with impaired capacity. The QIC noted that agencies encounter a range of difficulties in dealing with applications relating to people with impaired capacity in the absence of any specific statutory guidance. Difficulties are most likely to arise where a person of impaired capacity has not left an enduring power of attorney covering matters arising under the FOI Act.

There should be specific guidance on how to deal with FOI applications concerning persons with impaired capacity. In this regard, the *Guardianship and Administration Act 2000* provides:

- a limited right to a guardian who has power for a matter for an adult to obtain information 'which is necessary to make an informed exercise of the power': s 44(1)(a) and s 44(6). If a guardian was appointed in relation to 'all matters' for an adult, this provision would appear to be sufficient to ensure that the guardian could, on behalf of the person, seek access to relevant government-held information. A person appointed as a guardian for all matters would also appear to have authority to act on behalf of an adult with impaired capacity in relation to s 51 consultation; and
- the Guardianship and Administration Tribunal may approve a proposed exercise of power for a matter by an informal decision-maker for an adult with impaired capacity for the matter: s 154. An informal decision-maker is a person who is a member of the person's support network and not an attorney under an enduring document, administrator or guardian for the adult for the matter: s 154(5). If a person of impaired capacity sought assistance in responding to consultation, a person who is part of the adult's support network would be able to seek approval under s 154 to respond to the consultation on behalf of the person of impaired capacity.

Thus, the *Guardianship and Administration Act* appears to provide mechanisms which identify the appropriate course of action in circumstances where an adult is unable to make an access or amendment application or respond to consultation under s 51 on their own behalf.

In addition, that Act provides for appointment of the Adult Guardian whose functions include: seeking help (including help from a government department, or other institution, welfare organisation or provider of a service or facility) for, or making representations for, an adult with impaired capacity for a matter; and educating and advising people about, and conducting research into, the operation of the Act and the *Powers of Attorney Act 1998*: s 174. Accordingly, the office of the Adult Guardian would

[326] Relevant submissions: 35, 67, 91, 122, 142 and 155. QIC, first submission no 56 at paras C7-C8 and C12.

be able to provide advice to FOI decision-makers who are unsure of the appropriate action to take in relation to an application involving a person with impaired capacity.

There is also a role for the FOI monitor to ensure that agencies:

- are aware of the provisions and operation of the *Guardianship and Administration Act* as it relates to people with impaired capacity involved in FOI applications;[327] and
- know how to appropriately deal with applications by, and consultation with, people with impaired capacity.

The committee does not consider that the 'closest relative' or 'next of kin' provisions in Part 3 and Part 4 of the FOI Act—that is, s51(3), s53(b) and s59(4)(a)(i)—should also be made applicable to cases concerning people with impaired capacity.[328] This proposal: (a) presumes incompetence on the part of the person with impaired capacity; and (b) assumes that where a person does not have the capacity to form a view about whether material is exempt from disclosure, then their closest relative will have concurrent interests.

COMMITTEE FINDING 88—RECOMMENDATION

The Attorney-General should consult with the Information Commissioner and the Adult Guardian to determine whether the provisions of the FOI Act and the *Guardianship and Administration Act 2000* (Qld) provide appropriate mechanisms for people with impaired capacity or, where necessary, a person on their behalf, to (a) access information; (b) amend personal affairs information; and (c) be consulted under s 51.

The Attorney-General should then ensure that any necessary legislative amendments are made.

The FOI monitor should ensure that agencies:

- are aware of the provisions and operation of the *Guardianship and Administration Act* as it relates to people with impaired capacity involved in FOI applications; and
- know how to appropriately deal with applications by, and consultation with, people with impaired capacity.

6.17 PROVISIONS REGARDING MINORS[329]

There is no specific provision in the FOI Act dealing with access and amendment applications by or concerning minors. The QIC noted that the absence of any specific provision in the Act makes it difficult for agencies to determine whether: (a) parents have rights to access information concerning their minor children, or to express views on behalf of their minor children in respect of access applications lodged by third parties; or (b) minor children have privacy rights which they are able to assert even against their parents (and, if so, whether there should be a defined cut-off age, or whether each case should be determined on an assessment of the capacity of the individual minor).

The Department of Families, Youth and Community Care and Disability Services raised the following argument against amendment to the Act to clarify the rights of minors.

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327 In its submission, the Office of the Intellectually Disabled Citizens' Council of Queensland and the Legal Friend noted that there have been occasions when agencies have queried the authority of the Legal Friend (whose responsibilities have now been assumed by the Adult Guardian) to make applications under the Act: submission no 35.

328 This was recommended by the QIC, first submission no 56 at para C12. However, the QIC's submission was made prior to the enactment of the *Guardianship and Administration Act 2000* (Qld).

329 Relevant submissions: 77, 100A, 122, 142 and 155. QIC, first submission no 56 at paras C9-C12.

> [*The FOI Act*] *does not distinguish between children and adults. This lack of distinction provides for the possibility of children having separate personal affairs from their parents. This is crucial to the effective operation of FOI in relation to documents relating to child protection. In circumstances where parents' interests are concurrent with their children's there is no difficulty in disclosure of material. However if parents were generally able to act as agents for their children, it would preclude the possibility of their being able to communicate confidentially; for example, they would not be able to make complaints of being abused by a parent without the parent having a right of access to this material. Such a situation is untenable. A further complicating factor would arise in circumstances where parents are separated. It would need to be resolved whether the rights of parents differ on the basis of whether the child resides with them. The lack of distinction between children and adults in the current legislation provides scope for decision-making to occur on a case by case basis. While the repercussions of amendment are uncertain, change is not supported.*[330]

Minors fall within the definition of 'person' under the Act, and as such are extended all the rights under the Act. In the committee's view, the flexibility currently provided by the Act is preferable to a specific provision. While agencies might be required to address difficult situations because of the lack of clear guidance in the Act, these issues are best addressed on a case by case basis.

COMMITTEE FINDING 89—CONCLUSION

No specific provision should be inserted in the Act to address access and amendment applications made by, or relating to, documents or matter about minors.

6.18 DELETION OF EXEMPT MATTER: S 32

The right of access under the Act is a right of access to 'documents'. However, the exemption provisions refer to 'matter' as opposed to 'documents'. The term 'exempt matter' is defined in s 7 as '*matter that is exempt under part 3, division 2*'.

Pursuant to s 32, an agency or minister may give access to a document from which exempt matter has been deleted, if it is practicable to do so. 'Exempt document' is defined in s 7 as *'a document that contains exempt matter, but to which access cannot be given under section 32*'. Thus, the use of the term 'matter' in the exemption provisions, in conjunction with s 32, ensures that access to relevant material is given to the greatest degree possible without disclosing information which is protected by one of the exemption provisions.

The committee supports this provision which enables access to be given to documents with exempt matter excised. It is preferable to requiring that, where a document contains exempt matter, the whole document is exempt. Section 32 is consistent with the philosophy that access to information should be granted to the greatest degree possible, having regard to appropriate exemptions. (Although, it might be necessary for agencies to explain to applicants that when matter is deleted pursuant to s 32, the context of the document might be affected.)

However, the committee considers that this intent in the exemption provisions could be clarified if matter was defined as being 'part of a document'.

COMMITTEE FINDING 90—RECOMMENDATION

The term 'matter' should be defined in s 7 as 'part of a document'.

330 Department of Families, Youth and Community Care and Disability Services, submission no 122.

6.19 PERSONS WHO ARE TO MAKE DECISIONS FOR AGENCIES AND MINISTERS: S 33[331]

Section 33 provides that an agency's principal officer[332] is to deal with an application. Alternatively, applications can be dealt with by an officer directed by: the principal officer of the agency (for an agency other than a local government); an officer given authority by resolution of the government (for an agency which is a local government); or the minister (for a minister).

The committee considered whether s 33 should be amended to allow for the delegation of decision-making powers across agencies in the same portfolio. This would allow small agencies that receive few FOI applications to rely upon the FOI expertise of larger agencies within the same portfolio. It would also allow one agency in a portfolio to make decisions on an application that concerns similar documents held in a number of other agencies within the same portfolio. Potentially, this could lead to resource savings, contribute towards achieving consistent decision-making, and maximise the use of FOI expertise in departments.

By way of example, the Department of Employment, Training and Industrial Relations commented that agencies such as the Workplace Health and Safety Council do not employ any staff and a delegation to the departmental FOI decision-maker would be appropriate.[333]

For such a provision to work in practice it would be necessary for:

- the person to whom the authority is delegated to have full access to the records of the relevant agency. Without this, the decision-maker could not satisfy themselves of sufficiency of search, and could not be expected to accept responsibility for this aspect of processing the application; and
- the principal officer of the agency which received the application to be satisfied that the delegated decision-maker is sufficiently familiar with the operations of the agency to be able to properly apply the exemption provisions.

In addition, consideration would have to be given to matters including:

- internal review in cases where the original decision was delegated outside the agency;
- the receipt of fees and charges;
- whether a delegate from outside the agency can properly exercise the s 28(1) discretion to release information even if an exemption technically applies. Arguably, there is a risk that the delegate decision-maker would automatically claim all exemptions available;
- what input, if any, the agency to whom the application was made would have into the decision-making process and how this would occur; and
- if the matter goes to external review, who participates in mediation under s 80. For mediation to be a legitimate process it is necessary that the representative of the agency be one with authority to disclose particular information which might meet the applicants' needs.

The committee does not believe that any of these issues are insurmountable, and supports the suggestion in principle as it appears that it would contribute to the effective operation of the Act.

COMMITTEE FINDING 91—RECOMMENDATION

The Act should provide for cross-agency delegation of decision-making within the same portfolio.

331 Relevant submissions: 66, 87 and 128.

332 'Principal officer' is defined in s 7 of the Act.

333 Department of Employment, Training and Industrial Relations, submission no 87.

6.20 NOTIFICATION OF DECISIONS AND REASONS: S 34[334]

6.20.1 Content of statement of reasons

Section 34 requires an agency or minister to give an applicant for access written notice of the decision on the application specifying certain matters. Section 34 should be read in conjunction with the *Acts Interpretation Act 1954*, s 27B (Content of statement of reasons for decision). (In section 4.2.2 the committee recommends a role for the FOI monitor in ensuring compliance with the obligations regarding statements of reasons.)

It is important that agencies provide meaningful statements pursuant to this requirement,[335] so that applicants fully understand the decision, and can make informed decisions about whether to seek internal review or external review.

Section 34(2)(g) requires a statement of reasons to detail any public interest considerations on which the decision was based in relation to all documents, including those where access is provided in full. The committee considers that this requirement to detail public interest considerations should only be necessary where the agency or minister has refused access, either in part or in full, or where a 'reverse FOI' application has been made.

Guidelines regarding the various exemption provisions and the application of the relevant 'public interest' test would assist decision-makers in preparing meaningful statements of reasons in this regard.

Finally, the committee endorses the QIC's comment that agencies and ministers should ensure that each access applicant is provided with information concerning review rights which is specifically relevant to the circumstances of the particular application, rather than *pro formas* which may tend to confuse or mislead some applicants about their rights of review.[336]

COMMITTEE FINDING 92—RECOMMENDATION

Section 34 (Notification of decisions and reasons) should only require details of public interest considerations on which a decision was based to be included in a statement of reasons where the agency or minister has refused access, either in part or in full, or a 'reverse FOI' application has been made.

6.20.2 Notification of decision where documents not held

Section 34(1)(b) provides that if an application relates to a document that is not held by the agency or minister, the agency or minister is to advise the applicant in writing that the document is not so held.

The QIC recommended that consideration should be given to extending the 'notification of decision' obligations on agencies and ministers under s 34(1)(b) to require that agencies and ministers also take reasonable steps to provide an applicant with any information which may assist the applicant in identifying other agencies which hold or might hold a document which the applicant seeks.

The committee endorses this recommendation which is in accordance with FOI purposes and principles and the consultative approach advocated by the committee. It is also consistent with the

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334 Submissions relevant to one or more of the issues discussed in section 6.20 are: 90 and 92. QIC, first submission no 56 at paras C64-C71.

335 In *Re Eccleston and the Department of Family Services and Aboriginal and Islander Affairs* (1993) 1 QAR 60 at 64, the QIC commented that *'It is a matter of some concern for the general administration of the FOI Act that many agencies, and especially internal review officers, do not appear to be fully and adequately complying with* [*these statutory obligations*]'.

336 QIC, *1996/1997 Annual Report*, n 160 at para 3.22.

requirement under s25(3) that an agency assist an applicant to direct an application to the appropriate agency.

Further, s 34(1)(b) should require agencies and ministers to provide an applicant with details of all steps the agency took to locate documents, and where documents have been destroyed, details of the relevant retention and disposal schedule, together with procedures involved in the destruction of the documents. See also section 6.21 *Documents which do not exist or cannot be found*.

COMMITTEE FINDING 93—RECOMMENDATION

Section 34(1)(b) should require:

- an agency or minister that advises an applicant that a document is not held, to take reasonable steps to provide the applicant with any information which might assist the applicant to identify other agencies or ministers which hold or might hold a document which the applicant seeks; and
- agencies and ministers to provide an applicant with details of all steps the agency or minister took to locate documents, and where documents have been destroyed, details of the relevant retention and disposal schedule, together with procedures involved in the destruction of the documents.

6.20.3 Exempt matter not required in the notice: s 34(3)

Section 34(3) provides that an agency or minister is not required to include any exempt matter in the notice of decisions and reasons. The QIC advised that some agencies have been using s 34(3) as a way around perceived limitations to s 35. Section 35 provides that in certain circumstances an agency or minister is not required to give information as to the existence or non-existence of a document. However, s 35 is limited to documents containing matter that would be exempt under s36 (Cabinet matter), s37 (Executive Council matter), or 42 (Matter relating to law enforcement or public safety). As discussed in section 10.6 *Information as to the existence of certain documents: s 35*, some submitters argue that s 35 should extend beyond ss 36, 37 and 42.

The QIC submitted that some agencies have treated s 34(3) as:

> *… affording sufficient authority to not acknowledge the existence of, nor attempt to justify exemption for, a document (which falls within the terms of an FOI access application) in circumstances where it is considered that acknowledgment of the existence of the requested document would in itself disclose exempt matter, but not matter which is exempt under s 36, s 37 or s 42. Thus, an applicant who does not know or suspect that the document exists, is denied a proper opportunity to consider pursuing the rights of internal and external review conferred by the FOI Act in respect of what is, in effect, a refusal of access to a requested document.*[337]

The QIC submitted that s34(3) was not intended to be used in this way and recommended that the intent of s34(3) should be clarified to establish that an agency is not required to include in its decision the substance of any exempt matter.

The examples of misuse provided by the QIC in his submission relate to situations where the application is for information relating to the personal affairs of a third person. It appears that in certain situations agencies have considered that disclosure of the fact that documents exist in relation to the third person in itself breaches the third person's privacy interests.

If there are particular problem areas where the obligations imposed by s 34 are considered to have the potential to work unjustly, then they should be identified and specific provision made for them. As discussed in section 10.6.1 in the context of s 35, the committee is of the view that a provision

337 QIC, first submission no 56 at para C66.

allowing an agency to neither confirm nor deny the existence of a document which is exempt pursuant to s 44 (Matter affecting personal affairs) in certain circumstances is appropriate.

In the committee's view, it is a necessary implication of other provisions of the FOI Act that an agency or minister is not required to include any exempt matter in s 34 notices. The committee cannot identify a need for a provision such as s 34(3), and recommends that the provision be repealed.

COMMITTEE FINDING 94—RECOMMENDATION

Section s 34(3) should be repealed.

6.20.4 Schedule of documents

The QIC suggested that it is inherent in giving reasons for the making of a decision that each document responsive to an application for access is described sufficiently for an applicant to be able to make an informed decision about whether to seek review of the decision. Therefore, it may be useful to add a new s 34(2)(a) to provide that an agency or minister must specify the number and nature of the documents responsive to an applicant's request, and that, if it is over a certain number, then a schedule containing a brief description of the documents to which access has not been granted must be attached to the decision.

On a similar note, the Environmental Defenders Office (Qld) Inc submitted:

> *The costs of using FOI can often be greatest for applicants in regional communities as many agencies only allow access to view documents at the central office… . This increases the costs considerably, particularly for applicants who are rural dwellers where the applicant wishes to view the documents before ordering copies. These costs could be obviated to some extent by requiring agencies to provide a Schedule of Documents to which access has been granted if requested by the applicant. Some agencies already have this practice, but it should be made a requirement of the legislation. Applicants can then often quickly tell what documents they require saving travelling costs and time in viewing documents.*[338]

A schedule of documents could facilitate the efficient processing of applications in a number of stages in the FOI process, including:

- at the outset, to enable applicants to refine their FOI application and facilitate the consultation process set out in s 29A(2)(c) which requires that agencies and ministers give applicants the opportunity to consult with them with a view to making an application in a form that would reduce a charge;
- to facilitate negotiation regarding timeframes and the relative priority of documents;
- following a decision on an application, to enable applicants to identify exemptions relevant to particular documents, and to make informed decisions about whether to seek review; and
- to minimise the burden on applicants in seeking access to documents.

A mandatory requirement to prepare a schedule of documents at any stage of the FOI process might result in a significant administrative burden on agencies, particularly in the case of applications relating to broad subject matter, and might disclose information which might otherwise be exempt. However, there is greater justification for the additional cost to agencies in producing such schedules on request now that processing charges are payable. If applicants are to be charged for the processing of documents, arguably, they should be given the opportunity to decide which documents they wish to be processed.

338 Environmental Defenders Office (Qld) Inc., submission no 92.

Documents to which the provision authorising agencies 'to neither confirm nor deny the existence of a document' relates would need to be excluded from such a schedule and processed separately.

Given the potential administrative burden, the committee does not propose any legislative change at this stage. However, the FOI monitor should encourage agencies to prepare schedules of documents to facilitate the processing of applications and applicants exercising their rights of review as part of the FOI monitor's advice and awareness function.

COMMITTEE FINDING 95—RECOMMENDATION

Agencies and ministers should, where practical, prepare schedules of documents to facilitate the processing of FOI applications and to assist applicants to make applications in a form that would reduce processing charges, and exercise their rights of review.

6.21 DOCUMENTS WHICH DO NOT EXIST OR CANNOT BE FOUND[339]

Section 24A of the Commonwealth FOI Act provides that an agency or minister may refuse a request for access to a document if:

> *(a) all reasonable steps have been taken to find the document; and*
>
> *(b) the agency or Minister is satisfied that the document:*
>
> *(i) is in the agency's or Minister's possession but cannot be found; or*
>
> *(ii) does not exist.*[340]

The FOI Act has no equivalent provision. In circumstances where documents do not exist, or cannot be found, the application must be refused on the grounds that documents sought are not 'documents of an agency'.

A specific provision allowing refusal on the grounds that that a document does not exist or cannot be found would: facilitate the decision-making process; give applicants more accurate reasons for refusal; and provide clear review rights for applicants in sufficiency of search cases: see section 8.3.3 *'Sufficiency of search' cases*.)

The committee has no objection to such a provision provided that:

- there has been sufficient search for the document before access is refused on the grounds that it does not exist or cannot be found;
- the applicant is given in their statement of reasons: (a) information which might assist the applicant to identify other agencies which hold or might hold a document which the applicant seeks; and (b) details of all steps the agency took to locate documents, and where documents have been destroyed, details of the relevant retention and disposal schedule, together with procedures involved in the destruction of the documents as recommended in section 6.20.2 *Notification of decision where documents not held*; and
- there is a mechanism for review which allows the QIC to assess the sufficiency of search, see section 8.3.3.

339 Relevant submissions: 8, 66 and 67.

340 The South Australian Ombudsman has recommended that the SA FOI Act include a like provision: South Australian Ombudsman, *26th Annual Report 1997/98*, n 311 at 78-79.

COMMITTEE FINDING 96—RECOMMENDATION

The Act should include a provision enabling an agency or minister to refuse an application for documents that do not exist or cannot be found. The use of such provision should be conditional upon:

- sufficient search for the document before access is refused on the grounds that it does not exist or cannot be found;
- the applicant being given a statement of reasons containing information required in section 6.20.2 *Notification of decision where documents not held*; and
- a mechanism for review which allows the Information Commissioner to assess the sufficiency of search (see section 8.3.3 *'Sufficiency of search' cases*).

6.22 CONSULTATION WITH THIRD PARTIES: S 51[341]

Section 51 aims to ensure that all parties who might be affected by the disclosure of documents, or otherwise have a legitimate interest in whether or not documents are disclosed, are given an opportunity to have their views in relation to disclosure considered. Section 51 applies where access is sought to a document which '*may reasonably be expected to be of substantial concern to a government, agency or person*' other than the applicant. The provision requires the agency or minister to take such steps as are reasonably practicable to obtain the views of the government, agency or person concerned about whether or not the matter being sought is exempt, before granting access to the document. The provision also outlines the procedures to be undertaken when the parties disagree over whether the matter is exempt. A 'reverse FOI' application relates to the situation where a third party objects to disclosure.

In section 4.2.2 *The FOI monitor's specific functions* the committee recommends that one of the functions of the FOI monitor should be to provide advice to third parties consulted under s 51.

6.22.1 The scope of the provision

Section 51 applies where the disclosure of matter may reasonably be expected to be of substantial concern to a government, agency, or person other than the applicant. The provision is *not* limited to circumstances where particular, specified exemptions might apply. In this regard, s 51 differs from equivalent provisions in other Australian jurisdictions.

EARC's draft FOI bill contained an equivalent to s 51. However, EARC envisaged that third party consultation would only be required where matter may be exempt under three particular exemption provisions, namely, the equivalent provisions to the current s38 (Matter affecting relations with other governments), s 44 (Matter affecting personal affairs) and s 45(1) (Matter relating to a range of matters including trade secrets, information of commercial value or information relating to business, professional, commercial or financial affairs of an agency or another person).[342] EARC's approach is largely consistent with provisions in other Australian jurisdictions.

The QIC submitted that the requirement for consultation under s51 should only exist where there is an arguable case for an exemption under s38, s44, s45 or s46(1)(a)[343]—similar to EARC's original proposal—because:

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341 Submissions relevant to one or more of the issues discussed in this section: 39, 73, 96, 97, 101, 113, 124 and 134. QIC, first submission no 56 at paras C78-C84.

342 EARC FOI report, n 19 at paras 7.182 and 7.206.

343 Section 46(1)(a)—which relates to matter communicated in confidence—was not included in the third party consultation period in EARC's draft bill, and no other Australian FOI legislation requires the consultation with third parties in respect of their equivalent of s 46(1)(a). However, the QIC considered that information potentially exempt under this provision should fall within s 51.

- s 51 in its current form has imposed substantial additional burdens on FOI administrators in the processing of access applications, with corresponding resource costs, delays and inefficiencies;
- s 51 in its current form has permitted large numbers of 'reverse-FOI' applications, including many without substance, to delay an applicant obtaining access; and
- there have been several instances of 'reverse-FOI' applicants wishing to contest an agency's judgment on the application of exemption provisions which should properly be left to the judgment of the agency when the decision is in favour of disclosure to the initial applicant for access.

The committee does not have access to sufficient information about the resource implications of s 51 to enable it to make an informed assessment of the impact that reducing the scope of s 51 would have on the expeditious handling of applications. Further, the committee is not aware of the extent to which: (a) agencies are unnecessarily consulting with other agencies; and (b) third parties are raising exemptions which should properly be argued by another party. The FOI monitor will be in a better position to assess these matters and make recommendations for any necessary reform to s 51.

If disclosure of particular information might be of substantial concern to a person, that person is entitled to be consulted prior to the disclosure of the information. This should not be dependent upon the particular exemption provision in question. However, the FOI monitor should assess the extent to which the problems raised by the QIC impact on the expeditious handling of complaints and consider options to address these difficulties without necessarily restricting the exemption provisions to which s 51 relates. For example, the QIC's concerns might be addressed by removing the requirement for an agency or minister to consult with other Queensland government agencies before releasing information.

COMMITTEE FINDING 97—RECOMMENDATION

Section 51 (Disclosure that may reasonably be expected to be of substantial concern) should be retained in its current form at this stage.

However, the FOI monitor should assess the extent to which: (a) agencies are unnecessarily consulting with other agencies; and (b) third parties are raising exemptions which should properly be argued by another party; and make recommendations for any necessary reform to s 51 without necessarily restricting the exemption provisions to which s 51 relates.

6.22.2 The process after consultation

Section 51(2) outlines the process to be undertaken if, after a third party has been consulted pursuant to s 51(1), the third party believes that matter is exempt, but the agency or minister holding the documents considers that the information is not exempt, and the applicant should be given access.

The agency or minister must give the third party written notice of their decision and reasons for the decision, and advise the third party of the rights of review conferred by the Act and the procedure to exercise those rights. The agency or minister must defer granting access to the document/s until the end of the period during which any application for review can be made by the third party, or if such application is made, until after the application is finally disposed of.

The committee understands that some agencies will release the relevant document/s, whether or not the 28 day appeal period has expired if, after further consultation, the third party advises that they no longer object to the release of the information. In the committee's view this is the most sensible and practical approach. However, concern has been expressed that if the third party subsequently seeks to commence the appeal process, despite the fact that they have advised that they no longer object to the release of the information, the agency or minister which released the information could be found to be in breach of s 51.

This problem, while not evidently common, should be overcome by an amendment to s 51(2).

COMMITTEE FINDING 98—RECOMMENDATION

Section 51(2) should clarify that if, during the period in which a third party may seek review of an agency's or minister's decision to release documents, the third party advises the original decision-maker that they no longer object to the release of the documents, then the original decision-maker may release the documents.

6.22.3 Other suggestions regarding s 51

The committee has considered a number of other suggestions regarding s 51 including:

- whether there should be a sanction for not consulting third parties;
- the appropriate means of consulting with third parties; and
- information required by third parties to be able to comment on an agency's proposal to release documents.

The committee does not propose any legislative amendment relating to these issues. However, given that s 51 helps protect the interests of third parties, the appropriate and consistent implementation of the requirement to consult under s51 is extremely important. The committee envisages a role for the FOI monitor in issuing guidelines about, and monitoring the adequacy of:

- circumstances where third party consultation should take place;
- appropriate means of consultation with third parties;
- information supplied by agencies to third parties to ensure that effective consultation takes place without breaching appropriate confidentiality; and
- how the processing of FOI applications where third parties' interests are affected might be expedited. For example, in some cases the applicant might, in order to expedite processing of the application, permit their identity to be disclosed to the third party, and/or provide an indication of the reason for seeking the information.

COMMITTEE FINDING 99—RECOMMENDATION

The FOI monitor should issue guidelines about, and monitor the adequacy of, consultation by agencies and ministers with third parties.

6.23 CONDITIONAL DISCLOSURE[344]

Term of reference B(ix) asks whether the FOI Act should be amended to allow disclosure of material on conditions in the public interest (for example, to a legal representative who is prohibited from disclosing it to the applicant).

While the committee has been unable to locate a provision similar to that proposed in other jurisdictions, possibly such a provision might be useful where it is in the public interest to release material to an applicant, but that information, in the hands of the applicant, might jeopardise the personal safety of others. For example, the information sought could be used for the defence of a

[344] Relevant submissions: 3, 4, 8, 16, 21, 27, 29, 39, 42, 43, 45, 46, 47, 51, 53, 54, 59, 66, 67, 69, 73, 77, 79, 80, 87, 90, 100A, 100B, 101, 104, 107, 113, 119, 128, 131, 142, 150, 154, 160, 161 and 162. QIC, first submission no 56 at paras B281-B286. QIC, supplementary submission no 173 at 19.

person charged with a serious crime but pose some public interest concerns if the material was released to the applicant personally.

To implement such a provision numerous issues would need to be resolved including: who would enforce and monitor compliance with the conditions and how; which forum would hear alleged breaches of conditions imposed; and what penalties would apply for a breach of conditions imposed. The proposal would be further complicated by the need for independent review of: a decision to impose conditions, the reasonableness of any conditions imposed and, where access has been denied, the right to conditional disclosure.

Disclosure of information on conditions in the public interest is fundamentally inconsistent with FOI principles. Disclosure under FOI legislation is generally to 'the world at large'. It follows that generally conditions should not be placed on disclosure[345] and the identity and motives of a particular applicant are irrelevant to the processing of an FOI application. Queensland's FOI Act accords with these principles and does not discriminate between applicants.

The committee has not identified any major limitations of the current regime which would be overcome by such a provision. Further, the difficulties and practical limitations with monitoring and enforcing compliance are so significant that they outweigh any advantage that might be derived from such a provision.[346] The committee agrees with the QIC's analysis that such a provision is likely to cause more problems than it solves.

COMMITTEE FINDING 100—CONCLUSION

The Act should not allow disclosure of material on conditions in the public interest.

345 ALRC/ARC issues paper, n 24 at para 5.23.

346 The ALRC/ARC review rejected the suggestion that the Administrative Appeals Tribunal and the courts should be able to release documents otherwise exempt under particular exemption provisions subject to an undertaking by the applicant as to how the documents will be used. The ALRC/ARC review's reasoning was based on enforcement difficulties and the fact that the enforcement action would be too late as the damage would already be done: review report, n 13 at para 10.11. This suggestion was made by the Senate Standing Committee on Legal and Constitutional Affairs in its 1987 report, n 24 at paras 13.13-13.21 and 14.28.

7. INTERNAL REVIEW

7.1 INTRODUCTION

A person 'aggrieved' by a decision concerning access to documents, the release of certain matter, or amendment of personal affairs information can seek review of that decision by another person within the agency ('internal review'): ss 52 and 60.

Term of reference B(v) asks, among other matters, whether the mechanisms in the Act for internal review are effective.

In this chapter the committee discusses and makes recommendations about the internal review procedures in the Act. The issue of fees and charges as they relate to internal review is dealt with in section 9.7.

7.2 RETENTION OF INTERNAL REVIEW[347]

A small number of submitters to the committee queried the value of internal review mainly because they felt it: lacks impartiality; usually results in affirmation of the original decision; and adds another layer to the appeal process given that most decisions are appealed to the QIC anyway. The point was also made that junior officers might 'play it safe' knowing that their decision can be reviewed by a more senior officer and that in some, particularly smaller, agencies there is a lack of qualified internal reviewers.

However, table 7.1 indicates that a significant percentage of original decisions are varied on internal review.

Table 7.1: Outcome of internal review decisions—1998/99 and 1999/00[348]

1998/99			1999/00		
Agency type	*No. of internal review decisions*	*% variation of original decision*	*Agency type*	*No. of internal review decisions*	*% variation of original decision*
State government agencies	227	30%	State government agencies	313	27.8%
Local government agencies	38	31.6%	Local government agencies	45	33.3%

On balance, the committee agrees with the QIC and the majority of submitters that internal review should be retained as it can be a valuable tool in the FOI process. Internal review has advantages for both applicants and agencies. For applicants, internal review is a cost effective, relatively quick and accessible form of merits review. It allows applicants, who ordinarily have little or no input into the initial agency decision, to submit new arguments and evidence for consideration by an agency. As the QIC notes, this is particularly important in 'sufficiency of search' cases, where it is preferable that an applicant has an opportunity to raise such issues directly with the agency, and proceed to external review only if no satisfaction can be obtained from the agency.

From the agency perspective, internal review allows an agency to reconsider and, if necessary amend, decisions before those decisions are subject to external review. Concurrently, agencies can monitor

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347 Relevant submissions: 16, 21, 22, 27, 45, 62, 66, 67, 69, 70, 77, 79, 87, 100A, 104, 107, 161 and 163. QIC, first submission no 56 at para B177. QIC, supplementary submission no 173 at 13.

348 Source: DJAG, *Freedom of Information Annual Report 1998/99*, n 135 at appendix 1.9 and 1.10; DJAG, *Freedom of Information Annual Report 1999/00*, n 133 at appendix 1.9 and 1.10. Despite apparent inconsistencies in data collection, the information contained in these (s 108) reports is the most comprehensive statistical information about the operation of the Act currently available.

the quality of their primary decisions, and identify and correct problems or inconsistencies in their decision-making processes.

Further, internal review can operate as an important tool in managing demand for external review, and assists in inculcating a knowledge and understanding of FOI in agencies.

Well designed internal review mechanisms are generally consistent with sound administrative practice. This has been recognised by this committee,[349] EARC,[350] the PCEAR,[351] and the Administrative Review Council in a recent in-depth study of internal review (the 'ARC internal review report').[352] A discussion paper released by the current interdepartmental project led by the Queensland Department of the Premier and Cabinet to improve processes for dealing with disputes about administrative decisions also discussed the benefits of internal review.[353]

It is critical to effective internal review for the internal reviewer to be, and be perceived to be, independent from the original decision-maker. Currently, s 52(5) and s 60(5) provide that internal review applications must not be dealt with by the original decision-maker or a person who is less senior than that person. These provisions should be amended to stress that both the original decision-making process and the internal review process are to be conducted entirely independently of each other. The internal review best practice guide produced by the Administrative Review Council as part of its internal review report provides guidance in this regard. This guide is aimed at giving agencies the opportunity to re-examine their internal review systems with a view to improving them and includes a specific discussion on location and independence of internal review officers.[354]

Section 60 makes provision for a person who is aggrieved by a decision of an *agency* in relation to an amendment application to seek internal review. However, s60 does not expressly apply to situations where an original decision is made by a member of a minister's staff.[355] Section 60 should also apply in these situations.

COMMITTEE FINDING 101—RECOMMENDATION

The internal review rights in the Act should be retained, although the provisions relating to internal review should stress that the original decision-making process and the internal review process are to be conducted entirely independently of each other.

Section 60, relating to internal review of amendment applications, should apply to situations where an original decision is made by a member of a minister's staff.

349 LCARC, *Review of the Report of the Strategic Review of the Queensland Ombudsman*, Report no 14, Goprint, Brisbane, July 1999 at 31-34.

350 EARC, *Review of Appeals from Administrative Decisions*, Goprint, Brisbane, August 1993 at paras 7.274-7.296.

351 PCEAR, *Review of Appeals from Administrative Decisions*, Goprint, Brisbane, May 1995 at 41.

352 *Internal review of agency decision making: Report to the Attorney-General*, report no 44, Canberra, November 2000. This report followed on from the ARC's earlier report *Better Decisions*: *review of Commonwealth merits review tribunals*, report no 39, Canberra, 1995.

353 Department of the Premier and Cabinet, *Appeals from Administrative Decisions*, Discussion Paper, December 2000.

354 See n 352 at chapter 8.

355 In this regard, s 60 is inconsistent with other provisions of the Act, including s 52 relating to internal review of access applications.

7.3 WHEN INTERNAL REVIEW SHOULD TAKE PLACE

7.3.1 Internal review as a prerequisite to external review[356]

Internal review is a prerequisite to external review unless the original decision was made by a minister or an agency's principal officer: ss 52(3), 60(3)[357] and 73(3). Certain decisions regarding charges are also deemed to be made by an agency's principal officer and are therefore not internally reviewable: s 29C(5).

The suggestion was made to the committee that generally internal review should not be a prerequisite to external review as is the case in Western Australia[358] and as has been proposed in other jurisdictions.[359] Suggested mechanisms by which internal review might be bypassed included with the QIC's leave and where both the applicant and agency agree.

At this stage, the committee believes that internal review should remain a prerequisite to external review. Creating avenues to avoid internal review would run counter to the committee's comments above regarding the benefits of internal review.

The committee is also concerned about the impact of the proposal on the QIC's workload. The availability of direct external review might encourage agencies to channel matters to the QIC rather than spending time on internal review. Making the right to proceed directly to external review by leave of the QIC, would also potentially result in the QIC having to process a large number of such requests, only creating more paperwork and delay.

The strategic management review concluded that if the requirement for internal review was waived, there is likely to be an increased workload for the QIC.[360]

This being said, there must be checks in place to ensure that internal review is effective and not acting as a barrier to external review.[361] In this regard, the committee encourages agencies to review and adopt, as appropriate, the guidelines set out in the ARC's internal review best practice guide.[362] The discussion paper prepared by the Department of the Premier and Cabinet's interdepartmental project on administrative decisions also proposed that standards should be developed for the provision and conduct of internal review by agencies and attached draft standards for internal review as a basis for consultation.

Further, the strategic management review proposed that a preferable approach to removing mandatory internal review would be for the QIC to identify those agencies where internal review processes are not adding value to FOI decision-making, and target those agencies for assistance by way of training, advice and information to enable them to develop the required skills and expertise.[363] The committee endorses the thrust of this recommendation but believes that the FOI monitor should be responsible for ensuring that applicants have access to effective and efficient internal review.

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356 Relevant submissions: 16, 45, 53, 66, 67, 69, 70, 79, 91, 92, 93, 104, 113, 115, 116, 119, 125, 127, 128, 134, 137, 138, 142, 144, 145, 146, 150, 153, 154, 160, 161, 162, 163 and 167.

357 Section 60(3) does not specifically refer to a minister, although this would seem to be implied by s 73(3).

358 FOI Act (WA), s 66(6). Bypassing internal review is on the commissioner's discretion. The Western Australian Information Commissioner supports retention of this discretion: Western Australian Information Commissioner, submission no 70 at 5.

359 For example, at the Commonwealth level see the ALRC/ARC review report, n 13 at para 13.6 and recommendation 83, although this was later rejected by the Senate Legal and Constitutional Legislation Committee, n 27 at 3.76.

360 Strategic management review report, n 7 at viii.

361 In its internal review report, the ARC recommended that an agency that chooses to make internal review mandatory should ensure the internal review system is as worthwhile as possible for the applicant and does not operate as a potential barrier to effective merits review: n 352 at n 18.

362 See n 352 at chapter 8.

363 Strategic management review report, n 7 at viii.

COMMITTEE FINDING 102—RECOMMENDATION

Internal review should remain a prerequisite to external review, unless a minister or an agency's principal officer made (or is deemed to have made) the original decision. In this regard, s 60(3) should additionally provide that a person is not entitled to internal review of a decision concerning an amendment application where a minister makes that decision.

COMMITTEE FINDING 103—RECOMMENDATION

The FOI monitor should be responsible for ensuring that applicants have access to effective and efficient internal review by:

- monitoring and auditing agencies' internal review systems and processes; and
- where agencies' internal review processes are not adding value to FOI decision-making, providing assistance to those agencies by way of training, advice and information.

7.3.2 Review of determinations about the application of the Act

The rights of internal review conferred by s52 of the Act expressly apply to 'a decision under this Part' (being Part 3—Access to documents). This enables agencies to argue that the following are not decisions made under Part 3 and thus are not subject to internal review (nor ultimately the right of external review conferred by s 71 of the Act):

- a decision made under ss 11(1), 11A or 11B (dealing with bodies, or some of their functions or activities, excluded from the Act's operation);[364] and
- a decision that an entity is not an 'agency' as defined in ss 7, 8 and 9.[365]

Agencies adopting this view might argue that technically they have not refused access and accordingly review rights do not exist.[366]

However, agencies should not be unilaterally making decisions regarding matters of jurisdiction. Such decisions should be subject to internal and external review.

Legislation other than the FOI Act also excludes agencies, or some of their functions or activities, from the application of the FOI Act. Accordingly, the right to review should apply where an agency claims that it, or some of its functions or activities, are excluded from the application of the Act either by the FOI Act or another Act.

COMMITTEE FINDING 104—RECOMMENDATION

Section 52 (Internal review) and s71 (Functions of commissioner) should expressly enable applicants to seek internal and external review:

- where an agency decides that it, or some of its functions or activities, are excluded from the application of the Act either by the FOI Act or another Act; or
- where an entity decides that it is not an agency for the purposes of the Act.

364 QIC, first submission no 56 at paras C47-C51.

365 See, for example, *Local Government Association of Queensland Inc v Information Commissioner and Anor* [2001] QSC 052 where the Local Government Association asserted that it was not subject to the FOI Act as it was not an agency.

366 See, for example, *Christie v Queensland Industry Development Corporation* (1993) 1 QAR 1 and *Re Hansen and Queensland Industry Development Corporation* (1996) 3 QAR 265.

7.4 THE INTERNAL REVIEW PROCESS

7.4.1 Clarifying who can seek internal review

Section 51 of the Act requires an agency or minister to obtain the views of a *government, agency or person* about whether or not matter, the disclosure of which may reasonably be expected to be of substantial concern to the *government, agency or person*, is exempt matter.

However, s 52(1) provides that a *person* who is aggrieved by a decision under Part 3 of the Act is entitled to apply for internal review of the decision. Section 71(1)(f)(i) gives the QIC the power to investigate and review a decision by an agency or minister to disclose a document contrary to the views of a *person* obtained under s 51.

This inconsistency in wording gives rise to doubt as to whether *governments* and *agencies* were intended to have the right to apply for internal review of decisions of a kind mentioned in s 52(7)(b) with which they are aggrieved, and whether the QIC was intended to have jurisdiction under s 71(1)(f)(i) to deal with applications for external review by *governments* and *agencies* consulted under s 51.[367]

While there is an argument that the word 'person' encompasses governments and agencies by virtue of s 32D(1) and s 36 of the *Acts Interpretation Act 1954* (Qld), the committee believes that it is desirable for the FOI Act to be explicit on this point.

(In section 6.22.1, the committee recommends that the FOI monitor should consider and make recommendations about any necessary reform to s 51. Any amendments to s 51 might require consequential amendments to the above provisions.)

COMMITTEE FINDING 105—RECOMMENDATION

Section 52(7)(b) and s 71(1)(f)(i) should make it clear that a government, agency or person has the right to lodge a third party application for internal review and external review.

7.4.2 Requirements for making an internal review application[368]

An application for internal review must specify an address *in Australia* to which notices under the Act may be sent to the applicant: s 52(2)(b) and s 60(2)(b). In contrast, s 73(1)(b) of the Act does not require that external review applications contain an Australian address.[369]

These provisions should be consistent and there should not be a requirement for an *Australian* address. This disadvantages people who live overseas. Further, as the use of electronic communications becomes more globally prevalent and communication costs are thus greatly reduced, the issue of whether the QIC or the applicant should bear the communication expense is less significant. It follows that an e-mail address should suffice.

COMMITTEE FINDING 106—RECOMMENDATION

There should be no requirement for internal review applications to specify an *Australian* address. Therefore, s 52(2)(b) and s 60(2)(b) should be amended by removing the words 'in Australia' after address.

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367 QIC, first submission no 56 at paras C72-C77.

368 Relevant submission: 87.

369 In section 6.3.2 the committee recommends that s 25(2) should require an applicant to provide an address at which the applicant can be contacted.

7.4.3 A requirement to provide reasons for seeking internal review[370]

An internal reviewer is clearly required to undertake a complete review of the original decision: s 52(4) and s 60(4).

The QIC and others suggested that internal review might be more effective and efficient if applicants are required to specify the particular aspects of the original decision that are challenged, and to set out a succinct statement of the grounds on which those aspects are challenged.

The committee does not support a *mandatory* requirement to provide such reasons. The original decision might not provide sufficient information to enable the applicant to formulate reasons. Difficult issues also arise regarding the validity of an application and the calculation of time limits where an internal review applicant provides no reasons.

However, internal review would operate more effectively and efficiently if applicants provide the type of information suggested by the QIC and others. In sufficiency of search cases, it would also assist if applicants: (a) state any grounds for their belief that additional documents responsive to their application exist; (b) provide any evidence they have supporting this belief; and (c) outline what further searches they believe the agency should undertake.

Agencies should include in their original decision letters to applicants a statement as to how the applicant can assist internal review of the decision, if they wish to pursue that option. Ensuring that agencies do this and educating applicants in this regard should be a function of the FOI monitor.

COMMITTEE FINDING 107—RECOMMENDATION

Agencies and ministers should include in original decision letters to applicants refused access in whole or part, a statement as to how the applicant can assist internal review of the decision, if they wish to pursue that option.

The FOI monitor should ensure that agencies do this and educate applicants in this regard.

7.4.4 The 28 day time limit for lodging internal review applications

Applications for internal review of an access or amendment decision must be lodged within 28 days after the applicant is notified of the decision (or within such further time as the agency's principal officer allows): s 52(2)(c) and s 60(2)(c).

Twenty-eight days is appropriate as applicants need sufficient time to consider the outcome of their original application and decide whether, and on what basis, to apply for a review of that decision. Further, in the case of access applications, some applicants, particularly those living in regional areas, might need time to travel to an agency to view released documents before making a decision about seeking internal review.

However, this time limit, unlike that which applies for lodging external review applications—see s 73(1)(d)(ii)—commences from the day on which 'notice' rather than 'written notice' of the decision is given to the applicant. The internal review provisions should refer to the day on which *written* notice of the decision is given to the applicant.

Further, a decision by an agency's principal officer to refuse to grant an applicant more than 28 days in which to lodge and application should be externally reviewable by the QIC.

[370] Relevant submissions: 33, 76 and 137. QIC, supplementary submission no 173 at 13.

COMMITTEE FINDING 108—RECOMMENDATION

Internal review applications should be required to be lodged within 28 days after the day on which an agency or minister gives an applicant *written* notice of their original decision. A decision by an agency's principal officer to refuse to grant an applicant more than 28 days in which to lodge an application should be subject to external review by the Information Commissioner.

7.4.5 The 14 day time limit for determining internal review applications[371]

An agency must make a decision regarding an internal review application within 14 days of receipt of the application, otherwise the original decision is taken to have been affirmed: s 52(6) and s 60(6). In the case of access applications, the agency must also notify the applicant of that decision within the 14 day limit.

A large number of submissions (particularly those from agencies) called for an increase in this 14 day time limit to periods averaging 21 to 30 days. Generally, the current period was considered too short especially for complex applications where fresh searches have to be conducted or where additional consultation under s 51 is required and, given that in the case of access applications, the 14 day period includes notification time. Many also stressed that the reviewer is required to consider the application afresh and that the current limited period makes internal reviewers likely to affirm the original decision or fail to make a decision and hence be deemed to affirm the original decision. The availability of suitable senior internal reviewers apparently exacerbates these problems in some, particularly smaller, agencies.

The committee believes that agencies should have 28 days in which to make, and notify agencies of, a decision regarding an internal review application (whether relating to an access or amendment application).

There is no provision for the 14 day determination period for internal review to be extended where the internal reviewer is to conduct fresh consultation, such as would occur where the reviewer proposes to disclose material previously found by the agency to be exempt.[372] Extending the determination period from 14 to 28 days would give agencies additional time in cases requiring s 51 consultation not undertaken by the original decision-maker. This additional time is consistent with that relating to original applications: see s 27(4)(b).

This extended time frame should reduce the number of 'deemed refusals' and hence have a positive flow-on effect for the QIC's workload.

In accordance with the committee's recommendation in section 6.5.3 *A requirement to process 'as soon as practicable'*, the internal review time limit provisions should be redrafted to require an agency to make a decision on an internal review 'as soon as practicable' but in any case no later than 28 days.

The committee's general negotiation provision (see section 6.2.2 *Negotiation*) should also apply to internal review so as to expressly authorise applicants and agencies or ministers to agree to an extension of time within which an internal review decision can be made. Agreed extensions of time would be particularly useful in the case of complex and large applications which, if not completed within 28 days, would result in the original decision being affirmed. If, however, the agency or

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371 Relevant submissions: 33, 38, 39, 43, 45, 46, 47, 50, 53, 59, 66, 67, 69, 73, 76, 77, 87, 100A, 100C, 104, 106, 107, 109, 113, 119, 125, 127, 128, 134, 135, 136, 138, 142, 144, 145, 150, 153, 154, 155, 160, 162, 168 and 171.

372 A number of submitters expressed the view that the internal review provisions should be amended to clarify that consultation can take place at the internal review stage. The committee believes that no such amendment is required as s 52(4) and s 60(4) make it clear that internal review applications are to be dealt with as if they were original applications.

minister does not make a decision within the agreed extended time frame then the agency or minister should be taken to have made a decision affirming the original decision.

COMMITTEE FINDING 109—RECOMMENDATION

Section 52(6) and s 60(6) should require agencies and ministers to make a decision regarding an internal review application, and notify an applicant of that decision, as soon as practicable but in any case no later than 28 days after receipt of their internal review application.

The committee's general negotiation provision (see section 6.2.2 *Negotiation*) should also apply to internal review so as to expressly authorise applicants and agencies or ministers to agree to an extension of time within which an internal review decision can be made.

The Act should make it clear that, where an agency or minister and an applicant have agreed to extend the 28 day time limit for internal review, and the agency or minister has not made a decision within that agreed time frame, the agency or minister is taken to have made a decision affirming the original decision.

7.4.6 The need to retain s 52(7)(b)(i)

A third party who has a substantial concern about the release of documents and who was not consulted under s 51 can make an internal review application: s52(7)(b)(i). A similar provision exists in relation to external review: s 71(1)(f)(ii).

The committee considered whether these provisions should be deleted given that, in practice, a third party only finds out about the application after the release of documents—which is too late to object to their release.

The committee understands that while these provisions are rarely relied on as a basis for review, they have been used by persons seeking some admonishment for an agency which has released documents without proper consultation. Such action, while futile, is the only course open to such persons.

The provisions might be more usefully relied upon where a decision to release documents has been made but the documents have not yet been released or accessed.

On this basis, the committee is not persuaded that the provisions should be deleted.

COMMITTEE FINDING 110—CONCLUSION

Section 52(7)(b)(i) and s 71(1)(f)(ii)—which grant a third party who was not consulted about the release of documents rights of internal and external review—should be retained.

8. EXTERNAL REVIEW

8.1 INTRODUCTION

Part 5 of the Act deals with external review of decisions.

If an applicant is not satisfied with an internal reviewer's decision, they can apply to the QIC for external review of that decision: s73(1). The kinds of decisions of agencies and ministers which the QIC can investigate and review are set out in s71. As a form of merits review, the QIC's decision substitutes the decision of the agency or minister being reviewed.

Term of reference B(v) asks, among other matters, whether the mechanisms in the Act for external review are effective and, in particular, '*whether the method of review and decision by the Information Commissioner is excessively legalistic and time-consuming*'.

In this chapter the committee discusses and make recommendations about the external review procedures in the Act. The issue of fees and charges as they relate to external review is dealt with in section 9.7.

8.2 THE INFORMATION COMMISSIONER MODEL

8.2.1 Alternative models[373]

Critical to the credibility of any FOI regime is a right to external review of FOI decisions by an entity independent of government.

The three main models of external review in FOI regimes are:

- the courts (in the FOI context, often considered expensive, slow, formal and adversarial);
- a general administrative appeals tribunal with determinative powers such as the Commonwealth AAT (generally considered faster, cheaper, relatively informal, and potentially more specialised than the courts, though restricted in performing a monitoring role); and
- an Ombudsman or Information Commissioner (which can involve a specialist Information Commissioner or a combined Ombudsman and Information Commissioner. Under either of these models the Ombudsman or Information Commissioner's decisions may or may not be binding).[374]

The Information Commissioner model emerged from EARC's FOI inquiry. Rather than opting for a judicial approach (as with the courts and tribunals), EARC considered that this new model would offer review which was cheap, accessible, free from technicality, informal, expeditious and specialised.[375] The model has subsequently been adopted in a number of jurisdictions including Western Australia and Ireland.

The committee agrees with the majority of submitters that a separate Information Commissioner should be the external review body under the FOI Act. The model, more than any other alternative, has the capacity to operate as a cheap,[376] accessible, informal, expeditious and less intimidating form of review for FOI applicants. (The extent to which the design features of the Information

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373 Relevant submissions: 4, 11, 15, 16, 29, 45, 46, 47, 51, 54, 63, 64, 66, 70, 90, 91, 93, 103, 107, 113, 116, 119, 127, 128, 129, 132, 138, 142, 147, 154, 160, 161, 162, 163, 164 and 167. QIC, first submission no 56 at paras B142-B149.

374 See McDonagh M, *Freedom of Information Law in Ireland*, Round Hall Sweet & Maxwell, Dublin, 1998 at 345-346 (attached to submission 11). As to the external review models currently used in other jurisdictions see Table 4 (Review of FOI decisions) on the committee's website.

375 EARC FOI report, n 19 at paras 17.22-17.32. The PCEAR endorsed EARC's new model although recommended a review of it as part of the then proposed two-year review: PCEAR FOI report, n 20 at paras 3.11.9-3.11.11.

376 The recent strategic management review observed that the current approach to external review is very inexpensive for applicants: n 7 at 13.

Commissioner model have been fulfilled in Queensland, particularly informality and timeliness, are addressed in section 8.2.4 *The Information Commissioner's approach*.)

As the QIC submitted, the Information Commissioner model has the following advantages over a court, or tribunals which adopt court-like procedures:

- *greater access to justice for individuals, in the form of a less confrontational and less intimidating forum for dispute resolution, not surrounded by the trappings of a court-like process (the great majority of both agency and individual participants have not considered it necessary to obtain legal representation);*
- *significant scope for informal resolution of disputes (reflected in approximately 75% of disputes being resolved informally);*
- *reduced costs to participants as compared with the traditional court or tribunal model (Much of the initial burden of researching and defining relevant issues, in cases that are resolved informally, and some of it in cases that proceed to formal decision, is assumed by my staff, rather than by the agency or individual participants as would occur with a court or a tribunal which follows court-like procedures. Moreover, there is less perceived need for participants to engage legal representatives than in the more threatening oral hearing situation of the court model. Even where legal representatives are engaged, costs incurred in preparing written submissions and evidence are usually far less than for preparation and attendance at an oral hearing.);*
- *more equitable treatment of participants in regional areas (conducting negotiations and mediation by telephone or correspondence, and allowing them to make submissions and provide evidence in writing, rather than requiring them to travel long distances to attend conferences or oral hearings);*
- *timely resolution of most disputes (which will improve as the backlog of cases reduces further);*
- *reduced costs to the State in terms of administration of my Office, compared with a tribunal or court model; and*
- *specialist knowledge of resolution techniques and the FOI Act, that can be utilised in both informal resolution and in decision-making.*[377]

Despite recommendations by EARC and the PCEAR,[378] Queensland does not have a generalist administrative appeals tribunal like the Commonwealth AAT which could perform the review function.

The courts are not the appropriate entity to perform the FOI review function. The complex, adversarial nature of court procedures detract from the concept of an inexpensive, expeditious and informal form of external review.[379] Further, it is desirable, where possible, to remove from the courts the responsibility of having to exercise administrative, as opposed to judicial, discretions.[380]

The committee has also considered whether the Ombudsman could be vested with the QIC's functions. In other words, the FOI external review function could constitute part of the Ombudsman's wider role of reviewing administrative action.

Tasmania and South Australia have, based on the Information Commissioner model, given their Ombudsmen determinative powers in relation to FOI without creating a separate statutory office of

377 QIC, first submission no 56 at para B145.
378 EARC, *Review of Appeals from Administrative Decisions*, n 350; PCEAR, *Review of Appeals from Administrative Decisions*, n 351.
379 EARC FOI report, n 19 at para 17.26.
380 PCEAR FOI report, n 20 at para 3.11.4.

'Information Commissioner'.[381] Similarly, the New Zealand Ombudsmen, in addition to fulfilling the traditional Ombudsman role, act as external reviewers under New Zealand's FOI legislation. A recommendation made by an Ombudsman regarding the release of official information *becomes* binding on the agency after 21 working days unless the Governor-in-Council by Order-in-Council otherwise directs.[382]

In contrast, the Western Australian Information Commissioner is entirely separate from that state's Ombudsman.[383]

EARC did not support the conferral of determinative powers on the Ombudsman merely to effect an external review function for FOI legislation. EARC was concerned that such a conferral might alter the status of the Ombudsman and prejudice the manner in which government agencies deal with the Ombudsman in respect of that office's general jurisdiction.[384]

In response to the strategic management review recommendation that the possibility of fully integrating the review roles of the Ombudsman and Information Commissioner be explored in the future,[385] the QIC stated that he did not believe there was any value in considering integration for the following reasons.

> *The Information Commissioner is a specialist tribunal with determinative powers in a specialised field of law. The work requires particular skills and expertise (eg, qualifications in mediation; legal research and decision-making to the standard required of tribunals under Australian law) and would be performed most efficiently and effectively by legally qualified staff who are dedicated to that specialist work.*
>
> *Worthwhile efficiencies are unlikely to be gained for either office by integrating this work with the broad range of administrative investigations across state and local government that are undertaken by the Ombudsman's Office, without ultimate determinative powers, and without the procedural framework of a tribunal geared to receive formal evidence and submissions from parties to a dispute, and produce formal decisions (when attempts at informal resolution do not succeed).*[386]

The committee agrees with EARC's and the QIC's comments. Given the different nature and focus of each office, it is inappropriate to vest the Ombudsman with the Information Commissioner's determinative review functions.

A final issue to note regarding the Information Commissioner model concerns appeals from that entity. Although there is no avenue of appeal from decisions of the QIC, an agency, minister or applicant dissatisfied with a decision of the commissioner can, in certain circumstances, seek judicial review under the *Judicial Review Act 1991* (Qld).[387] The committee believes that this is appropriate.

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381 See the Freedom of Information Acts of: Tasmania, s48 and South Australia, s39. Note that in SA, the Ombudsman is one of two avenues of external merits review. The other is an appeal to the District Court.

382 *Official Information Act 1982* (NZ), s 32(1)(a). See also s 32A. The New Zealand Law Commission considered the appropriateness of this procedure but did not recommend any substantive change: NZLC, n 39 at paras 345-382.

383 Note that the WA Law Reform Commission, in its October 1999 report, *Review of the Criminal and Civil Justice System* recommended that a new WA Civil and Administrative Tribunal be established with jurisdiction including the adjudicative functions of the FOI Commissioner.

384 EARC FOI report, n 19 at para 17.25.

385 Strategic management review report, n 7, volume 2 at 61-63, recommendation 25.

386 QIC's response to strategic management review recommendation 25 in the QIC's progress report on implementation of the strategic management review recommendations. This document was tabled as part of LCARC's *Progress report on implementation of recommendations made in the report of the strategic management review of the offices of the Queensland Ombudsman and the Information Commissioner*, report no 30, August 2001.

387 The QIC may also refer a question of law to the Supreme Court: s 97.

COMMITTEE FINDING 111—CONCLUSION

The Information Commissioner model of external review of decisions made under the Act should be retained.

8.2.2 The Ombudsman as Information Commissioner[388]

Section 61(2) provides that the Ombudsman is to be the Information Commissioner unless another person is appointed as Information Commissioner. Currently, the same person holds both offices.

A small number of submitters expressed concern about the offices of the Ombudsman and QIC being held by the same person, noting the potential conflict of interest when the QIC is required to review a decision of the Ombudsman regarding access to documents of that office.[389] Section 70(7) of the FOI Act—which provides that, if the Ombudsman is the QIC, staff of the Ombudsman's office are considered to be staff of the QIC—presumably adds to these concerns.

The Ombudsman has the following procedures in place to ensure that the Ombudsman takes no part in any applications made to the Ombudsman's Office under the FOI Act.

> *In such cases the primary decision is made by a fairly senior officer and if internal review is sought by the applicant that is determined by the relevant Deputy Ombudsman. If the applicant is still dissatisfied with the Deputy Ombudsman's decision on review, the applicant may appeal to me as Information Commissioner, but again in an appropriate case I can delegate to the Deputy Information Commissioner my decision making powers in relation to FOI applications involving the Ombudsman's Office.*[390]

The strategic management review considered the perceived conflict between the role and responsibilities of the Ombudsman and the QIC and concluded that *'past external reviews relating to decisions of the Ombudsman's Office appear to have been handled appropriately and there is currently insufficient information which would confirm any widespread view that there is a conflict of interest between the two roles*'.[391]

Despite the review's conclusion that there is no compelling evidence of an *actual* conflict of interest between the two roles, the committee is concerned about the *perception* that the two roles are not entirely independent.

Additionally, for the reasons noted in section 8.2.1 *Alternative models,* the committee is concerned about the appropriateness of the Ombudsman 'wearing two hats' given the different nature and focus of the roles of Ombudsman and Information Commissioner. In this regard, the committee notes that EARC's draft FOI bill did not contain an equivalent of s 61(2).

The committee believes that a separate, dedicated QIC should be appointed.

The strategic management review observed that currently the Deputy Information Commissioner has full management control and accountability for the QIC's office and that the Ombudsman/Information Commissioner does not play an active role in day to day matters within the Information Commissioner's office.[392] Given that the Deputy Information Commissioner is already an SES officer, separating the two offices should not involve substantial cost.

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388 Relevant submissions: 10, 17, 22, 52, 58, 79, 88, 98, 103, 113, 116, 119, 120, 128, 134, 138, 142, 147, 153, 154, 160, 161, 167 and 171.

389 Decisions of the QIC are not reviewable by the Ombudsman: s 107.

390 Queensland Ombudsman, *25th Annual Report 1998/99*, Brisbane, 1999 at 39.

391 Strategic management review report, n 7 at viii.

392 Strategic management review report, n 7 at 64.

In addition, in section 4.2.3 the committee recommends that the QIC's functions be expanded to incorporate a monitor, advice and awareness role. The conferral of such additional functions on the office further supports the appointment of a dedicated Information Commissioner.

In accordance with this conclusion, s 70(7) of the Act is inappropriate and should be repealed.

While the committee has no difficulty with the offices of the Ombudsman and Information Commissioner sharing corporate services for efficiency reasons, the offices should not share allocated funding and should therefore have separate budgets.

COMMITTEE FINDING 112—RECOMMENDATION

A person separate from the Ombudsman should be appointed as the Information Commissioner. As a result:

- s 61(2) should be repealed;
- s 70(7) should be repealed; and
- separate budgetary provision should be made for the Office of the Information Commissioner.

8.2.3 Ensuring the independence of the Information Commissioner[393]

Given that the QIC is, in effect, monitoring the executive arm of government, it is essential that the QIC's independence from government is maintained. In accordance with recommendations by EARC,[394] various provisions of the FOI Act operate to ensure the QIC's independence, primarily through links with, and accountability to, Parliament. The LCARC is the conduit through which much of this accountability occurs.

The provisions relating to the QIC's relationship with Parliament include requirements regarding: the QIC's appointment (where the QIC is the Ombudsman), suspension and removal; annual and other reports to Parliament; and strategic review of the QIC.[395] Further, as the office of the Ombudsman shares its allocated funding with the Office of the QIC, the requirement in s 88(3) of the *Ombudsman Act 2001* (Qld) that the Treasurer consult with the LCARC in developing the budget for the Ombudsman equally applies to the budget of the QIC.

Similar provisions apply in respect of the Ombudsman and Auditor-General. In this regard, the QIC might likewise be described as an 'officer of Parliament'.

While the committee believes that such provisions are entirely appropriate, as the Act is currently worded:

- if a separate person is appointed to the office of QIC, the LCARC has no role in relation to that officer's appointment, yet cross-party committee support is required in relation to that person's removal or suspension;[396] and
- the requirement that LCARC be consulted regarding the QIC's budget is implied by virtue of a shared budget allocation with the Ombudsman. If the Ombudsman and the QIC were to no longer share allocated funding, there is no provision for the LCARC to be involved in the development of the QIC's budget.

393 Relevant submissions: 1, 161 and 167.
394 EARC FOI report, n 19 at para 17.29.
395 See s 61(2), s 67(3)(c) and (d), s 101 and s 108A.
396 See s 67(3)(d).

Amendments to overcome these inconsistencies should be implemented. (Implementation of the committee's recommendation in section 8.2.2 regarding a separate QIC would make these amendments imperative.)

Further, the intent of the various provisions regarding the committee's relationship with the QIC should be expressed in a clear statement. Section 89 of the *Ombudsman Act*—which gives the committee a monitor, review and report role regarding the Ombudsman—provides an appropriate precedent in this regard.[397]

A final provision which relates to the QIC's independence is s 70 (Staff of commissioner) which provides that the *Public Service Act 1996* does not apply to the staff of the QIC. A similar provision applies to the staff of the Ombudsman.[398] These provisions are designed to ensure the independence of the office from the Office of Public Service which is within the jurisdiction of both agencies.[399]

COMMITTEE FINDING 113—RECOMMENDATION

The Act should:

- provide that cross-party support of the Legal, Constitutional and Administrative Review Committee is required in relation to the appointment of a separate Information Commissioner;
- provide that the Legal, Constitutional and Administrative Review Committee be consulted regarding development of the proposed budget of the Information Commissioner; and
- include a provision equivalent to the *Ombudsman Act 2001* (Qld), s 89 (Functions).

8.2.4 The Information Commissioner's approach[400]

The review terms of reference ask whether the method of 'review and decision' by the QIC is 'excessively legalistic and time-consuming'.

The 'review and decision' process adopted by the QIC involves the following steps.[401]

- An initial assessment where documents in issue are examined.
- An informal resolution stage where attempts are made to resolve issues informally. If a matter is not resolved, the QIC prepares a preliminary views letter.
- A preparation for decision stage where parties have the opportunity to lodge written submissions in support of their case.
- A final decision and publication stage.

Appendix G contains information regarding the QIC's caseload, staffing, timeliness and backlog which is relevant to the discussion below.

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397 Note, however, that the committee does not have jurisdiction to review, reconsider or investigate particular complaints: *Parliamentary Committees Act 1995* (Qld), s 10(2). This should remain the case.

398 *Ombudsman Act 2001* (Qld), s 76 (Officers).

399 An issue that has arisen as a result of this provision relates to staff access to grievance procedures. The Ombudsman has recently reviewed the office grievance policy as a result of comments in this regard in the strategic management review report, n 7, volume 1 at 99-100, recommendation 70, volume 2 at 56. See also the committee's report no 30, n 386.

400 Relevant submissions: 3, 8, 11, 15, 21, 24, 27, 28, 34, 39, 41, 42, 45, 46, 47, 50, 51, 54, 59, 61, 64, 66, 67, 69, 70, 73, 77, 79, 90, 92, 93, 98, 100A, 100B, 100C, 101, 102, 103, 104, 113, 115, 119, 124, 127, 128, 129, 132, 134, 135, 138, 142, 146, 147, 154, 157, 158, 159, 160, 161, 162, 163 and 164. QIC, first submission no 56 at paras B142-B143 and B151-B176. QIC, supplementary submission no 173 at 13-15 and 21-22.

401 For more information on the QIC's review handling processes see the QIC's first submission no 56 at para B144 and the strategic management review report, n 7, chapter 2 and attachment 1 of volume 2.

Legalism

EARC's focus on an informal and non-adversarial approach to determining external review applications is reflected in those provisions of the Act relating to the QIC's procedures and powers. Relevantly, s 72 gives the QIC a wide discretion regarding review procedures and requires proceedings to be '*conducted with as little formality and technicality, and with as much expedition, as the requirements of this Act and a proper consideration of the matters before the commissioner permits*'. Similarly, s 80 (Mediation) encourages the QIC to negotiate a settlement between parties.

However, the informality encouraged by the Act clearly does not exonerate the QIC from having due regard to common law procedural fairness obligations in conducting reviews.[402] In this regard, the QIC explained that, while every effort is made to resolve matters informally, a 'legalistic' approach is to some extent unavoidable as:

- in accordance with clear legal obligations, the QIC must ensure that his or her decisions adequately explain what legal principles apply and how;
- in judicial review proceedings, the failure by a tribunal to give adequate reasons for decision may constitute an error of law sufficient to warrant the court setting aside the tribunal's decision and remitting the matter to be decided again according to law;
- most cases which proceed to external review involve some of the more contentious and complex issues that arise and/or necessitate consultation with (numerous) third parties;
- participants in a review are entitled to have their dispute resolved according to proper legal standards and principles;
- the QIC's decisions are subject to supervision by the Supreme Court through judicial review and need to contain sufficient justification to withstand legal challenge; and
- the FOI Act is complex and there is not much scope to remove this complexity.

A substantial number of submitters who commented on the QIC's approach did not feel that it was too 'legalistic', predominantly because of the legal framework within which the QIC is required to work and the important precedent value of the QIC's decisions, especially for FOI decision-makers.

Others submitted that the QIC's approach was too legalistic with consequences that:

- applicants are often forced to seek legal assistance to respond to the QIC's request for legal arguments in support of their applications;
- the QIC's decisions are often too detailed and difficult to understand (especially for applicants); and
- the backlog was accordingly exacerbated. (The interrelated issue of timeliness is addressed below.)

There was considerable support in submissions (from those advocating both sides of the argument) for the QIC to:

- prepare guidelines, information papers and practice notes to assist agencies and applicants to understand, interpret and administer the Act;
- produce formal decisions that are more succinct, and written in 'plain-English'—as those produced by the Western Australian Information Commissioner and New Zealand Ombudsmen were characterised;
- publish a summary of each decision; and

[402] For example, s 83 (Conduct of reviews) requires the commissioner '*to adopt procedures that are fair having regard to the obligations of the commissioner under this Act*' and '*to ensure that each party has an opportunity to present the participant's views to the commissioner*'.

- publish the QIC 'letter' decisions which are handed down 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 QIC's formal decision series.[403]

The above comments raise a number of discrete issues.

Review processes: The committee endorses the design characteristics of the Information Commissioner model, namely, a speedy, cheap, informal and user-friendly means of review. By the same token, the QIC is a legal tribunal and, as such, it is unavoidable that the office's processes involve a certain amount of legalism, requiring more formal procedures in complex cases.[404]

However, this does not mean that the QIC cannot and should not use informal dispute resolution approaches where possible. Section 80 (Mediation) clearly envisages this. The use of such processes also has a significant impact on timeliness.

In 1998/99, the QIC used informal dispute resolution in 90% of cases, resulting in 77% of cases being resolved by informal methods.[405] In 1999/00, 259 (or 74%) of the 352 applications received by the office were resolved without the need for a formal decision.[406] In 2000/01, this figure increased to 340 (or 86%) of the 396 applications finalised being resolved without the need for a formal decision.[407]

The strategic management review considered and made recommendations about a number of aspects of the office's review processes including greater use of early intervention and informal resolution strategies, and steps to simplify and use plain English in written communications. In a July 2001 progress report on implementation of these recommendations, the QIC advised that the office has developed numerous new strategies with respect to review processes.[408]

As noted in section 4.2.1 *The need for an independent FOI monitor*, the review also recommended that the FOI process could be significantly improved if the office was given legislative underpinning to establish advice, awareness and demand management strategies.[409]

Length and style of the QIC's decisions: The QIC's decisions provide authoritative guidance for FOI administrators on the correct interpretation and application of the Act's provisions.[410] Submitters[411] variously advised the committee that the QIC's decisions serve as a benchmark for FOI external review bodies in other jurisdictions and decisions of the QIC are regularly cited by other FOI decision-makers, a fact which further attests to their quality. The QIC was described as a decision-maker of international repute, and his decisions as 'mini-textbooks'.

Given the initial influx of cases to his office the QIC originally focused on producing a series of 'leading' cases which dealt in detail with the interpretation of key provisions of the Act. The QIC's objective, to clearly establish principles for FOI administrators and expedite subsequent, similar cases,

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403 The formal decision series is edited by Mr Bill Lane, Senior Lecturer in Law, and published in hard copy as the *Queensland Administrative Reports*. They are also available through the AUSTLII website at <http://www.austlii.edu.au>.

404 EARC also specifically recognised this: EARC FOI report, n 19 at paras 17.33-17.45.

405 QIC, *1998/99 Annual Report*, n 60 at para 2.11.

406 QIC, *1999/00 Annual Report*, n 60 at 3. For further information on what 'informal resolution' entails see the strategic management review report, n 7, volume 2 at 25.

407 QIC, *2000/01 Annual Report*, n 60 at ii.

408 See LCARC, report no 30, n 386 at 3.

409 Strategic management review report, n 7 at 38-41, recommendation 12.

410 The QIC considers that this is one of the most important functions of his office: QIC, *1998/99 Annual Report*, n 60 at paras 2.6-2.13.

411 Mr B Lane, Senior Lecturer in Law, QUT, submission no 147, M McDonagh, Lecturer in Law, University College Cork, Ireland, submission no 11 and Ms M Campbell, submission no 34.

appears to have been successful.[412] (Of course, any substantial amendments to the Act as a result of this committee's inquiry will detract somewhat from the stated goal of this approach.)

The QIC has also recently put in place a number of measures to make his decisions more reader-friendly. The QIC has commenced putting a brief plain English summary of the outcome of each letter decision at the start of letter decisions, and publishing these summaries on the QIC's website. The QIC is also preparing a plain English summary of published decisions at the time the decision is made, for provision to the participants and publication on the Internet.

If practice guidelines are developed (discussed below), the need for in depth consideration of specific provisions in decisions should be further minimised.

Practice guidelines: The committee considers that there is a need for practice guidelines to assist agencies and applicants to understand, interpret and administer the Act.[413] The QIC advised that a number of priority issues for development of practice guidelines—which give in-depth consideration to individual exemption provisions and are aimed at FOI coordinators and staff of the QIC—have been identified, and that a number of draft guidelines are in the process of being developed. However, the QIC stated that this is seen as a long-term goal which would be best finalised by whatever unit is resourced to carry out an FOI advice and awareness role.[414]

The QIC has commenced preparing a series of plain English information sheets covering some of the most frequently encountered areas of dispute under the Act such as fees and charges, the personal affairs exemption, missing documents etc. These information sheets are posted on the Internet and sent to applicants where relevant.

While the committee commends the QIC on the publication of the information sheets, the committee agrees that the development of more detailed practice guidelines needs to be integrated into a wider FOI advice and awareness strategy, a matter which the committee canvasses in section 4.2.1 *The need for an independent FOI monitor.*

Accessibility of QIC decisions: The QIC's website now includes formal decisions and summaries of those decisions together with summaries of letter decisions. (In his supplementary submission the QIC stated that given the highly repetitive nature of letter decisions, the resource costs would not justify posting them in full on the office's website.)

The QIC's website is currently hosted by the State Library of Queensland. The domain name is <www.slq.qld.gov.au/infocomm>. The committee encourages the QIC to explore the advantages of the office having its own website and domain name. A more logical web address should make it easier for persons to locate the website. While there might be initial set up and ongoing costs, other benefits might include more timely and cost effective uploading of decisions, a more effective search facility, and the availability of more space.

The publication of all QIC decisions to the extent that confidentiality allows (including all letter decisions) would be consistent with the committee's recommendation in section 4.3 *Greater disclosure outside the Act* that agencies routinely publish as much information as possible.

It was suggested that the Act contain an equivalent to s 76(8) of WA's FOI Act which provides that the WA Information Commissioner *'has to arrange to have his or her decisions published in full or in an abbreviated, summary or note form whichever is appropriate in order to ensure that the public is*

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412 See submission no 147, Mr Bill Lane (editor of Queensland Administrative Reports) who noted '*that the more recent published decisions constitute, for the most part, succinct applications of the pre-existing principles established in the 'foundation' cases*'.

413 The strategic management review recommended that the QIC develop and introduce such practice guidelines: n 7, volume 2 at 31 and recommendation 6.

414 QIC's response to strategic management review recommendation 6 in the QIC's progress report on implementation of the strategic management review recommendations. This document was tabled as part of LCARC report no 30, n 386.

adequately informed of the grounds on which such decisions are made'. [Currently, the FOI Act provides that the QIC *may* publish his or her decisions: s 89(5).]

While the QIC is currently publishing his decisions in one form or another, the committee believes that there is merit in such a provision to ensure that the practice is continued despite changes in the person holding the office. The committee reiterates that it does not believe that this provision should require the QIC to divulge the identity of a person where it is inappropriate to do so.

Timeliness

The QIC's office has experienced substantial delays in finalising external review applications. Timely access to information is critical to effective FOI legislation. Currency of information is often imperative. Further, if external review is slow, there is a risk that the external review process is open to abuse as a means of delaying the release of information.

A number of factors in isolation and combination appear to have impacted on the QIC's timeliness.

Backlog and caseload: The QIC submitted that the delays in the QIC's office are due to the backlog which arose because of the unexpectedly high demand for external review in the early years of operation of the Act and initial under-resourcing of the office, but that the resourcing of the office has since been addressed by additional funding. This was supported by the strategic management review.[415]

At productivity levels of March 2000, the strategic management review anticipated a progressive elimination of the backlog to an acceptable number of cases on hand over a period of 28 months (assuming resource levels, intake numbers and office procedures remain the same).

As at June 2000, the office was achieving a closure rate of 76% of matters within twelve months of receipt. The office has a goal of closing 90% of cases within twelve months. The review considered there are encouraging signs that timeliness within the Office is improving, and changes to the approach of the office as recommended by the review should assist the office to resolve 100% of matters within 12 months, with an average resolution time of less than 100 days. These timelines are similar to those in other jurisdictions.[416]

In 2000/2001, the average time to close appeals in the office was 185 days with 55% of cases finalised in 2000/2001 closed within 3 months, 71% closed within 6 months and 80% closed within 9 months.[417] This represented a significant improvement on closure rates for 1999/2000.

This improvement in closure rates should be viewed in light of demand for the QIC's services. Since 1998/99, there has been a noticeable increase in the number of new appeals received by the office: see table G.2 in **appendix G.** The number of new appeals received in 2000/2001 represented a 15% increase in demand for the services of the office.[418] This is consistent with increased usage of the Act: see table D.1 in **appendix D**.

It is difficult to assess at this stage the impact that the November 2001 amendments to the Act might have on the office. The introduction of processing charges might reduce the number of initial FOI applications and hence the number of external review applications. More likely, however, there might be more external review applications concerning disputes over matters such as:

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415 The terms of reference for the strategic management review specifically required the reviewers to assess the extent to which delays in the office are resource based or dependent on other factors such as management and other practices used in the office.

416 In 1998/99, the average resolution time in Western Australia was 41 days, and in New Zealand was 73 working days: strategic management review report, n 7 at iv and 18 (Table 2.6).

417 QIC, *2000/01 Annual Report*, n 60 at ii, and further information provided by the Office of the Information Commissioner to the committee.

418 QIC, *2000/01 Annual Report*, n 60 at i.

- the reasonableness of the time taken by an agency or minister to process an application;
- the amount of a charge; and
- whether documents relate to an applicant's personal affairs given that no processing charge applies to such documents.

Legislative requirements: The QIC considers that legislative differences between Queensland and other jurisdictions are a factor which result in additional workload for the QIC and must be taken into account in assessing timeliness.[419]

A number of the committee's recommendations for legislative change should assist in reducing demand and hence improving timeliness in the QIC's office. For example, the committee has recommended that: agencies and applicants be able to agree upon matters including extensions of time (see sections 6.2.2 *Negotiation* and 6.5.5 *Extension by agreement between the parties)* and the QIC have a discretion as to whether to notify a third party of an external review (see section 8.4.2 *Obligation of the Information Commissioner to notify:* s 74.

Any move to impose external review fees (although not recommended by the committee: see section 9.7) would also be likely to reduce demand.

Office processes and practices: The strategic management review recognised that legislation, the number of applications received and backlog, the number of staff, and overall caseloads have major impacts on average closure times in the office. However, the review concluded that office approaches, processes and practices also have a significant impact on productivity levels and on average resolution times. Consequently, the review recommended a number of strategies aimed at improving response times. The QIC is in the process of implementing many of these recommendations.[420]

Resources: The office gained a significant boost in resources in 1998/99 which led to additional staff being engaged in 1999. The strategic management review essentially recommended maintenance of current office resource levels.[421]

Given that the QIC (an officer of the Parliament) is scrutinising the Executive government and to avoid any allegation that the Executive is attempting to hinder the QIC in performing that role by a reduction in resources, it is important that the requirement for a parliamentary committee (currently this committee) to be consulted in the development of the office's budget be maintained: see section 8.2.3 *Ensuring the independence of the Information Commissioner.*

Conclusion: The committee is most concerned that the backlog in the QIC's office is cleared and that the QIC deals with external reviews more expeditiously. Similarly, the QIC has stated his genuine concern to improve performance in terms of timeliness.[422] By the same token, greater speed must not come at the expense of a lack of due consideration of all matters pertinent to a review application and/or incorrect decisions. The implementation of recommendations of the strategic management review, in conjunction with recommendations for legislative amendment in this report, should improve timeliness without jeopardising the accuracy or quality of decisions.

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419 Strategic management review report, n 7, volume 2 at 19. See also attachment 5 which contains the QIC's analysis of the relevant provisions in Western Australia and their impact.

420 See LCARC report no 30, n 386.

421 This is implicit in the discussion in chapter 9 of the strategic management review report, n 7.

422 Strategic management review report, n 7, volume 2, QIC's response at para 16.

COMMITTEE FINDING 114—RECOMMENDATION

The Information Commissioner should:

- continually review office approaches, processes and practices in order to balance the need for legal precision with requirements for timely and responsive service;
- in this regard, continue to use informal dispute resolution mechanisms to the greatest extent possible in investigating external review applications; and
- in those cases where a formal decision is required, produce succinct, reader-friendly decisions which are easily accessible by agencies and the community.

COMMITTEE FINDING 115—RECOMMENDATION

The Act should provide that the Information Commissioner must arrange to have *all* of his or her decisions published in full or in an abbreviated, summary or note form, whichever is appropriate, in order to ensure that the public is adequately informed of the grounds on which such decisions are made.

COMMITTEE FINDING 116—RECOMMENDATION

The Information Commissioner should explore the advantages of the office having its own Internet website and domain name.

8.2.5 Power of the Information Commissioner not to review: s 77[423]

Section 77(1) of the Act enables the QIC to decide not to review, or not to review further, a decision in relation to which an application has been made for external review, if the QIC is satisfied that the application is 'frivolous, vexatious, misconceived or lacking in substance'.

The phrase 'frivolous, vexatious, misconceived or lacking in substance' is used in a number of Queensland statutes. Individual and various combinations of terms from that phrase are used in many other Acts and regulations.

In the context of external review applications, the QIC has referred to 'frivolous' as meaning 'of little weight or importance, paltry, manifestly futile, given to trifling' (taken from the *Shorter Oxford English Dictionary*, 1983),[424] and 'vexatious' as referring to a claim instituted without sufficient ground, for the purpose of causing trouble or annoyance to the defendant.[425] The phrase 'misconceived or lacking in substance' refers to a range of applications and can include those based on a mistaken understanding or belief.[426]

The QIC has used s 77(1) in the following cases.

- Where an applicant sought to pursue concurrent applications for review in respect of identical documents in the possession of the one agency.
- Where an applicant sought, by way of external review of an amendment application, to have the QIC revisit findings of fact made by a Magistrate in convicting the applicant: something which the QIC is legally bound not to do.

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423 Relevant submissions: 28 and 155. QIC, first submission no 56 at paras C111-C114. See also the current Information Commissioner's letter dated 29 November 2001.

424 Letter decision 13/98: "JAC" and Queensland Transport, October 1999.

425 *Re Hearl and Mulgrave Shire Council* (1994) 1 QAR 557 at para 36. The QIC notes in that decision that the Federal Court of Australia has approved of this meaning in a comparably similar context.

426 See for example, *Re Jennings and Department of Justice and Attorney-General* (1994) 2 QAR 219.

- Where an application was made to the wrong agency on the basis of a misunderstanding of federal/state responsibilities.
- Where an applicant sought to obtain answers to questions asked of an agency, a right not conferred by the FOI Act (the Act confers persons with a right to access documents).
- Where an application related to documents previously disclosed to an applicant or dealt with on external review and found to be exempt.

The committee believes that the QIC should retain the power to refuse to process certain external review applications. It is important that the minority of applicants who use the external review process for questionable purposes do not unreasonably divert resources away from other review applicants (whose matters are consequently delayed), agencies (whose resources are consumed at all stages of the FOI process), and the community as a whole (given the competing needs of other agencies and programs).

Further, the various mechanisms available to agencies as a basis for refusing to deal with applications—such as s 28(2) and the committee's proposed 'serial applications' provision: see section 6.12—are not available to the QIC. The fact that the QIC is an independent officer who publishes his decisions safeguards against abuse of the power.

It was suggested to the committee that the QIC has interpreted s 77(1) too narrowly and/or was reluctant to exercise the power. The strategic management review also suggested that one way the QIC could be more active in managing demand was careful consideration of applications to determine whether they could be rejected under s 77(1). The review noted that over the past three years, in only 1% of applications received (seven matters in total), has a decision been made not to review a decision on these grounds. The review made the following comment:

> *The Review team discussed this issue at length with the Deputy Information Commissioner, as repetitive high volume applicants exploiting legislation for questionable purposes, such as personal vendettas against public officials, contribute disproportionately to Office workloads. The Deputy is firmly of the opinion that the current legislation cannot be used to remove this 10-15% of the Office workload. The Review team questions whether greater use could be made of this provision, but if not, then there is a need for possible legislative amendments to be raised with the [Attorney-General and LCARC].*[427]

The QIC acknowledged the argument that eliminating legal obligations which circumscribe the exercise of the statutory discretion conferred by s 77(1) would improve the economy and efficiency of the QIC. However, the QIC also stressed that Parliament and the courts have put such obligations in place in order to strike some delicate balances aimed at protecting the rights or interests of individual applicants, agencies and third parties. The QIC therefore considers legislative amendment is required if a wider interpretation of s 77(1) is deemed necessary.[428]

There should not be any legislative amendment to enable a wider interpretation of s 77(1). To do so runs the risk of inappropriately curtailing the rights of legitimate individual applicants. The above examples represent, in the committee's opinion, an appropriate use of the provision.

The committee is concerned as to connotations associated with, in particular, the word 'vexatious' and the tendency by some to readily label an applicant as vexatious rather than individually assessing their applications. Accordingly, the committee considered whether the phrase 'frivolous, vexatious, misconceived or lacking in substance' should be amended. As noted above, the phrase and variations of it are commonly used in Queensland legislation. To change the phrase would result in the loss of consistency and precedents on interpretation.

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427 Strategic management review report, n 7, volume 2 at 27. Recommendation 5 of the review was that demand management strategies (including legislative options canvassed with the Attorney-General and with LCARC) be actively pursued to minimise the number of successful applications for external review.

428 Strategic management review report, n 7, volume 2, QIC's response at paras 19-21.

The QIC's suggested amendments to s 77

The QIC suggested two amendments to s77 and included proposed drafting for an amended s 77 in his submission.

Firstly, the QIC recommended that s 77(1) be amended to make clear that the QIC is entitled to invoke s 77(1) in respect of *part* only of the subject-matter of an application for review. The QIC stated:

> *As presently drafted, ss.77(1) and (2) employ inconsistent wording, which should be eliminated. Section 77(1) states that I can decide not to review or not to review further "*if satisfied that the application is frivolous etc*". Section 77(2) refers to the Information Commissioner deciding not to review "*a matter to which an application relates".

Secondly, the QIC recommended that s 77 empower the QIC to decide not to review, or not to review further, for 'want of prosecution' on the part of an applicant for review. 'Want of prosecution' would include circumstances where the external review applicant fails to take action to progress the external review, fails to comply with directions of the Information Commissioner or fails to notify a current address for an unreasonable length of time.

Failure by parties to take necessary action to progress external review delays the time in which external reviews are resolved. This is particularly significant in the case of 'reverse FOI applications', where an external review applicant can delay access to information that an agency has decided to release.

The committee has no objection to either of the amendments proposed by the QIC. In particular, external reviews should not be delayed because applicants fail to take action which would progress a review. It is contrary to the spirit of the Act for applicants, especially reverse FOI applicants, to simply delay access to documents which an agency has decided to release. Implementation of this recommendation might require consequential amendment to s89 (Decisions of commissioner) to refer to cases where the QIC decides not to review further a decision to which an application for review relates.

COMMITTEE FINDING 117—RECOMMENDATION

Section 77 (Commissioner may decide not to review) should:

- make it clear that the Information Commissioner is entitled to invoke s77(1) in respect of part only of the subject-matter of an application for review; and
- empower the Commissioner to decide not to review, or not to review further, for 'want of prosecution' on the part of an applicant for review.

8.2.6 A time limit on the Information Commissioner[429]

The committee has considered the suggestion that a time limit should be imposed on the QIC to finalise a review (as is the case with original decision-makers and internal reviewers).[430] Suggested advantages to such a time limit included: encouraging office efficiency, reducing any overly legalistic tendencies, and forcing a more client-focused approach. Time limits for review bodies currently exist in Western Australia and Tasmania.[431]

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[429] Relevant submissions: 1, 45, 46, 50, 52, 54, 59, 66, 69, 87, 100A, 100C, 104, 106, 113, 119, 122, 124, 125, 127, 128, 134, 135, 138, 142, 147, 154, 158, 160, 161 and 162. QIC, supplementary submission no 173 at 15-18.

[430] Suggested time limits were in the range of 60 days to 1 year.

[431] In Western Australia the limit is within 30 days unless the commissioner considers that it is impracticable to do so: FOI Act (WA), s 76(3). In Tasmania, the time limit is within 30 days or such further period as may be agreed by the applicant: FOI Act (Tas), s48(6). Although the Tasmanian Legislative Council Select Committee on

In his supplementary submission the QIC made the following comments regarding a statutory time limit on his office.

- Statutory time limits do not work, unless resources sufficient to provide the relevant service within the specified time limit are available.
- The statutory time limit imposed on the WA Information Commissioner does not work because it is grossly unrealistic 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.
- Application of the exemption provisions, especially where there are third party interests involved, can be complex and many agencies, struggling to meet their time limits for primary decision-making, simply do not have the capability to do the job properly. There has to be one place in the system where applicants can go to obtain a full and fair hearing and assessment of their cases.
- If an unrealistic statutory time limit is set, it will tend to bring the law, as well as the tribunal, into disrepute.
- Imposing a statutory time limit for every case would mean: loss of flexibility; reduction of quality of decisions; reduced capacity to provide personalised service, particularly for unrepresented applicants; and greater resources being applied to applicants depending on how many applications they have lodged.

The committee does not support a time limit on the QIC. There is no evidence that forcing each case to be dealt with within a single timeframe produces efficient or effective resolution of disputes. Nor does such an approach allow consideration of each case according to its circumstances (which is important given that often it is the more difficult matters which proceed to external review). The New Zealand Law Commission, in rejecting a similar proposal for New Zealand, also noted that bodies set up to independently resolve disputes are very rarely subject to such obligations, and there would be difficulties in finding an appropriate sanction for non-compliance.[432]

A more effective approach to ensuring timeliness can be achieved by establishing: (a) realistic targets; (b) internal and external performance indicators regarding timeliness; and (c) appropriate case management strategies. As discussed in section 8.2.4 *The Information Commissioner's approach*, the QIC has implemented, or is in the process of implementing, a number of strategic management review recommendations in this regard.

In those cases where there has been significant delay, the *Judicial Review Act 1991* (Qld), s22(1) provides a mechanism whereby a person can apply to the Supreme Court for a statutory order of review on the ground that there has been a failure to make a decision.

The committee is also opposed to the suggestion made in some submissions that the QIC deal with all applications for review in strict order of receipt. As the QIC pointed out in his supplementary submission, active case management involves allocating different priorities to different cases. In particular, the QIC applies the logic that priority is given to cases where a person has been refused access to that which it appears the person is entitled, in preference to cases where a person has quite properly been refused access. Resolving cases in strict order of receipt would not allow this to occur.

COMMITTEE FINDING 118—CONCLUSION

There should be no statutory time limit imposed on the Information Commissioner for determination of external review applications.

Freedom of Information found that this period was impractical and recommended that it be extended to 60 days: n 29 at para 6.4.

[432] NZLC, n 39 at para 343.

COMMITTEE FINDING 119—CONCLUSION

There should be no statutory requirement that the Information Commissioner deal with applications for review in strict date order of receipt.

8.3 THE INFORMATION COMMISSIONER'S JURISDICTION

Section 71(1) provides that the functions of the QIC are to investigate and review certain specified decisions of agencies and ministers.

In section 7.3.2 the committee recommends that s 71 expressly enable applicants to seek external review:

- where an agency decides that it, or some of its functions or activities, are excluded from the application of the Act either by the FOI Act or another Act; or
- where an entity decides that it is not an agency for the purposes of the Act.

Below, the committee recommends further amendments to s 71(1). The committee leaves it as a matter for the Attorney-General to consider, in conjunction with Parliamentary Counsel, as to whether the drafting of s 71(1) could be simplified.

8.3.1 Decisions made under s 35[433]

The QIC submitted that Part 5 of the FOI Act does not make adequate provision for review of decisions invoking a s35 'neither confirm nor deny' response. (See section 10.6 for further discussion on s 35.) In *Re 'EST' and Department of Family Services and Aboriginal and Islander Affairs*[434] the QIC recommended that the legislative scheme for external review of decisions to invoke s35 of the FOI Act needs amendment in several respects.

Firstly, the QIC stated that it would make for fairer review under Part 5 of the Act if the QIC had the power, in certain circumstances, to inform an applicant that the requested document exists and allow the applicant an opportunity to argue the merits of whether access should be granted. The QIC would be able to exercise this power if, for example, the QIC was satisfied that no harm could be caused by disclosure of the existence of a requested document.[435]

In section 10.6.2 the committee recommends that a second test be included in s 35 to ensure that the provision is only used in circumstances where disclosure of information as to the existence of the relevant document would cause the harm which the exemption provision seeks to avoid. The committee considers that the application of s 35, including this additional test, should be subject to merits review by the QIC. This falls short of giving the QIC discretion to disclose information about the existence of the document, as suggested by the QIC. However, the committee considers that its proposal is sufficient to ensure that s 35 is only applied in appropriate circumstances.

Secondly, the QIC noted that the present legislative scheme only works satisfactorily where an agency or minister has correctly invoked s 35, and the outcome of a review under Part 5 is to affirm the decision under review. The QIC believes that adequate provision has not been made for the situations where the agency was not entitled to invoke s 35 either because:

- a requested document, which exists, does not contain exempt matter under ss 36, 37 or 42; or
- a requested document which does not exist, would not (if it did exist) contain exempt matter under ss 36, 37 or 42.

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433 QIC, first submission no 56 at paras C100-C102.

434 *Re EST and Department of Families Services and Aboriginal and Islander Affairs* (1995) 2 QAR 645.

435 *Re EST and Department of Families Services and Aboriginal and Islander Affairs* (1995) 2 QAR 645 at para 16.

On the QIC's interpretation, the most a successful applicant can be told is that the QIC has decided that, if a document of the kind to which the applicant has requested access exists, it would not contain exempt matter under ss 36, 37 or 42. The terms of s87(2)(a) prevent an applicant being informed of the details of the outcome of a review which is in the applicant's favour. The scheme of the Act is silent as to what should happen next to enable the applicant to obtain the benefits of a successful application for review.[436] The QIC recommended that this problem could be overcome by amending s 89 of the Act to give the QIC power, when a decision under review is set aside, to give directions to the respondent agency or minister.[437]

Thirdly, s 89 of the Act requires the QIC to give reasons for his or her decisions, a copy of which must be given to each participant. The QIC noted that it is likely to be impractical to give a sensible account of the reasons for holding that a document, which does in fact exist, does not contain exempt matter under ss 36, 37 or 42, while complying with the requirement not to include any information as to the existence or non-existence of the requested document. However, the QIC believes that it would assist both the respondent and a court exercising judicial review to have a full account of the QIC's decision in such cases.

To overcome this problem, the QIC recommended that, following a successful application for review of a decision to invoke a s 35 response in respect of a document that does in fact exist, the QIC prepare reasons for decision which acknowledge the existence of, and directly address the exempt status of, the requested document. Those reasons should be delivered to the respondent, and if the respondent does not commence a judicial review application of the QIC's decision within 28 days, the reasons should then be delivered to the applicant.[438]

It is common sense that if the QIC determines that, as a question of law, material does not fall within s 35, either because it is not exempt, or because it is not exempt under ss 36, 37 or 42, then the applicant should be entitled to be advised of the existence of the document and either why it is exempt or, if the material is not exempt, then the applicant should be given access to the document as the applicant would be if the agency had not claimed that s35 applied. The QIC's proposal not to give detailed reasons to the applicant until the minister or agency has had an opportunity to seek judicial review provides appropriate safeguards.

COMMITTEE FINDING 120—RECOMMENDATION

Part 5 (External review of decisions) should make provision for circumstances where an applicant has been successful at the external review level in challenging an agency decision to invoke s 35 by:

- in the case of a *successful* application for review of a decision to invoke a s 35 response in respect of a document that does in fact exist, requiring the Information Commissioner to prepare reasons for the Commissioner's decision which acknowledge the existence of, and directly address the exempt status of, the requested document. Those reasons should be required to be delivered to the respondent agency or minister and, if the respondent does not make an application for judicial review of the Commissioner's decision within 28 days, the reasons should then be delivered to the applicant; and
- empowering the Commissioner to give appropriate directions to the respondent agency or minister subject to a similar proviso that the agency or minister not be required to implement the directions unless 28 days have elapsed and the agency or minister has not made an application for judicial review.

The Attorney-General should consult the Information Commissioner in drafting appropriate amending provisions.

436 *Re EST and Department of Families Services and Aboriginal and Islander Affairs* (1995) 2 QAR 645 at para 24.
437 *Re EST and Department of Families Services and Aboriginal and Islander Affairs* (1995) 2 QAR 645 at para 25.
438 *Re EST and Department of Families Services and Aboriginal and Islander Affairs* (1995) 2 QAR 645 at para 27.

8.3.2 Form of access

Currently, the functions of the QIC, as set out in s 71, do not include reviewing decisions of agencies and ministers regarding the form of access to documents. The QIC recommended that s 71(1) be amended by adding a new category of decisions subject to investigation and review by the QIC, namely, *'decisions granting access to documents in a form other than that requested by the access applicant'*.[439]

The increasing use of a wide variety of information technologies in the delivery of government services is likely to result in more issues about the form of access granted by agencies and ministers to applicants. Further, the committee has recommended in section 6.13 that an agency should have a discretion as to the form in which it grants access to applicants, subject to certain limitations. Implementation of this recommendation would make review rights as to form of access imperative.

On this basis, the committee considers it appropriate that the QIC have jurisdiction to review disputes over the form of access to documents.

COMMITTEE FINDING 121—RECOMMENDATION

Section 71(1) should confer explicit jurisdiction on the Information Commissioner to review decisions regarding the form of access to documents.

8.3.3 'Sufficiency of search' cases[440]

The QIC has held that he has jurisdiction to review, and the power to give directions in relation to, the 'sufficiency of search' by an agency to locate a document to which access has been requested under the Act.[441] However, the QIC submitted that it is preferable, in the interests of applicants, that the Act explicitly confer jurisdiction in this regard.[442]

The committee has no objection to the QIC's submission. If the QIC does not have the power to review questions relating to the sufficiency of search for particular matter relevant to an application, there is potential for the objectives of the Act to be frustrated. Such a power is particularly important if a provision is included in the Act allowing access to be refused on the basis that documents cannot be found or do not exist as recommended in section 6.21.

COMMITTEE FINDING 122—RECOMMENDATION

Section 71(1) should confer explicit jurisdiction on the Information Commissioner to review a decision on the basis of an applicant's complaint that an agency or minister has not located and dealt with all documents in its possession or control which fall within the terms of the applicant's access application.

439 QIC, first submission no 56 at paras B129-B130.

440 Relevant submissions: 52 and 88. QIC, first submission no 56 at paras C103-C104.

441 *Re Smith and Administrative Services Department* (1993) 1 QAR 22; *Re Cannon and Australian Quality Egg Farms Limited* (1994) 1 QAR 491; and *Re Shepherd and Department of Housing, Local Government & Planning* (1994) 1 QAR 464.

442 The QIC also referred to appropriate models in s 26 of the Western Australian FOI Act, and s 55(1)(aa) and s 55(1)(ab) of the Commonwealth FOI Act.

8.3.4 When extension of time granted: s 79[443]

Section 79(2) allows the QIC to grant an agency or minister further time to deal with an application in certain prescribed circumstances. However, the Act does not seem to confer jurisdiction on the QIC in the case of a 'fresh deemed refusal', that is, where the QIC has granted an agency or minister further time to deal with an application under s79(2), but the agency or minister still has not determined the application within the further period of time allowed.

The committee agrees with the QIC[444] that the Act should make it clear that the QIC has jurisdiction to conduct a review on the basis of a fresh deemed refusal. Similarly, the QIC should have the jurisdiction to review deemed refusals where an agency or minister and applicant agree on an extended time frame in which to process an application and the agency or minister fails to process the application within the agreed time frame. This may occur under s 28A or as recommended by the committee in section 6.5.5 *Extension by agreement between the parties*. Appropriate amendments will ensure that in such circumstances applicants are not disadvantaged in terms of external review rights.

COMMITTEE FINDING 123—RECOMMENDATION

The Information Commissioner should have jurisdiction to conduct a review where:

- the Commissioner has granted an agency or minister further time to deal with an application under s 79(2), but the agency or minister still has not determined the application within the further period of time allowed;
- an agency or minister and applicant have agreed to an extended time frame within which to decide an application, but the agency or minister still has not determined the application within the further agreed time frame.

8.4 THE EXTERNAL REVIEW PROCESS

8.4.1 Time limits for lodging external review applications[445]

An application for external review—other than a 'reverse FOI' application—must be made within 60 days from the day on which written notice of the decision is given to the applicant. The time limit for lodging a 'reverse FOI' application for external review of a decision is 28 days. The QIC has the power to extend these periods: s 73(1)(d).

In the case of deemed refusals under s 27(4), there is no time limit as by definition no written notice is given to the applicant.

While a 60 day limit applies in all other Australian jurisdictions except the ACT (where it is 28 days), a number of submitters stated that the period to lodge non-reverse FOI applications should be reduced from 60 days to either 45 or 28 days. Reasons for this position included:

- many legislative provisions, including the *Judicial Review Act 1991* (Qld), impose a limit of 28 days in which to make an application for review;
- a limit of 28 days would ensure consistency with the time period for lodging applications for internal review and 'reverse FOI' external review applications; and
- the QIC would still be empowered under s73(1)(d) to allow an applicant further time to lodge an external review application.

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443 Relevant submissions: 67. QIC, first submission no 56 at paras C115-C117.

444 The QIC proposes amendments to s 79(1)(b) and s 73(3) to overcome the jurisdictional issue.

445 Relevant submissions: 28, 43, 66, 87, 106, 113, 119, 125, 127, 134, 135, 138, 142, 144, 150, 153, 154, 155, 160 and 171.

Reasons given by submitters opposed to this proposed reduction were: the need for applicants to have every opportunity to formulate an appropriate request for external review (which may involve seeking legal advice and having their legal representative research case law in the area and develop a proper submission); and potential disadvantage to applicants by removing their appeal rights.

On balance, the committee believes that 28 days should be sufficient time for a person to lodge an external review application. If an external review applicant requires additional time to formulate their argument or seek legal advice, they can lodge their application with advice that they propose to provide further submissions at a later stage. The QIC should also retain the discretion to allow an applicant additional time to lodge an application.

This would also ensure consistency (and hence reduce confusion) with time periods relating to: (a) lodging internal review applications; and (b) lodging applications for external review of 'reverse FOI' decisions.

COMMITTEE FINDING 124—RECOMMENDATION

The period within which persons may *lodge* (non-reverse FOI) external review applications pursuant to s 73(1)(d) should be reduced from 60 to 28 days.

8.4.2 Obligation of the Information Commissioner to notify: s 74[446]

Before starting an external review, the QIC *must* notify the applicant, the relevant agency or minister, and third persons who the QIC considers '*would be affected by the decision the subject of the review*': s 74(1).[447] The QIC is not obliged to inform a third person where the QIC believes that informing the person may cause them undue distress or otherwise adversely affect their physical or mental wellbeing: s 74(2).

The committee agrees with the QIC's submission[448] that s 74 should be amended to give the QIC a *discretion* regarding notification of third parties who might be affected by the decision as:

- there might be circumstances where the QIC is obliged to inform a third party of review proceedings that might affect them, but is unable because of other statutory obligations to provide information about the nature of the matter in dispute and how it might affect the third party (meaning that the third party cannot participate in the review proceedings in a meaningful way);
- before starting a review, the QIC can not be in a position to even consider (let alone taking any practical steps towards) giving notice to persons other than the applicant and relevant decision-maker; and
- it would assist in eliminating or reducing unnecessary delay, expense and inconvenience for participants and anxiety for others, if third parties were only given notice when it was apparent there was a real prospect that a decision adverse to their interests would be made.

Further, and as the QIC points out, procedural fairness requirements will ensure that affected parties are heard if the QIC proposes to make a decision adverse to their interests.

Granting the QIC such a discretion would enable repeal of s 74(2). However, the committee stresses that it is desirable that the QIC not consult with a third person where that is likely to cause that person undue distress or otherwise adversely affect their physical or mental wellbeing—for example, where it

446 QIC, first submission no 56 at paras C105-C106 and C120-C121.

447 This is a lower threshold than under s 51 which obliges agencies and ministers to consult third parties where disclosure may '*reasonably be expected to be of substantial concern*' to a third party.

448 The QIC's submission in turn refers to the QIC's comments in: QIC, *1992/93 Annual Report*, Brisbane 1993 at paras 4.12-4.15 and QIC, *1993/94 Annual Report*, Brisbane, 1994 at paras 2.20-2.26.

might result in re-victimising a victim of crime—unless there is a real prospect that a decision adverse to their interest will be made.

Implementation of this recommendation will require consequential amendments to s 83(5) and s 89(4).

COMMITTEE FINDING 125—RECOMMENDATION

Section 74 (Commissioner to notify) should provide that:

- before starting a review, the Information Commissioner must inform the applicant and the agency or minister concerned that the decision is to be reviewed; and
- the Commissioner *may* take such steps as are practicable to inform another person who the Commissioner considers could be affected by the decision the subject of the review, that the decision is to be reviewed.

8.4.3 Inspection of exempt documents by the Information Commissioner: s 76(1)[449]

Section 76(1) enables the QIC to obtain and inspect documents for the purpose of fulfilling the review function. However, the QIC has advised the committee that s76(1), as currently drafted, appears to unduly restrict the QIC's ability to access certain documents in fulfilling the review function. This is because the subsection only enables the QIC to inspect documents for two purposes, namely, to determine whether a document or matter is exempt, or whether a document is an 'official document of a minister'.[450]

The subsection does not cover other situations where the QIC might need to inspect documents in fulfilling the review function, for example, where the QIC wishes to determine whether:

- a document falls within the terms of an access application (under s 25);
- a fee or charge is properly payable;
- a document is 'a document of an agency'; and
- a document is excluded from the Act by virtue of s 11(1), s 11A or s 11B.

These difficulties should be overcome by amending s76(1) so that it refers to a non-exhaustive list of purposes for which the QIC might require production of a document or matter.

However, the QIC should not have the power to require production of a document or matter in certain, very limited circumstances. In section 11.11.4 *Intelligence and witness protection information* and section 11.21 *Matter disclosure of which would be contempt of Parliament: s 50(c),* the committee recommends that provision be made for conclusive certificates, which are not reviewable by the QIC, for particular types of documents.

COMMITTEE FINDING 126—RECOMMENDATION

Section 76(1) should empower the Information Commissioner to require the production of a document or matter for inspection for the purpose of enabling the Commissioner to determine matters *including*:

- whether a document or matter is exempt;
- if a document in the possession of a minister is claimed by the minister not to be 'an official document of the minister'—whether the document is 'an official document of the minister';

449 QIC, first submission no 56 at paras C107-C108.

450 The Deputy QIC later expanded on this submission in discussions with the committee's staff.

- whether a document is 'a document of an agency';
- whether a document falls within the terms of an access application (under s 25);
- whether a fee or charge is properly payable; and
- whether a document is excluded from the Act by s 11(1), s 11A or s 11B.

However, the Commissioner should not be empowered to require the production of a document or matter for inspection where the document or matter is subject to a conclusive certificate which is not reviewable by the Commissioner: see section 11.11.4 *Intelligence and witness protection information* and section 11.21 *Matter disclosure of which would be contempt of Parliament: s 50(c).*

8.4.4 Disclosure of exempt documents by the Information Commissioner: s 76(2)[451]

Section 76(2)(a) of the Act provides that the QIC must not disclose information produced for inspection under subsection (1) to a person other than a staff member of the commissioner.

The QIC points out that s 76(2), if applied literally, prevents the commissioner's staff from forwarding to a third party a copy of a document which that party originally provided to an agency and from even discussing the contents of the document with the person. Because this causes enormous practical problems in the conduct of a review, the QIC proposes that the following words be inserted at the end of s 76(2)(a) '*…staff, or to a person to whom it is necessary to disclose the document or matter for the purposes of the conduct of a review under this Part*'.

The committee has no in principle objection to the QIC's proposed amendment. It accords with procedural fairness that a third party notified of a review should have an opportunity to be heard in relation to a review which affects them. This would require that copies of the documents in issue be provided to that third party. However, the amended provision should be carefully drafted to ensure that its purpose as a confidentiality provision is not undermined.

COMMITTEE FINDING 127—RECOMMENDATION

Section 76(2)(a) should empower the Information Commissioner, where the Commissioner believes it is necessary in the interests of procedural fairness, to disclose documents or matter produced to the Commissioner under s 76(1) to a person for the purpose of the conduct of an external review.

8.4.5 'Reverse FOI' applications: s 81[452]

Section 81 of the Act provides that, on review, the agency or minister who made the decision under review has the onus of establishing that the decision was justified.

The committee supports a submission by the QIC[453] that it is consistent with the object of the Act that the party which asserts that documents in issue are exempt should bear the onus of establishing its case. The QIC is concerned that the 'reverse FOI' procedures in the Act are capable of abuse by a third party asserting that documents are exempt merely for the purpose of delaying for as long as possible access by the original applicant for access.

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451 QIC, first submission no 56 at paras C109-C110 and the QIC's comments in his *1993/94 Annual Report*, n 448 at paras 2.27-2.29.

452 Relevant submissions: 66, 67 and 87. QIC, first submission no 56 at paras C118-C119.

453 See also QIC's *1993/94 Annual Report*, n 448 at paras 2.30-2.31.

Efforts should be made to discourage those who wish merely to delay the release of documents for as long as possible. Placing the responsibility of presenting a case on the party who asserts that the documents in issue are exempt might go some way in having this deterrent effect. Even where the applicant in a reverse FOI application has a legitimate case to argue, it is difficult to see any justification for imposing on an agency or minister who has decided in favour of giving access to documents the responsibility of establishing that documents in issue are not exempt. In fact, it is more logical that the third party whose interests stand to be affected by disclosure should be required to argue the case for exemption.

The proposal might lead to resource savings for agencies and would bring the Queensland FOI Act into line with Commonwealth and Western Australian FOI legislation.[454]

COMMITTEE FINDING 128—RECOMMENDATION

Section 81 (Onus to lie with agencies and ministers) should be amended so that in a 'reverse FOI' application, the applicant bears the responsibility of establishing that the matter which the relevant agency or minister has decided to disclose is exempt matter.

8.4.6 Commissioner to ensure non-disclosure of certain matter: s 87[455]

Section 87(1) requires the QIC not to disclose 'exempt matter' or information of the kind mentioned in s 35 (that is, information as to the existence or non-existence of a document containing matter that would be exempt matter under s 36, s 37 or s 42, where the agency has invoked a 'neither confirm nor deny' response).

The QIC recommended that s 87 be amended to:

- refer to matter 'claimed to be exempt' rather than 'exempt matter' so that the right of agencies or third parties to seek judicial review of decisions of the QIC is preserved;
- reflect that the object of the provision is to prevent disclosure to 'a participant (or to the representative of a participant)' whose right of access to information is in issue because currently s 87(1) is unsuitable in the case of 'reverse-FOI' applicants; and
- repeal s 87(3) as it is otiose.[456]

These proposed amendments are largely technical and the committee has no difficulty with them.

COMMITTEE FINDING 129—RECOMMENDATION

Section 87(1) should: (a) apply to matter 'claimed to be exempt'; and (b) reflect that its object is to prevent disclosure to 'a participant (or the representative of a participant)' whose right of access to matter is in issue.

Section 87(3) should be repealed.

454 See the Freedom of Information Acts of: the Commonwealth, s 61(2) and Western Australia, s 102(2).
455 QIC, first submission no 56 at paras C124-C129.
456 The QIC included an amended s 87(1) in his submission.

8.5 THE INFORMATION COMMISSIONER'S POWERS

8.5.1 Review of conclusive certificates: s 84[457]

The exemptions in s36 (Cabinet matter), s37 (Executive Council matter) and s42 (Matter relating to law enforcement or public safety) enable the minister responsible for the FOI Act to sign a conclusive certificate certifying that matter that has been requested is of a kind mentioned in the exemption category. Such a certificate establishes that the matter is exempt.

External review of the issue is considerably narrowed. The QIC cannot review a decision to issue a conclusive certificate; the QIC can only determine whether reasonable grounds existed for the issuing of the certificate: s84. This means the QIC's power of review in the case of conclusive certificates is limited to whether there are reasonable grounds for the claim made in the certificate that the matter is exempt under ss 36, 37 or 42.[458]

If the QIC determines that there were no reasonable grounds for issuing a certificate, then the certificate to which the QIC's decision relates ceases to have effect at the end of 28 days after the decision was made unless, before that time, the minister notifies the QIC in writing that the certificate is confirmed. Any such confirmation by the minister must be tabled in the Legislative Assembly and given to the applicant: s 84(3)-(4).

In section 10.7 *Conclusive certificates*, the committee recommends that provision for conclusive certificates be removed from s 36 and s 37. In section 11.11.4 *Intelligence and witness protection information* and section 11.21 *Matter disclosure of which would be contempt of Parliament: s 50(c),* the committee recommends that provision be made for conclusive certificates, which are not reviewable by the QIC, for particular types of documents.

Conclusive certificates should still be available in respect of s 42.

The committee does not propose amendment to the scope of the QIC's decision-making powers in relation to conclusive certificates given that:

- the committee is not aware of any widespread push for reform;
- the QIC does not make a case for expansion of his decision-making powers in relation to conclusive certificates as long as conclusive certificates continue to be confined to the sections they currently relate to;
- there is no evidence of abuse of conclusive certificates;[459] and
- the requirement that the Attorney-General notify the Legislative Assembly if he or she confirms a certificate contrary to the advice of the QIC imposes a considerable and sufficient discipline on ministers.[460]

However, the committee believes that s84 might be redrafted to make the QIC's power in relation to reviewing conclusive certificates clearer.

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457 Relevant submissions: 92, 113, 138, 142, 154, 160 and 162. QIC, supplementary submission no 173 at 9.

458 EARC FOI report, n 19 at paras 7.317-7.323.

459 The committee is not aware of any cases where a minister has confirmed a certificate following a decision by the QIC that there were no reasonable grounds for the issue of a certificate.

460 See ALRC/ARC review report which reached a similar conclusion: n 13 at para 8.19.

COMMITTEE FINDING 130—RECOMMENDATION

Section 84 (Review of minister's certificates) should make it clear that the Information Commissioner's power of review in the case of conclusive certificates is limited to whether there are reasonable grounds for the claim made in the certificate that matter is exempt under s 42.

(In section 10.7 *Conclusive certificates* the committee recommends that the conclusive certificate provisions in s 36 and s 37 be repealed.)

8.5.2 Power to enter premises and inspect documents[461]

The QIC can require a person to give the QIC information or produce documents, and compel attendance of a person before the commissioner: s 85. Section 94 makes it an offence for a person not to comply with a notice given under s 85 with a maximum penalty of 20 penalty units (currently $1,500).

The QIC submitted that he should also have the power to enter any premises occupied or used by an agency subject to the Act, and the power to inspect those premises or anything for the time being therein.[462] The QIC sees it as a: *'significant shortcoming in the FOI Act, capable of manipulation or exploitation by an unprincipled agency official, if an agency could escape thorough scrutiny by claiming that documents to which access has been requested do not, and never did, exist*'.[463]

The committee supports the submission that the QIC be conferred entry and search powers. The conferral of such powers:

- would overcome what the committee sees as a deficiency in the Act capable of abuse by an unscrupulous agency claiming that documents which once existed have now been destroyed or lost, or that documents to which access has been requested do not, and never did, exist;
- would enable the QIC to conduct more efficient and timely review of sufficiency of search matters; and
- might promote better record keeping in agencies.

Further, it is anomalous that the Queensland Ombudsman has this power but the QIC does not.[464]

The committee notes concerns regarding the conferral of such a power given the confidential nature of the records held by some agencies such as health and medical records. However, the secrecy provision (s 93) addresses these concerns.

The entry and search powers should be subject to statutory requirements that:

- the QIC gives reasonable notice to an agency's principal officer prior to the exercise of the powers; and
- officers of agencies provide the QIC with reasonable assistance in the exercise of the powers. It should be an offence not to comply with such a requirement without reasonable excuse. In section

461 Relevant submissions: 113, 115, 119, 128, 138, 142, 149, 150, 153, 154, 160, 161, 162 and 163. QIC, first submission no 56 at paras C122-C123.

462 Refers to the QIC's Annual Reports: *1992/93*, n 448 at paras 4.9-4.11; *1993/94*, n 448 at para 2.19; and *1997/98 Annual Report*, Brisbane, 1998 at 20-21.

463 QIC, *1992/93 Annual Report*, n 448 at para 4.10. In his *1997/98 Annual Report*, the QIC reported on a case which reinforced the need for the QIC to have powers of entry and search: QIC, *1997/98 Annual Report*, n 462 at 20-21.

464 See the *Ombudsman Act 2001* (Qld), s 34 (Investigation at agency premises).

8.6.1 the committee recommends that the maximum penalty for the offence provisions in the Act should be 100 penalty units (currently $7,500).[465]

The Act should also make it clear that these powers do not extend to documents that are not reviewable by the QIC. In section 11.11.4 *Intelligence and witness protection information* and section 11.21 *Matter disclosure of which would be contempt of Parliament: s 50(c)*, the committee recommends that provision be made for conclusive certificates, which are not reviewable by the QIC, for particular types of documents.

The QIC should also include in each annual report, a report on the exercise of these powers.

COMMITTEE FINDING 131—RECOMMENDATION

The Information Commissioner should have the statutory power to, on the giving of reasonable notice to the principal officer of an agency, and at a reasonable time:

- enter and inspect a place occupied by the agency;
- take into the place, the persons, equipment and materials the Commissioner reasonably requires for investigation;
- take extracts from, or copy in any way, documents located at the place; and
- require an officer of the agency at the place to give the Commissioner reasonable assistance in exercising the above powers.

It should be an offence not to comply with a requirement of the Commissioner in this regard without reasonable excuse. In section 8.6.1 the committee recommends that the maximum penalty for the offence provisions in the Act be 100 penalty units.

However, these powers should not extend to documents or matter that are subject to a conclusive certificate which is not reviewable by the Commissioner: see section 11.11.4 *Intelligence and witness protection information* and section 11.21 *Matter disclosure of which would be contempt of Parliament: s 50(c)*.

8.5.3 Powers of the Information Commissioner on review: s 88(2)[466]

Section 88(2) provides that if it is established that a document is an exempt document, the QIC does not have power to direct that access to the document is to be granted. This is in contrast to s 28(1) which provides that an agency or minister *may* refuse access to exempt matter or an exempt document.

The committee has considered whether the QIC should be empowered to order disclosure of otherwise exempt matter if the QIC considers that it is in the public interest to do so.[467] The committee has concluded against a general, overriding public interest provision on the basis that:

- such a provision would be otiose in respect of the exemption provisions that already incorporate a public interest balancing test;
- for the remaining exemptions, either the harm these exemptions refer to or the harm inherent in the disclosure of documents of that type justifies an exemption without the need for a public interest test; and

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465 This is consistent with the penalty for non-compliance with such requirements of the Ombudsman: *Ombudsman Act 2001* (Qld), s 34 (Investigation at agency premises).

466 Relevant submissions: 54, 69, 90, 92, 93, 113, 119, 122, 127, 128, 138, 142, 149, 150, 153, 154, 160, 161, 162 and 163. QIC, supplementary submission no 173 at 22.

467 Such a provision exists in Victoria in relation to certain documents: FOI Act (Vic), s 50(4).

- to apply a public interest balancing test to information which has traditionally had the benefit of class protection under the general law, for example, Cabinet documents, trade secrets, documents subject to legal professional privilege or parliamentary privilege, would require careful consideration and strong justification.[468]

An approach with a similar outcome would be to remove the restriction imposed on the QIC by s 88(2). This would require the QIC to go through the two stage process that agencies should go through at the primary decision-making level in light of the s 28(1) discretion. That is: (a) determine whether a particular document does or does not qualify for exemption; and (b) if it does, then determine whether or not to exercise the discretion to disclose it anyway.

This would enable the QIC to: (a) take into account an overriding public interest in disclosure of information that qualified for exemption under a provision containing no public interest balancing test (such cases, in the commissioner's opinion, being extremely rare); and (b) 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.[469]

On balance, the committee does not believe that there is sufficient justification to remove the restriction imposed on the QIC by s 88(2). In this regard the committee has taken into account concerns expressed in submissions that the QIC might override agency commitments regarding confidentiality and/or duties of care and that it is more appropriate to leave the discretion in the hands of the agency in question. The agency will have the detailed understanding of the factual circumstances and sensitivities of each case.

Further, in section 4.4 the committee recommends that the Premier issue a directive to all agencies and ministers directing them to invoke exemptions only where there is a reasonable expectation that disclosure would result in harm (and not where matter might technically or arguably fall within an exemption. If this is implemented and embraced by agencies then the need for an overriding public interest test or for the QIC to have a s 28(1) type discretion should be reduced.

COMMITTEE FINDING 132—CONCLUSION

The Information Commissioner should not have the power to order disclosure of otherwise exempt matter in the public interest or a power equivalent to that contained in s 28(1).

8.5.4 Power to punish for contempt[470]

The QIC submitted that a contempt provision should be included in the Act to give the QIC similar powers to those held by tribunals discharging similar functions in other jurisdictions.[471]

The QIC stated that such powers are needed as a sanction for breach of the QIC's directions under s 72(2).[472] Such directions are, the QIC noted, *'honoured as much in the breach as the observance, by*

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468 The QIC and the ALRC/ARC review did not support such a provision for similar reasons: ALRC/ARC, *Freedom of Information,* discussion paper 59, AGPS, Canberra, May 1995 at para 5.9 and review report, n 13 at para 8.5.

469 Examples provided by the QIC in this context included disclosure of matter that is technically exempt because it has been submitted to Cabinet, but the matter is already in the public domain and disclosure to a grieving parent of information concerning the personal affairs of a deceased child.

470 Relevant submissions: 92, 113, 115, 119, 128, 138, 149, 150, 154, 160, 161, 162 and 163. QIC, first submission no 56 at paras C135-C138.

471 The three tribunals which conduct independent external review of FOI decisions for the Commonwealth, Victoria and NSW all have powers to take action with respect to contempt of the tribunal: see s 63 of the *Administrative Appeals Tribunal Act 1975* (Cth), s 137 of the *Victorian Civil and Administrative Tribunal Act 1998* (Vic), and s 131 of the *Administrative Decisions Tribunal Act 1997* (NSW).

some (especially some serial applicants) who have worked out that they cannot be subjected to any meaningful penalty for non-compliance. This adds to the delay in finalising applications for review'.[473]

Neither EARC nor the PCEAR specifically addressed whether the QIC should have the power to punish for contempt.[474] No other Information Commissioner has the power to punish for contempt.

The committee believes that a contempt provision should be inserted in the Act but that the Supreme Court, on complaint from the QIC, should deal with any issue of contempt. Sections 38-40 of the *Ombudsman Act 2001* (Qld) provide an appropriate model in this regard.

COMMITTEE FINDING 133—RECOMMENDATION

The Act should include provisions dealing with contempt of the Information Commissioner. In particular, these provisions should:

- set out the grounds which constitute a contempt;
- provide that if the Commissioner is satisfied there is evidence of contempt, the Commissioner may certify the contempt in writing to the Supreme Court which is to inquire into and punish the contempt; and
- ensure that an offender will not be punished twice for the same conduct if that conduct constitutes both an offence and a contempt.

Sections 38-40 of the *Ombudsman Act 2001* (Qld) provide an appropriate model for these provisions.

8.5.5 Decisions of the Information Commissioner: s 89[475]

The QIC has corrected slips or omissions in his published decisions. However, the QIC submitted that it would be preferable for the QIC to be expressly conferred with the power to correct slips or omissions in decisions given under s 89 of the Act.[476]

The committee supports this suggestion.

COMMITTEE FINDING 134—RECOMMENDATION

The Act should include a provision giving the Information Commissioner the power to correct slips or omissions in decisions given under s 89 (Decisions of commissioner).

8.5.6 Information Commissioner's opinions

The committee has recommended that the FOI monitor issue guidelines to assist agencies in the application of a number of provisions of the Act: see section 4.2.2. However, it appears that, in some cases, guidelines might not provide sufficient certainty for interested parties about how the Act applies. This uncertainty has the potential, among other matters, to make people reticent to record or provide information in a variety of circumstances for an unfounded fear of disclosure under the Act,

472 Section 72(2) provides that the QIC may, during a review, give directions as to the procedure to be followed on the review.

473 QIC, first submission no 56 at para C136.

474 Although, EARC recommended a contempt power for its proposed Queensland Administrative Appeals Tribunal. See clause 163 of its draft Review of Administrative Decisions Bill attached as part of its report on *Review of Appeals from Administrative Decisions*, n 350, volume 2.

475 QIC, supplementary submission no 173 at 30.

476 The QIC recommended that such a provision be similar in terms to the *Administrative Appeals Tribunal Act 1975* (Cth), s 43AA.

and cause agencies unwarranted operational inconvenience. These consequences might not only impact on agency attitude to the Act but, in some cases, have ramifications beyond the FOI regime.

To avoid this, the QIC should be empowered to provide an opinion about the application of the Act to a particular situation.[477] This would allow the QIC to clarify the effect of provisions without waiting for a relevant matter to be considered on external review.

The QIC's information sheets provide some valuable guidance on the application of the Act. However, these information sheets do not have the precedent value of QIC decisions. Rather, they explain and clarify complex issues. Similarly, the committee envisages that the FOI monitor will produce guidelines explaining how the Act *has been* interpreted and applied. The QIC's opinion on how the Act *might* apply in a particular set of circumstances will complement these guidelines.

The QIC should have discretion about whether to provide opinions, and should be able to provide such opinions on his or her own motion or on the request of an agency or other person.

As a matter of practice, the QIC should only provide opinions where it would clarify a matter that arises regularly. Further, the QIC should not provide opinions in relation to specific matters which are, or are foreseeably, the subject of external review.

COMMITTEE FINDING 135—RECOMMENDATION

The Act should empower the Information Commissioner to provide an opinion about the application of the Act to a particular situation.

8.6 ENFORCEMENT

8.6.1 The offence provisions

The Act contains the following offence provisions.

- Section 93 makes it an offence for the QIC or a member of the QIC's staff to disclose any information obtained by them in the course of the performance of their functions or to take advantage of such information to their or another person's benefit.
- Section 94 makes it an offence for a person to fail to comply, without reasonable excuse, with a notice under s 85 to: (a) give information; (b) produce a document; or (c) attend before the QIC.
- Section 106 makes it an offence for a person to, in order to gain access to a document containing matter relating to the personal affairs of another person, knowingly deceive or mislead a person exercising powers under the Act.

For each of these offences the maximum penalty is 20 penalty units (that is, $1,500).[478]

The committee has recommended that the Act also make it an offence to:

- not comply with a requirement of the QIC in exercising the QIC's powers of search and entry: see section 8.5.2; and
- obstruct access to a document held by an agency or minister: see section 5.3.7.

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[477] The Anti-Discrimination Tribunal has a similar power: see chapter 8 (Opinions) of the *Anti-Discrimination Act 1991* (Qld).

[478] The *Penalties and Sentences Act 1992* (Qld), s 181B (Corporation fines under penalty provision) provides that where no separate maximum fine is made for a body corporate, the maximum fine is taken to be the maximum fine for an individual, and if a body corporate is found guilty of the offence, the court may impose a maximum fine of an amount equal to 5 times the maximum fine for an individual.

The committee did not receive submissions calling for additional offence provisions in the Act. Nor did it receive evidence which indicated the need for additional offence provisions. However, the *Ombudsman Act 2001* (Qld) contains provisions which make it an offence for a person to:

- make a statement to the Ombudsman or an officer of the Ombudsman which the person knows is false or misleading in a material particular (maximum penalty—100 penalty units, that is, currently $7,500): s 41;
- give the Ombudsman or an officer of the Ombudsman a document containing information the person knows is false or misleading in a material particular (maximum penalty—100 penalty units, that is, currently $7,500): s 42;
- assault or obstruct the Ombudsman or an officer of the Ombudsman in the performance of duties under that Act (maximum penalty—40 penalty units, that is, currently $3,000 or 6 months imprisonment): s 43;
- threaten detriment to a person because they gave information or a document to the Ombudsman (maximum penalty—100 penalty units, that is, currently $7,500): s 47.

These provisions indicate that the penalties for the offence provisions currently in the Act should be increased to 100 penalty units.

The Attorney-General might also consider whether similar offence provisions to those in ss 41-43 and s 47 of the *Ombudsman Act* should be incorporated in the FOI Act.

COMMITTEE FINDING 136—RECOMMENDATION

The maximum penalty for the offence provisions in the Act should be 100 penalty units.

The Attorney-General should consider whether the following offence provisions which appear in the *Ombudsman Act 2001* (Qld) should be replicated in the FOI Act: s 41 (False or misleading statement), s 42 (False or misleading document), s 43 (Offence to assault or obstruct ombudsman or officer of ombudsman), and s 47 (Protection of person helping ombudsman).

8.6.2 Enforcement of the Information Commissioner's decisions

The Act currently contains no mechanism for enforcement of the QIC's decisions. The most an applicant could do is seek judicial review of the agency's or minister's non-compliance.[479]

While it would be rare for an agency or minister not to abide by a decision of the QIC in favour of the applicant, it is important that the Act addresses this possibility.

It should be an offence to fail or refuse to comply with a lawful direction or requirement of the QIC. The maximum penalty for non-compliance should be 100 penalty units or $7,500. (See the discussion in section 8.6.1 in this regard.)

COMMITTEE FINDING 137—RECOMMENDATION

The Act should make it an offence for a person, agency or minister to fail or refuse to comply with a lawful direction or requirement of the Information Commissioner.

479 Gilbert and Lane, n 17 at para 2.100.

8.7 OTHER PROVISIONS CONCERNING THE INFORMATION COMMISSIONER

8.7.1 Costs in Supreme Court proceedings: s 98[480]

Section 98 provides that if a proceeding arising out of the performance of the functions of the QIC is instituted by the State, the reasonable costs of a party to the proceeding are to be paid by the State.

The apparent policy behind s98 is that if an agency wishes to challenge a decision of the QIC, then that agency should pay the reasonable costs of a party to such proceedings. Hence, clause 89 of EARC's draft FOI Bill read: *'If judicial review proceedings arising out of the performance of the functions of the Commissioner are instituted by the Government, the reasonable costs of a party to those proceedings are to be paid by the Government'*. EARC's draft bill defined Government to include an agency and a minister.[481]

For some reason, which the committee has been unable to discern, the term 'Government' was changed to 'the State' in the FOI Act. The term 'the State' in s 98 has been interpreted by the Supreme Court to mean 'the Crown' or 'the State of Queensland' raising questions of whether an agency represents the Crown or not.[482] In the QIC's view, this interpretation undermines the policy behind the section.

Section 98 should be amended so that the words 'the State' are deleted and replaced by 'an agency or a minister'. It would be anathema to the concept of the QIC as a cheap form of review for a citizen to be subject to a substantial costs order if forced to defend a decision of the QIC in their favour in Supreme Court proceedings brought by an agency. The amendment of EARC's term 'Government' to 'the State' has apparently inappropriately limited that policy intention.

Such an amendment would have the incidental effect of subjecting local authorities to the same obligations as state government agencies. Different treatment of state and local government agencies might be warranted given resourcing disparities. However, local government agencies will only be potentially liable for costs where they themselves institute proceedings. The possibility of an adverse costs order should be a matter a local government considers when challenging a decision of the QIC.

COMMITTEE FINDING 138—RECOMMENDATION

The words 'the State' in s 98 (Costs in proceedings) should be replaced with 'an agency or a minister'.

8.7.2 Appearance in proceedings: s 99[483]

Section 99 provides that the QIC is entitled to appear and be heard in a proceeding arising out of the performance of the functions of the commissioner.

The QIC advised the committee that the policy behind s 99 was to overcome the restrictions placed on tribunals appearing to defend their decisions in judicial review proceedings in 'Hardiman's case'.[484] In that case, the High Court of Australia stated that '*the presentation of a case in this Court by a tribunal*

480 Relevant submission: QIC, first submission no 56 at paras C139-C142.

481 See also EARC's FOI report, n 19 at para 17.45.

482 See the decision of Thomas J in *Cairns Port Authority v Albietz* [1995] 2 Qd R 470 where an agency, namely the Cairns Port Authority, challenged a decision of the QIC in the Supreme Court but was held to be not obliged by the terms of s 98 to pay the reasonable costs of other parties to the proceedings because it did not represent the Crown.

483 Relevant submissions: QIC, first submission no 56 at paras C143-C145.

484 *R v The Australian Broadcasting Tribunal and Others ex parte Hardiman* (1980) 144 CLR 13.

should be regarded as exceptional and, where it occurs should, in general, be limited to submissions going to the powers and procedures of the Tribunal'.[485]

However, the QIC points out that the courts have not interpreted s 99 in accordance with this policy.

> *Instead, in* Re Cairns Port Authority v Albietz*, Thomas J read down the terms of s.99 so as to accord with the principle stated by the High Court in* Hardiman's *case. Thomas J held that amongst the limited factors which might justify the Information Commissioner entering the arena to argue against the Cairns Port Authority's case was the extent to which the original applicant for access to the information in issue might be handicapped in presenting a case to the court, because it did not know the content of the documents in question. His Honour considered that there was an insufficient justification in that case. His Honour's decision was a decision in relation to the question of costs, and the costs order that His Honour made in my favour as Information Commissioner, was limited to the extent that His Honour considered that my participation was justified.*[486]

It is appropriate and important that the QIC be represented in proceedings so as to inform the court of the QIC's views about the correct interpretation and application of relevant provisions of the Act. This way the court can take the QIC's views into account in formulating whatever authoritative principles emerge from the court's decision. This is particularly important in cases where one party is not represented in court or is not aware of the contents of the documents, and is therefore unable to comprehensively argue their case.

Where the QIC participates in proceedings in this capacity, the QIC should be responsible for the QIC's costs.[487] However, no award of costs should be made in favour of another party to the proceeding against the QIC.[488]

COMMITTEE FINDING 139—RECOMMENDATION

Section 99 (Commissioner may appear in proceedings) should provide that:

- in judicial review proceedings the Information Commissioner is entitled to appear and be heard for the purposes of informing the court of the Commissioner's views as to the correct interpretation and application of the relevant provisions of the Act; and
- where the Commissioner does so participate in proceedings: (a) the Commissioner must bear the costs of the Commissioner's participation; and (b) no award of costs may be made in favour of another party to the proceeding against the Commissioner.

8.7.3 Non-disclosure of documents: s 93[489]

Section 93 makes it an offence for the QIC or a member of the QIC's staff to disclose any information obtained by them in the course of the performance of their functions or to take advantage of such information to their or another person's benefit. The maximum penalty is 20 penalty units, although the committee recommends in section 8.6.1 that this be increased to 100 penalty units.

The QIC submitted that a new s93(2) should be inserted to make it clear that, except in the case of judicial review proceedings, neither the QIC nor the QIC's officers shall be called to give evidence or produce any document in any court, or in any judicial proceedings, in respect of any matter coming to his or her knowledge in the exercise of his or her functions under this Act. The QIC stated that the

485 Note 484 at 35-36.
486 QIC, first submission no 56 at para C143.
487 In *Cairns Port Authority v Albietz* [1995] 2 Qd R 470, the QIC was unsuccessful in a submission that he be awarded full costs. The judge noted that the QIC chose not to limit his role in any way and that it was apparent that considerable costs were incurred in the preparation and delivery of a full adversarial case: at 480.
488 See the QIC's suggested amended s 99.
489 QIC, first submission no 56 at paras C130-C134.

need for such a provision was highlighted in recent court proceedings commenced by the QIC to set aside a writ of non-party discovery served on the QIC (in the course of a civil Supreme Court action to which the QIC was not a party).

Although, such a provision existed in the now repealed *Parliamentary Commissioner Act 1974* (Qld), s 29(4), an equivalent provision does not appear in the *Ombudsman Act 2001*. However, the current QIC reiterated the importance of such a provision in relation to the Information Commissioner's office.[490]

The committee has no objection to the QIC's proposed amendment.

COMMITTEE FINDING 140—RECOMMENDATION

Section 93 of the Act should provide that, except in judicial review proceedings, neither the Information Commissioner nor any member of the staff of the Commissioner shall be required in any court, or in any judicial proceedings, to give evidence in respect of any matter coming to their knowledge in the exercise of their functions under this Act, or to produce any document obtained in the course of the performance of functions under this Act.

8.7.4 Application of Ombudsman Act: s 107

The Ombudsman does not have jurisdiction regarding the QIC: s 107. The committee considered whether administrative decisions of the QIC (as opposed to the QIC's decisions made in the capacity of external reviewer) should be within the jurisdiction of the Ombudsman. In this regard a parallel might be drawn with the limited application of the *Ombudsman Act 2001* (Qld) to courts and registries. That Act does not apply to the judicial functions of a court and registries.[491]

The case for this suggestion would be bolstered if the offices of Ombudsman and QIC were separated (as it would reduce the argument regarding a conflict of interest), and the QIC were also given the role of FOI monitor.

COMMITTEE FINDING 141—RECOMMENDATION

The Attorney-General should consider whether s 107 (Application of Ombudsman Act) should provide that the Ombudsman has jurisdiction in relation to the Information Commissioner other than when the Commissioner is performing the review function under the Act following consideration of the committee recommendations in section 4.2.3 regarding who should perform the role of FOI monitor and in section 8.2.2 regarding separation of the offices of Ombudsman and Information Commissioner.

490 Letter dated 29 November 2001 to the Committee from the current QIC.
491 *Ombudsman Act 2001* (Qld), s 9(2).

9. FEES AND CHARGES

9.1 INTRODUCTION

Term of reference B(vii) asks whether the Act should be amended to minimise the resource implications for agencies in order to protect the public interest in proper and efficient government administration.

The resource implications for agencies under the Act arise from:

- processing applications, particularly applications for access to information (which includes identifying and retrieving documents, considering whether any exemptions apply, corresponding with the applicant, consulting third parties if necessary, providing access and conducting internal review);
- making information available as required by s18 (Publication of information concerning affairs of agencies) and s 19 (Availability of certain documents); and
- collecting data as required by s 108 (Report to Legislative Assembly by agencies and ministers).

In section 5.5 *Availability of information: ss 18 and 19*, the committee discusses the ss 18 and 19 requirements. In section 4.8 *The data collection and reporting requirements* the committee discusses the s 108 requirements. The committee believes that these requirements, in conjunction with the relevant committee recommendations for their improvement, appropriately balance the public interest in the availability of information with the public interest in proper and efficient government administration.

In this chapter the committee discusses the resource implications for agencies in processing applications in the context of the Act's fees and charges regime. (Term of reference B(vi) also asked whether the then existing regime of fees and charges under the Act required amendment.)

Fees and charges imposed on applicants reduce the amount of publicly funded resources which must be allocated to administering the Act. The extent to which applicants should contribute to meeting the resource costs of an FOI regime requires a careful balance between achieving the fundamental democratic principles of FOI and the efficient administration of these principles.

EARC[492] and the PCEAR,[493] while acknowledging the cost of administering FOI legislation in Queensland, considered that access to government-held information was an essential right in a healthy democracy and one which should apply equally to all citizens. The liberal charging regime recommended by those entities was substantially adopted by Parliament when the Act was introduced in 1992 with the exception of an application fee for non-personal affairs documents.

However, the *Freedom of Information Amendment Act 2001* (Qld) relating to fees and charges and the *Freedom of Information Amendment Regulation (No 1) 2001* (Qld), both of which commenced on 23 November 2001, amended the fees and charges regime imposed under the Act.[494] In particular, the amending Act introduced for the first time, in relation to non-personal affairs applications, charges for processing applications and supervising inspection of documents.

492 EARC FOI report, n 19 at paras 18.21-18.38 and 18.73.
493 PCEAR FOI report, n 20 at para 3.13.5
494 As to the commencement of this legislation, see subordinate legislation number 222 and 223 of 2001.

9.2 CURRENT FEES AND CHARGES

9.2.1 Non-personal affairs applications

An applicant who applies for access to a document that does not concern their personal affairs must pay a $31 application fee at the time the application is made.[495] An application need only seek one document which does not concern the personal affairs of the applicant to attract the imposition of the application fee.[496]

In addition, the applicant must pay a processing charge of $5 per 15 minutes or part of 15 minutes for the time spent by the agency or minister in searching for or retrieving a document, or making, or doing things related to making a decision on an application for access, or supervising the applicant's inspection of a document. However, this charge only applies where the total time spent by the agency or minister in doing these things is likely to be more than two hours.[497]

An agency or minister can require an applicant to pay a deposit of 25% of the charge assessed on a preliminary basis by the agency or minister.[498]

Access charges also apply. The amount of these charges varies depending on the form in which access is granted, that is, whether the agency or minister supervises the applicant's inspection of documents, provides an applicant with photocopies of documents or provides access in another 'non-standard' form.

Where an agency or minister decides that an applicant is liable to pay a charge in relation to an application for access to a document, or the provision of access to a document, the agency or minister must give the applicant written notice of certain matters including a preliminary assessment of the charge, and an opportunity to consult with a specified officer with a view to making an application in a form that would reduce the charge. The Act sets out a process to be followed where an applicant contends that a charge has been wrongly assessed or should not be imposed.[499]

An applicant must pay an agency or minister a charge in relation to an application for access to a document, other than a charge for supervising inspection of a document, before access is given.[500]

Charges can be waived if an applicant (either an individual or non-profit organisation) contends that they are in financial hardship.[501]

9.2.2 Personal affairs applications

If an application relates to documents concerning the applicant's personal affairs, there is no fee to make the application, to have the application processed, or to access documents.[502] To be categorised as a document which 'concerns' the applicant's personal affairs, the document need not 'solely' or 'exclusively' concern the applicant's personal affairs.[503]

Similarly, there is no charge for an applicant who seeks to *amend* information concerning their own personal affairs. The issue of fees for accessing documents relating to the personal affairs of a deceased person to whom the applicant is a 'close relative' is discussed in section 9.6.6 *Applications relating to a deceased close relative of the applicant.*

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495 FOI Act, s 29(1) and the FOI Regulation, s 6(1).
496 *Re Stewart and Department of Transport* (1993) 1 QAR 227 at 268-269.
497 FOI Act, s 29(2) and the FOI Regulation, s 7.
498 FOI Act, s 29A(2)(f) and the FOI Regulation, s 7(2)-(3).
499 FOI Act, ss 29A and 29B.
500 FOI Regulation, s 8(3).
501 FOI Act, s 109(3)(c) and the FOI Regulation, s 10.
502 FOI Act, s 29 and the FOI Regulation, s 6(2).
503 *Re Shute and Queensland Police Service*, QIC letter decision, 13 February 1998.

9.3 THE ESTIMATED COST OF FOI[504]

The estimated cost to the Queensland Government of administering the FOI Act for state government departments and agencies in 1999/2000 was $7.5m. The revenue derived under the Act for the same period was estimated to be 2% of the total cost of administration. In 1999, it was estimated that the average cost incurred by state government departments and agencies in processing an application relating to the personal affairs of the applicant was $724 and the estimated average cost of processing a non-personal affairs application was $944.[505]

To the extent that the cost of administering FOI is not recouped in fees and charges, it is borne by agencies, and therefore, indirectly, by the community as a whole.

The QIC recognised that the FOI process can require a significant commitment of resources, particularly by 'high demand' agencies, but urged a degree of caution in considering high estimates of the cost of administering FOI. In his view, in some agencies a significant portion of resources committed to FOI have been committed unnecessarily because of inefficiencies within the agency, or unjustified efforts to avoid disclosure. The QIC commented that this may take the form of:

- *inefficient records management procedures;*
- *failure to consult with applicants to clarify precisely what documents are sought;*
- *raising and persisting in multiple claims to exemption where there is little chance of success;*
- *considering at length the possible application of exemption provisions to matter which is innocuous, and which could be disclosed by the agency using the discretion permitted to it under s 28(1); and*
- *setting the seniority of internal review decision-makers at high levels within the agency.*[506]

Despite these observations and the absence of accurate, fully costed data, it is clear that the cost to government of administering the FOI regime is substantial and that a very small proportion of FOI processing costs are recouped through the fees and charges regime. Even the recent introduction of processing charges is unlikely to dramatically increase the amount of FOI revenue recouped by agencies and ministers.[507]

9.4 COMPETING CONSIDERATIONS[508]

As discussed in chapter 3, the primary objective of Queensland's FOI regime is to enhance certain key principles underpinning democratic government—openness, accountability and public participation. A number of intangible benefits, which all members of the community share, derive from these objectives.[509] These benefits include accountable government, administrative improvements (such as better record management systems and better decision-making) and a more informed electorate.

It is important that the Act does not undermine these objectives through the imposition of fees and charges, particularly in relation to documents which concern government decision-making and policy

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504 Relevant submissions: 69, 73, 77, 77B, 99, 100A and 105. QIC, first submission no 56 at paras B221-B225.

505 Data supplied by the Attorney-General and Minister for Justice to the committee under cover of a letter dated 9 November 2001.

506 QIC, first submission no 56 at para B221.

507 This is because a large percentage of applications (roughly 50% in recent years, see table D.1 in **appendix D**) relate to the applicant's personal affairs and therefore do not attract fees or charges.

508 Relevant submissions: 2, 16, 21, 22, 24, 25, 26, 27, 29, 42, 43, 44, 45, 46, 48, 50, 52, 54, 55, 62, 66, 67, 68, 69, 71, 73, 75, 77, 77B, 78, 80, 81, 84, 87, 89, 101C. QIC, first submission no 56 at paras B178-B185.

509 As the QIC noted, the *Appropriation Act 1998* (Qld) authorised expenditure of over $23 billion of public money by the State Government for the financial year and FOI legislation is one of the most significant means by which members of the public can scrutinise expenditure of that money: QIC, first submission no 56 at para B183.

development. This might occur if fees and charges are set at a level that makes the FOI process inaccessible to a large part of the community, particularly those potential applicants who are individuals and community groups. Flow-on impacts of high fees and charges, such as the cost of administering those charges and the likely increase in the number of matters proceeding to review, also need to be taken into account.

The impact of the fees and charges regime on achievement of FOI objectives should not be underestimated. In this regard the ALRC noted with respect to the Commonwealth FOI regime:

> *…it could not be said that the FOI legislation has achieved the level of interaction between the government and the people originally envisaged. One likely reason for this is the unpredictable and potentially substantial charges which FOI applications are liable to attract.*[510]

By the same token, it is reasonable that the Act should require some contribution from users to offset the resources that must be devoted by agencies and ministers in administering the Act.

The committee is in favour of steps which increase the efficient administration of the Act and ensure that resources are not allocated to activities which do not promote the objectives of the Act. However, steps to increase efficiency should not significantly detract from the rights conferred by the Act.[511] A number of the recommendations in this report will potentially minimise the resources involved in FOI administration. For example, see:

- section 6.2 regarding greater emphasis on agencies consulting with applicants to determine exactly what information they require and considering alternative ways by which applicants' requests might be met;
- section 6.8 regarding voluminous applications;
- section 6.12 regarding repeat applications; and
- section 6.13 regarding forms of access.

The remaining discussion in this chapter focuses specifically on particular aspects of the fees and charges regime.

9.5 ALTERNATIVE FEE AND CHARGING ARRANGEMENTS[512]

Broadly, there are three types of fees and charges that might be imposed under FOI legislation—application fees, processing charges and access charges. These fees and charges can be applied uniformly to all applications, or, separate fees and charges structures can be used to reflect the fact that different considerations apply in relation to different applications. Currently, there are different charging regimes for applications relating to the personal affairs of the applicant, and applications not relating to the personal affairs of the applicant.

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510 ALRC, *Australia's Federal Record: A Review of the Archives Act 1983*, n 155 at para 3.48.

511 QIC, first submission no 56 at para B225.

512 Relevant submissions to the issues raised in section 9.5 are: 2, 3, 6, 8, 14, 16, 21, 27, 29, 31, 33, 37, 38, 39, 41, 42, 43, 45, 46, 47, 50, 52, 55, 59, 60, 61, 62, 64, 66, 67, 68, 69, 75, 77, 77B, 80, 81, 84, 85, 87, 90, 91, 92, 95, 99, 100A, 100B, 100C, 101, 101D, 101G, 101H, 101L, 102, 104, 105, 106, 107, 110, 111, 112, 113, 114, 115, 118, 119, 120, 125, 127, 128, 133, 134, 136, 138, 142, 143, 144, 146, 148, 150, 153, 154, 158, 160, 161, 162 and 163. The QIC's submissions regarding alternative fee and charging arrangements are noted under the relevant level 3 headings in this section.

9.5.1 Distinction between types of applications[513]

If an application relates to documents concerning the applicant's personal affairs, no fees or charges apply.[514] In contrast, there are application fees, processing charges, and access charges for applications to access documents which do not relate to the applicant's personal affairs.

There are a number of difficulties in maintaining the 'personal affairs' distinction as the basis for a fees and charges regime where the applicant is an individual. As discussed in section 11.13 *Matter affecting personal affairs*, while the phrase 'personal affairs' is not defined in the Act, it has been interpreted to generally refer to private aspects of a person's life, rather than to any public activity or occupation in which a person engages. However, there remains 'grey areas' as to what exactly the term encompasses.

Thus, the question of whether an application relates to an applicant's 'personal affairs' can be complex, and has been the source of some uncertainty, confusion and dispute between agencies and applicants.[515]

The use of the term 'personal affairs' in a fees and charges context might also be seen as unnecessarily restrictive. A document which affects an individual's affairs is not necessarily a document that concerns that individual's 'personal affairs'. For example, documents relating to affairs of an individual such as business or employment related matters are not 'personal affairs' documents. Fees and charges thereby apply to accessing such documents.

The introduction of processing and supervising access charges in November 2001 is likely to exacerbate difficulties with use of the term 'personal affairs'. Prior to 23 November 2001, disputes only concerned whether a $31 fee and access charges were payable. The number of disputes over whether documents concern an applicant's personal affairs is likely to rise since considerably more money will be in issue now that processing charges apply to non-personal affairs documents. Foreseeably, administrative difficulties will also be encountered by agencies where some of the documents responsive to an application concern the applicant's personal affairs, while others do not. Agencies are only able to charge for those documents which fall in the latter category.

One option to overcome these difficulties is to have uniform fees and charges for both personal affairs and non-personal affairs applications. This would simplify the processing of applications, and ensure that there is no discrimination between applicants for different types of information.

However, charging citizens to access personal information would inhibit citizens' ability to access, and seek amendment of, information relating to themselves. It is inappropriate and inconsistent with privacy principles that citizens should be required to pay a fee to identify information held by government relating to themselves, or to clarify the accuracy of such information, particularly in circumstances where individuals have no say in whether, or what, information is collected by government about them. In contrast, it is appropriate that the users of the FOI regime bear some of the cost of applications for information which does not relate to themselves. Accordingly, different charging regimes for different types of information are necessary.

An alternative position advocated by the QIC is that individuals (as distinct from bodies corporate) should be entitled to obtain access to, free of charge, documents containing information about their 'affairs' and not just their 'personal affairs' as presently interpreted by the courts.

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513 Relevant submissions: 90, 95, 96, 100B, 100C, 104, 106, 107, 109, 111, 113, 114, 119, 120, 124, 125, 128, 136, 138, 142, 144, 145, 150, 154, 158, 160, 161, 163 and 168. QIC, first submission no 56 at paras B186-B188; QIC, supplementary submission no 173 at 23-24. Current QIC's letter to the Attorney-General dated 29 October 2001, tabled 31 October 2001.

514 FOI Act, s 29 and the FOI Regulation, s 6(2).

515 These problems do not arise where the applicant is a body corporate as a body corporate is incapable of having personal affairs.

The committee supports this suggestion on the basis that it would: be more equitable to citizens; reduce the administrative burden on FOI decision-makers in deciding whether or not fees and charges are payable; and remove a significant source of dispute in the Act. Such an amendment is consistent with the committee's recommendation regarding s 6 that the term 'affairs' rather than 'personal affairs' is appropriate in that context: see section 10.5 *Matter relating to the personal affairs of the applicant: s 6*.

The term 'personal affairs' remains the appropriate terminology in the context of the provisions which are aimed at the protection of personal privacy, namely, s44 (Matter affecting personal affairs) and Part 4 (Amendment of information).

COMMITTEE FINDING 142—RECOMMENDATION

The Act should provide that there is no fee or charge for an applicant who is an individual (as opposed to a body corporate) to make an application, to have the application processed, or to access documents, if the application relates to documents concerning the applicant's 'affairs' as opposed to their 'personal affairs'.

The QIC should issue an opinion—see section 8.5.6 *Information Commissioner's opinions*—as to what constitutes a person's 'affairs' to clarify the application of the provision.

9.5.2 Application fees[516]

The committee supports the retention of a moderate application fee for applications that do not relate to the affairs of the applicant, and for applications made by bodies corporate. The current fee of $31 is appropriate.

However, the *Freedom of Information Amendment Act 2001* (Qld):

- inserted in s 7 a definition of 'charge' which states that it does not include an application fee under s 29(1); and
- omitted s 27(5) which, under the former fees and charges regime, required an agency or minister to notify an applicant of application and access charges payable.[517]

The new provisions of the Act which require an agency or minister to notify an applicant of their liability to pay charges and set out the process to be followed where an applicant contends that a charge has been wrongly assessed or should not be imposed, do not apply to an agency decision regarding an application fee.[518]

Agencies and ministers should be required to notify applicants in writing of a decision to require payment of an application fee. The committee's discussion in 6.3.6 *The need for an accompanying fee* is also relevant in this regard.

The committee also considered the option of restricting the number of issues or subject matter in relation to which non-personal affairs documents can be sought in one application. Currently, it is possible for an applicant to seek a broad range of unrelated material in one application and hence only pay one application fee of $31. However, the committee is concerned that the difficulties involved in determining what constitutes an 'issue' might outweigh any advantage to be achieved from such a provision. The recent introduction of processing charges will also make this issue less significant given that the applicant will incur charges relative to the time spent in processing their application.

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516 Relevant submissions: QIC, first submission no 56 at paras B189-B192; current QIC's letter to the Attorney-General dated 29 October 2001, tabled 31 October 2001.

517 *Re Allanson and QTC* (1997) 4 QAR 219 at paras 11-19.

518 FOI Act, ss 29A-29D.

COMMITTEE FINDING 143—RECOMMENDATION

The Act should provide that, if an agency or minister decides that an applicant is liable to pay an application fee under s 29(1), the agency or minister must notify the applicant in writing of the decision to require payment of the application fee.

COMMITTEE FINDING 144—CONCLUSION

No limit should be placed on the number of issues or subject matters about which documents can be sought in one application.

9.5.3 Processing charges[519]

Processing charges are charges for the resources allocated by an agency in processing an application, that is, conducting activities including search and retrieval of documents, consultation with the applicant and third parties where necessary, decision-making, preparing documents for inspection and granting access.

Section 109(4)(b) requires that any charges under the Act for the time spent by an agency or minister in processing an application are to be calculated at a single hourly rate regardless of the classification or designation of the person who undertakes the work involved.

There are a number of advantages to calculating charges based on a 'time spent' basis which is the basis used in the FOI legislation of most other Australian jurisdictions. These advantages include that the cost reflects the complexity of the application and the cost to the agency in processing it. Such a charging basis might also encourage applicants to reduce the scope of their application. However, stipulating that processing charges are to be calculated on an hourly 'time spent' basis in the manner specified in the Act and FOI Regulation raises a number of concerns.

One of the major concerns with the charging basis is that applicants may be paying for additional time spent by an agency or minister in processing an application due to deficiencies in an agency's records management system and/or the inexperience of the decision-maker.[520] In extreme cases, agencies might even abuse the provision, particularly in relation to search and retrieval. There is no incentive for an agency to improve its records keeping practices. Further, neither the Act nor the FOI Regulation include a provision stating that agencies and ministers cannot charge for time spent looking for a lost or misplaced document.[521] The absence of such a provision is not only unfair on applicants but also raises issues as to the payment of charges (and deposits) where the QIC raises a 'sufficiency of search' issue with an agency.

'Time keeping' also has the potential to involve substantial administration for agencies and create further grounds for appeal based on, for example, disputes over the reasonableness of the time taken by an agency to process an application. This might be exacerbated in cases where the applicant has to pay a processing charge but ultimately no documents are disclosed because all documents responsive to the application are considered exempt. The QIC considered that an increase of applications to his office disputing charges imposed on a 'time spent' basis would presumably have to be given priority. This would, in turn, prejudice applicants seeking timely review of more substantive issues.

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519 Relevant submissions: QIC, first submission no 56 at paras B196-B207; current QIC's letter to the Attorney-General dated 29 October 2001, tabled 31 October 2001.

520 Although the committee has recommended that a new provision be inserted in the objects clause encouraging agencies to disclose information promptly and at the lowest reasonable cost: see section 3.6 *The objects clauses*.

521 Such provisions exist in the FOI legislation of other jurisdictions. For example, see the FOI (Fees and charges) Regulations (Cth), reg 2(2); FOI Act (WA), s 16(1)(a).

There is no scope for these impacts to be ameliorated by the introduction of a sliding scale of charges. That is, an applicant pays a set rate for processing time of, say, less than 3 hours, between 3 and 6 hours and over 6 hours.

Broadly, there are two alternative methods of calculating processing charges apart from the 'time spent' method.

Firstly, a processing charge could be calculated on the basis of the *number of documents/pages considered* by an agency in processing an application. This would ensure that applicants do not pay for administrative inefficiencies within agencies. Such a charging basis would broadly reflect the amount of time an efficient agency would need to allocate to responding to a particular application and would encourage applicants to refine the scope of their applications at all stages of the process. Like charging for time spent, an applicant would be required to pay charges in relation to processing a document responsive to the application but not disclosed because it is exempt. Charges imposed under this option would not reflect the relative complexity of the pages processed.

To minimise administrative costs, a scale of fees rather than a flat rate per page could be adopted.

Secondly, a processing charge could be calculated on the basis of the *number of documents/pages which the agency authorises for release*. The charge that agencies may impose in respect of documents released might be determined by a fixed scale (set to reflect the average time involved in processing an application for differing numbers of documents by a competent FOI decision-maker in an agency with reasonably efficient records management systems).[522] Such a charging basis would encourage applicants to refine the scope of their application, thus promoting efficient administration of the FOI regime. At the same time it would ensure that applicants do not pay the cost for administrative inefficiencies within agencies, or pay for information which they are not ultimately able to access. However, charges imposed under this option would not necessarily reflect the resources allocated by the agency or minister to processing the application, particularly in cases where a substantial amount of matter responsive to the application is exempt.

Given its very recent introduction, the committee has not been in a position to assess how the new fees and charges regime will operate in practice, and whether the concerns noted above will be realised. A review of the operation of the regime should be conducted in a year to assess whether it is operating fairly and efficiently. In particular, matters which should be addressed in this review include:

- whether and, if so, the extent to which the introduction of processing charges has inhibited use of the Act;
- whether the two hour threshold before charges apply is equitable in light of the average time taken to process applications;
- the impact of the regime on the timely release of information given the calculation of time periods where charges apply;
- whether there should be some cap placed on the amount of a charge that an agency can impose on an applicant;
- the impact of the regime on the QIC's workload;
- whether agencies and ministers are providing applicants with accurate preliminary assessments of charges. Deliberately inflating such assessments might deter applicants from proceeding with their application (especially if a deposit of 25% of that preliminary assessment is required); and
- whether different fees and charges regimes should be used for individuals and corporations.

522 The ALRC/ARC review recommended such a charging system for the Commonwealth Act (in preference to the existing 'time spent' basis): ALRC/ARC review report, n 13 at paras 14.14-14.20.

The committee believes that, given its jurisdiction and work on this inquiry, it is the appropriate entity to conduct this review in consultation with the Attorney-General, the QIC, the FOI monitor, agency FOI administrators, applicants and citizens.

In the meantime, the Act should be amended to:

- clarify that other charging regimes such as one based on the number of documents/pages considered or released are authorised; and
- enable the introduction of a sliding scale of charges and/or a cap to be placed on charges where they are calculated on a 'time spent' basis (at present this is precluded by the stipulation that such charges are to apply at a single hourly rate).

This will allow for the ready introduction of modifications to the current regime should there be difficulties or inequities in administration of the hourly 'time spent' regime.

The Act should also be amended as a matter of priority to address the following concerns with the 'processing charges' in the new fees and charges regime.

- It is unclear whether time spent by an agency in consulting with an applicant regarding the agency's preliminary assessment of a charge is 'doing things related to making a decision on an application for access'. It is inappropriate that applicants should bear this cost, especially given that any inflated preliminary assessment is likely to require more consultation.
- In some cases an agency or minister will need to spend time searching for and retrieving documents(s) before it is possible to make, and give an applicant notice of, a preliminary assessment of the amount of a charge payable by the applicant. The Act should clarify that the agency or minister must not impose a charge where, during the consultation process relating to charges, the applicant withdraws the application, or is taken to have withdrawn the application pursuant to s 29A(2)(h).[523]
- In making a preliminary assessment as to a charge (and requiring a deposit of 25% of that amount), an agency is required to take into account time spent in supervising the applicant's inspection of a document. However, this assumes that the applicant will access documents by inspecting them and not by other means, such as requiring a photocopy. Given that other forms of access are available, an agency or minister should not be able to take into account time spent in supervising inspection of documents.
- There is no provision dealing with the process of readjusting charges when the actual charge is either greater or less than the preliminary assessment, and stating that the charge to be paid by the applicant is the actual charge.[524] Such a provision should be inserted.

COMMITTEE FINDING 145—RECOMMENDATION

The Legal, Constitutional and Administrative Review Committee should conduct a review of the fees and charges regime applicable under the Act in a year to assess whether that regime is operating fairly and efficiently.

In the meantime, the fees and charges regime prescribed under the Act and FOI Regulation should:

- clarify that alternative charging regimes (apart from a regime based on an hourly 'time spent' basis) are authorised;

523 Section 29A(4) appears to envisage that a charge may be imposed after an application is withdrawn or taken to be withdrawn.

524 In this regard, see the Freedom of Information (Fees and Charges) Regulations (Cth), s 10.

- enable the introduction of a sliding scale of charges and the introduction of a cap to be placed on charges where they are calculated on a 'time spent' basis;
- provide that agencies cannot charge for time spent searching for a document that is lost or misplaced;
- clarify that agencies cannot charge for time spent consulting with an applicant about the preliminary assessment of a charge;
- clarify that an agency or minister must not impose a charge on an applicant where, during the consultation process relating to charges, the applicant withdraws the application or is taken to have withdrawn the application pursuant to s 29A(2)(h);
- provide that in making a preliminary assessment as to a charge, an agency or minister is not to take into account time spent in supervising inspection of documents; and
- include a provision dealing with the process of readjusting charges when the actual charge is either greater or less than the preliminary assessment, and stating that the charge to be paid by the applicant is the actual charge.

9.5.4 Access charges[525]

The following charges currently apply for accessing non-personal affairs documents disclosed under the Act:

- making an officer available to supervise inspection of a document—$5 for each 15 minutes or part of 15 minutes (if the total time for processing the application and supervising access is greater than 2 hours);[526]
- giving access to a written document by providing a black and white photocopy in A4 size—20c per page; and
- giving access to a document other than by inspection or providing a black and white photocopy in A4 size—an amount that is not more than the actual cost incurred by the agency or minister in giving access to the document.

An applicant must pay an agency or minister a charge in relation to an application for access to a document, other than a charge for supervising inspection of a document, before access is given.[527]

Prior to 23 November 2001, there was no charge for supervising an applicant's inspection of documents, photocopies of documents cost 50 cents per page (with no black and white stipulation), and other forms of access were charged at an amount that an agency considered reasonable but no more than the amount that reasonably reflected the cost of providing the copy.

The cost to agencies of supervising access can be substantial, particularly if applicants wish to repeatedly view documents. As well as the cost of physically supervising access, the requirement to keep the documents available for the applicant can cause inconvenience if other areas of the agency require the documents for operational reasons. Further, there is no clear justification for providing this form of access free of charge when other forms of access incur a charge.

The stipulation that a 20c per page charge applies to black and white as opposed to colour photocopies also appears reasonable.

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525 Relevant submissions: 92, 100A, 104, 109, 113, 118, 119, 120, 125, 128, 133, 134, 136, 138, 142, 144, 145, 150, 153, 154, 155, 158, 160, 161, 162, 163 and 168. QIC, first submission no 56 at paras B194 and B208-B211.

526 FOI Regulation, s 8(2).

527 FOI Regulation, s 8(3).

The committee considered whether charges should apply to access to documents relating to the applicant's affairs in some cases. Significant costs can be incurred in this regard, particularly in providing non-standard access to documents, that is, access other than by inspecting or providing copies of documents.

The committee intends to consider the entire issue of access charges as part of its intended review of the fees and charges regime.

COMMITTEE FINDING 146—CONCLUSION

The Legal, Constitutional and Administrative Review Committee should consider access charges as part of its review of the fees and charges regime recommended in section 9.5.3 *Processing charges*.

9.6 OTHER ISSUES RELATING TO FEES AND CHARGES

9.6.1 Negotiation between the agency and applicant[528]

In section 6.2 the committee advocates a flexible and consultative approach to the processing of applications, and recommends that the Act contain a provision authorising applicants and agencies to agree to diverge from the requirements of the Act.

The committee considers that this authority to negotiate should extend to the application of fees and charges. For example, an agency might agree to prepare a document for an applicant, rather than processing an application involving numerous documents. In exchange, the applicant might agree to pay a charge greater than the time spent at the hourly rate in creating the new document but less than the charge which would have applied if the agency had processed the original application.

COMMITTEE FINDING 147—RECOMMENDATION

The provision recommended in section 6.2.2 *Negotiation* authorising agencies and applicants to agree to diverge from the requirements of the Act should expressly apply to the fees and charges payable under the Act.

9.6.2 Deposits[529]

If an agency or minister decides that an applicant who applies for access to documents that do not concern their personal affairs is liable to pay a charge, then the agency or minister must decide whether the applicant is required to pay a deposit on account of the charge. If the applicant is required to pay a deposit, the deposit is 25% of the charge assessed, on a preliminary basis, by the agency or minister.[530]

The deposit requirements are much more significant in a regime which involves processing charges. Substantial amounts can be required, and there is a risk that high preliminary assessments, resulting in inflated deposits, might deter applicants and jeopardise the objectives of the Act.[531] Substantial deposits might also be required in situations where access is ultimately denied.

528 Relevant submission: 58.
529 Relevant submissions: 67 and 104.
530 FOI Regulation, s 7(2) and (3).
531 See, for example, comments by the NSW Ombudsman in his *Special Report to Parliament by the Office of the Ombudsman Proposing Amendments to the Freedom of Information Act 1989*, n 35 at paras 3.23-3.37.

As noted in section 9.5.3 *Processing charges*, whether agencies are providing applicants with accurate preliminary assessments of charges is a matter which the committee intends to consider as part of its review of the fees and charges regime.

In the meantime, three amendments should be made regarding the payment of deposits.

First, the provision setting the percentage deposit to be paid is more appropriate for primary legislation than regulation. Given that the deposit amount is expressed as a percentage, it should not need to be changed as a result of inflation.

Secondly, provision should made for refund of deposits in situations where, for example, an applicant withdraws their application after paying a deposit but before the application is fully processed, or in the rare circumstance where the processing charge ultimately does not exceed the deposit paid.

Thirdly, the Act should clarify the time within which a deposit must be paid. The payment period should be reasonable having regard to the circumstances of the case. [532] Section 29A(2)(g) appears to allow an applicant at least 30 days to pay a deposit.

COMMITTEE FINDING 148—RECOMMENDATION

The Act (as opposed to the FOI Regulation) should:

- prescribe the percentage amount of any deposit which an agency or minister may require of an applicant;
- provide for refund of deposits; and
- clarify the time within which a deposit must be paid.

9.6.3 Waiver of charges[533]

Charges can be waived if an applicant (either an individual or non-profit organisation) contends that they are in financial hardship.[534] The criterion for determining financial hardship in the case of an individual is whether the individual is the holder of a 'concession card'.[535] Criteria for determining financial hardship in the case of a non-profit organisation[536] are the nature and size of the organisation's funding base, and the amount of the preliminary assessment of the charge compared to the organisation's financial position.[537]

In the case of applications made to agencies that are departments, the chief executive of the Department of the Premier and Cabinet decides whether a charge may be waived because an applicant is in financial hardship.[538] There is no internal review of the chief executive's decision.[539]

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532 The NSW Ombudsman has cited one example in that jurisdiction where an agency required a deposit of over $6,000 and gave the applicant two weeks over Christmas in which to pay: *Special Report to Parliament by the Office of the Ombudsman Proposing Amendments to the Freedom of Information Act 1989*, n 35 at para 3.25.

533 Relevant submissions: 24, 29, 39, 41, 43, 46, 51, 55, 62, 63, 66, 67, 73, 76, 87, 91, 95, 100A, 101, 103, 106, 113, 114, 115, 119, 120, 125, 128, 133, 134, 143, 144, 150, 154, 155, 158, 161, 162 and 163.

534 FOI Regulation, s 10. There is no provision for waiver of application fees due to the definition of 'charge' in s 7 of the Act.

535 FOI Regulation, s10(2), (3) and (5). 'Concession card' is defined to mean a health care card or pensioner concession card under the *Social Security Act 1991* (Cth) or a pensioner concession card issued by the Commonwealth Department of Veterans' Affairs.

536 'Non-profit organisation' is defined as an organisation that is not carried on for the profit or gain of its individual members: FOI Regulation, s 10(5).

537 FOI Regulation, s 10(4).

538 FOI Act, s 29C(2) and FOI Regulation, s 9.

539 FOI Act, s 29C(5).

Arguably, if a minimalist, 'user friendly' fees and charges regime exists, waiver or reduction provisions are not required.[540] The higher the fees and charges, the more significant a provision allowing or requiring waiver or reduction of charges in certain circumstances.

The committee is concerned that the current provisions regarding waiver are too narrow. Among other matters, the current provisions do not allow for waiver of charges where:

- release of a document(s) is in the public interest or in the interest of a substantial section of the public;[541]
- release to the applicant is likely to be of the public benefit, for example, if access is requested by a community organisation;
- compassionate grounds exist, for example, where an applicant is seeking access to hospital or WorkCover records of their deceased spouse (although this will be addressed if the committee's recommendation in section 9.6.6 *Applications relating to a deceased close relative of the applicant* is implemented); and
- an applicant is 'impecunious' or the payment of charges will *cause* the applicant financial hardship (as opposed to the applicant being *in financial hardship*),[542] but the applicant is not a concession card holder for whatever reason.

The committee appreciates that application of a discretion to waive fees has the potential to result in inconsistent decision-making, especially if considerations of 'public interest' are incorporated into the discretion. However, centralised decision-making, such as must occur in the case of agencies who are departments, would substantially address these concerns.

Indeed, it might be queried why, in the case of individual applicants who contend that they are in financial hardship, centralised decision-making is required given that whether an individual holds a concession card is an entirely objective test. The current requirement for centralised decision-making in this regard also has the potential to delay the processing of such applications.

COMMITTEE FINDING 149—RECOMMENDATION

The Attorney-General should consider expanding the circumstances in which charges can be waived.

9.6.4 Charges where the information is of commercial benefit to the applicant[543]

The committee considered whether higher fees and charges, or even full-cost recovery charges, should be imposed for information where the applicant will acquire commercial benefit from the information, or will use the information for commercial purposes. A provision to this effect could, in many cases, apply to applicants which are corporations operating for profit.

Practically, this could be achieved by asking applicants who wish to be charged on the lower regime to sign a statement that the information will not be used for commercial purposes. Release of the information would then be subject to a requirement that the information can only be used for commercial purposes if the applicant subsequently pays the commercial charges. An appropriate definition of 'commercial purpose' or other similar term would need to be included in the legislation.

Such a provision would pose a number of practical difficulties, particularly in enforcement. Moreover, this proposal is contrary to the general FOI principle that an applicant's reason for seeking

540 EARC FOI report, n 19 para 18.46.
541 See, for example, FOI Act (Cth), s 29(5) and s 30A(1)(b).
542 This is the terminology used in the Freedom of Information Acts of: the Commonwealth, s 29(5) and s 30A(1)(b); Victoria, s 17(2B); the Australian Capital Territory, s 29.
543 Relevant submissions: 4, 22, 39, 87, 150, 161 and 162.

information is irrelevant. Accordingly, the committee does not support the inclusion of a provision to this effect.

COMMITTEE FINDING 150—CONCLUSION

The charging regime under the Act should not contain a different fees and charges structure for applicants seeking information for commercial purposes.

9.6.5 Full cost recovery charges

The committee considered the suggestion that where agencies cite substantial and unreasonable diversion of agency resources as a reason for refusing to process an application—pursuant to s 28(2)—the applicant should be given the option of paying full cost recovery charges to have the work undertaken to obtain the requested information.

This option would introduce inequities between applicants and still substantially and unreasonably divert an agency from its core functions. Further, practical difficulties in establishing the actual cost involved in processing the application would make implementation of such a provision extremely complex.

COMMITTEE FINDING 151—CONCLUSION

The Act should not make provision for an applicant to have the option of paying full cost recovery charges in circumstances where the agency or minister relies on s 28(2) (relating to voluminous applications) to refuse to process an application.

9.6.6 Applications relating to a deceased close relative of the applicant[544]

Documents relating to a deceased relative of the applicant are not documents relating to the applicant's 'personal affairs'. Accordingly, an applicant seeking access to such documents is required to pay an application fee, processing charges, and access charges. Further, it is unclear whether the agency relationship envisaged by s105 extends to the personal representative of a deceased person's estate, and if so, whether the imposition of a $31 application fee and charges apply to a person acting as agent of the deceased person.[545]

Payment of an application fee for documents in such situations can be difficult for applicants to understand. Further, s 53 provides that a person is entitled to apply for correction or amendment of information relating to their next of kin which is inaccurate, incomplete, out-of-date or misleading. (In section 6.15 *Provisions regarding deceased people*, the committee recommends that the term 'next of kin' be amended to 'close relative'.)

It is not appropriate that an applicant should be required to pay fees and charges for information relating to the affairs of a deceased close relative given that:

- access to information is essential to ensure its accuracy and exercise rights of amendment and correction pursuant to s 53;

544 QIC, first submission no 56 at paras C5-C6 and C12.

545 In *Re Turner and Northern Downs Regional Health Authority* (1997) 4 QAR 23 the QIC held that an applicant seeking access to medical records concerning her late husband (in her capacity as next of kin and executrix of the estate) was required to pay the then $30 application fee provided for in s 29(2) of the FOI Act, and s 6 of the FOI Regulation as the matter did not concern her 'personal affairs'.

- despite the fact that the information does not technically relate to the applicant's 'personal affairs' it will often have substantial personal significance to the applicant; and
- in light of the fact that the person to whom the information relates is deceased, the information might not be accessible in any other way.

The committee's recommendation in section 9.5.1 *Distinction between types of applications* that the term 'affairs' rather than 'personal affairs' should apply in the fees and charges context will address these concerns in some situations. However, situations might still arise where a person is charged for information relating to the affairs of a deceased close relative. Therefore, specific legislative amendment is required.

Further, the Act should be clarified to ensure that a personal representative of a deceased person is not required to pay fees or charges for information relating to the affairs of the deceased person.

Situations might also arise where information about a close relative who is still alive is significant to an applicant. This can raise similar considerations as applications relating to deceased people, particularly where the applicant is not aware of the identity or whereabouts of the relative. Again, providing information relating to the affairs of the applicant free of charge will address this issue in some circumstances. The committee does not consider that broader exemption from fees is justified where the person to whom the information relates is still alive.

COMMITTEE FINDING 152—RECOMMENDATION

Applicants seeking access to documents which contain information about the affairs of a deceased 'close relative' of the applicant should not be required to pay fees or charges.

Further, a personal representative of a deceased person should not be required to pay fees or charges for information relating to the affairs of the deceased person.

9.7 FEES AND CHARGES FOR INTERNAL AND EXTERNAL REVIEW[546]

The committee does not support the introduction of application fees or other charges for internal or external review.[547]

Internal review is an integral part of an agency's decision-making process. The cost and time involved in internal review should be an incentive to improve the standard of initial decision-making, rather than a reason to charge for review.[548] Fees create a barrier to access by applicants to internal review, and are likely to make only a token contribution to the cost of the review.[549]

External review fees and charges are inconsistent with the Act's objective of providing a cheap and informal method of review and contrary to the usual practice followed in other forms of merits review. The committee supports the QIC's comment that, having paid to exercise the right of access under the Act, an applicant should be entitled to challenge an agency's decision to ensure its correctness at no extra cost.

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546 Relevant submissions: 1, 21, 38, 43, 45, 50, 55, 57, 63, 66, 67, 69, 80, 87, 100A, 106, 113, 114, 115, 118, 119, 128, 135, 136, 138, 142, 144, 148, 150, 154, 158, 160, 161, 162 and 168. QIC, first submission no 56 at paras B212-B220. QIC, supplementary submission no 173 at 25-26.

547 While the only costs imposed in other jurisdictions for internal and external review are application fees, the same arguments apply to charges.

548 The ALRC/ARC review report, n 13 at paras 14.22-14.23.

549 See the ARC's *Internal Review of Agency Decision Making – A Best Practice Guide* (at 12) which formed part of the ARC's internal review report, n 352. The ARC recommends, as a general principle, that internal review should be offered free of charge.

Introducing review fees would reduce the number of reviews lodged, and offset compliance costs. Some submitters also suggested that review fees would deter repeat, frivolous or vexatious applicants. However, the committee has not been presented with any evidence that fees would deter unreasonable applicants to any greater degree than they would deter legitimate applicants. The impediment to exercising appeal rights to legitimate applicants which would result from introducing review fees and/or charges is not justified.

COMMITTEE FINDING 153—CONCLUSION

There should be no fees or charges for internal or external review.

10. EXEMPTIONS: GENERAL PRINCIPLES

10.1 INTRODUCTION

Term of reference B(ii) asks whether the exemption provisions in the Act should be amended.

The right of access in the Act is subject to the 15 exemption provisions contained in Part 3 Division 2, many of which contain multiple subsections. The exemptions reflect Parliament's attempt to provide a right to access government-held information while maintaining confidentiality where it is necessary to protect certain public and private interests (for example, to protect Cabinet deliberations, law enforcement and public safety, certain commercial activities, citizens' personal affairs, and court and parliamentary processes). The exemptions aim to balance the objective of providing access to government-held information against legitimate claims for protection from disclosure.

The formulation of the exemption provisions vary. Some focus on the consequences of disclosing documents or the harm which might result from disclosure. Others are 'class exemptions', that is, categorical exemptions that provide that, if a document is of a specified class or category or relates to a specified matter, it is exempt matter regardless of whether its release would harm any particular interest.

In this chapter the committee discusses general issues relating to exemptions. In chapter 11 *The specific exemption provisions* the committee discusses specific issues relevant to particular exemption provisions.

10.2 ALTERNATIVE APPROACHES TO THE EXEMPTION PROVISIONS[550]

As in other Australian FOI legislation, Queensland's FOI Act provides for a number of specific exemptions. It has been suggested that a change in approach to the exemptions would better achieve FOI objectives. Below, the committee outlines its consideration of some alternative approaches.[551]

10.2.1 A single, general exemption provision

It was suggested that all specific exemptions could be replaced with a general exemption stating that, for example, information is exempt if its disclosure would result in 'social harm', or alternatively, information is exempt where it is in the public interest to retain confidentiality.

The Deputy QIC[552] did not support this suggestion because:

- most of the exemption provisions now set out what Parliament has stipulated is a social harm;
- the suggestion would allow agencies to develop new reasons, outside those envisaged by Parliament, for withholding information; and
- such simplification would push the boundary substantially in favour of disclosure or substantially in favour of non-disclosure.

The committee is concerned that a single, broad exemption provision could result in uncertainty and inconsistent application by decision-makers, at least until a broad base of precedent is established to

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550 Submissions relevant to one or more of the issues discussed in section 10.2 are: 4, 22, 44, 66, 70, 93, 113, 119, 120, 127, 128, 133, 134, 135, 138, 142, 144, 150, 153, 154, 156, 160, 161, 162, 163 and 167. QIC, supplementary submission no 173 at 7.

551 While there are other approaches, they are generally a variation on one of the approaches considered by the committee or a combination of two or more of them.

552 Public hearing transcript, 12 May 1999 at 108. While the Deputy QIC's comments related specifically to a broad 'social harm' exemption, his comments apply generally to the suggestion of a single, general exemption provision.

assist in its interpretation.[553] Moreover, the precedent established to interpret such a broad provision would, in the long term, either be as complex as the current exemption provisions, or fail to provide necessary certainty, clarity and consistency in the interpretation and application of the provisions.[554]

The committee believes that the balance between the public interest in disclosure and non-disclosure is best served by specific exemptions which reflect the particular public interest in non-disclosure.

10.2.2 An overriding 'public interest' or 'harm' test

An alternative approach to specific exemptions which reflect the particular public interest in non-disclosure is to subject all exemptions to an overriding public interest or harm test.

Public interest tests direct a FOI decision-maker to weigh up the public interest in an individual's right of access to documents against the public interest in preserving the confidentiality of government and third parties, and in ensuring the proper working of government. Any review of such decisions about access then focuses on whether there has been a proper weighing up of the competing interests. Harm tests relate to the consequences or harm which could be reasonably be expected to result from disclosure of documents.

An overriding public interest or harm test could be a test: (a) separate and additional to establishing that matter is exempt; or (b) applied to refute a presumption that matter within an exemption category is exempt.

There are currently some exemptions where the public interest is in the 'class' nature of the exemption. In these cases, the absence of a public interest or harm test reflects that Parliament has deemed that the release of such documents would be harmful and against the public interest. Harm can arise merely from the risk of disclosure of matter within a particular class as well as from actual disclosure. For example, in the case of the Cabinet exemption, one of the reasons for the class exemption is to ensure that full and frank discussion of issues being considered by Cabinet is not inhibited. The knowledge that the details of particular Cabinet considerations could subsequently be considered appropriate for release could, in itself, inhibit frank discussion in Cabinet. Thus, the mere *potential* of disclosure could be detrimental.

Further, public interest and harm tests currently vary between exemptions because the matter protected by some exemptions is inherently more sensitive than matter protected by other exemptions.

The committee opposes the inclusion of general overriding public interest or harm tests in the Act because they are not sufficiently flexible to recognise these considerations. Further, the practical effect of such a provision would be to give the QIC power to order disclosure of otherwise exempt documents in the public interest, or because there is no demonstrable harm from disclosure. In section 8.5.3 *Powers of the Information Commissioner on review: s 88(2)*, the committee discusses and concludes against the QIC having the power to order disclosure of otherwise exempt documents in the public interest, or a power equivalent to that contained in s 28(1).

10.2.3 Specific harm tests v class exemptions

Another approach is to retain specific exemptions but frame each exemption provision to focus on the harm to result from disclosure, rather than the type or dass of document. This approach allows public interest and harm tests to be tailored to suit individual exemptions. It also removes class exemptions, that is, exemptions where harm is assumed to flow from any disclosure of documents within the particular dass. For example, New Zealand's *Official Information Act* generally adopts an approach

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553 The ALRC/ARC review likewise rejected the option of a general exemption for documents the disclosure of which would be contrary to the public interest: review report, n 13 at para 8.6.

554 It is also likely that the existing exemptions would be used as a reference in the initial stages of applying any single, general test.

which allows access to information subject to a judgement of the consequences of release, and not simply a categorisation of the information.

Many of the exemptions in Queensland's FOI Act focus on the harm which could reasonably be expected to result from the disclosure. **Appendix H** sets out those exemptions which contain harm tests and those which relate to classes of documents.

There is some merit in the argument that a categorical approach to exemptions bogs FOI consideration down *'in arid and technical disputes'*[555] and ignores the real issue: whether the information could be released without significant adverse consequence. In most cases, an approach which focuses on the harm likely to result from disclosure is more likely to result in exemptions which provide the necessary protection from disclosure without being unnecessarily broad.

However, as discussed above in the context of general overriding tests, there are circumstances where exempting a particular class of matter is necessary and justified. That is, circumstances where harm arises merely from the risk that material might be released. A provision which exempts material only after considering the consequences of the release of particular information within the class does not overcome this more fundamental issue.

Thus, while the committee believes that as a general principle exemption provisions should require agencies and ministers to focus on the harm resulting from disclosure of matter, the committee also believes that class exemptions are justified in limited circumstances.

10.2.4 Mandatory v discretionary exemptions: s 28(1)

In some jurisdictions, agencies do not have the discretion to disclose documents which meet exemption criteria.[556] In contrast, s 28(1) of Queensland's FOI Act provides that '*an agency or minister may refuse access to exempt matter or an exempt document*'. This provision enables an agency or minister to provide access to matter, even if it is technically exempt. A discretion to release technically exempt matter recognises the underlying philosophy of the Act that the community should, to the greatest extent possible, be kept informed of government's operations. Release of information on the basis that that no harm would result from disclosure also precludes the need for protracted, technical disputes as to the application of the exemptions.

The committee endorses the retention of this discretion and recommends in section 4.4 that the Premier issue a directive to all agencies and ministers directing agencies and ministers to:

- approach applications for access to documents under the Act with a spirit of presumption of disclosure; and
- invoke exemptions only where there is a reasonable expectation that disclosure would result in harm (and not where matter might technically or arguably fall within an exemption).

It has also been suggested that decisions regarding the exercise of the s 28(1) discretion should be reviewable by the QIC. Depending on the drafting of the provision, this could have a similar result to including an overriding harm or public interest test. As discussed in section 8.5.3 *Powers of the Information Commissioner on review: s 88(2)*, the committee does not support giving the QIC jurisdiction to review such decisions.

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555 Snell R, 'Rethinking administrative law: A redundancy package for FOI?', n 5 at 13.

556 For example, the Commonwealth and Victorian FOI legislation provide a right of access to a document other than an exempt document: See the Freedom of Information Acts for: the Commonwealth, s 11(1); Victoria, s 13.

10.2.5 Exemptions in a schedule to the Act

It has been suggested that placing the exemption provisions in a schedule to the Act, rather than as provisions of the main body of the Act, would reinforce that exemptions are not the primary focus of the Act.[557] This is the approach adopted by some other jurisdictions, for example, Western Australia.

The committee is of the view that it is not the placement of the exemption provisions which is significant, but the content of the provisions and the application of the provisions by FOI decision-makers.

10.2.6 Committee conclusion

Having considered a broad range of options the committee is of the view that:

- the Act should continue to contain specific exemption provisions;
- general public interest or harm tests overriding all provisions should not be included;
- as a general principle, specific exemption provisions should be framed to require agencies and ministers to focus on the harm which would result from disclosure of a document, rather than on the class of documents to which the relevant document belongs;
- class exemptions should be included only where harm would result from the risk of potential disclosure of the relevant matter, and there is an inherent public interest in protecting the particular class of documents; and
- agencies and ministers should retain a discretion to release documents and matter despite the fact that it would technically qualify for an exemption.

In chapter 11 the committee considers the application of these principles to the specific exemption provisions.

COMMITTEE FINDING 154—CONCLUSION

As a general principle, exemption provisions should be structured to exempt matter the disclosure of which could reasonably be expected to result in a specified harm. Class exemptions should be included only where harm would result from the risk of potential disclosure of the relevant document or matter, and there is an inherent public interest in protecting the particular class of document.

COMMITTEE FINDING 155—CONCLUSION

The Act should continue to provide agencies and ministers with a discretion to release documents for matter which is technically exempt.

10.3 RATIONALISATION OF THE PUBLIC INTEREST AND HARM TESTS[558]

Public interest and harm tests, expressed in a variety of ways, are incorporated into a number of the specific exemption provisions. **Appendix H** shows which exemption provisions are subject to public interest tests, which exemptions currently contain harm tests and which contain class exemptions.

Appendix H shows that there are currently three separate public interest tests and numerous different harm tests in the exemption provisions.

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557 See ALRC/ARC review report, n 13 at para 8.9.

558 Relevant submissions: 54, 89, 92, 113, 115, 119, 127, 128, 133, 134, 138, 142, 144, 149, 150, 154, 156, 160, 161, 162 and 163. QIC, supplementary submission no 173 at 7.

The committee has considered whether the different public interest and harm tests contained in the exemption provisions should be rationalised and/or simplified. The major advantage of rationalising these tests is that QIC decisions made in relation to one test would be applicable to other similar tests. This would assist in the interpretation of the provisions containing the tests.

Currently, the exemption provisions contain three differently-worded public interest tests: See **appendix H**. In sections 11.8.2 and 11.18.2 the committee recommends that one of these tests (public interest test 3 in **appendix H**) be removed. If this recommendation is implemented, all public interest tests except that contained in s 41 (Matter relating to deliberative processes) will be consistent. For reasons discussed in section 11.10 the committee considers that the unique test in s 41 is justified.

The harm tests in the specific exemption provisions relate to many diverse interests. Some exemptions, by the nature of the information they seek to protect, justify a much lower threshold to establish the exemption. Absolute consistency between the tests would remove this flexibility and would not necessarily result in exemptions which achieve the best balance between openness and necessary confidentiality. Further, the committee has not received any substantial evidence that the different tests used in the exemption provisions have, to date, caused significant problems in interpretation.

Therefore, while the committee supports consistency between public interest and harm tests used in the different exemption provisions to the greatest degree possible, the committee does not consider that absolute consistency is appropriate or desirable. Some exemptions justify higher threshold tests than others.

Likewise, the committee does not agree with a general policy of increasing the level of harm expressed in the exemptions. The appropriate threshold for harm and public interest tests should be considered in the context of each individual exemption.

The committee is also conscious that the QIC has made decisions in relation to the tests as they currently exist and that changes to the provisions will reduce the value of existing precedent and might result in a period of uncertainty until decisions are made in relation to the new provisions. With this in mind, the committee's approach to the specific exemption provisions is to not recommend amendment in the absence of a clear reason for doing so.

In chapter 11 *The specific exemption provisions*, the committee considers appropriate public interest tests and/or harm tests in the context of the specific exemption provisions.

COMMITTEE FINDING 156—CONCLUSION

While the committee supports consistency between public interest and harm tests used in the different exemption provisions to the greatest degree possible, the committee does not consider that absolute consistency is appropriate or desirable.

Likewise, the committee does not agree with a general policy of increasing the level of harm expressed in the exemptions. The appropriate threshold for harm and public interest tests should be considered in the context of each individual exemption.

10.4 DEFINING THE 'PUBLIC INTEREST'[559]

The 'public interest', as important as it is to the formulation of many of the exemptions, is not defined in the Act. The only provision of the Act which provides any guidance regarding the meaning of the 'public interest' is s 6. This provision is discussed further in section 10.5

[559] Relevant submissions: 48, 54, 90, 92, 93, 101, 113, 115, 119, 120, 127, 128, 133, 134, 135, 136, 138, 142, 146, 150, 152, 153, 154, 157, 158, 161, 162, 163 and 167. QIC, supplementary submission no 173 at 8.

Matter relating to the personal affairs of the applicant: s 6.

Some submitters suggested there should be more guidance about what the public interest means—over and above the existing guidance available from the formal decisions of the QIC[560] and the courts in other jurisdictions—as the concept is too open-ended and the discretion given is too wide.

The committee does not believe that it is possible or desirable to define the public interest in legislation. The public interest changes over time and according to the circumstances of each case. Decision-makers must have some flexibility in considering what is in the public interest when balancing all relevant considerations to disclosing or withholding information.

However, the committee considers it appropriate to insert a clear and unambiguous provision in the Act reflecting the principle that government embarrassment is irrelevant to the consideration of whether the disclosure of information would be in the public interest.[561] Although this principle has been recognised in the QIC's decisions,[562] the committee believes that there is value in including a legislative provision to this effect to ensure that it is clear to decision-makers.

The committee also considers that guidelines for decision-makers on the application of the public interest tests would overcome some of the difficulties currently experienced while maintaining the necessary flexibility.[563] The FOI monitor would be best placed to prepare such guidelines and conduct complementary training.

Similarly, any attempt to legislatively define any of the various 'harm' tests used in the Act would detract from the flexibility of the tests. Again, guidelines in relation to their application could assist the interpretation and consistent application of the provisions.

COMMITTEE FINDING 157—RECOMMENDATION

The Act should not attempt to define the 'public interest' or any of the various 'harm' tests used in the Act. However, a provision should be inserted into the Act that expressly provides that for the purpose of determining whether the disclosure of a document would be contrary to the public interest, it is irrelevant that the disclosure may cause embarrassment to government.

COMMITTEE FINDING 158—RECOMMENDATION

The FOI monitor should issue and continually revise guidelines regarding the application of the public interest and harm tests, and conduct complementary training.

560 For example, in *Re Eccleston and Department of Family Services and Aboriginal and Islander Affairs* (1993) 1 QAR 60 at 66-72, the QIC thoroughly discusses the 'public interest' in the context of s41, although his comments in this regard are of wider application.

561 See, for example, the NSW FOI Act, s59A(a). A similar provision was recommended by the ALRC/ARC review, n 13 at para 8.15 (recommendation 38) and appears in Senator Murray's Freedom of Information (Open Government) Amendment Bill 2000 (Cth). The Senate Legal and Constitutional Legislation Committee rejected the clause on the basis that it was unnecessary in light of numerous Federal Court and Administrative Appeals Tribunal decisions on this issue: n 27 at paras 3.12-3.14

562 See, for example, *Re Eccleston and the Department of Family Services and Aboriginal and Islander Affairs* (1993) 1 QAR 60 at 76.

563 The ALRC/ARC review recommended the (proposed) Commonwealth FOI Commissioner should issue administrative (rather than legislative) guidelines *on how to apply* a public interest test, listing factors that are relevant and factors that are irrelevant when weighing the public interest: review report, n 13 at para 8.14 (recommendation 37).

10.5 MATTER RELATING TO THE PERSONAL AFFAIRS OF THE APPLICANT: S 6[564]

Section 6 provides that if an application for access to a document is made under the Act, the fact that the document contains matter relating to the *personal affairs* of the applicant is an element to be taken into account in deciding: (a) whether it is in the public interest to grant access to the applicant; and (b) the effect that disclosure of the matter might have.

EARC recommended this provision in recognition of the tension between FOI legislation conferring rights of access to all persons regardless of their motive for seeking access, and information privacy, which FOI legislation also seeks to promote. EARC concluded that primacy should be given to the privacy of the individual and recommended that the fact that a document relates to the personal affairs of the applicant should be a matter to be taken into account when the application of other exemptions turns upon the effect which disclosure of the document would have on the public interest or other relevant interest.[565]

The QIC recommended that s6 be amended, by deleting the qualification 'personal' which appears in relation to the affairs of the applicant. The QIC commented:

> *The obvious limitation of s 6 is that it applies only when the matter in issue relates to the personal affairs of the applicant. The phrase "personal affairs" has a fairly narrow scope as I explained in my decision in* Re Stewart and Department of Transport (1993) 1 QAR 227. *Section 6 in its present terms would not assist an applicant in relation to information which does concern the applicant, but does not concern the applicant's personal affairs, for example, information which concerns the applicant's employment or professional affairs. Such an applicant has a greater interest in obtaining access to that information than the public generally. The interest of the individual applicant, which is given recognition in s 6, is deserving of extension beyond the narrow scope of the applicant's "personal affairs" to the applicant's affairs generally.*
>
> *The proposed amendment would extend the availability of s 6 to applicants other than natural persons (eg a corporation could rely on it in respect of information concerning its business affairs), but I see no difficulty in principle in that regard.*[566]

The committee supports the QIC's proposed amendment. The expanded terminology more accurately reflects the policy objective of the provision.

Further, the term 'affairs' would allow consideration of an applicant's relationship with another person. This is consistent with the principle that the identity of an applicant is, in certain circumstances, a relevant consideration in applying the public interest test: see section 11.13.4.

COMMITTEE FINDING 159—RECOMMENDATION

Section 6 (Matter relating to personal affairs of applicant) should provide that the fact that a document contains matter relating to the 'affairs' of a person is an element to be taken into account in deciding whether it is in the public interest to grant access to the applicant, and the effect that disclosure of the matter might have.

564 Relevant submissions: 16, 63, 96 and 101. QIC, first submission no 56 at paras C18-C22.
565 EARC FOI report, n 19 at para 9.22.
566 QIC, first submission no 56 at paras C20-C21.

10.6 INFORMATION AS TO THE EXISTENCE OF CERTAIN DOCUMENTS: S 35[567]

Section 35 provides that an agency or minister is not required to give information as to the existence or non-existence of a document containing matter that would be exempt matter under s 36 (Cabinet matter), s 37 (Executive Council matter) and s 42 (Matter relating to law enforcement or public safety). Pursuant to s 35, the agency or minister may give a notice which neither confirms nor denies the existence of the document, and states that assuming the existence of the document it would be an exempt document. In other words, s 35 focuses on the existence rather than the contents of a document.

Section 35 is designed for circumstances '*where the character of the document is such that the mere acknowledgment of its existence, albeit accompanied by a denial of access, will itself cause the damage against which the exemption provision is designed to guard*'.[568] It is generally accepted that while such a provision is necessary it ought to be confined to a very narrow set of exemptions, namely, those relating to classes of documents which by their very nature are likely to be widely accepted as especially sensitive.[569]

10.6.1 Scope of s 35

The committee considered whether the list of exemptions to which s 35 applies should be expanded and, in particular, whether s 35 should apply to documents exempt under s 44 (Matter affecting personal affairs). Refusal to grant access to third persons' records on the ground that they are exempt under s 44(1) implicitly confirms the existence of the records. In some cases, information that a person appears on a particular database or has a particular type of file with an agency is significant in itself. For example, a response to an application for a person's psychiatric record refusing access to the record, but in doing so implicitly confirming its existence, could be damaging.

It is clearly necessary in relation to some documents exempt under s 44, that the agency be able to refuse to confirm or deny the existence of the document. Therefore, s 35 should be extended to include personal affairs information. However, to ensure that s 35 is not broader than necessary, an additional requirement should be met before an agency can rely on s 35: see section 10.6.2.

Submitters also recommended that s 35 be amended to allow an agency to neither confirm nor deny the existence of a document containing matter that would be exempt under s 46 (Matter communicated in confidence) because the identification of such a document could lead to a breach of the confidentiality the exemption is intended to protect. For example, to admit the existence of a document and apply s 46(1)(a) to it can disclose the existence of a proposed development and breach the confidentiality agreement made with the development proponent. This could lead to land speculation or give unfair advantage in some way so as to cause a real detriment to the development proponent. An applicant who seeks a range of documents may not know of the existence of specific documents which have been provided to an agency in confidence, but can become aware of these documents when advice on the exemption of the document is provided to them.

No other Australian jurisdiction applies a 'neither confirm nor deny' provision to exemptions equivalent to the s 46 exemption. The committee is not convinced that the restriction of applicants' rights which would result from including s 46 within the scope of s 35 is justified. Accordingly, the committee does not consider that s 46 should be brought within the scope of s 35.

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567 Submissions relevant to one or more of the issues discussed in section 10.6 are: 43, 46, 55, 66, 72, 87, 100A, 103, 106, 122, 124, 150 and 168.

568 1979 Senate Committee, n 14 at para 9.27.

569 1979 Senate Committee, n 14 at para 9.29; EARC FOI report, n 19 at para 7.332; ALRC/ARC review report, n 13 at para 8.22.

COMMITTEE FINDING 160—RECOMMENDATION

Subject to implementation of the recommendation in section 10.6.2, s 35 (Information as to existence of certain documents) should apply to documents claimed to be exempt under s 44 (Matter affecting personal affairs).

10.6.2 Requirements of s 35

A provision allowing an agency or minister to neither confirm nor deny the existence of matter has the potential to impede applicants' rights in the FOI process. Requirements to give reasons for a refusal under s 34(2)(f) are usurped and access to internal and external review is limited in practice because the capacity of the applicant to make informed submissions is restricted. Section 35 should prevent disclosure of the existence of certain documents in appropriate cases, without extending the authority to refuse to confirm or deny the existence of documents more broadly than necessary.

The application of s 35 is justified in circumstances where the harm which is sought to be avoided by an exemption could be caused by the FOI process itself. However, pursuant to s 35 as currently drafted, an agency or minister may use s 35 if it can establish that matter is exempt under one of the relevant exemption provisions. It is not currently necessary to establish that harm would flow from disclosure of the existence of the document.

Section 35 would more appropriately meet its objective if there was an overriding requirement that disclosure of information relating to the existence of the documents would have the effect which the relevant exemption seeks to avoid.[570] Thus, an agency or minister would have to meet two tests to apply s 35. They would need to establish that:

- the document, if it exists, is exempt under the relevant exemption provision (the current test); and
- disclosure of the existence of the document, if it exists, would have the consequence which the relevant exemption provision seeks to avoid.

This additional test would have limited impact on the application of s 35 to the Cabinet and Executive Council exemptions. However, it would limit the circumstances in which s 35 could be applied to documents exempt under the law enforcement or public safety exemption or the personal affairs exemption (if the committee's recommendation to include s 44 within the scope of s 35 is adopted), to those cases where disclosure of the existence of the document could reasonably be expected to have the consequence which the relevant exemption provision seeks to avoid.

The application of this additional test would be a reviewable decision. Issues relating to review of decisions under s 35 are discussed further in section 8.3.1.

COMMITTEE FINDING 161—RECOMMENDATION

Section 35 (Information as to existence of certain documents) should require that disclosure of the existence of the document, if it exists, would have the consequence which the relevant exemption provision seeks to avoid, as a separate and additional test to the existing requirement that matter be exempt pursuant to a specified provision.

[570] Examples of such provisions exist in s 25 of the Commonwealth FOI Act and s 10 of the *Official Information Act 1982* (NZ).

10.6.3 Safeguards

As a safeguard to s 35, the committee also believes that:

- agencies should be required to notify the FOI monitor when they invoke s35 to enable the FOI monitor to assess the extent and appropriateness of the use of s 35 and report generally on inappropriate use where the FOI monitor believes that is warranted; and
- the FOI monitor should educate agencies about the correct use of s 35.

COMMITTEE FINDING 162—RECOMMENDATION

Agencies should be required to notify the FOI monitor when they invoke s 35 (Information as to existence of certain documents) to enable the FOI monitor to assess the extent and appropriateness of the use of s 35 and report generally on inappropriate use where the FOI monitor believes that is warranted.

COMMITTEE FINDING 163—RECOMMENDATION

The FOI monitor should educate agencies about the correct use of s 35 (Information as to existence of certain documents).

10.7 CONCLUSIVE CERTIFICATES[571]

The exemptions in s36 (Cabinet matter), s37 (Executive Council matter) and s42 (Matter relating to law enforcement or public safety) enable the Attorney-General, as the minister administering the Act, to sign a conclusive certificate certifying that matter that has been requested is of a kind mentioned in the exemption category. Such a certificate establishes that the matter is exempt. The QIC cannot review a decision to issue a conclusive certificate. The QIC can only determine whether reasonable grounds existed for the issuing of the certificate: s 84.[572] Even if the QIC is of the view that there were no reasonable grounds for issuing the certificate, the certificate does not cease to have effect if the minister confirms the certificate within 28 days of the QIC's decision.

The QIC submitted that although the logical rationale for conclusive certificates is 'murky indeed', the QIC is aware of only two instances in Queensland where conclusive certificates have been issued. The QIC commented this limited use would not appear to support the case for repeal of those provisions on the ground that they are being abused. However, he did not support widening the minister's power to issue such certificates.

The committee considers that conclusive certificates are inconsistent with the fundamental precepts of FOI and should only be included where there is strong justification for doing so.

The committee can see no justification for including provision for conclusive certificates in s 36 (Cabinet matter) and s37 (Executive Council matter). If matter is not legally exempt pursuant to s36 or s 37, there should be no provision for the Attorney-General to effectively override that legal position. In contrast, the committee considers provision for conclusive certificates in relation to s42 is justified. Although such certificates should rarely be used, s 42 concerns matter so sensitive that retention of the power is warranted.

Where the minister issues a conclusive certificate, that fact and the reasons for the issue of the certificate should be reported to the FOI monitor. This would enable the FOI monitor to report generally on the use of the certificates if it appears they might be being over-utilised.

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571 Relevant submissions: 16, 90, 92, 113, 115, 138, 142, 150, 154, 158, 160, 161 and 162. QIC, first submission no 56 at paras B9-B11. QIC, supplementary submission no 173 at 8.

572 See further the discussion in section 8.5.1 *Review of conclusive certificates: s 84*.

The QIC commented that amendments to the Act made in March 1995 seem to suggest that a ministerial certificate can only be issued under these provisions in circumstances where a 'neither confirm nor deny' response is invoked, and this would seem to unduly limit the possible use of the ministerial certificate.

It would be preferable for it to be clarified that s 42(3) applies whether or not the relevant minister or agency has confirmed the existence of the document.

Finally, s 42(3) refers to 'a specified matter', in contrast to other comparable provisions—ss 36(3) and 37(3)—which refer to 'specified matter'. The QIC considered that there was no reason for the anomaly and recommended that s 42(3) be amended to bring it into line with ss 36(3) and 37(3). The committee supports this amendment, whether or not ss 36(3) and 37(3) are retained.

COMMITTEE FINDING 164—RECOMMENDATION

Provision for conclusive certificates should be removed from s 36 (Cabinet matter) and s 37 (Executive Council matter).

COMMITTEE FINDING 165—RECOMMENDATION

Where the minister administering the Act issues a conclusive certificate, that fact and the reasons for the issue of the certificate should be reported to the FOI monitor.

COMMITTEE FINDING 166—RECOMMENDATION

Section 42(3) should clarify that the provision applies whether or not the relevant minister or agency has confirmed the existence of the document.

The words 'a specified matter' in s 42(3) should be replaced by the words 'specified matter'.

10.8 NATIONAL UNIFORM FOI LEGISLATION[573]

The ALRC/ARC review noted that national consistency in the exemption provisions would assist applicants and be a worthwhile enhancement. Given that achieving uniformity would require intensive consultation between governments at the state and federal level, the ALRC/ARC review suggested that the Standing Committee of Attorneys-General pursue the matter.[574]

There is some divergence of opinion in the committee about whether the benefits to be achieved from uniformity would be outweighed by the practical and other difficulties that are likely to be encountered in trying to achieve and maintain this result.

573 Relevant submissions: 46, 142 and 161.
574 ALRC/ARC review report, n 13 at para 8.25.

11. THE SPECIFIC EXEMPTION PROVISIONS

11.1 INTRODUCTION[575]

Provisions which exempt matter from the statutory right of access conferred by the FOI Act reflect Parliament's attempt to provide a right to access government-held information while maintaining confidentiality where necessary to protect certain public and private interests. In chapter 10 *Exemptions: General principles* the committee concluded that the best way to protect these interests without unnecessarily restricting disclosure of information is to retain specific exemption provisions in the Act rather than, for example, a single, general exemption provision.

In this chapter the committee considers the individual exemption provisions in light of the conclusions in chapter 10. **Appendix I** provides an indication of the extent to which particular exemption provisions are relied upon by agencies. Reports prepared pursuant to s 108 of the Act were the primary source of information for this table. As discussed at section 4.8 *The data collection and reporting requirements*, the committee is concerned about the reliability and usefulness of this data, given apparent inconsistencies in reporting practices by agencies. Hence, the information included in table I.1 and I.2 in **appendix I** is expressed in broad terms.

11.2 APPROACH TO EXEMPTIONS[576]

Specific subsections of the exemption provisions are only discussed in detail below if the committee recommends some amendment, or if a significant issue relating to the provision was brought to the committee's attention.

The committee is conscious that amending the exemption provisions, most of which have now been interpreted by and are the subject of decisions by the QIC, would detract from the precedent which has already been established in relation to each provision, and run the risk of unintended consequences. As a general strategy, the committee has not recommended amendment in the absence of a clear reason for doing so.

11.3 GUIDELINES, TRAINING AND ADVICE[577]

At the outset, the committee notes that many of the exemption provisions are extremely complex and, in some cases, agencies and members of the community do not have a clear understanding of their correct interpretation. This highlights the need for a body responsible for:

- issuing guidelines regarding the exemption provisions, and ensuring such guidelines remain up to date as new cases are decided and other developments occur which affect the application of the exemption provisions;
- providing training to FOI decision-makers on the application of the exemption provisions; and
- providing advice to FOI decision-makers and members of the community in relation to the application of the exemption provisions on an ongoing basis.

In section 4.2.1, the committee recommends establishment of an FOI monitor with advice and awareness functions. The FOI monitor would be the ideal entity to perform the above functions.

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575 A number of submitters made very broad comments regarding specific exemption provisions. In this regard, see submissions: 4, 24, 29, 39, 42, 54, 61, 62, 79, 92, 104, 113, 119, 120, 134, 140, 142, 144, 149, 150, 154 and 163. Submissions relevant to specific exemption provisions are footnoted to the relevant headings in this chapter.

576 Relevant submission: 161.

577 Relevant submission: 59

Implementation of these strategies, in particular guidelines, will help ensure consistent and appropriate interpretation and application of the exemption provisions. However, throughout this chapter the committee notes certain exemption provisions in relation to which the need for guidelines is particularly evident.

The inclusion of examples might also assist in the interpretation of many of the exemption provisions.

COMMITTEE FINDING 167—RECOMMENDATION

The FOI monitor should be responsible for:

- issuing guidelines regarding the exemption provisions, and ensuring such guidelines remain up to date as new cases are decided and other developments occur which affect the application of the exemption provisions;
- providing training to FOI decision-makers on the application of the exemption provisions; and
- providing advice to FOI decision-makers and members of the community in relation to the application of the exemption provisions on an ongoing basis.

11.4 CABINET MATTER: S 36[578]

Reform of the Cabinet exemption would enhance open, accountable and participatory government. Some members of the committee believed that the form in which the Cabinet exemption was enacted in 1992 is the most appropriate. However, the committee as a whole agrees that the Cabinet exemption recommended below achieves a more appropriate balance between FOI principles of openness and the need to protect the confidentiality of Cabinet deliberations than the current provision.

By tradition, the deliberations of Cabinet (the peak government decision-making body) have been secret. The rationale for Cabinet secrecy derives from the Westminster convention that members of Cabinet must collectively accept responsibility for Cabinet's decisions and the actions taken to implement those decisions.

The Westminster system of government requires that members of the Cabinet must be freely able to discuss matters while maintaining the principle of collective responsibility. The Cabinet exemption recognises this essential characteristic of Westminster governance.

There is no doubt that an exemption for Cabinet material should exist, however it is important to ensure that the exemption is in a form that protects collective ministerial responsibility without restricting access to material unnecessarily and thus undermining the objectives of FOI legislation. Documents which potentially would prejudice collective ministerial responsibility are those which disclose the individual submissions or opinions of ministers, and Cabinet collective deliberations which by their nature expose Cabinet divisions.[579]

The Cabinet exemption was substantially amended in 1993 and 1995 to broaden the application of the exemption.[580] It has been suggested both in submissions to the committee and other commentary that following these amendments, the Cabinet exemption is so wide that it no longer represents an appropriate balance between the competing public interests of protecting collective ministerial

578 Relevant submissions: 16, 23, 27, 29, 43, 44, 48, 54, 58, 62, 63, 64, 77, 81, 88, 89, 90, 91, 92, 93, 101, 101N, 103, 119, 120, 133, 138, 142, 147, 152, 153, 154, 161, 163 and 167. QIC, first submission no 56 at paras B5-B8 and attachment B(ii)1.

579 1979 Senate Committee report, n 14 at paras 4.11-4.15; Legal and Constitutional Committee (Victorian Parliament), *Report upon Freedom of Information in Victoria*, n 28 at paras 4.1-4.3, 5.27 and 7.8.

580 *Freedom of Information Amendment Act 1993* (Qld) and *Freedom of Information Amendment Act 1995* (Qld).

responsibility on one hand and promoting openness, accountability and informed public participation in the processes of government, on the other.[581] Many feel that the original form of s 36 more appropriately balanced these competing interests.

As discussed in section 3.4.2 *Factors influencing the success of Queensland's FOI regime* and 3.4.3 *Measuring the success of Queensland's FOI regime*, the current form of the Cabinet exemption potentially detracts from community confidence in the government's commitment to the Act's objectives of open, accountable and participatory government.

As a result, the committee recommends substantial reform to the current Cabinet exemption. Amendment of the Cabinet exemption as recommended by the committee will also require amendment to the definition of Cabinet document as it appears in the *Queensland Cabinet Handbook*.

A purposive test: Purposive tests operate to limit a Cabinet exemption to documents which were *created* for the purpose of being considered by Cabinet.

Section 36(1)(a) in its current form does not contain any purposive test. Any document that has been 'submitted to Cabinet' is exempt, pursuant to the current s 36(1)(a), regardless of the purpose for which the document was originally created.

The absence of a purposive test creates the potential for agencies to abuse the exemption by submitting documents to Cabinet merely to avoid disclosure under the Act. As the QIC noted in his 1994/95 annual report:

> *Under s36(1)(a) in its present form, any document (even a bundle of thousands of documents) can be made exempt by placing it before Cabinet. A Minister, or official with sufficient influence to have a document placed before Cabinet, now holds the power, in practical terms, to veto access to any document under the FOI Act by adopting this mechanism. It does not matter that the document was not created for the purpose of submission to Cabinet, or that the disclosure of the document would not compromise or reveal anything about the Cabinet process. It is not even necessary that the document be in any way relevant to any issue considered by Cabinet. At any time, even at a time after an FOI access application has been made for that specific document, a document may be made exempt by placing it before Cabinet.*[582]

The lack of a purposive test in s 36(1)(a) has been the primary source of much of the criticism of the Cabinet exemption.[583]

All Australian jurisdictions which have FOI legislation, except Queensland, have some purposive element in the test to determine whether documents submitted to Cabinet are exempt.[584] The Queensland FOI Act originally contained a similar element when the Act was passed in 1992.

The committee considers that public access to government-held information will be maximised, while ensuring that the convention of collective ministerial responsibility is protected, by including a purposive test in the Cabinet exemption.

Disclosing or prejudicing Cabinet considerations: Section 36(1)(e) originally provided that matter is exempt if its disclosure would involve the disclosure of any deliberation or decision of Cabinet, other than matter that has been officially published by decision of Cabinet. It now provides that matter

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581 For the QIC's comments on the Cabinet exemption, see the QIC's first submission no 56 at paras B5-B8 and attachment B(ii)1 which contains relevant extracts from the QIC's annual reports. The QIC recommended that s 36 should be amended to restore it to the form in which it was originally enacted in 1992, subject to two minor variations.

582 QIC, *1994/95 Annual Report*, n 160 at para 3.28.

583 As to general criticism of the lack of purposive tests in Cabinet exemptions, see comments by the Legal and Constitutional Committee (Victorian Parliament), n 28 at paras 7.25-7.35.

584 See Gregorczuk H, *Freedom of Information: Government Owned Corporations, contractors and Cabinet exemptions*, Queensland Parliamentary Library, *Research Bulletin No 5/99*, Brisbane, May 1999 at 35.

is exempt if its disclosure would involve the disclosure of *any consideration* of Cabinet, or could *otherwise prejudice the confidentiality of Cabinet considerations or operations*.

Equivalent provisions in other Australian jurisdictions are restricted to matter the disclosure of which would involve the disclosure of any deliberation or decision of Cabinet. The general exemption at the end of paragraph (e) is not contained in the Cabinet exemptions of any other jurisdiction.[585]

The QIC recommended that s 36(1)(e) revert to its original form with the following minor amendment. That is, omit 'decision of Cabinet' where it last appears and substitute 'government'. This would remove the present anomaly that permits agencies and ministers to claim exemption under s 36(1) and s 37(1) in respect of information that has been released into the public domain through official channels of the Queensland Government.[586]

Factual and statistical material: All Australian jurisdictions which have FOI legislation, except Queensland, include in their Cabinet exemptions an exception for factual or statistical matter.[587] The rationale for this exception is that factual documentation provided to assist Cabinet in its deliberations pre-dates decisions based upon that documentation and consequently will not disclose the later Cabinet decisions.[588] However, factual or statistical information might be exempt under another provision.

The committee considers that it is unnecessary to specifically exclude factual and statistical matter from the Cabinet exemption. The majority of the relevant material would not have been prepared for submission to Cabinet, or briefing a minister or chief executive in relation to a matter for submission to Cabinet and, accordingly, would not fall within the terms of the exemption.

Ministerial expenses: Unsuccessful private members' bills have been introduced into Parliament on two occasions seeking to exclude from the Cabinet exemption matter about expenses incurred, or claimed to be incurred, by a minister or person assisting a minister.[589] The bills were designed to ensure that ministerial expense documents are not exempt from the Act pursuant to the Cabinet exemption.

The committee supports the objective of these bills and considers that a provision to this effect should be included in the Cabinet exemption.

Public interest test: The committee received some submissions advocating the inclusion of a public interest test in the Cabinet exemption. No other Cabinet exemption in Australian FOI legislation contains a public interest test.

In the committee's view the public interest lies in ensuring the confidentiality of Cabinet deliberations. Application of a public interest test to specific matters has the potential to inhibit free and open debate in Cabinet, as ministers might be conscious of the possibility of the deliberations being deemed to be 'in the public interest' at a later time. Accordingly, the committee does not support the inclusion of a public interest test in the Cabinet exemption.

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585 Although, the Western Australian provision is drafted in different terms and is, therefore, not directly comparable.

586 *Re Lindeberg and Department of Families, Youth and Community Care* (1998) 4 QAR 14. See also the QIC's *1996/97 Annual Report*, n 160 at para 3.18.

587 Although the terms used by these provisions are not consistent. See the Freedom of Information Acts of: the Commonwealth, s 34(1A); Victoria, s 28(3); New South Wales, schedule 1, s 1(2); South Australia, Schedule 1, s 1(2); Western Australia, schedule 1, s 1(2); the Australian Capital Territory, s 35(2)(b); and Tasmania, s 24(5). Such an exception was included in the Queensland Cabinet exemption prior to the 1995 amendments by the *Freedom of Information Amendment Act 1995* (Qld).

588 See Legal and Constitutional Committee (Victorian Parliament), n 28 at para 7.53.

589 *Freedom of Information Amendment Bill 1998* introduced by P Beattie MP, 4 March 1998, lapsed 19 May 1998; *Freedom of Information Amendment Bill 1999* introduced by R Borbidge MP, 25 May 1999, failed 23 August 2000.

Time limits: Some submitters suggested that the Cabinet exemption should only apply for a limited period of time. Arguably, release of the information at the end of a Parliament, or when there has been a generational change of ministers[590] would not be contrary to the principle of collective ministerial responsibility. It was variously submitted that Cabinet documents should be released at the end of each parliamentary session, or after a specified period (say, 10 or 20 years) of the relevant document coming into existence. Such time limits are contained in the FOI legislation of other Australian jurisdictions.[591] In Queensland, under the *Libraries and Archives Act 1988*, s 63, public records are required to be deposited with the State archives within 30 years after the documents were brought into existence. Subject to certain restrictions, public records are open to access and inspection 30 years after the date of 'last dealing'.[592]

The committee considers that it is preferable to utilise the time limits currently contained in the *Libraries and Archives Act* than to introduce new time limits into the FOI Act. However, agencies should, as a matter of practice, release matter where it has ceased to be sensitive.

Section 36(2): Section 36(2) provides that subsection (1) does not apply to matter officially published by 'decision of Cabinet'. The QIC recommended that the words 'decision of Cabinet' be omitted and the word 'government' substituted to remove the present anomaly that permits agencies and ministers to claim exemption under s36(1) and s37(1) in respect of information that has been released into the public domain through official channels of the Queensland Government.[593] The committee supports this amendment.

The committee also believes that the phrase 'officially published' should be defined in the Act.[594]

Conclusive certificates: s 36(3): Section 36(3) provides that a certificate signed by a minister stating that specified matter would, if it existed, be exempt under s36 establishes that, if the matter exists, it is exempt matter. This section applies subject to part 5 (external review of decisions). In section 10.7 *Conclusive certificates* the committee recommends repeal of this subsection.

COMMITTEE FINDING 168—RECOMMENDATION

In light of the above considerations, the Cabinet exemption (contained in s 36) should provide that:

(1) Matter is exempt matter if:

(a) it has been prepared for submission to Cabinet (whether or not it has been so submitted);

(b) it was prepared for briefing, or the use of a minister or chief executive in relation to a matter for submission to Cabinet (whether or not it has been so submitted);

(c) it is a draft of a matter mentioned in paragraphs (a) or (b);

(d) it is, or forms part of an official record of Cabinet;

590 See the ALRC/ARC, review report, n 13 at para 9.12.

591 See the Freedom of Information Acts of: Victoria, s 28(2)–10 years; New South Wales, Schedule 1, s (1)(2)(b)–10 years; Tasmania, s 24(2)–10 years; Western Australia, schedule 1, s 1(3)–15 years; South Australia, schedule 1, s(1)(2)(b)–20 years. (Note in some jurisdictions the relevant provision only relates to documents created after a certain date.) The ALRC/ARC review recommended that Cabinet documents should only be exempt for 20 years after the date on which they were created: review report n 13 at para 9.12.

592 *Libraries and Archives Regulations 1990* (Qld), s 22.

593 *Re Lindeberg and Department of Families, Youth and Community Care* (1998) 4 QAR 14. See also the QIC's *1996/97 Annual Report*, n 160 at para 3.18.

594 The ALRC/ARC review made a similar recommendation: review report, n 13 at para 9.11 and recommendation 48.

(e) its disclosure would involve the disclosure of any deliberation or decision of Cabinet, other than matter that has been officially published by government.

(2) Subsection (1) does not apply to:

(a) a specific record of Ministerial expenses;

(b) matter officially published by government.

Appropriate amendments will need to be made to the definitions in s 36(4).

11.5 CABINET EXEMPTION FOR LOCAL GOVERNMENTS[595]

A number of local governments suggested that an exemption with a similar effect to the Cabinet exemption should apply at local government level.[596]

The committee does not propose such an amendment. The rationale for the Cabinet exemption—namely, to preserve the convention of collective ministerial responsibility—does not apply at local government level. Further, any need for secrecy in respect of the deliberations of local governments can be adequately protected by other exemptions in the Act, in particular the deliberative processes exemption.[597]

COMMITTEE FINDING 169—CONCLUSION

No exemption with a similar effect to the Cabinet exemption (contained in s36) should apply at the local government level.

11.6 EXECUTIVE COUNCIL MATTER: S 37[598]

Section 37 exempts Executive Council matter.

Section 6 of the *Constitution (Office of Governor) Act 1987* (Qld) establishes an Executive Council for Queensland. Executive Council advises the Governor on the exercise of the powers of Governor-in-Council.[599] Unlike Cabinet, Executive Council is not a deliberative body. Administrative action under numerous Acts, such as appointments, making regulations and by-laws, approving financial deeds of agreement and approval of expenditure over prescribed limits can only be carried out by the Governor-in-Council.[600]

EARC recommended the s 37 exemption for reasons including: (a) the Governor, as the Queen's representative, should not be subject to FOI legislation and accordingly it is inappropriate to subject to FOI legislation a body through which the Governor functions; (b) as the Governor is excluded from the Act, the body within the executive branch of government over which the Governor presides should

595 Relevant submissions: 6, 21, 31 and 50.

596 The Brisbane City Council also argued that it is unique amongst local councils, and outlined the similarity between its 'Civic Cabinet' and Cabinet: submission no 50.

597 Both EARC and the PCEAR considered and rejected similar suggestions made to it on the same grounds: EARC FOI report, n 19 at paras 7.278-7.282; PCEAR FOI report, n 20 at para 3.8.

598 Relevant submissions: 16, 23, 27, 44, 54, 62, 63, 88, 92, 93, 101, 101N, 103, 120, 138, 147, 161 and 163. QIC, first submission no 56 at paras B5-B8.

599 The *Acts Interpretation Act 1954* (Qld), s 36 defines the term 'Governor in Council' for Queensland as *'the Governor acting with the advice of Executive Council'*.

600 Queensland Executive Council Handbook, para 2.0. Available at <http://www.premiers.qld.gov.au/governingqld/exec_council/powers2_2.htm>.

similarly be exempt; and (c) exemption is necessary to complement the Cabinet exemption because, in effect, Executive Council is the formal expression of the Cabinet process.[601]

The terms of s 37 duplicate the Cabinet exemption (contained in s 36) in its current form. The amendments made to s 36 since its introduction have similarly been made to s37. As with s36, the QIC argued that the current reach of s 37 is so wide that it cannot be said to represent an appropriate balance between the competing public interests favouring disclosure and non-disclosure of government information.[602]

The QIC has recommended repeal of s 37 for the following reasons.[603]

> *… Any matter of perceived importance or political sensitivity which must be submitted to the Governor in Council will invariably be considered by Cabinet or a Cabinet committee or sub-committee beforehand, so that exemption under s 36 will be available when necessary. Nothing would be lost in terms of necessary protection, and much would be gained in terms of opening up access to documents which shed light on the workings of government, if s 37 were to be repealed. Documents submitted to Executive Council would ordinarily fall within s 41(1)(a) (Matter relating to deliberative processes) of the FOI Act, so that any which are not exempt under s 36 by reason of their prior consideration by Cabinet, will qualify for exemption under s 41(1) if their disclosure would be contrary to the public interest.*

The QIC further submitted that if s 37 is not repealed then it should be restored to the form in which it was originally enacted in 1992, subject to the same two variations that the QIC suggested to the original form of s 36.

The committee is not convinced that s 37 should be repealed. While it is current practice for most matters to go before Cabinet prior to consideration by Executive Council in the way described by the *Executive Council Handbook*,[604] these procedures might not always be adopted. Moreover, not all matters which go to Executive Council need prior Cabinet approval.

However, the committee's comments above regarding the unnecessary breadth of s36 also apply to s 37. Therefore, while an Executive Council exemption should be retained, the exemption should be in the same form as the committee has recommend for s 36 (which includes the two variations recommended by the QIC).

COMMITTEE FINDING 170—RECOMMENDATION

The exemption contained in s37 (Executive Council matter) should be amended in the same way that the Cabinet exemption (contained in s 36) is amended.

601 EARC FOI report, n 19 at para 7.74.

602 QIC, first submission no 56 at para B5. QIC, *1994/95 Annual Report*, n 160 at paras 3.43-3.49.

603 QIC, *1994/95 Annual Report*, n 160 at para 3.46. The ALRC/ARC review recommended repeal of the Executive Council exemption in the Commonwealth FOI Act: review report, n 13 at para 9.14.

604 Queensland Executive Council Handbook, n 600 at paras 2.0 and 6.3.

11.7 MATTER AFFECTING RELATIONS WITH OTHER GOVERNMENTS: S 38[605]

Section 38 provides that matter is exempt if its disclosure could reasonably be expected to:

(a) cause damage to relations between the State and another government; or

(b) divulge information of a confidential nature that was communicated in confidence by or on behalf of another government;

unless its disclosure would, on balance, be in the public interest.

The s 38 exemption was designed to protect the need for secrecy in respect of inter-governmental relations, recognising that in some cases inter-governmental relations may be damaged by the disclosure of matter under FOI legislation.[606] A local government is not a 'government' for the purposes of this section.[607]

Section 38(b) does not require an FOI decision-maker to consider or identify the harm which would result from disclosure. As discussed in section 10.2.3 *Specific harm tests v class exemptions* the committee considers that, where possible, exemptions should contain harm tests. However, the committee considers that in this case the absence of a harm test is justified. Many inter-governmental communications are premised on confidentiality. Governmental communications within Australia are an important part of our federal system of government.

Moreover, s 38(b) is still subject to a public interest test, thus requiring a case-by-case consideration of the competing public interest considerations.

COMMITTEE FINDING 171—CONCLUSION

No amendment should be made to the exemption contained in s 38 (Matter affecting relations with other governments).

11.8 MATTER RELATING TO INVESTIGATIONS BY OMBUDSMAN OR AUDITS BY AUDITOR-GENERAL: S 39[608]

Section 39(1) exempts matter if its disclosure could reasonably be expected to prejudice the conduct of an investigation by the Ombudsman or an audit by the Auditor-General, unless its disclosure would, on balance, be in the public interest. The provision reflects EARC's concern to ensure that the investigatory and audit functions of these officers were not interfered with to the detriment of the public interest.[609]

Section 39(2) provides that matter is also exempt if its disclosure is prohibited by the *Financial Administration and Audit Act 1977* (Qld), s 92[610] unless disclosure is required by a compelling reason in the public interest. Section 39(2) was inserted in 1994 following a recommendation by the

605 Relevant submissions: 16, 23, 29, 45, 54, 63, 72 and 120.

606 EARC FOI report, n 19 at para 7.81.

607 *Brisbane City Council* v *Albietz* [2001] QSC 160 at para 13.

608 Submissions relevant to one or more of the issues discussed in this section: 44, 45, 63, 68, 135 and 171. QIC, first submission no 56 at paras B12-B18.

609 EARC further intended that once these processes are complete, any documents which relate to them would be accessible subject to other exemptions: EARC FOI report, n 19 at paras 7.89-7.91.

610 Section 92 prohibits officers from the Queensland Audit Office from making a record of or divulging or communicating information obtained under the Act other than under or for the purposes of the Act.

QLRC.[611] The QLRC's recommendation was in response to the Auditor-General's concerns that the exemption was not wide enough and that, in particular, information might be disclosed which would: (a) prejudice future action where information gathered did not produce a result in a particular audit period; and (b) provide sufficient information about the audit process to allow a person to defeat the audit process and defraud public funds.[612]

11.8.1 Working papers of the Auditor-General

The Auditor-General submitted that while the 1994 amendment to s 39 has strengthened the Auditor-General's ability to preserve the confidentiality of working papers and related files, the unequivocal exemption of working papers and related files is still considered essential to the integrity of the audit process.[613] In this regard, the Auditor-General suggested that consideration be given to excluding the Queensland Audit Office under s 11(1).

While the Auditor-General is excluded from the application of FOI legislation in most other Australian jurisdictions, EARC and the PCEAR concluded there was no justification for an agency-based exclusion for the Auditor-General or the Ombudsman.[614]

For the reasons explained in section 12.3 *The 'agency-based' exclusions*, this committee is not making any recommendations at this stage regarding the appropriateness of the current or proposed agency-based exclusions. However, the committee has considered whether s 39 in its present form adequately protects the Auditor-General's audit function.

Section 39(1)(b) would protect matter which could prejudice the conduct of *current* or *future* audits. Further, s 39(2) covers most information obtained by the Auditor-General and officers of the Queensland Audit Office from an agency in the course of conducting an audit. Other exemptions are also relevant, such as: s 40(a) and (b) which exempt matter relating to the effectiveness of, or attaining the objects of, an audit; s 41, the deliberative processes exemption; and s 46, the matter communicated in confidence exemption.

Thus, the committee believes that the exemption provisions adequately protect the integrity of the Auditor-General's audit function, and that no further broadening of s 39 is warranted.

11.8.2 Public interest tests

Section 39(1) and (2) contain different public interest tests. Subsection (1) provides that relevant matter is exempt unless disclosure would, on balance, be in the public interest. In contrast, subsection (2) provides that relevant matter is exempt *'unless disclosure is required by a compelling reason in the public interest*'.[615] Only s 39(2) and s 48 (Matter to which secrecy provisions of enactments apply) contain such a test. The rationale for the different public interest test in these provisions was to ensure '*the courts [are] given a clear standard in this regard*'.[616]

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611 QLRC, *The Freedom of Information Act 1992: Review of Secrecy Provision Exemption*, n 22 at 103. The amendment was effected by the *Freedom of Information (Review of Secrecy Provision Exemption) Amendment Act 1994* (Qld), s 4.

612 QLRC, *The Freedom of Information Act 1992: Review of Secrecy Provision Exemption*, n 22 at 103.

613 Queensland Audit Office, submission nos 68 and 135.

614 EARC FOI report, n 19 at para 8.43; PCEAR FOI report, n 20 at para 3.4.

615 The QIC has interpreted s 39(2) as providing that matter the disclosure of which is prohibited by s 92 of the *Financial Administration and Audit Act 1977* (Qld) will be exempt unless there are one or more identifiable public interest considerations favouring disclosure which are so compelling (in the sense of forceful or overpowering) as to require (in the sense of demand or necessitate) disclosure in the public interest: *Paul Whittaker v Queensland Audit Office*, QIC Decision number 05/2001 at para 30.

616 The Hon D M Wells MLA Minister for Justice and Attorney-General and Minister for Arts, Second Reading Speech, Freedom of Information (Review of Secrecy Provision Exemption) Amendment Bill 1994, *Parliamentary Debates (Hansard)*, 22 June 1994 at 8408-8409.

The QIC recommended that the public interest test contained in s 39(2) should be amended to the public interest test that is used in s 39(1) to increase consistency with other public interest tests.[617] This accords with the QLRC's original recommendation regarding s 39(2)[618] and the committee's conclusion in section 10.3, that public interest tests should be rationalised to the greatest degree possible. The committee does not consider that the matter sought to be protected by s 39(2) is so inherently sensitive that divergence from the general public interest test—unless its disclosure would, on balance, be in the public interest—is justified.

COMMITTEE FINDING 172—RECOMMENDATION

No broadening of the exemption contained in s 39 (Matter relating to investigations by Ombudsman or audits by the Auditor-General) is warranted. Rather, the public interest test in s 39(2) should be amended to be 'unless its disclosure would, on balance, be in the public interest'.

11.9 MATTER CONCERNING CERTAIN OPERATIONS OF AGENCIES: S 40[619]

Section 40 exempts certain information relating to the conduct of tests, examinations or audits conducted by an agency, and information relating to staff management, personnel and industrial relations. All subsections contain harm tests, and are subject to a public interest test.

11.9.1 'Management or assessment by an agency of an agency's personnel': s 40(c)

Section 40(c) provides that matter is exempt matter if its disclosure could reasonably be expected to have a substantial adverse effect[620] on the management or assessment by an agency of the agency's personnel unless its disclosure would, on balance, be in the public interest.

The committee received submissions expressing concern that under s 40 documents relating to grievance management processes have become available under the Act.[621] Similarly, some submitters expressed concerns in relation to performance assessment documentation becoming available.

The committee recognises the sensitivity of documents collected throughout grievance processes and performance assessment processes. However, the committee has not identified any evidence that the current s 40(c), in conjunction with the other relevant exemptions such as s 44 (Matter affecting personal affairs), is failing to provide appropriate protection to documents regarding these processes. The FOI monitor should monitor the application of this provision and, if it becomes evident that the provision is failing to provide sufficient confidentiality in appropriate cases, recommend legislative amendment.

COMMITTEE FINDING 173—RECOMMENDATION

The FOI monitor should monitor the application of s 40(c) and, if it becomes evident that the provision is failing to provide sufficient confidentiality in appropriate cases, recommend legislative amendment.

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617 See also the Queensland Audit Office's comments as to the public interest test in s 39(2) in submission no 135.

618 QLRC, *The Freedom of Information Act 1992: Review of Secrecy Provision Exemption*, n 22 at 109.

619 Submissions relevant to one or more of the issues discussed in this section: 6, 12, 13, 16, 26, 45, 54, 63, 66, 69, 77, 78, 100A, 101, 101B, 102, 141 and 160.

620 The QIC has interpreted the adjective 'substantial' to be used in the sense of grave, weighty, significant or serious. Contrast s 45(1)(c) where the adjective 'substantial' does not appear: *Re Cairns Port Authority and Department of Lands* (1994) 1 QAR 663 at para 150.

621 See, for example, *Re Chambers and Department of Families, Youth and Community Care* (1999) 5 QAR 16.

11.9.2 'Substantial adverse effect on the conduct of industrial relations …': s 40(d)

Section 40(d) provides that matter is exempt matter if its disclosure could reasonably be expected to have a substantial adverse effect[622] on the conduct of industrial relations by an agency, unless its disclosure would, on balance, be in the public interest.

The focus of s 40(d) is on relations between an agency and its employees which may appropriately be, or have become, the subject of dealings between the agency and the representatives of its employees, or an individual employee, under the system of industrial law which governs those relations. It is not sufficient if employer/employee relations are affected by disclosure of the matter in issue. The 'substantial adverse effect' must be on the conduct by an agency (that is, the employer) of industrial relations.[623]

It was suggested to the committee that s 40(d) be repealed for reasons including that it is not appropriate that the effect of disclosure of information on industrial relations determine what information is disclosed, particularly when other exemptions will adequately protect the sort of information that may give rise to industrial concerns.

Although the provision is rarely used, the committee considers that it should be retained to ensure an equal playing field between government employers and unions, which are not subject to the FOI Act, in industrial negotiations. Other exemption provisions might not necessarily apply in such cases.

COMMITTEE FINDING 174—CONCLUSION

No amendment should be made to the exemption contained in s 40(d).

11.10 MATTER RELATING TO DELIBERATIVE PROCESSES: S 41[624]

Section 41(1)(a) provides that matter which would disclose an opinion, advice, recommendation, consultation or deliberation as part of the deliberative processes involved in the functions of government is exempt.[625] Policy documents, factual and statistical matter and expert opinion are expressly excluded from s 41, as are certain reports and reasons for certain decisions: s 41(2) and (3).

The application of s 41 to matter in a document calls for an initial assessment of whether the matter falls within a prescribed class, that is, matter relating to deliberative processes as defined by s 41(1)(a). Independent judgment must then be made that disclosure of the matter would, on balance, be contrary to the public interest.[626] Section 41 is unique in the Act because the public interest criterion is a separate and additional criterion which must be satisfied by an agency or minister seeking to invoke the exemption.[627]

This unique public interest test prevents s 41(1)(a), which does not contain a harm test, from applying excessively broadly. It might be possible to amend s 41 to include a public interest test which is consistent with most other public interest tests, while still achieving the objective of s 41 and ensuring that the exemption does not apply too broadly. This would require s 41(1)(a) to be reframed to include a harm test such as *'matter is exempt if its disclosure could reasonably be expected to have a*

622 See n 620 regarding the effect of the adjective 'substantial'.

623 *Re Murphy and Queensland Treasury* (1995) 2 QAR 744 at paras 162 and 166.

624 Relevant submissions: 92, 100A, 100B, 100C, 103, 107, 128, 138 and 167.

625 For background to this exemption see: EARC FOI report, n 19 at paras 7.101-7.134. For a discussion of the application of the provision see *Re Eccleston and Department of Family Services and Aboriginal and Islander Affairs* (1993) 1 QAR 60.

626 *Re Eccleston and Department of Family Services and Aboriginal and Islander Affairs* (1993) 1 QAR 60 at paras 20 and 25.

627 The structure apparently stems from the equivalent provision in the Commonwealth FOI Act, on which s 41 was modelled.

substantial adverse effect on the deliberative processes of government unless disclosure would, on balance, be in the public interest'.

As a general principle, the committee supports the inclusion of harm tests in the exemption provisions: see section 10.2.3 *Specific harm tests v class exemptions*. However, the committee notes that the precedent developed in Queensland and in other jurisdictions would be lost if such a change were implemented. This would also have consequences for s 46(2) which relates to the s 41(1)(a) exemption. Accordingly, the committee considers it preferable to retain the provision as it currently stands, with the public interest test as a separate and additional test necessary to establish that material is exempt.

The committee also considered whether s 41(2)(c), which excludes expert opinion or analysis from the scope of the s 41 exemption, should be removed or restricted to only apply to, for example, scientific or technical expert opinion. Arguably, expert opinion is often intrinsically intertwined with deliberative processes. However, the committee believes that the Act makes sufficient provision for dealing with such issues and does not recommend any amendment in this regard.[628]

COMMITTEE FINDING 175—CONCLUSION

No amendment should be made to the exemptions contained in s 41 (Matter relating to deliberative processes).

11.11 MATTER RELATING TO LAW ENFORCEMENT OR PUBLIC SAFETY: S 42[629]

Section 42(1) and (1A) exempts law enforcement and public safety matter. The exemption is not subject to a public interest test. In recommending this exemption, EARC was conscious of the tension between the need to properly protect law enforcement procedures and public safety on the one hand, and the need to satisfy the public interest in the disclosure of unsatisfactory law enforcement practices.[630]

As well as the specific amendment recommended below, the committee considers that guidelines in relation to the application of s 42 would be valuable.[631] In particular, the FOI monitor should issue guidelines about the application of the provision to completed investigations.[632]

11.11.1 'Prejudice the investigation of a (possible) contravention of the law': s 42(1)(a)[633]

To utilise this exemption it is not sufficient for an agency to establish that disclosure of information would *reveal* the investigation of a contravention or possible contravention of the law. It is necessary to establish that disclosure could reasonably be expected to prejudice such an investigation.[634] The committee considered this exemption in light of information provided by the Queensland Police Service about the application of the exemption in practice.

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628 Although, the committee does have some concern relating to the release of certain reports regarding prisoners. This issue is discussed further in section 11.11 *Matter relating to law enforcement or public safety: s 42*.

629 A number of submitters made general comments about s42. See submissions: 16, 27, 29, 39, 61, 63, 69, 72, 101, 140 and 149. Submissions regarding specific aspects of s42 are discussed under the relevant level 3 headings in this section. See also submissions noted in section 11.22 *Exemptions relating to the identity or other personal details of a person.*

630 EARC FOI report, n 19 at para 7.139. Amendments were made to EARC's recommendation in this regard prior to the enactment of the FOI Act in 1992.

631 Such guidelines might build upon the QIC's information sheets regarding s 42(1)(a) and (e).

632 The ALRC/ARC review made a similar recommendation: review report, n 13 at para 9.21.

633 The committee's staff had a number of discussions with the Queensland Police Service regarding this exemption.

634 In contrast, see, for example: *Freedom of Information Act 1992* (WA), schedule 1, s 5(1)(b).

It is important that the application of the Act does not hinder current investigations, for example, by requiring the disclosure of documents which might subsequently become significant to the investigation, or requiring the removal of relevant documents from the unit investigating the contravention or possible contravention of the law. However, on the basis of the information available, the committee was not able make a fully informed assessment about whether the exemptions adequately protect information relating to current investigations.

The Attorney-General should consult with the QIC, the Queensland Police Service and other Queensland law enforcement agencies to ensure that the operation of the Act does not unduly inhibit the core functions of law enforcement agencies.

If it becomes apparent that procedural aspects of the Act are hindering current investigations, steps should be taken to prevent this occurring. This issue might be addressed by a published opinion by the QIC[635] to clarify the application of the Act, or legislative amendment might be necessary.

COMMITTEE FINDING 176—RECOMMENDATION

The Attorney-General should consult the Information Commissioner, the Queensland Police Service and other Queensland law enforcement agencies to assess whether s 42(1)(a) is operating so as to hinder current investigations and, if so, to develop appropriate solutions to overcome the problems identified.

11.11.2 'Endanger a person's life or physical safety': s 42(1)(c)[636]

Section 42(1)(c) provides that matter is exempt matter if its disclosure could reasonably be expected to endanger a person's life or physical safety.

In some circumstances the disclosure of matter could risk harm to an individual which falls short of endangering their life or physical safety. For example, the disclosure of information could cause a person to apprehend harassment or intimidation. Harassment does not satisfy s 42(1)(c) unless there is evidence of a risk that disclosure of the matter in issue would endanger a person's life or physical safety.[637] The QIC submitted that, for these reasons, the provision should be extended to also exempt matter which could reasonably be expected to subject a person to acts of serious harassment.

The QLRC in a report on evidence of children in Queensland courts recommended that s 42(1)(c) should be extended to circumstances where the disclosure of matter might substantially prejudice the mental wellbeing of a person.[638]

The committee received other submissions that s 42(1)(c) should be extended to circumstances where the disclosure of information could reasonably be expected to:

- endanger a person's mental health or emotional health;
- cause a significant risk of injury to a person's mental wellbeing;
- endanger an employee of an agency; or
- subject staff to harassment.

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635 The committee recommends that the QIC be given power to issue opinions in section 8.5.6 *Information Commissioner's opinions.*

636 Relevant submissions: 8, 13, 19, 21, 45, 55, 57, 60, 69, 73, 77, 87, 100A, 101I, 107, 118, 124, 127, 128, 141, 144, 150 and 166. QIC, first submission no 56 at paras B19-B20.

637 *Re Murphy and Queensland Treasury* (1995) 2 QAR 744 at paras 53, 90-91.

638 Queensland Law Reform Commission, *The receipt of evidence by Queensland courts: the evidence of children*, Report No 55, Part 2, Watson Ferguson & Company, 2000 at 489.

The committee agrees that potential harm to an individual, apart from the risk of endangering a person's life or physical safety, justifies the non-disclosure of material under the Act. In particular, people should not be deterred from providing information to investigative authorities, and professionals responsible for preparing reports about individuals should not be deterred from providing full and frank reports. In this regard, s 42(1)(c) should be extended to situations where disclosure of information could be reasonably expected to:

- subject a person to serious acts of harassment; or
- substantially prejudice the mental well-being of a person.

Each of these components is necessary. The first relates to likely possible acts against the person, whereas the second is focussed on any reasonable apprehension of harm which a person may have. Care should be taken in drafting the new provision to ensure that it is no broader than is necessary to protect the well-being of third parties who might be affected.

The definition of 'detriment' for the purposes of the *Criminal Code*, chapter 33A (Unlawful stalking) appears to provide an appropriate precedent for an amended provision.

If the amended provision is separated from s42, no public interest test should apply to the provision and the provision should fall within the ambit of s 35 (Information as to existence of certain documents).

COMMITTEE FINDING 177—RECOMMENDATION

In relation to the exemptions contained in s42 (Matter relating to law enforcement or public safety), s 42(1)(c) should be extended to also exempt matter if its disclosure could reasonably be expected to:

- subject a person to serious acts of harassment; or
- substantially prejudice the mental well-being of a person.

The definition of 'detriment' for the purposes of the *Criminal Code*, chapter 33A (Unlawful stalking) appears to provide an appropriate precedent for an amended provision.

11.11.3 'Prejudice the effectiveness of a lawful (law enforcement) method or procedure': s 42(1)(e)

Section 42(1)(e) provides that matter is exempt matter if its disclosure could reasonably be expected to prejudice the effectiveness of a lawful method or procedure for preventing, detecting, investigating or dealing with a contravention or possible contravention of the law (including revenue law).[639]

The QIC submitted that, in his experience, s 42(1)(e) is both overused, and incorrectly used by agencies. For example, agencies are using the provision in respect of methods or procedures of such an ordinary and fundamental kind (such as interviewing witnesses, taking statements or even reviewing reports) that it could not possibly be reasonably expected that disclosure would prejudice the effectiveness of those methods or procedures.[640]

The QIC recommended that the provision be redrafted to include a two stage inquiry:

- first, whether disclosure of a document in issue would, or could reasonably be expected to, disclose lawful methods or procedures for preventing, detecting, investigating or dealing with a contravention or possible contravention of the law (including revenue law); and

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639 For the policy behind this exemption see EARC FOI report, n 19 at para 7.146. The operation of s 42(1)(e) is discussed in *Re 'T' and Queensland Health* (1994) 1 QAR 386.

640 QIC, first submission no 56 at paras B21-B25.

- second, whether that disclosure of the lawful methods or procedures would, or could reasonably be expected to, prejudice their effectiveness.[641]

The committee is of the view that the question of whether the disclosure could 'reasonably be expected to prejudice the effectiveness' of a lawful method or procedure is the appropriate test. Any inappropriate use of the provision should be dealt with by the publication of practice guidelines on the appropriate use of the provision, and monitoring agencies' use of the provision. [In this regard, the committee notes that the QIC has now published an information sheet that includes discussion on the proper application of s 42(1)(e).]

The committee is also concerned about the impact of a higher threshold test on the mosaic argument, that is, '*that someone (not necessarily the applicant) might build a complete picture of* [*law enforcement*] *investigation methods by adding their own knowledge to that which would be gained from disclosure under FOI legislation*.'[642]

COMMITTEE FINDING 178—CONCLUSION

No amendment should be made to s 42(1)(e).

11.11.4 Intelligence and witness protection information[643]

Currently, the Act does not specifically exempt matter concerning intelligence or witness protection. Nor does s11(1) exclude any particular law enforcement agency or one or more of their functions. A number of Queensland law enforcement agencies sought an agency-based exclusion under the Act.[644] In section 12.3.2 the committee recommends that the Attorney-General review both current and proposed exclusions.

However, the following provisions are relevant to documents concerning intelligence and witness protection.

- Section 11(1)(j) excludes an agency in relation to a document that has originated with, or been received from, certain specified intelligence organisations. The committee is not aware of the background to this exclusion and why it only relates to the specified organisations and not, for example, interstate police services, and why the subject matter cannot be dealt with by an exemption. The Attorney-General should consider s11(1)(j) as part of the review of current and proposed exclusions recommended in section 12.3.2.
- Section 38 exempts matter affecting relations with other governments and would therefore protect the exchange of intelligence information between Queensland law enforcement agencies and similar agencies interstate and overseas, subject to a public interest test.
- Section 42 contains numerous exemptions relevant to *intelligence gathering* which are not subject to a public interest test. For example, matter is exempt if its disclosure could reasonably be expected to:
  - prejudice the investigation of a contravention or possible contravention of the law in a particular case: ss (a);
  - prejudice the maintenance or enforcement of a lawful method or procedure for protecting public safety: ss (f); and

641 This accords with the two stage test in the equivalent exemption provision in the Commonwealth FOI Act.
642 EARC FOI report, n 19 at para 7.146.
643 Relevant submissions: 45, 72 and 86.
644 The Queensland Crime Commission, submission no 72; the Criminal Justice Commission, submission no 86, in relation to information held by its witness protection division and intelligence division; and the Bureau of Criminal Intelligence and Crime Stoppers (see the Queensland Police Service submission no 45).

- prejudice a system or procedure for the protection of persons, property or environment: ss (h).

These provisions mean that there is no need to specifically protect the *exchange* of intelligence information between Queensland law enforcement agencies because the exemptions will apply to the documents in the hands of all Queensland law enforcement agencies.

- Section 42 contains numerous exemptions relevant to *witness protection* which are not subject to a public interest test. For example, matter is exempt if its disclosure could reasonably be expected to:
  - endanger a person's life or physical safety: ss (c);[645] and
  - prejudice a system or procedure for the protection of persons, property or environment: ss (h).

The committee received submissions suggesting that a specific reference to intelligence information in s 38 would be beneficial. These submissions are based on concerns about the limitation of the current exemptions, including s 38, in dealing with the exchange of information with other organisations such as the Australian Security Intelligence Organisation and the National Crime Authority. It could equally be argued that information relating to witness protection should be specifically excluded from the Act or exempted from disclosure under the Act.

It is strongly in the public interest that information about suspected illegal activity and its participants be collected and exchanged between law enforcement agencies. The efforts of these agencies to adduce sufficient evidence to secure convictions are more likely to prove fruitful if such information is kept confidential to law enforcement officers.[646] Similarly, protection of information that could endanger people under witness protection programs is clearly in the public interest.[647]

However, in the absence of any evidence that the current exemptions are failing to adequately protect the confidentiality of relevant material, the committee does not recommend the inclusion of a specific provision to deal with this intelligence and witness protection matter. It appears that the existing exemption provisions provide sufficient protection.

A further issue relating to intelligence and witness protection documents arises from the external review process. The QIC has authority under s 76(1) to require production of exempt documents. In section 8.4.3 *Inspection of exempt documents by the Information Commissioner: s 76(1)*, the committee recommends that the QIC also have authority to require the production of a document where, among other matters, it is necessary to inspect the document to determine whether a document is excluded from the Act by virtue of s 11(1), s 11A or s 11B. In some cases, providing such documents to the QIC could constitute a breach of an intelligence and/or witness protection protocol with a law enforcement agency of another jurisdiction.

To address this problem and, at the same time ensure appropriate review mechanisms are available:

- the Chairperson of the Crime and Misconduct Commission should be authorised to issue a conclusive certificate that disclosure of the information would constitute a breach of such a protocol; and
- the Parliamentary Crime and Misconduct Commissioner, rather than the QIC, should be responsible for conducting external review of such certificates. This person will be qualified to

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645 In section 11.11.2 *'Endanger a person's life or physical safety': s 42(1)(c)* the committee recommends that this exemption be expanded.

646 *Re Ainsworth and Criminal Justice Commission* (1999) 5 QAR 284 at para 97.

647 During debate of the Witness Protection Bill 2000 (Qld), the Premier explained that reliance on the exemption in s 42, in conjunction with s 35 (Information as to the existence of certain documents) is preferable to exclusion in relation to witness protection documents because the mere acknowledgment that requested documents exist might cause the very kind of damage that the proposed exemption seeks to prevent: *Queensland Parliamentary Debates (Hansard)*, 10 November 2000 at 4302.

perform this function,[648] is required to have access to such information for other purposes,[649] and would have in place security procedures appropriate for dealing with such information.[650] Like s 84 (Review of Minister's certificates), this review mechanism should provide that if the Parliamentary Crime and Misconduct Commissioner is satisfied that there were no reasonable grounds for the issue of the certificate, the certificate will cease to have effect after 28 days unless the Chair of the Crime and Misconduct Commission confirms the certificate. In such circumstances, the Chair of the Crime and Misconduct Commission should be required to provide to the Legislative Assembly a copy of the notice confirming the decision.

As recommended in section 10.7 *Conclusive certificates*, all circumstances in which this provision is used should be reported to the FOI monitor. Like s42(3), this provision should be able to be used in conjunction with s 35 where necessary.

COMMITTEE FINDING 179—RECOMMENDATION

The Act should include a provision covering circumstances where disclosure of matter, even to the Information Commissioner, would constitute a breach of an intelligence and/or witness protection protocol with a law enforcement agency of another jurisdiction. This provision should provide:

- the Chairperson of the Crime and Misconduct Commission is authorised to issue a conclusive certificate that disclosure of the information would constitute a breach of an intelligence or witness protection protocol with another jurisdiction; and
- the Parliamentary Crime and Misconduct Commissioner, rather than the Information Commissioner, should be responsible for conducting external review of such certificates. If the Parliamentary Crime and Misconduct Commissioner is satisfied that there were no reasonable grounds for the issue of the certificate, the certificate should cease to have effect after 28 days unless the Chair of the Crime and Misconduct Commission confirms the certificate. In such circumstances, the Chair of the Crime and Misconduct Commission should be required to provide to the Legislative Assembly a copy of the notice confirming the decision.

All circumstances in which this provision is used should be reported to the FOI monitor and the provision should be able to be used in conjunction with s 35 where necessary.

11.11.5 Disciplinary investigations by agencies and professional registration boards[651]

There are numerous professional registration bodies that investigate allegations of inappropriate conduct by relevant professionals. Similarly, agencies from time to time need to investigate allegations against their employees to determine whether disciplinary action should be taken. Like investigations of alleged breaches of criminal law, it is necessary to protect the confidentiality of certain information relating to the conduct of these investigations to ensure that complainants and others are not reluctant to provide information relevant to the investigation, and to otherwise protect the integrity of the investigative process.

The committee considered whether the current exemptions adequately provide this necessary protection. Section 42 is relevant in this regard. In particular, s42(1) provides, amongst other things, that matter is exempt if its disclosure could reasonably be expected to:

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[648] Pursuant to s304 of the *Crime and Misconduct Act 2001* (Qld), the Parliamentary Crime and Misconduct Commissioner must have served as, or be qualified for appointment as, a judge of the Supreme Court of Queensland or another State, the High Court of Australia or the Federal Court of Australia.

[649] *Crime and Misconduct Act 2001* (Qld), s 317(2)(a) and (3)(a).

[650] This recommended process is similar to s 42(3) relating to conclusive certificates and the process for review of those certificates in s 84(1).

[651] Relevant submissions: 36, 78, 83 and 149.

- prejudice the investigation of a contravention or possible contravention of the law in a particular case: ss (a);
- enable the existence or identity of a confidential source of information in relation to the enforcement or administration of the law, to be ascertained: ss (b);
- prejudice a person's fair trial or the impartial adjudication of a case: ss (d);
- prejudice the effectiveness of a lawful method or procedure for preventing, detecting, investigating or dealing with a contravention or possible contravention of the law: ss (e).

'Contravention or possible contravention of the law' is defined in s 42(4) to include a reference to misconduct or official misconduct, or possible misconduct or official misconduct, within the meaning of the *Crime and Misconduct Act 2001*. 'Law' includes a law of the Commonwealth, another state or territory or a foreign country: s 45(5).

The QIC has given a wide interpretation to the phrase 'contravention or possible contravention of the law'. The phrase is not confined to contraventions of the criminal law or other statutory provisions establishing penalties,[652] and appears to extend to any law which imposes an enforceable legal duty to do or refrain from doing some thing.[653]

Section 40(c)—which exempts matter if its disclosure could reasonably be expected to have a substantial adverse effect on the management or assessment by an agency of the agency's personnel—is also relevant to investigations by agencies to determine whether there are grounds for disciplinary action.

Accordingly, the committee considers that the current exemption provisions provide adequate protection for disciplinary investigations by agencies and professional registration boards. However, this could be made clearer by some further guidance in the Act on the definition of the 'contravention or possible contravention of the law'. Further, guidelines or information sheets should be issued to ensure that people providing information as part of disciplinary investigations are aware of the extent to which the information they provide is exempt from disclosure under the Act.

COMMITTEE FINDING 180—RECOMMENDATION

Section 42(4) should expand on what is encompassed by the phrase 'contravention or possible contravention of the law'.

11.11.6 Reports relating to prisoners[654]

The committee considered whether the current exemption provisions ensure that reports prepared by forensic psychiatrists, psychologists and community corrections officers relating to prisoners are not released in inappropriate circumstances.

Inappropriate release of these reports raises concerns about:

- the personal safety of the people preparing the reports;
- the mental and physical health and well-being of prisoners if they are given direct access to reports prepared by persons such as psychologists; and

652 *Re T and Queensland Health* (1994) 1 QAR 386 at para 16.

653 'Law' includes both the civil and criminal law expressed by statute, regulation and the case and common law: *Sobh v Police Force of Victoria* (1933) 65 A Crim R 466 at 481 applied in *McEniery and Medical Board of Queensland* (1994) 1 QAR 349 at para 43. Section 36 of the *Acts Interpretation Act 1954* (Qld) provides that in an Act "*'contravene' includes fail to comply with*".

654 Relevant submissions: 13 and 107.

- the possibility that prisoners might modify their behaviour as a result of being granted access to such reports in order to obtain more favourable reports or outcomes in future assessments, for example, by being granted parole.

Further, the professionals responsible for preparing these reports might prepare less candid or comprehensive reports if they perceive a risk that the contents of the reports will not be kept confidential. This has the potential to detrimentally impact on the quality of the decisions made about the progress of prisoners through the correctional system.

The committee's recommendation in relation to s 42(1)(c) in section 11.11.2 should ensure that material is exempt where its disclosure could reasonably be expected to endanger the personal safety of any person. Similarly, the committee's recommendation in relation to s 44(3) in section 11.13.6 should ensure that access to such reports is given in a way which will not be detrimental to the health and well-being of the applicant.

In relation to the concern that a prisoner might modify their behaviour on being granted access to a particular report or information about a testing procedure, s42(1)(f)[655] and s 42(1)(h)[656] might provide a basis to exempt the relevant matter. However, the committee does not have sufficient information to determine whether the current exemptions provide sufficient protection to address this concern. Nor is the committee aware of the extent to which any problem in this regard extends beyond the correctional system. For example, similar concerns might arise in relation to psychiatric patients.

The Attorney-General should consult with the Minister for Corrective Services, the QIC and other stakeholders to determine whether the current provisions of the Act, in conjunction with any amendments proposed by the Attorney-General on the basis of the committee's other recommendations, are sufficient to ensure that reports prepared relating to prisoners will not be released in circumstances where harm could result from that release. The Attorney-General should also conduct inquiries to establish whether the concerns extend beyond the correctional system.

If, as a result of this consultation, the Attorney-General recommends legislative amendment, care should be taken in drafting relevant provisions to ensure that the rights of prisoners (and other persons as the case may be) are not unjustifiably infringed.

Further, the FOI monitor should issue guidelines about the application of the relevant exemption provisions (that is, the existing provisions or, if amendments are introduced, the new provisions) to ensure that professionals responsible for the preparation of reports regarding prisoners (and other persons as the case may be) understand the extent to which this information is protected from disclosure. This is particularly important given that even a false perception that the exemption provisions are inadequate could reduce the value of the reports.

COMMITTEE FINDING 181—RECOMMENDATION

The Attorney-General should consult the Minister for Corrective Services, the Information Commissioner and other stakeholders to determine whether the current provisions of the Act, in conjunction with any amendments arising from the committee's other recommendations, are sufficient to ensure that reports prepared relating to prisoners will not be released in circumstances where harm could result from that release.

655 This subsection provides that matter is exempt matter if its disclosure could reasonably be expected to prejudice the maintenance or enforcement of a lawful method or procedure for protecting public safety.

656 This subsection provides that matter is exempt matter if its disclosure could reasonably be expected to prejudice a system or procedure for the protection of persons, property or environment.

The Attorney-General should also conduct inquiries to establish whether the concerns raised in this regard extend beyond the correctional system.

The FOI monitor should issue guidelines about the application of the relevant provisions to ensure that professionals responsible for the preparation of reports involving prisoners (and other persons as the case may be) understand the extent to which this information is protected from disclosure.

11.12 MATTER AFFECTING LEGAL PROCEEDINGS: S 43[657]

Section 43 provides that matter is exempt if it would be privileged from production in a legal proceeding on the ground of legal professional privilege.[658] The exemption is a class exemption and does not contain a harm or public interest test. The committee considers that this is justified. As the ALRC/ARC review noted, the possibility that matter to which legal professional privilege applies could, in specific circumstances, be disclosed would potentially defeat the public interest objectives designed to be achieved by legal professional privilege. Safeguarding legal professional privilege is inherently in the public interest.[659]

The scope of legal professional privilege at common law has increased as the result of a recent High Court decision in which the Court held that the test for claiming legal professional privilege is whether a document has been brought into existence for the *dominant purpose* of obtaining legal advice.[660] Because this exemption relies on the common law regarding legal professional privilege, changes in the common law will change the scope of this exemption. The committee does not believe that there should be any statutory interference with the common law.

The publication and updating of guidelines in relation to this exemption would assist agencies to keep up-to-date with common law developments and appropriately apply the exemption provision.

COMMITTEE FINDING 182—CONCLUSION

No amendment should be made to the exemption contained in s 43 (Matter affecting legal proceedings).

11.13 MATTER AFFECTING PERSONAL AFFAIRS: S 44[661]

Section 44(1) provides that matter is exempt if its disclosure would disclose information concerning the 'personal affairs' of a person, whether living or dead, unless its disclosure would, on balance, be in the public interest.[662]

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657 Relevant submissions: 16, 51, 63, 80, 92, 101, 116, 118, 127, 138, 149 and 163.

658 EARC commented that this exemption *'serves to prevent FOI legislation from being used to compel government agencies to disclose their hand in pending or likely litigation or to circumvent the ordinary rules of discovery applied by the courts'*: EARC FOI report, n 19 at para 7.151.

659 ALRC/ARC, review report, n 13 at para 10.27.

660 *Esso Australia Resources Ltd v The Commissioner of Taxation* (1999) HCA 67. Previously, legal professional privilege could only be claimed when a document was brought into existence for the *sole purpose* of obtaining legal advice: *Grant v Downs* (1976) 135 CLR 674.

661 A number of submitters made general comments about s 44. See submissions: 8, 16, 21, 27, 42, 44, 46, 54, 55, 60, 63, 64, 67, 68, 73, 77, 80, 82, 87, 89, 94, 101, 101I and 149. Submissions regarding specific aspects of s 44 are discussed under the relevant level 3 headings in this section. See also submissions noted in section 11.22 *Exemptions relating to the identity or other personal details of a person*.

662 Section 44(2) provides that matter is not exempt under s44(1) merely because it relates to information concerning the personal affairs of the person by whom, or on whose behalf, an application for access to a document containing the matter is being made.

While there is no definition of 'personal affairs' in the Act, the QIC's decisions reveal the following.[663]

- 'Personal affairs' includes: affairs relating to family and marital relations; health or ill health; relationships and emotional ties with other people; domestic responsibilities or financial obligations; a person's signature (as distinct from a person's name); the mention of a person's name in association with some possible wrong-doing; and a person's income and personal financial position.
- 'Personal affairs' does not cover business or professional affairs of a person, nor does it apply to corporations.
- There are some 'grey areas' including: names, addresses and telephone numbers; employment related matters; one-off commercial transactions; and documents having a 'public character'.

One of the more significant 'grey areas' is employment-related matters of public servants. Information which merely concerns the performance by government employees of their employment duties is ordinarily incapable of being properly characterised as information concerning the employee's 'personal affairs' for the purposes of the Act.[664]

However, depending on the proper characterisation of the actual material in issue, an employee's personnel records, such as an employee's sick leave, annual leave, reasons for requesting a transfer, superannuation contributions and similar material constitute 'personal affairs'.[665]

11.13.1 Personal affairs v personal information[666]

Section 44 refers to information concerning the 'personal affairs' of a person. In contrast, the equivalent provision of the Commonwealth FOI Act (s 41) provides that a document is exempt if its disclosure would involve the unreasonable disclosure of 'personal information' about any person.[667]

Despite the lack of a statutory definition, the term 'personal affairs' is generally recognised as not being as broad in scope as the term 'personal information'. 'Personal information' means information or an opinion (including information forming part of a database), whether true or not, and whether recorded in a material form or not, about an individual whose identity is apparent, or can reasonably be ascertained, from the information or opinion.[668]

The difference between 'personal affairs' and 'personal information' is significant in two respects. The first is the interface with Queensland's administrative privacy regime provided for in *Information Standard 42*: *Information privacy* (IS42). The second area of relevance is the application of the provision to public service employees.

IS42 is based on the Commonwealth privacy principles and, among other matters, provides a mechanism for people to access and amend information about themselves held by government agencies. In this regard, the standard overlaps with the FOI Act. The standard uses the term 'personal information' for the majority of the information privacy principles. However, for the purpose of those privacy principles which overlap with the FOI Act, 'personal information' is limited to information

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663 See, in particular, *Re Stewart v Department of Transport* (1993) 1 QAR 227.

664 *Re Murphy and Queensland Treasury* (1995) 2 QAR 744 applying *Re Stewart and Department of Transport* (1993) 1 QAR 227 and *Re Pope and Queensland Health* (1994) 1 QAR 616.

665 *Re Stewart and Department of Transport* (1993) 1 QAR 227 at para 93.

666 Relevant submissions: 9, 32, 42, 45, 54, 59, 61, 67, 69, 76, 77, 80, 87, 94, 96, 100B, 100C, 101, 101B, 102, 106, 107, 122, 128, 132, 141, 149, 150, 155, 166, 169 and 171.

667 The Commonwealth FOI Act originally used the term 'personal affairs'. In 1991, the term 'personal affairs' was substituted with 'personal information'. The reasons for the change appear to have included to ensure that work related information (for example, work performance information which does not constitute 'personal affairs') would be covered by the amendment provisions of the Commonwealth FOI Act and to make the Commonwealth FOI and Privacy Acts uniform in this respect: ALRC/ARC, review report, n 13 at para 10.3 (footnote 5).

668 FOI Act (Cth), s 4 and *Information Standard 42: Information privacy* at 13.

concerning an individual's personal affairs as the phrase 'personal affairs' has been interpreted in the FOI Act.

The second consideration relates to the application of s44 to public sector employees. Individuals do not forfeit all right to privacy when they become employees of the government.[669] However, public servants must be accountable for the way they carry out their duties.[670] Given that accountability of the bureaucracy is an important FOI objective, it would be contrary to the democratic principles underlying FOI legislation to grant public servants *engaged in their official duties* a general exemption from being identified.[671] Further, and as the Commonwealth Privacy Commissioner stated in a submission to the ALRC/ARC review, the disclosure of personal information of public servants as it relates to the performance of their duties does not unduly threaten personal privacy.[672]

However, some information held about public sector employees is inherently more sensitive. This includes information such as identifying information relating to grievance procedures, performance assessment and disciplinary proceedings, and personnel information other than name, designation and remuneration of an officer. Given the highly private nature of such information, it should not be released unless there is a clear public interest in doing so.

One option to balance these considerations and enable a high degree of consistency with the privacy regime is to extend s 44 to apply to 'personal information', but to specifically exclude from the exemption information relating to public officers in the performance of their official duties. Such a provision would replicate the provision in the Western Australian FOI Act.[673]

However, the committee was not presented with substantial evidence that s44 in its current form is resulting in the inappropriate release of information. As discussed in section 11.13.3 *Public interest test v an 'unreasonable disclosure' test*, the committee considers that s 44 in its current form, in conjunction with a public interest test, enables the privacy of public officials to be appropriately balanced with the principles of public accountability.

Further, IS42 has not been in place for long enough to determine whether the use of different terms within the privacy standard is causing difficulties in practice. Accordingly, the committee does not consider that s 44 should be amended to refer to 'personal information' at this stage. Rather, any review of IS42, should consider the interrelationship between Queensland's privacy and FOI regimes, including whether consistent terminology should be used. Such a review should be undertaken in consultation with the QIC and the FOI monitor.

COMMITTEE FINDING 183—CONCLUSION

Section 44 (Matter affecting personal affairs) should continue to utilise the term 'personal affairs' at this stage. However, in any review of *Information Standard 42: Information Privacy*, the Attorney-General and the Minister for Innovation and Information Economy should consider the interrelationship between Queensland's privacy and FOI regimes, including whether consistent terminology should be used. Such a review should be undertaken in consultation with the Information Commissioner and the FOI monitor.

669 ALRC/ARC review report, n 13 at para 10.14.

670 See comments of the QIC in this regard in his first submission no 56 at paras B271-B278.

671 See the ALRC/ARC review report, n 13 at para 10.14. See also comments by the QIC in *Re Stewart and Department of Transport* (1993) 1 QAR 227 at para 85.

672 ALRC/ARC review report, n 13 at para 10.14. However, the Commonwealth Privacy Commissioner noted there would be situations which would warrant non-disclosure, for example, there could in some situations be reasonable security or other concerns which would justify non-disclosure of an officer's identity.

673 Western Australian *Freedom of Information Act 1992*, schedule 1, clause 3(3) and the Western Australian *Freedom of Information Regulations 1993*.

11.13.2 Definition of 'personal affairs'[674]

Because s 44 might be relevant in a wide range of circumstances in which there are numerous competing interests, the phrase 'personal affairs' needs to be flexible to permit a case by case consideration of each application.

The committee recognises that the 'grey areas' which continue to exist in relation to s44 result in some uncertainty about its application. This uncertainty is, to some degree, unavoidable if the provision is to retain the necessary flexibility to assess each case on its merits. However, appropriate guidelines could help to clarify the application of the provision and minimise the uncertainty which currently exists in relation to the 'grey areas'.

Guidelines should also address other complex issues arising from the personal affairs exemption, such as the extent to which the results of criminal history checks on public officials and those who apply to become public officials are accessible.

COMMITTEE FINDING 184—RECOMMENDATION

The FOI monitor should issue, and regularly update, guidelines on s 44 (Matter affecting personal affairs) which, among other matters, address interpretation of the term 'personal affairs' and the type of information about public officials which should be released in accordance with FOI purposes and principles.

11.13.3 Public interest test v an 'unreasonable disclosure' test[675]

Queensland's personal affairs exemption provides that relevant information is exempt unless disclosure would, on balance, be in the public interest. In contrast, most other Australian jurisdictions exempt a document if its disclosure would involve the unreasonable disclosure of information relating to the personal affairs of any person.[676] EARC recommended this departure from other jurisdictions in order to make it clear that the public interest is the ultimate criterion for disclosure.[677] Under the current provision, only '*countervailing public interest considerations of sufficient weight*' will operate to displace this *prima facie* entitlement to exemption.[678]

The unreasonable disclosure test allows for greater flexibility in applying the exemption than s44 of the Queensland FOI Act. Under s 44 some personal affairs matter may be found to be exempt in circumstances where its disclosure would not be unreasonable, but where it would be difficult to say that its disclosure would positively be in the public interest.[679] The 'unreasonable disclosure' test allows a range of factors, as well as a public interest, to be taken into account. Such factors include: the extent to which the public interest in disclosure of a particular document may outweigh the

674 Relevant submissions: 9, 32, 42, 45, 54, 59, 61, 67, 69, 76, 77, 80, 87, 94, 96, 100B, 100C, 101, 101B, 102, 106, 107, 122, 128, 132, 141, 149, 150, 155, 166, 169 and 171.

675 Relevant submissions: 128, 100A, 100C and 132. QIC, first submission no 56 at paras B26-B32. QIC, supplementary submission no 173 at 8.

676 See the Freedom of Information Acts of: the Commonwealth, s41(1); Victoria, s33(1); New South Wales, clause 6(1) of Schedule 1.

677 EARC FOI report, n 19 at para 7.177. The ALRC/ARC review considered this issue and recommended that the equivalent Commonwealth provision be changed from the current 'unreasonable disclosure' test to a public interest test. It appears that the recommendation was made to facilitate drafting of a provision as consistent as possible with the *Privacy Act 1988* (Cth). This recommendation was made in relation to a provision which refers to 'personal information' as opposed to 'personal affairs' information: ALRC/ARC review report, n 13 at para 10.7 (recommendation 59).

678 *Re Stewart and Department of Transport* (1993) 1 QAR 227.

679 QIC, first submission no 56 at para B28. On this basis, the QIC recommended the personal affairs exemption be amended so that matter is exempt if its disclosure would involve the unreasonable disclosure of information concerning the personal affairs of a person whether living or dead.

invasion of privacy that could result from disclosure; the degree of personal sensitivity of the information; the extent to which the information concerned is already a matter of public knowledge; the extent to which the subject of the information is a public figure and the relationship between the information concerned and the capacity in which he or she is a public figure; the nature of the document; the age of the document; the existence of a significant relationship (for example, a family relationship) between the applicant; and the subject of the information.[680]

In the committee's view, there is generally no inherent public interest in the disclosure of information relating to an individual other than the applicant. The objectives of government accountability and participative democracy are most likely to be achieved by the release of more general policy-type documents, rather than those relating to particular individuals. Further, amending the provision to refer to 'unreasonable disclosure' would introduce another test which, in the committee's view, has the potential to create unnecessary complexity. Accordingly, the committee considers that it is more appropriate to only release personal affairs information where some public interest in doing so can be demonstrated and that public interest outweighs the public interest in retaining confidentiality of the information.

COMMITTEE FINDING 185—CONCLUSION

Section 44 (Matter affecting personal affairs) should continue to contain a public interest balancing test, and not be redrafted 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'.

11.13.4 Special relationship between the applicant and a third party[681]

The committee considered whether the personal affairs exemption (s 44) should be amended to provide that, in weighing the public interest in disclosure, an agency may have regard to any special relationship between the applicant and a third party.[682]

This issue is particularly significant where the third party is deceased and, therefore, their authority for release of the information cannot be obtained. If an applicant applies for information relating to a deceased person, the matter will be exempt pursuant to s 44 unless its disclosure would, on balance, be in the public interest. Pursuant to s 51, the agency must consult with the deceased person's closest relative before releasing the matter. (Although, the committee recommends amendment to the term 'close relative': see section 6.15)

The relationship between an applicant and a third party might also be significant where the third party person is not deceased. For example, where the applicant does not know the identity of, or is not in contact with, their relatives.

It is important that the relationship between the applicant and the third person be a relevant consideration in applying the public interest test in s 44. This allows the significance of the information to the applicant to be weighed against other relevant considerations, such as the privacy of the third person, and the wishes of (other) close relatives if the third person is deceased.

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680 QIC, first submission no 56 at para B30 which in turn draws on the Commonwealth Attorney-General's Revised Memorandum no 23 regarding the Commonwealth FOI Act's 'personal information' exemption and observations made in decisions of the Administrative Appeal Tribunal.

681 Relevant submissions: 90, 113, 115, 119, 127, 128, 142, 146, 149, 150, 154, 160 and 162.

682 The former committee raised this issue in its discussion paper (discussion point 73) in the context of term of reference B(ix) which asks whether the FOI Act should be amended to allow disclosure of material on conditions in the public interest. This issue is considered in more detail in section 6.23 *Conditional disclosure*. The ALRC/ARC review recommended that the personal information exemption in the Commonwealth FOI Act be amended to provide that, in weighing the public interest in disclosure, an agency may have regard to any special relationship between the applicant and the third party: ALRC/ARC review report, n 13 at para 10.12.

In general there is no test of standing to gain access to documents under the Act.[683] However, in certain circumstances the identity of an applicant can be a factor in deciding whether access is to be granted.[684] Further, '*a public interest in the disclosure of particular documents to a particular applicant, in certain circumstances, is capable of being a public interest consideration of determinative weight (depending on the relative weight of competing public interest considerations favouring non-disclosure*)'.[685]

Moreover, in section 10.5 *Matter relating to the personal affairs of the applicant: s 6*, the committee recommends that s 6 should provide that the fact that a document contains matter relating to the 'affairs' of the applicant is an element to be taken into account in deciding whether it is in the public interest to grant access to the applicant. The applicant's relationship with a third person would relate to 'affairs' of the applicant.

In this light, the committee does not consider it necessary to amend the personal affairs exemption to expressly provide that, in weighing the public interest in disclosure, an agency may have regard to any special relationship between the applicant and a third party. This issue should be canvassed by the FOI monitor in relevant guidelines.

COMMITTEE FINDING 186—CONCLUSION

Section 44 (Matter affecting personal affairs) should not expressly provide that, in weighing the public interest in disclosure, an agency may have regard to any special relationship between the applicant and a third party.

11.13.5 Former residents of Queensland Institutions

The report on the *Commission of Inquiry into Abuse of Children in Queensland Institutions* recognised the importance of former State wards having access to information about their time in care.[686] The Department of Families has undertaken a number of steps in this regard including retrieving relevant records and establishing a special departmental unit to expedite requests for documents from departmental files for former residents of children's homes.[687]

In a recent report, the Forde Implementation Monitoring Committee recognised the Government's achievements to date in relation to ex-resident record retrieval.[688] However, the Monitoring Committee noted that several areas of concern remain. In particular, the Monitoring Committee considered that the concept of the 'public interest' contained in s 44(1), is being interpreted too narrowly and recommended:

- guidelines should be developed and consistently applied, particularly in relation to s 44(1);
- if a reconsideration of the Act does not allow for more appropriate access to records by former residents, the Government should consider legislative amendment to ensure that former residents have access to the information which is necessary in order to construct their personal and family histories; and
- the Government should consider amending legislation to allow an individual access to information about deceased parents and siblings.[689]

683 EARC FOI report, n 19 at paras 7.51-7.53.
684 *Re Pemberton and the University of Queensland* (1994) 2 QAR 293.
685 *Re Pemberton and the University of Queensland* (1994) 2 QAR 293 at para 172.
686 Goprint, May 1999 at 105.
687 *Report to the Queensland Parliament by the Forde Implementation Monitoring Committee,* August 2001 at 113.
688 Note 687 at 114.
689 Note 687 at 114-115.

The Government referred the Monitoring Committee's recommendations regarding amendment to the FOI Act to this committee to consider as part of its review of the Act.[690]

A number of recommendations in this report are relevant.

- In section 10.5 the committee recommends that s 6 should provide that the fact that a document contains matter relating to the 'affairs' of a person—as opposed to 'personal affairs'—is an element to be taken into account in deciding whether it is in the public interest to grant access to the applicant, and the effect that the disclosure of the matter might have.
- In section 11.13.4 the committee discusses that the identity of an applicant can be a relevant factor in weighing public interest considerations under s 44, and recommends that the FOI monitor canvass this issue in relevant guidelines. See also section 10.4 regarding the need for guidance and training regarding the public interest tests generally.

Implementation of these recommendations will help clarify the application of the FOI Act to applications by former residents of Queensland institutions about their time in care, and applications for information about deceased relatives. However, the concerns of the Monitoring Committee could be more fully addressed, giving due regard to the sensitivities of the content area, by establishing a specific access scheme. Such a scheme could, among other matters:

- recognise the public interest in the disclosure of certain information to former residents of Queensland institutions;
- for the purposes of the access scheme, define who is a former resident of an institution;
- grant former residents a right to have the chief executive disclose to them certain, listed types of information;
- grant former residents entitlement to certain types of records; and
- provide for circumstances where consultation processes are to be undertaken, and what restrictions might be imposed on access under the scheme.

The objectives of the Monitoring Committee might be achieved by an administrative access scheme. However, if an administrative access scheme is not feasible (for example, because of a statutory confidentiality clause preventing disclosure of the relevant information) and the amended provisions of the FOI Act prove inadequate to address the issue, the Minister for Families should consider introducing a statutory access scheme. It is not appropriate to include special provisions for access to a specific type of document in the FOI Act. Therefore, a specific statutory access scheme would need to be established in legislation relevant to the content area.[691]

The Monitoring Committee should be consulted in drafting any relevant legislation.

COMMITTEE FINDING 187—RECOMMENDATION

If administrative access schemes, in conjunction with the general provisions of the FOI Act, are not adequate to ensure that sufficient, appropriate information is provided to former residents of Queensland institutions, the Minister for Families should consider establishing, in consultation with the Forde Implementation Monitoring Committee, a separate statutory access scheme to specifically address this issue.

690 Queensland Government, Queensland Government response to the recommendations of the Commission of Inquiry into Abuse of Children in Queensland Institutions, Progress Report, 11 September 2001 at 6.

691 For an example of a statutory access scheme, see Part 4A of the *Adoption of Children Act 1964* (Qld) (Access to identifying information).

11.13.6 Medical or psychiatric information: ss 44(3) and (4)[692]

Section 44(3) provides that if an application is made to an agency or minister for access to a document that contains information of a medical or psychiatric nature concerning the applicant, and it appears to the agency's principal officer or the minister, that the disclosure of the information to the person might be prejudicial to their physical or mental health or wellbeing, access may be given to a qualified medical practitioner, instead of the applicant. The qualified medical practitioner is to be nominated by the applicant and approved by the principal officer or minister.

An 'agency or minister' may appoint a qualified medical practitioner to make a decision under subsection (3) on behalf of the agency or minister: s 44(4).

While s44(3) and (4) should only be used in extreme cases, there appears to be scope for aspects of these provisions to be extended.

Whether medical practitioner may give applicant access

There is currently some uncertainty regarding whether, pursuant to s44(3), the medical practitioner to whom access is given:

- has a discretion about whether to provide the documents to the applicant (with appropriate counselling or explanation);
- must provide the documents to the applicant (with appropriate counselling or explanation); or
- must ensure that access to the documents is not given to the applicant.

This should be clarified. The medical practitioner should be given a discretion regarding the release of the documents to the person, and the manner of that release. This way, the medical practitioner can provide whatever counselling or explanation is necessary to ensure that disclosure of the information contained in the documents does not prejudice the mental health or well-being of the applicant.

COMMITTEE FINDING 188—RECOMMENDATION

A qualified medical practitioner, to whom a document is released under s 44(3), should have a discretion regarding whether to disclose documents to the applicant and the manner in which the information contained in those documents is disclosed.

'Information of a medical or psychiatric nature'

Section 44(3) relates to information of a 'medical or psychiatric nature'. This term was also contained in the Commonwealth FOI Act when that Act was originally enacted. To address concerns that this term might not be broad enough to cover all reports which contain highly sensitive information about the applicant to which direct access might be prejudicial, the Commonwealth FOI Act was amended to refer to '*information concerning the applicant, being information that was provided by a qualified person acting in his or her capacity as a qualified person*.' 'Qualified person' is defined as a person who carries on, and is entitled to carry on, an occupation that involves the provision or care for the physical or mental health of people or for their well-being, and includes (but is not limited to) a medical practitioner, a psychiatrist, a psychologist, a marriage guidance counsellor, and a social worker.[693]

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692 Relevant submissions: 16, 69, 77, 87, 100A, 100C, 106, 107, 128 and 155. QIC, first submission no 56 at paras B33-B40.

693 FOI Act (Cth), s 41(3) and (8). These amendments were made on the recommendation of the Senate Standing Committee on Legal and Constitutional Affairs, *Freedom of Information Act 1982 - A report on the operation and administration of the Freedom of Information Legislation*, n 24 at 193-4 and 196-8. The ALRC/ARC review has since recommended that these provisions be amended to provide that if an agency reasonably apprehends

The committee believes that s 44(3) should be extended to cover documents prepared by a wider range of health care professionals than at present (for example, psychologists[694] counsellors and social workers).

Documents other than medical or psychiatric documents could cause the harm which the provision seeks to avoid. It is consistent with the objective of the provision that it should be extended to a wide variety of people involved in caring for the mental and physical health of a person.

It was further submitted that amendments should be made to expand the range of health professionals who may be nominated by the applicant (and approved by an agency's principal officer or minister) as the person to whom access is to be given.[695] The committee considers that it is appropriate for access to be given to a health care professional of the same kind as the health care professional who originally provided the information.

COMMITTEE FINDING 189—RECOMMENDATION

Section 44(3)(a) should relate to a document that contains 'information concerning the applicant, being information that was provided by a qualified person acting in his or her capacity as a qualified person.'

'Qualified person' should be defined as a person who carries on, and is entitled to carry on, an occupation that involves the provision or care for the physical or mental health of people or for their well-being, and includes (but is not limited to) a medical practitioner, a psychiatrist, a psychologist, a marriage guidance counsellor, and a social worker.

Section 44(3)(b) should provide that instead of access being granted to the applicant, access is to be given to a qualified person of the same kind as the qualified person who originally provided the information.

Section 44(4)

Numerous technical matters arise in the context of s 44(4).[696]

- Agencies and ministers must make four decisions in applying s 44(3): whether the information concerned is information of a medical or psychiatric nature; whether disclosure of the information might be prejudicial to the physical or mental health or well-being of the person; the exercise of the discretion whether the information is not to be given to the applicant but instead to a qualified medical practitioner; and approval of the medical practitioner nominated by the applicant.

  Section 44(4) provides that an agency or minister may appoint a qualified medical practitioner to make 'a decision' under subsection (3). To clarify that the term 'a decision' applies to all of the four separate decisions, the QIC recommended that s44(4) be amended to apply to *any* decision under s 44(3). The committee supports this recommendation.

that the applicant, upon receiving a document requested under the FOI Act which includes information about the applicant, is likely to cause serious injury to himself or herself, the agency must disclose the information in a way that minimises that risk: ALRC/ARC review report, n 13 at para 10.21 (recommendation 63).

694 The QIC considered that it would be worthwhile extending the coverage of s 44(3) to permit a psychologist's report on an access applicant to be disclosed to a nominated, approved psychologist, if direct disclosure to the access applicant might be prejudicial to his/her physical or mental health or wellbeing. However, the QIC did not consider that the Queensland provision should go as far as the Commonwealth provisions: QIC, first submission no 56 at para B39.

695 Pursuant to s 41(3) and (8) of the Commonwealth FOI Act the information can be given to a qualified person of the same kind as the qualified person who originally provided the information.

696 Implementation of the committee's recommendation in relation to s44(3) will be relevant to these issues, however, it will not change the recommendation.

- The committee considered whether s 44(3) should be redrafted so that the FOI decision–maker (and not just the principal officer and minister) has discretion, in certain circumstances, to grant access to a qualified medical practitioner. The decision to grant access to a qualified medical practitioner instead of directly to the applicant, while justified in limited circumstances, is fundamentally contrary to FOI principles enabling citizens to access government-held information about themselves. Therefore, the committee considers that such decisions should be made by an agency's principal officer, the relevant minister, or a medical practitioner appointed under s 44(3).[697]
- The QIC also raised an ambiguity between the language in s 44(3) ('principal officer') and s 44(4) ('an agency'), and recommended that the ambiguity be clarified. Section 44(4) should be amended to clarify that a principal officer of an agency or minister may appoint a qualified medical practitioner to make a decision under subsection (3) on behalf of the principal officer or minister.
- Section 44(4) should authorise delegation of the decision-making authority under s 44(3) to a qualified person of the same kind as the qualified person who provided this information. This is consistent with the committee's recommendation in relation to s 44(3) above.

COMMITTEE FINDING 190—RECOMMENDATION

Section 44(4) should provide that a *principal officer* or minister may appoint a qualified person of the of the same kind as the qualified person who originally provided the information to make *any* decision under subsection (3) on behalf of the *principal officer* or minister.

11.13.7 Other relevant issues

The committee considers whether s 35 which allows agencies to neither confirm nor deny the existence of a document should be extended to include matter which is exempt under s 44 in section 10.6.1 *Scope of s 35*.

Section 6.17 *Provisions regarding minors*, section 6.15 *Provisions regarding deceased people* and section 6.16 *Provisions regarding people of impaired capacity* are also relevant to s 44.

11.14 MATTER RELATING TO TRADE SECRETS, BUSINESS AFFAIRS AND RESEARCH: S 45[698]

Section 45(1) attempts to protect against the disclosure of information which would cause a commercial disadvantage to a person, organisation or agency carrying on commercial activity.[699] The provision protects:

(a) trade secrets;

(b) information which has a commercial value; and

(c) information concerning the business, professional, commercial, or financial affairs of an agency or person.

Paragraphs (b) and (c) contain harm tests. Only paragraph (c) is subject to a public interest test. This reflects a legislative intention that the public interest in protecting trade secrets and other information the disclosure of which would destroy or diminish its commercial value, is paramount.[700]

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697 Therefore, the ability to delegate decision-making functions under s 33 should not be available under s 44(3) and s 44(4).

698 Relevant submissions: 16, 42, 45, 54, 89, 100C, 103, 120, 127, 160 and 163. QIC, first submission no 56 at paras B41-B44.

699 See the QIC's information sheet s on s 45(1) for a further discussion on the operation of the exemption.

700 See Gilbert and Lane, n 17 at para 2.2120.

In section 12.7.2 *'Commercial-in-confidence' claims and the 'commercial exemptions'*, the committee concludes that no substantial amendment to s45(1) and s46(1) is necessary to appropriately balance the need to retain confidentiality of commercially sensitive information with the general principle that information should be released where possible.

However, a specific issue arises with respect to s45(3). Section 45(3) exempts matter which would disclose the purpose or results of research, where the disclosure could reasonably be expected to have an adverse effect on the agency or other person by, or on whose behalf, the research is being, or is intended to be, carried out.[701]

The QIC recommended that s 45(3) be amended to:

- clarify whether it extends to research which has been completed given that the words 'being, or is intended to be' suggest the provision does not apply to research which has been completed while s 45(3)(a) refers to research which is 'finished';[702]
- include a public interest balancing test, namely, 'unless its disclosure would, on balance, be in the public interest'; and
- require a 'substantial adverse effect' rather than an 'adverse effect'.

In support of these recommendations the QIC noted that, as the provision is currently worded, *'even the smallest adverse effect on an agency or other person will mean that the matter is exempt, notwithstanding that there may be overwhelming public interest factors in favour of disclosure'*.[703]

The committee supports the QIC's recommendations. In particular, s 45(3) should be restricted to research which is proposed or is currently being undertaken, and not extended to research which has been completed. The committee can see no justification for the results of completed research to remain confidential, unless the information is exempt under another exemption provision.

COMMITTEE FINDING 191—RECOMMENDATION

Section 45(3) should:

- clarify that it does not extend to research which has been completed;
- provide that relevant matter is exempt 'unless its disclosure would, on balance, be in the public interest'; and
- require a 'substantial adverse effect' rather than an adverse effect.

11.15 MATTER COMMUNICATED IN CONFIDENCE: S 46[704]

Section 46(1), subject to the exception contained in s 46(2), exempts matter:

- the disclosure of which would found an action for breach of confidence; or
- which consists of information of a confidential nature that was communicated in confidence, the disclosure of which could reasonably be expected to prejudice the future supply of such information, unless its disclosure would, on balance, be in the public interest.

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701 The ALRC/ARC review recommended that the equivalent Commonwealth provision be repealed, noting that other exemptions will ensure that agencies do not suffer financial disadvantage from premature release of research documents: ALRC/ARC review report, n 13 at para 11.4 (recommendation 71).

702 The equivalent provision in the Commonwealth FOI Act (s 43A) does not apply to completed research, only proposed research and research in progress.

703 QIC, first submission no 56 at para B43.

704 Submissions relevant to one or more of the issues discussed in section 11.15 are: 16, 21, 39, 42, 63, 100A, 101I, 120, 127, 140, 149, 160 and 163. QIC, first submission no 56 at paras B45-B49.

The exemption is designed to protect the flow of confidential personal, commercial and governmental information to government.[705]

11.15.1 Section 46(1)(a)

Section 46(1)(a) exempts matter if its disclosure would found an action for breach of confidence. This provision is a class exemption, and no public interest test applies. The committee considers that this is justified as the protection of information the disclosure of which would be actionable under the general law for breach of confidence is inherently in the public interest.[706]

Establishing an exemption under s46(1)(a) requires complex legal analysis as the provision imports a number of criteria from the common law and equity.[707] Moreover, changes to the law regarding breach of confidence will change the scope of this exemption.

The committee considered whether the provision should be redrafted to be a self-contained provision and thus reduce reliance on principles of common law and equity. Arguably, this would reduce difficulties in the application of the provision arising from the complexity of the law relating to breach of confidence. However, the committee does not support redrafting the provision in this way. Any self-contained provision would have to be complex in its terms. Further, the interpretation of any self-contained provision would rely heavily on the common law precedent.[708]

11.15.2 Section 46(2)

Section 46(2) provides that:

> *Subsection (1) does not apply to matter of a kind mentioned in section 41(1)(a) unless its disclosure would found an action for breach of confidence owed to a person or body other than-*
>
> *(a) a person in the capacity of –*
>
> *(i) a Minister; or*
>
> *(ii) a member of the staff of, or a consultant to, a Minister; or*
>
> *(iii) an officer of an agency; or*
>
> *(b) the State or an agency.*

Section 41(1)(a) provides for matter relating to the deliberative processes of government.

Section 46(2) means that the exemptions in s 46(1)(a) and (b) are not available in respect of deliberative process of government matter unless the disclosure of that deliberative process matter would found on action for breach of confidence owed to a person or body other than the State, an agency or minister. In other words, the purpose of s 46(2) is to make deliberative process matter ineligible for exemption under s 46(1) unless that matter was provided by a source external to government.

Section 46(2) renders s 46(1)(b) redundant, for practical purposes, in respect of deliberative process matter. Even where deliberative process matter was provided by an 'outside' third party, s 46(2) requires that disclosure of the matter must found an action for breach of confidence owed to such a person or body. As the QIC noted: *'If that requirement can be satisfied, then s 46(1)(a) will apply, and the issue of whether s 46(1)(b) also applies is of academic interest only'*.[709]

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705 EARC Issues Paper No 3, *Freedom of Information*, Goprint, Brisbane, May 1990 at 19.

706 The ALRC/ARC review took a similar approach: ALRC/ARC review report, n 13 at para 10.33.

707 See, for example, *Re B and Brisbane North Regional Health Authority* (1994) 1 QAR 279.

708 The ALRC/ARC review similarly concluded that s45 of the Commonwealth FOI Act (the Commonwealth equivalent exemption) should have the same scope as the common law: ALRC/ARC review report, n 13 at para 10.32.

709 *Re 'B' and Brisbane North Regional Health Authority* (1994) 1 QAR 279 at para 36.

The QIC recommended that the drafting of s 46(2) be clarified by providing:

> *Subsection (1) does not apply to matter of a kind mentioned in s 41(1)(a) unless its disclosure would disclose information communicated by a person or body, other than information communicated-*
>
> *(a) in the person's capacity as-*
>
> *(i) a Minister; or*
>
> *(ii) a member of the staff of , or a consultant to, a Minister; or*
>
> *(iii) an officer of an agency; or*
>
> *(b) by the State or an agency.*

The committee considers that this amendment will simplify the application of the provision. While it also removes reference to an action for breach of confidence, the committee agrees with the QIC that this does not detract from the essential purpose of the provision.

COMMITTEE FINDING 192—RECOMMENDATION

No amendment should be made to s 46(1)(a).

Section 46(2) should provide:

> *Subsection (1) does not apply to matter of a kind mentioned in s 41(1)(a) unless its disclosure would disclose information communicated by a person or body, other than information communicated-*
>
> *(a) in the person's capacity as-*
>
> *(i) a minister; or*
>
> *(ii) a member of the staff of, or a consultant to, a minister; or*
>
> *(iii) an officer of an agency; or*
>
> *(b) by the State or an agency.*

11.16 CONFIDENTIAL INDIGENOUS INFORMATION[710]

The ALRC/ARC review considered whether there should be a separate, non-waivable exemption to protect sensitive Aboriginal and Torres Strait Islander cultural information which is confidential or subject to particular disclosure restrictions. The review concluded that such an exemption was not necessary because the general law of confidence encompasses communication of confidential indigenous information. However, the review supported the suggestion that decision-makers be required to consult an expert on indigenous information to determine whether the release of such information would found an action for breach of confidence before deciding whether the equivalent to Queensland's s 46 (Matter communicated in confidence) applies. The review stated that this expert could be someone accredited by the indigenous community who liaises with the review's proposed Commonwealth FOI commissioner, and that the commissioner should consult this expert when developing guidelines on the relevant exemption.[711]

The ALRC, in a subsequent report, recommended that an exemption should be inserted in the Commonwealth FOI Act relating to information that, under indigenous tradition, is confidential or subject to particular disclosure restrictions.[712]

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710 Relevant submissions: 16 and 29.

711 ALRC/ARC review report, n 13 at para 10.34.

712 ALRC, *Australia's federal record: A review of Archives Act 1983*, n 155 at paras 20.65-20.73.

The committee did not receive any submissions from indigenous groups calling for a similar exemption to be inserted in Queensland's FOI Act. Nevertheless, the committee believes that the issue warrants further consideration by the Attorney-General in consultation with appropriate experts.

COMMITTEE FINDING 193—RECOMMENDATION

The Attorney-General should consider, in consultation with appropriate experts from the indigenous community, whether an exemption should be inserted in the Act relating to information that, under Aboriginal tradition and Island custom, is confidential or subject to particular disclosure restrictions.

11.17 MATTER AFFECTING THE ECONOMY OF THE STATE: S 47[713]

Section 47(1) exempts matter if its disclosure could reasonably be expected to have a substantial adverse effect on the ability of government to manage the economy of the State, or expose any person or class of persons to an unfair advantage or disadvantage because of the premature disclosure of information relating to the management of the economy.[714] The exemption is subject to a public interest test.

11.17.1 Need for section 47

The ALRC/ARC review considered the equivalent exemption to s 47 in the Commonwealth FOI Act[715] and recommended that the provision is superfluous and should be repealed. This recommendation was made on the basis that the exemption is rarely used and, in each case where the exemption has been claimed, the relevant documents have been found on appeal to be exempt under another provision.[716]

Other exemptions in Queensland's FOI Act which might make the s47 exemption redundant include the exemptions for 'deliberative process documents' (s 41), 'business affairs' (s 45) and 'financial interests of the state' (s 49).

Although, s 47 has rarely been used in the last three years, the committee has not received overwhelming evidence in support for the repeal of the provision. Further, if s 36 is amended as recommended by the committee section 11.4, there might be further justification for retention of s 47.

11.17.2 Section 47(2)

Section 47(2) provides that s 47(1)(a) applies to matter the disclosure of which would reveal the consideration of a contemplated movement in government taxes, fees or charges, or the imposition of credit controls.

The QIC submitted that on a literal interpretation of s47(2), matter specified in s47(2) automatically falls within the terms of s47(1)(a), and hence is prima facie exempt subject to the application of the public interest balancing test in s 47(1). The requirement under s 47(1)(a) to demonstrate that disclosure of the matter in issue would have a substantial adverse effect on the ability of the government to manage the economy of the State, is arguably bypassed in the case of matter that answers the description in s 47(2).

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713 Submissions relevant to one or more of the issues discussed in section 11.17 are: 16, 63, 89, 90 and 120. QIC, first submission no 56 at paras B50-B52.

714 As to the background to this exemption see EARC's FOI report, n 19 at paras 7.222 and 7.223.

715 This is s44 of the Commonwealth FOI Act. However, this provision is not identical to the Queensland provision.

716 The ALRC/ARC review noted that documents falling within the exemption that warrant exemption could be withheld under other provisions such as the provisions relating to 'deliberative process documents' and 'business affairs': ALRC/ARC review report, n 13 at para 9.28 (recommendation 58).

The QIC believed that this was not the intention of the provision but, rather, it was intended that matter of the kind described in s 47(2) *may* fall within s 47(1)(a) but that it should still be necessary to demonstrate that its disclosure could reasonably be expected to have the required substantial adverse effect. The QIC recommended an amendment to require the harm test in s 47(1)(a) to apply to matter described in s 47(2).

The approach recommended by the QIC is consistent with the approach adopted in the Commonwealth equivalent provision[717] and with the general principle that exemption provisions should focus on the harm which would result from the disclosure of particular information.

COMMITTEE FINDING 194—RECOMMENDATION

In relation to the exemptions contained in s 47 (Matter affecting the economy of State), s 47(2) should provide:

> *The type of matter to which subsection (1)(a) may apply includes, but is not limited to, matter the disclosure of which would reveal:*
>
> *(a) the consideration of a contemplated movement in government taxes, fees or charges; or*
>
> *(b) the imposition of credit controls.*

11.18 MATTER TO WHICH SECRECY PROVISIONS OF ENACTMENTS APPLY: S 48[718]

Section 48(1) provides that matter is exempt if its disclosure is prohibited by an enactment mentioned in schedule 1 to the Act unless disclosure is required by a compelling reason in the public interest. The exemption does not apply to information relating to the personal affairs of the applicant: s48(2). Section 48, as originally enacted, was effective for only two years from the date of assent of the FOI Act.

11.18.1 A review of schedule 1

EARC recommended that, in the absence of an express provision in another enactment, FOI legislation should override secrecy clauses contained in other legislation. EARC was of the view that FOI legislation achieves the appropriate standard of openness and secrecy, and it is inappropriate that secrecy clauses, which pre-date FOI legislation, should be allowed to interfere with that standard when they had not been drafted with FOI legislation in mind.[719]

The QLRC subsequently reviewed s 48[720] and noted that to qualify as a 'secrecy provision' a provision must:

- refer directly and explicitly to the nature of the information in question so that the information is capable of being identified as a genus; and
- prohibit a person or persons named in the provision from disclosing that kind of information.

The QLRC concluded that the appropriate extent of exemption from the FOI Act should be determined by the FOI Act itself and that, in general, future exemptions under the FOI Act should be via provisions other than s 48. However, the QLRC also stated that a small number of specified

717 *Freedom of Information Act 1982* (Cth), s 44(2).

718 Submissions relevant to one or more of the issues discussed in section 11.18 are: 16, 32, 45, 48, 69, 72, 77, 86 and 118. QIC, first submission no 56 at paras B14-B18.

719 EARC FOI report, n 19 at para 7.257.

720 QLRC, *The Freedom of Information Act 1992: Review of secrecy provision exemption*, n 22 at 14-16.

secrecy provisions should continue to be exempt because the matter protected by those provisions is not sufficiently protected by exemption provisions of the FOI Act other than s 48.[721]

The current s 48, which provides an exemption in relation to provisions referred to in schedule 1, reflects the QLRC's recommendation in this regard, although the current schedule 1 is slightly more expansive that originally recommended by the QLRC.

The committee considers that it is appropriate that s48 apply only to provisions specifically identified in the FOI Act. These provisions should satisfy the QLRC's test of what constitutes a 'secrecy provision' and the matter protected by them should not be sufficiently protected by other exemptions in the FOI Act.

A number of submitters claimed that further provisions should be added to schedule 1. The committee does not have the resources to review the current and proposed provisions appropriate for inclusion in this schedule. This is a task which the Attorney-General should undertake in consultation with the QIC.

COMMITTEE FINDING 195—RECOMMENDATION

Section 48 (Matter to which secrecy provisions of enactments apply) should be retained in its current form but the Attorney-General should review schedule 1, in consultation with the Information Commissioner, to determine whether there is justification for retaining the secrecy provisions currently listed, and whether there are other provisions that should be added to schedule 1.

All provisions listed in, or proposed to be listed, in schedule 1 should:

- refer directly and explicitly to the nature of the information in question so that the information is capable of being identified as a genus;
- prohibit a person or persons named in the provision from disclosing the specified kind of information; and
- protect information the disclosure of which would risk harm which is not protected by another exemption provision in the Act.

11.18.2 Public interest test

The public interest test in s 48—unless disclosure is required by a compelling reason in the public interest—is higher than the public interest test in other exemption provisions.[722] The rationale for this higher test was to give the courts a *'clear standard'* in relation to the public interest test applying to s 48 *'because Parliament had already expressed its views in relation to these particular secrecy clauses contained in other statutes'*.[723]

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721 QLRC, *The Freedom of Information Act 1992: Review of secrecy provision exemption,* n 22 at 81. The ALRC/ARC review recommended repeal of the Commonwealth equivalent to s 48 as in most, if not all, cases the FOI exemptions cover government-held information currently protected by a secrecy provision, and the exemption provisions in the FOI Act represent the full extent of information that should not be disclosed. The review further commented that if s 38 (the Commonwealth equivalent to s 48) is not repealed, it should at least be amended so that there is a definitive list of all secrecy provisions to which the FOI Act is subject: ALRC/ARC review report, n 13 at para 11.3 (recommendation 70).

722 Section 39(2) uses the same public interest test, although in section 11.8.2 the committee recommends that this test be amended.

723 The Hon D M Wells MP, Minister for Justice and Attorney-General and Minister for Arts, Second Reading Speech, Freedom of Information (Review of Secrecy Provision Exemption) Amendment Bill 1994, *Queensland Parliamentary Debates (Hansard)*, 22 June 1994 at 8409.

This is contrary to the QLRC recommendation that the public interest test in s 48 be similar to other exemption provisions, that is, that relevant matter is exempt 'unless disclosure would, on balance, be in the public interest'.[724]

The committee agrees with the QIC that the public interest test used in most other exemption provisions would ensure an appropriate balance between the protection of information which should be confidential and the public interest in open and accountable government.

COMMITTEE FINDING 196—RECOMMENDATION

The public interest test in s 48 (Matter to which secrecy provisions of enactments apply) should be amended to provide that relevant matter is exempt 'unless its disclosure would, on balance, be in the public interest'.

11.19 MATTER AFFECTING FINANCIAL OR PROPERTY INTERESTS: S 49

Section 49 exempts matter if its disclosure could reasonably be expected to have a substantial adverse effect on the financial or property interests of the State or an agency unless its disclosure would, on balance, be in the public interest.

The committee did not receive any submissions in relation to this provision and does not propose any amendment to it.

The ALRC/ARC review considered repeal of the Commonwealth equivalent exemption but in its final report resiled from that approach.[725] The FOI legislation of all other Australian jurisdictions contain a similar exemption.

COMMITTEE FINDING 197—CONCLUSION

No amendment should be made to the exemption contained in s 49 (Matter affecting financial or property interests).

11.20 MATTER DISCLOSURE OF WHICH WOULD BE CONTRARY TO AN ORDER OR DIRECTION OF A COMMISSION ON INQUIRY: S 50(b)[726]

Section 50(b) provides that matter is exempt matter if its disclosure would be contrary to an order made or direction given by a royal commission or commission of inquiry, or a person or body having power to take evidence on oath.[727]

Section 50(b) relates to:

- commissions of inquiry issued by the Governor-in-Council;
- boards, tribunals and investigative committees established to investigate and deliver findings about a variety of matters, if, when performing certain functions, those bodies are deemed (under

724 QLRC, *The Freedom of Information Act 1992: Review of secrecy provision exemption*, n 22 at 109.

725 ALRC/ARC review report, n 13 at para 9.24.

726 Relevant submission: 16. QIC, first submission no 56 at paras B53-B63.

727 Section 11(1)(i) provides that the Act does not apply to a commission of inquiry issued by the Governor-in-Council. However, this exclusion does not apply to commissions established under the *Commissions of Inquiry Act 1950* (Qld). EARC considered that once commissions of inquiry have completed their investigations, and presented their reports, there is no continuing need or justification for an agency-based exclusion for them, and that other exemptions would adequately protect any continuing need for secrecy: EARC FOI report, n 19 at para 8.26.

provisions in their constituting statute) to be commissions of inquiry within the meaning of the *Commissions of Inquiry Act 1950*; and

- bodies empowered to take evidence on oath.

Section 16 of the *Commissions of Inquiry Act 1950* (Qld) gives 'commissions of inquiry' a general power to make non-publication orders in respect of certain material which is placed before them.

The QIC expressed concern that he has found in several cases involving bodies covered by s 50(b)—other than commissions of inquiry issued by the Governor-in-Council—that their non-publication orders have been made in terms that are too broad, and do not contain logical exceptions, such as disclosure to those parties who are directly involved in the relevant hearing. Moreover, the QIC noted that in these cases, no attention is given to the appropriate duration of a non-publication order. Unless rescinded or varied, non-publication orders continue to have legal effect, and render information exempt under s 50(b) *ad infinitum*, whether or not any sensitivity, or the reason for making the order, continues to exist.

The ALRC/ARC review did not see any need to amend the Commonwealth FOI Act equivalent to s 50(b), although the review did note that that royal commissioners should be made aware of the need to limit orders that place restrictions on the dissemination of documents to the period in which the document is likely to be genuinely sensitive.[728]

The QIC recommended that s 50(b) be amended to permit review of an order or direction—other than those made by a royal commission or a commission of inquiry issued by the Governor-in-Council—on which a claim for exemption is based on s 50(b) in certain circumstances.

To achieve this, the QIC suggested that a new subsection be added to s 50, which would apply in circumstances where the QIC:

- is reviewing a decision that matter is exempt under s 50(b);
- has consulted with the person or body (or the successor of that person or body) which made the relevant order or direction of the kind referred to in s 50(b); and
- forms the view that the order or direction should be rescinded or amended so as to permit disclosure to the applicant of the matter in issue, in whole or in part.

In these circumstances, the subsection would authorise the QIC to recommend (with reasons for the recommendation) that the relevant person or body (or successor thereof) amend or rescind the order or direction. The relevant person or body would then be required to make a decision, within 28 days, as to whether or not it is prepared to rescind or amend the relevant order in accordance with the QIC's recommendation. If the person or body declined to accept the QIC's recommendation, it would be required to publish its reasons for doing so.

The committee considers that this mechanism would appropriately balance the need to retain confidentiality in certain circumstances with the objectives of the FOI Act.

The QIC further recommended that where the person or body—other than a royal commission, or commission of inquiry issued by the Governor-in-Council—which made the relevant order or direction under s 50(b) has ceased to exist and there is no successor body, the QIC be given the legislative authority, after consulting with any affected person, to decide to rescind or amend the relevant order or direction, having regard to whether any valid reasons warrant the continuation of the relevant order or direction.

The committee has some concerns about the QIC having original decision-making power where the relevant body has ceased to exist and there is no successor body. It would be anomalous for the QIC to have original decision-making, as opposed to review, authority for this issue. It would also have the

728 ALRC/ARC review report, n 13 at para 11.5.

effect that the only review mechanism available would be judicial review. Further, staff of the QIC will not necessarily have sufficient expertise in the relevant content area to recognise the implications or sensitivities of relevant documents, although they could seek expert assistance in this regard.

Apart from these issues, the committee does not have the resources to conduct a comprehensive assessment of the nature of the records which might be affected by implementation of this recommendation. The Attorney-General, who will be better placed in this regard, should consider a mechanism which overcomes the problems identified by the QIC in relation to bodies which are or will become defunct.

COMMITTEE FINDING 198—RECOMMENDATION

Section 50(b) should permit review of a suppression order or direction made by an entity—other than one made by a royal commission or a commission of inquiry issued by the Governor-in-Council—by the Information Commissioner where the Commissioner:

- is reviewing a decision that matter is exempt under s 50(b);
- has consulted with the person or body (or the successor of that person or body) which made the relevant order or direction of the kind referred to in s 50(b); and
- forms the view that the order or direction should be rescinded or amended so as to permit disclosure to the applicant of the matter in issue, in whole or in part.

In such circumstances, the provision should enable the Commissioner to make recommendations that the order or direction should be rescinded or amended to the relevant person or body (or successor thereof), accompanied by the reasons for the recommendation. The relevant person or body should be required to make a decision within 28 days as to whether or not it is prepared to rescind or amend the relevant order or direction in accordance with the Commissioner's recommendation. If the person or body declines to accept the Commissioner's recommendation, it should be required to publish its reasons for doing so.

Further, the Attorney-General should consider appropriate legislative amendments to enable the release in appropriate cases of records of defunct bodies—other than royal commissions and commissions of inquiry issued by Governor-in-Council—with powers under the *Commissions of Inquiry Act 1950* (Qld).

11.21 MATTER DISCLOSURE OF WHICH WOULD BE CONTEMPT OF PARLIAMENT: S 50(C)[729]

The FOI Act does not apply to the Legislative Assembly, its members and committees, parliamentary commissions of inquiry and the Parliamentary Service: see s11(1)(b) and (d).[730] However, exclusion by s 11(1) does not mean that the documents created by or concerning the excluded entities can never be subject to disclosure under the Act. Copies of any such documents in the possession or control of a minister or agency that are subject to the Act, are accessible under the Act subject to the application of relevant exemptions. Section 50(c) is relevant in this regard. It applies where an agency or minister holds documents that, if released, would infringe the privileges of Parliament (or the Parliament of the Commonwealth, a State or territory, or Norfolk Island).

The most recent FOI annual report indicates that agencies are increasingly claiming this exemption.[731]

The following privileges of Parliament are particularly relevant to the discussion in this section.

729 Relevant submissions: 23, 44, 87, 139 and 151. QIC, supplementary submission no 173 at 29-30.

730 The FOI Act was only intended to apply to the executive and not the legislative or judicial arm of government: EARC FOI report, n 19 at paras 8.18-8.20 and 8.150.

731 See DJAG, *Freedom of Information Annual Report 1999/2000*, n 133 at appendix 1.7 and **appendix I.**

- The privilege of freedom of speech, which means that freedom of speech, debates and proceedings in Parliament, shall not be impeached or questioned in any court or place outside Parliament.[732]
- Parliament's privilege to regulate its own proceedings and, in particular, to regulate the publication of parliamentary papers, whether by authorising or prohibiting such publication.[733] In accordance with the privilege to regulate its own proceedings, Standing Order 197 of the *Standing Rules and Orders* adopted by the Legislative Assembly and approved by the Governor provides that:

  > *The evidence taken by a Committee and documents presented to it which have not been presented or reported to the House, shall not, unless authorised by the House or the Committee, be disclosed to any person other than a Member or officer of the Committee.*

  The unauthorised disclosure of 'proceedings in Parliament'—a term defined in the *Parliamentary Papers Act 1992* (Qld), s 3—will, in some circumstances, constitute an infringement of the privileges of Parliament and a contempt.
- Parliament's authority to define the scope of its own privileges. While the Legislative Assembly may not unilaterally confer on itself new privileges, the Legislative Assembly is the sole judge of the scope and extent of its existing privileges.[734] Further, only the Parliament as a whole can override the privileges of the Legislative Assembly, by an Act of Parliament.[735]

The committee has sought the advice of the Members' Ethics and Parliamentary Privileges Committee (MEPPC)[736] regarding a number of issues which arise concerning the parliamentary privilege exemption. Much of the discussion below draws on that advice.[737]

11.21.1 'Infringe the privileges of Parliament'

The heading of s 50 refers to a 'contempt of Parliament' while s 50(c) provides that matter is exempt if its disclosure would 'infringe the privileges of Parliament'. Every breach or infringement of privilege is a contempt, but a contempt need not be a breach of privilege. The committee considers that contempt of Parliament is the preferable terminology and the section should be amended accordingly.

Further, given that the issue of contempt of Parliament is distinct from the other matters covered by s 50, and in light of the amendments to the provision which the committee recommends below, this exemption should appear in a separate, stand alone provision.

COMMITTEE FINDING 199—RECOMMENDATION

Section 50(c) should appear in a stand alone provision and should refer to conduct which is a contempt of Parliament rather than conduct which would infringe the privileges of Parliament.

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732 See Article 9 of the *Bill of Rights 1688* (Imp) which applies in Queensland by virtue of s 40A of the *Constitution Act 1867* (Qld).

733 See the: *Standing Rules and Orders of the Legislative Assembly* made pursuant to the *Constitution Act 1867* (Qld), s 8; *Parliamentary Papers Act 1992* (Qld); *Bill of Rights 1688* (Imp), Article 9.

734 See D Limon and W R McKay, *Erskine May's treatise on the law, privileges, proceedings and usage of Parliament*, 22nd edition, Butterworths, London, 1997 at 88-92.

735 See also the *Acts Interpretation Act 1954* (Qld), s 13B which provides that an Act enacted after the commencement of the section affects the powers, rights and immunities of the Legislative Assembly or of its members or committees only so far as the Act expressly provides.

736 The MEPPC's areas of responsibility include parliamentary privilege: *Parliamentary Committees Act 1995* (Qld), s 14.

737 The MEPPC's advice to the committee in this regard was provided in letters dated 14 November 2001 and 5 December 2001.

11.21.2 The type of matter exempt under s 50(c)

Parliamentary privilege is a complex area of law and generally not well understood. The MEPPC suggests that s 50(c) could be enhanced by either including:

- a more specific explanation as to the matter covered by the provision, such as in s 36 relating to Cabinet material; or
- examples of the type of documents that are exempt and, perhaps, the types of documents that would not be exempt.

Examples of the type of matter that is exempt under s 50(c) could include the following.

- Correspondence and other documents or communications between a committee and a minister, or a committee and an agency (including a department or local government authority) that has not been tabled by the committee or otherwise published or authorised for public release by the committee.
- A submission by an agency (including a department or local government authority) to a committee that has not been tabled by the committee or otherwise published or authorised for public release by the committee.
- A transcript of proceedings of an in-camera hearing of a committee that has not been tabled or authorised for public release by a committee or the House.
- Documents in the possession of an agency, including correspondence, that reveal the private deliberations of a committee or private meetings or hearings of a committee.

The committee agrees that examples would assist in clarifying the type of matter that is exempt under s 50(c). This is consistent with the committee's recommendation in chapter 13 that, where appropriate, examples should be used to clarify the application of provisions of the Act. Guidelines issued by the FOI monitor might also assist in this regard.

COMMITTEE FINDING 200—RECOMMENDATION

The contempt of Parliament provision should include examples of the type of matter that is exempt under the provision and the type of matter that is not exempt under the provision.

11.21.3 'Constituency correspondence'

All material held by a Member of Parliament (MP), for example, in their electorate office, is excluded from the Act under s 11(1)(b). However, MPs' correspondence with ministers, departments and agencies (including local governments) in the hands of those 'agencies' is amenable to disclosure under the Act, subject to the application of relevant exemptions.[738]

The committee has considered whether and, if so, to what extent MPs' correspondence with ministers, departments and agencies about constituency matters ('constituency correspondence') should be subject to disclosure under the Act. This issue raises two separate, but related considerations. Firstly, consideration must be given to achieving FOI purposes and principles. Secondly, consideration must be given to legal and other repercussions in respect of members' and constituency communications.

The MEPPC believes that a separate exemption provision under the Act is warranted in respect of communications (and attachments to those communications and including both documentary and

[738] Thus, for example, the situation might arise where a constituent complains to a member, the member writes to a minister and then the matter is released under the Act to the constituent or a third party. See *Re a Member of the Legislative Assembly and Queensland Corrective Services Commission* (1998) 4 QAR 99.

electronic communications) between members and ministers, departments and agencies (including local government authorities) concerning constituency matters.[739]

The MEPPC believes that such an exemption is justified on the following grounds.

- It would clarify the law as to whether constituency correspondence in the hands of an 'agency' is subject to disclosure under the Act.
- It is essential that MPs are able to perform their representative and scrutiny role in a frank and fearless manner and that they are not deterred from doing so in any way. Currently under the Act, there is a distinct possibility that the representative and scrutiny role of members could be compromised by a minister or agency releasing constituency correspondence to a third party.
- Many issues raised by constituents are highly sensitive but they may require that confidential information be provided to ministers and agencies in an effort to resolve a particular issue. Constituents believe and expect that their communications with an MP are confidential and will be treated confidentially both within the members' electorate office and by the minister or agency to whom the matter might be referred for action. A constituent's right to confidentiality, privacy and fairness could be compromised by a third party obtaining access to confidential constituency information via a minister or agency.
- Individual MPs are in the best position to determine the appropriate release of their confidential constituency correspondence with ministers and agencies.
- Currently, there is an inconsistent approach to the handling of constituency correspondence—the same piece of correspondence will be exempt when held in members' electorate offices but is prima facie accessible when sent to a minister or agency for further action.
- MPs should be accountable for their actions. However, MPs also have an obligation towards the welfare and confidentiality of their constituents which should be of the highest priority. There is currently the prospect of more trauma being caused to individuals by personal concerns being made available to the public under the Act than would be caused by an inability to obtain access to confidential information under the Act.

While this committee agrees that the Act should not apply to MPs and that matter held by them is properly immune from disclosure under the Act, the committee is not supportive of the broad exemption proposed by the MEPPC. Generally, the committee believes that the proposed exemption is contrary to the FOI principle of openness advocated by the committee in this report. Indeed, the proposal has the potential to operate against an applicant trying to access matter held by an agency merely because of a members' involvement in the relevant issue.

Further, the MEPPC does not appear to have given full consideration to how other exemptions might apply to prevent such information being disclosed under the Act. All constituency correspondence held by ministers and agencies is not automatically released if responsive to an FOI application. Other exemptions might apply to the relevant documents. In particular, the exemptions in s 46 (Matter communicated in confidence)[740] and s 44 (Matter affecting personal affairs) might apply. These exemptions would appear to address many of the MEPPC's concerns regarding maintaining the confidentiality and privacy of constituents.

It is also relevant to note that, pursuant to s51, an agency or minister is required to consult an MP (and the constituent where the application is made by a third party) before disclosing a document likely to be of substantial concern to the MP or another third person, to obtain their views as to whether or not the relevant matter is exempt. In section 6.22.3 the committee notes that the

739 The MEPPC further argues that a wide definition of 'constituency' is required so as not to limit it only to MPs acting on behalf of people in their electorate, as it is not uncommon for MPs to act for people living outside the geographical borders of their electorate.

740 The application of s46(1)(b) in a constituency correspondence matter was considered by the QIC in *Re a Member of the Legislative Assembly and Queensland Corrective Services Commission* (1998) 4 QAR 99.

appropriate and consistent implementation of the requirement to consult under s 51 is extremely important, and recommends that the FOI monitor should issue guidelines about, and monitor the adequacy of, consultation by agencies and ministers with third parties.

Members need to be circumspect in what they put in their correspondence and the material they attach to their correspondence. They also need to explain to constituents at the outset the possibility of material relating to their matter being subject to disclosure under FOI legislation. In many cases, this is unlikely to be of any consequence to the particular constituent. In fact, the committee believes that many constituents accept that a member will be unable to make representations on their behalf without airing their matter in numerous fora.

However, the committee accepts that this issue is wider than just one relating to FOI and includes the extent to which constituency correspondence is covered by parliamentary privilege. Members can raise any issue within the Assembly in a frank and fearless manner because parliamentary privilege operates to make them immune from legal repercussions. However, the extent to which parliamentary privilege extends to constituency correspondence is unclear. This is relevant to the FOI Act because if such matter becomes available under FOI, the need for immunity from legal repercussions becomes more acute for both the MP and the constituent. The MEPPC argues that, conversely, the absence of any guaranteed immunity in respect of such information emphasises the need for exemption under FOI.

The MEPPC advises that the extent to which constituency correspondence is covered by parliamentary privilege is an issue which it is examining in further detail as part of its privileges inquiry into information provided to members. The committee believes that the issues raised above should be revisited following the tabling of the MEPPC's report. In the meantime, no amendment should be made to the Act.

COMMITTEE FINDING 201—RECOMMENDATION

In principle, there should be no broad exemption in the Act in respect of communications (and attachments to those communications and including both documentary and electronic communications) between members and ministers, departments and agencies (including local governments) concerning constituency matters. The other exemption provisions in the Act, in conjunction with the requirement to consult third parties pursuant to s 51, should provide sufficient protection from disclosure where such protection is warranted.

However, given that this issue is related to parliamentary privilege, the Attorney-General should consider the extent to which constituency correspondence should be disclosed under the Act once the Members' Ethics and Parliamentary Privileges Committee reports to Parliament on the extent to which constituency correspondence is covered by parliamentary privilege. In this regard, the Attorney-General should consult the Members' Ethics and Parliamentary Privileges Committee, the Legal, Constitutional and Administrative Review Committee, the Information Commissioner and the FOI monitor.

11.21.4 Departmental briefings prepared for parliamentary purposes

The QIC has considered whether briefing papers prepared for ministers' and members' use in Parliament are exempt under the Act. However, there remains some uncertainty regarding the extent to which such documents should be exempt under s 50(c).

Generally, the MEPPC believes that the s 50(c) exemption should not apply to ministers' briefing papers as they are not related to the contempt of Parliament exemption. Whilst some of these documents may be classified as proceedings in Parliament (as they are documents prepared for the

purpose of Parliament[741]), this does not mean that the release of these documents would amount to a contempt. These documents are essentially a tool for the executive. Any exemption (if at all) for ministers' briefings should be made under the Cabinet exemption in the Act.[742]

The MEPPC of the 48th Parliament in its *Report on a matter of privilege—matter of privilege referred to the committee on 3 March 1998 concerning the tabling of a document from a former Cabinet,*[743] considered the status of a particular class of executive documents. That committee stated in its report that: '*It would be extraordinary for the Assembly to protect the privileges of the executive*' and that it would also be ironic, *'as a significant proportion of the Legislative Assembly's time in scrutinising the executive is spent trying to [wrest] information from the Cabinet*'.[744] The former MEPPC concluded:

> *There is no matter of privilege before the committee because the privileges involved are the privileges of the Cabinet, the executive arm of Government. In no way does the breach of the convention [of Cabinet secrecy] affect the privileges, powers or immunities of the House, its committees or members.*[745]

The current MEPPC went on to advise that:

> *It is difficult to envisage a situation (although possible) where the MEPPC would find the release of Cabinet or ministerial briefings to be a contempt of Parliament, even where those documents may have been prepared for, and could have been used for proceedings in, the House or a committee. Whilst it is not appropriate for us to "pre-judge" matters, we find it difficult to see, for example, how we would ever find the unauthorised release of possible Parliamentary questions or similar briefing material prepared for a Minister in case a question is asked, to be a contempt of Parliament. Therefore, we find it difficult to see how the s.50 exemption could ever apply*.[746]

This committee believes that the MEPPC's assessment regarding the non-application the exemption under s 50(c) to briefing papers prepared for ministers' or members' use in Parliament leads to appropriate outcomes, and that no amendment to the Act is required in this regard.

However, given the uncertainty as to the application of the Act to briefing papers prepared for ministers' and members' use in Parliament, it would appear to be an appropriate issue about which the QIC could issue an opinion: see section 8.5.6. The QIC should consult the MEPPC in preparing any such opinion.

COMMITTEE FINDING 202—CONCLUSION

There should be no amendment to s 50(c) regarding briefing papers prepared for ministers' or members' use in Parliament.

741 See the *Parliamentary Papers Act 1992* (Qld), s 3.

742 In this regard, see *Re Beanland and Department of Justice and Attorney-General* (1995) 3 QAR 26. However, other exemptions might also be relevant, for example, s 41 (Matter relating to deliberative processes).

743 MEPPC, *Report on a matter of privilege—matter of privilege referred to the committee on 3 March 1998 concerning the tabling of a document from a former Cabinet*, report no 16, Goprint, Brisbane, April 1998.

744 Note 743 at 6.

745 Note 743 at 7.

746 Letter dated 5 December 2001 from the MEPPC to the Legal, Constitutional and Administrative Review Committee. See also the comments of the then Speaker noted in *Re Beanland and Department of Justice and Attorney-General* (1995) 3 QAR 26 at para 51.

11.21.5 Review of claims that matter is exempt under s 50(c)

In his supplementary submission, the QIC raised an issue concerning the QIC's jurisdiction and powers to deal with applications for review of agency decisions that matter is exempt from disclosure under s 50(c).[747]

The QIC submitted that it is clear from the language and scheme of the FOI Act that Parliament intended that:

- the QIC should have power, on a review of an agency decision under Part 5 of the 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)); and
- the power conferred on the QIC by s 76(1) 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), as it does to other highly sensitive kinds of exempt documents such as Cabinet submissions.

The QIC recommended that, in order to render the relevant legal position clear beyond doubt, s 92(2) should be amended to specifically state that parliamentary privilege does not apply to the production of documents or the giving of evidence by an agency or minister for the purposes of external review.

The central issue to the QIC's submission is whether by passing ss 76 and 92, the Parliament intended to abrogate the long standing and pivotal privileges of the Legislative Assembly including, in particular, its privileges to control its procedures. The QIC argues that by enacting part 5 of the FOI Act, Parliament 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.

To a large degree, the issue could be resolved by a provision suggested by the MEPPC and which this committee endorses. That is, a certificate issued by the Speaker, the Chair of a committee or the Clerk of the Parliament provides *conclusive* evidence that:

- a document is a proceeding in Parliament and has not been tabled, published or authorised for public release by a committee or the House; or
- a document is a proceeding in Parliament and its general release is contrary to a rule or order of the House.

Similarly, the Speaker, President, Chair of a committee or the Clerk of the House of any Parliament of the Commonwealth or a State, or the Legislative Assembly of the Australian Capital Territory, the Northern Territory or Norfolk Island should be able to certify such matters for their respective jurisdiction.

This would avoid the need for the QIC to call for and inspect the relevant documents, and would be an efficient and cost-effective way of disposing of an FOI application.

The committee does not believe that there needs to be any provision for review of such certificates. However, if this is felt necessary, the Legislative Assembly (or other relevant House of Parliament in other jurisdictions) should be the only review body. Thus, the Act could include a provision enabling the QIC to refer a certificate to the Legislative Assembly (or other relevant House of Parliament) for its consideration where there is evidence to indicate that the certificate should not have been issued.

[747] QIC, supplementary submission no 173 at 29-30.

COMMITTEE FINDING 203—RECOMMENDATION

The Act should provide that a certificate issued by the Speaker, President, Chair of a committee or the Clerk of the House of any Parliament of the Commonwealth or a State, or the Legislative Assembly of the Australian Capital Territory, the Northern Territory or Norfolk Island that:

- a document is a proceeding in Parliament and has not been tabled, published or authorised for public release by a committee or the House; or
- a document is a proceeding in Parliament and its general release is contrary to a rule or order of the House;

is *conclusive* evidence of that fact.

Thus, where such a certificate has been issued the Information Commissioner should not be empowered under s 76(1) to require production of the documents or matter the subject of the certificate: see section 8.4.3. The Information Commissioner's powers of search and entry should also not extend to documents covered by such certificates: see section 8.5.2.

11.22 EXEMPTIONS RELATING TO THE IDENTITY OR OTHER PERSONAL DETAILS OF A PERSON[748]

Term of reference B(viii) asks whether amendments should be made to either s 42(1)(Matter relating to law enforcement or public safety) or s 44(1)(Matter affecting personal affairs) to exempt from disclosure information concerning the identity or other personal details of a person (other than the applicant) unless its disclosure would be in the public interest having regard to the likely use(s) to be made of the information.

The committee can find no equivalent to this proposal in other FOI legislation.

There are two significant components of the proposed exemption. Matter would be exempt under the proposed provision if:

- the information concerned the identity or other personal details of a person (other than the applicant) *unless*;
- its disclosure would be in the public interest having regard to the use(s) likely to be made of the information.

In relation to the first component, the QIC noted that in most cases, reference of any significance to members of the public acting in a private capacity will appear in a context qualifying their name for exemption under s 44(1). Thus, the main effect of the proposal would be to extend the protection currently provided by s44 to: (a) public servants acting in their official duties;[749] and (b) members of the public acting in a representative capacity or in the course of their business or professional affairs.

However, a number of exemption provisions already exist under which members of the public and public servants can claim exemption in respect of their names and other identifying material where the circumstances warrant. These include: s42(1)(b), s42(1)(c), s44(1) and s46(1). The QIC considered that there is no significant gap in the protection now offered by those exemptions and the existing level of protection given to staff of agencies is adequate.

The second component introduces a public interest test which would be unique in Queensland legislation. In applying the test, the decision-maker would have regard to the likely use to be made of

[748] Relevant submissions: 3, 4, 21, 43, 46, 47, 54, 66, 68, 73, 77, 90, 100B, 101, 102, 104, 107, 113, 118, 119, 127, 135, 142, 144, 145, 146, 149, 150, 154, 157, 160, 161, 162 and 166. QIC, first submission no 56 at paras B271-B280.

[749] This issue is discussed in more detail in section 11.13.1 *Personal affairs v personal information*.

the information. Implementation of the provision would either require conjecture on the part of the decision-maker or would require applicants to provide reasons for making their application. This would be contrary to the general structure and philosophy of the Act, which does not require an applicant to disclose the purposes for which particular information is being sought.

The QIC expressed concern that the introduction of the proposed public interest balancing test would add further unwarranted layers of complexity and uncertainty to the Act given that:

- it introduces a new public interest balancing test (to the already three differently worded public interest balancing tests in the Act);
- a test involving an assessment of the uses likely to be made of matter in issue would raise questions as to whether this test is in some way different from the test 'could be reasonably expected to' which now appears in several exemption provisions; and
- it is unclear whether the intention is to limit or expand the public interest balancing test.

The committee is unable to identify the mischief the proposed provision is attempting to address. Therefore, the committee considers that a better approach is to attempt to identify and remedy any inadequacy in ss 42 and 44 by mechanisms more consistent with the general philosophy of the Act. The committee does not consider that any further amendments to those already recommended in relation to ss 42 and 44 are appropriate. Specifically, the committee does not recommend the introduction of a public interest test which requires reference to the likely use to be made of the information being sought.

COMMITTEE FINDING 204—CONCLUSION

No amendment should be made to the Act to exempt from disclosure information concerning the identity or other personal details of a person (other than the applicant) unless its disclosure would be in the public interest having regard to the likely use(s) to be made of the information.

11.23 EVIDENCE GIVEN BY CHILD WITNESSES IN COURT PROCEEDINGS[750]

In a recent report on the receipt of evidence of children by Queensland Courts,[751] the Queensland Law Reform Commission (QLRC) considered the adequacy of the exemption provisions in the FOI Act to deal with access to, and inappropriate use of, evidence given by, and about, children.

The QLRC '*was concerned by reports that attempts have been made to misuse the FOI Act to obtain sensitive material relating to incidents of alleged child abuse for improper purposes such as circulation as pornography or intimidation or harassment of a victim of abuse*'.[752]

The majority of material containing information about victims of alleged child abuse would be exempt from disclosure pursuant to s42 (Matter relating to law enforcement or public safety) or s 44 (Matter affecting personal affairs). However, if evidence such as statements and tape recordings have been presented in open court the material may have lost its confidentiality and privacy and thus not fall within the exemptions.[753]

The QLRC considered that the existing exemptions in the FOI Act do not adequately provide a mechanism by which access to material for such improper purposes is able to be restricted.[754]

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750 Relevant submissions: 45, 113, 119, 122, 127, 128, 131, 142, 150, 154 and 160.

751 Note 638 at chapter 21 (Inappropriate use of evidentiary material).

752 Note 638 at 491. See also Queensland Police Service, submission no 45; QIC, *1994/95 Annual Report*, n 160 at 20; QIC, *1996/97 Annual Report*, n 160 at 22; QIC, *1997/98 Annual Report*, n 462 at 26.

753 Note 638 at 484.

754 Note 638 at 491.

The QLRC considered possible amendments to s 42 and s 44 to overcome the problem, and recommended amendment to s 42(1)(c)—this provision is discussed in more detail in section 11.11.2 *Section 42(1)(c)*. However, the QLRC believed that even in an amended form, s 42(1)(c) and s 44(1) would not provide sufficient protection if access were sought for an improper purpose to material relating to the investigation and prosecution of an alleged offence of child abuse.

In particular, the QLRC noted that:[755]

- the reason for an FOI application is irrelevant to whether access should be granted under these sections;
- because the decision as to whether matter is exempt inevitably involves the exercise of individual discretion, there cannot be any guarantee that matter will be exempted;
- in the case of s 44(1), access may be granted even to *prima facie* exempt matter if it is in the public interest to do so; and
- ss 42 and 44 are subject to the notification provision contained in s 51. The QLRC was concerned that '*if an application for access to the material has been made for the purpose of intimidating or harassing the victim, the requirements of s 51 may themselves give effect to that purpose*'.[756]

Accordingly, the QLRC recommended that a new provision should be inserted into the FOI Act specifically dealing with applications for access to the kind of material under consideration. That is, the provision should prohibit access to prescribed matter unless an applicant can show cause why access should be granted, and state that, where the FOI decision-maker concludes that an applicant has succeeded in showing cause, the decision-maker is then to consider the application in accordance with the procedure set out in the FOI Act.[757]

The QLRC recommended that 'prescribed matter' should be defined as the following items in relation to the prosecution of a sexual offence or an offence of violence, or to a civil proceeding arising from the commission of such an offence or to an application for a domestic violence order:

- audio and videotapes of the statements made of a child or prerecorded videotapes of the child's evidence;
- medical records relating to a child;
- photographs of a child;
- witness statements relating to a child; and
- a transcript of evidence given by or relating to a child witness.[758]

The QLRC further intended that the definition should provide that one of the above items is prescribed matter if it was used or intended to be used as evidence in the proceeding or collected during the course of the investigation of an offence.[759]

Given that the QLRC has recently considered this issue in detail, the committee has not embarked upon a comprehensive reconsideration of the QLRC's recommendations. However, given the serious nature of this issue the committee believes that the QLRC's recommendations should be implemented as soon as possible.

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755 Note 638 at 492.
756 Note 638 at 492.
757 Note 638 at 492 and 493.
758 Note 638 at 494 and 501 (recommendation 21.4).
759 Note 638 at 501 (recommendation 21.5). The QLRC recognised that its proposed amendment to the FOI Act would not, by itself, be sufficient to prevent transcripts of evidence being obtained for an improper purpose. Accordingly, the QLRC made recommendations for changes outside the FOI Act which it considered necessary.

The committee makes the following comments which the Attorney-General might take into account in considering the QLRC's recommendations in this regard.

First, the QLRC's proposal is inconsistent with the fundamental FOI principle that information should generally be accessible unless there is a reason why it should not be disclosed,[760] and applicants should not be required to provide reasons for seeking access. Accordingly, as recognised by the QLRC, care should be taken to ensure that any such provision is no broader than necessary to achieve its objectives.

Secondly, the QLRC recommended that the provision should state that access to prescribed material is not to be granted unless reasonable steps have been taken to ascertain whether a person to whom disclosure of the matter is likely to be of substantial concern is of the view that:

- the applicant has shown cause why access should be granted; or
- the matter is exempt.[761]

The previous paragraph of the QLRC's recommendation requires that, if a person has shown cause, the application will be processed in accordance with the FOI Act. It is implicit in this requirement that a person to whom disclosure is likely to be of substantial concern would be consulted regarding whether the matter is exempt. It appears inappropriate that a person to whom disclosure is likely to be of substantial concern should be consulted regarding whether the applicant has shown cause why access should be granted. By the time the applicant is consulted, the FOI decision-maker will have already formed the view that the person has shown cause why access should be granted. Further, consulting a person to whom disclosure is likely to be of substantial concern in relation to whether the applicant has shown cause why access should be granted could involve disclosing confidential information about the applicant. This component of the recommendation does not appear necessary to achieve the QLRC's objective.

Thirdly, in June 2000 and November 2000 the Queensland Crime Commission and Queensland Police Service released volumes of a report on Project Axis, a wide-ranging inquiry into child-sex offending in Queensland.[762] The project aims to contribute to the community's understanding of child sex offending, its causes and impacts on victims and society, as well as to identify better ways of dealing with the problem. The Attorney-General might wish to consult with the authors of this report in considering the QLRC's recommendation.

Finally, the committee notes that similar concerns to those raised by the QLRC might apply to material involved in the prosecution of particular offences against adults, for example, rape, sexual assault, stalking and, in certain cases, unlawful assault. The Attorney-General should consider whether the QLRC's recommended provision should extend beyond offences involving children and, if so, the appropriate scope of such a provision.

760 Note 638 at 492 and 493.

761 Note 638 at 500-501 (recommendation 21.3).

762 Queensland Crime Commission and Queensland Police Service, Project Axis, *Child Sexual Abuse in Queensland: The nature and extent*, Brisbane, June 2000 and Queensland Crime Commission and Queensland Police Service, Project Axis, volume 2, *Child Sexual Abuse in Queensland: Responses to the problem*, Brisbane November 2000.

COMMITTEE FINDING 205—RECOMMENDATION

The Attorney-General should implement recommendations 21.1 to 21.5 of the Queensland Law Reform Commission in its report *The receipt of evidence by Queensland courts: The evidence of children*, report no 55, December 2000.

In implementing these recommendations, the Attorney-General should consider:

- the QLRC's recommended approach in light of FOI purposes and principles;
- the desirability and need for QLRC recommendation 21.3;
- consulting with the authors of the Project Axis report; and
- whether a provision as recommended by the QLRC should be extended to certain offences involving adults.

12. SCOPE OF THE ACT

12.1 INTRODUCTION

Term of reference B(iii) asks whether the ambit of the application of the Act, both generally and by operation of ss 11 and 11A, should be narrowed or extended.

The FOI Act applies to 'agencies'[763] and ministers. Section 11(1) excludes certain persons and bodies (or documents they hold or a function or activity they perform) from the application of the Act. Pursuant to s 11(1)(q), this list of 'agency-based' exclusions has been expanded by regulation: see s 5 of the FOI Regulation.

Sections 11A and 11B were inserted in 1994 and 1997 respectively to provide that certain kinds of documents received by, or created in respect of, specified activities of Government Owned Corporations (GOCs),[764] and their local government equivalents (LGOCs),[765] are afforded absolute immunity from the operation of the Act.

Entities have also been excluded from the Act by legislation other than the Act or the FOI Regulation.

12.2 SCOPE FOR FURTHER INQUIRY

Since EARC's report, the Queensland Government has increasingly moved towards the commercialisation, corporatisation, privatisation and contracting out of its services. A number of issues arise in considering the application of administrative law in this environment. As part of this review, the committee has considered those issues that arise in the context of the application of the FOI Act.

However, the committee believes that the Attorney-General should consider commissioning an inquiry into the broader issue of the future of administrative law so as to ensure that in this new environment, accountability mechanisms are sufficient and that the rights of members of the community to administrative justice are not unreasonably eroded. Such an inquiry would ensure that a consistent, whole of government approach is taken to these issues.

COMMITTEE FINDING 206—RECOMMENDATION

The Attorney-General should consider commissioning an inquiry into the application of administrative law in Queensland in light of the increasing commercialisation, corporatisation, privatisation and contracting out of government services.

763 In section 5.2 the committee discusses the definition of 'agency'.

764 For further information about GOCs see the *Government Owned Corporations Act 1993* (Qld).

765 Section 11B actually refers to 'corporatised corporations'. According to s 592 of the *Local Government Act 1993* (Qld), this term means a LGOC or a subsidiary of a LGOC. 'LGOC' is defined to mean *'a significant business entity declared to be a local government's LGOC by resolution of the local government that has taken effect*'.

12.3 THE 'AGENCY-BASED' EXCLUSIONS[766]

12.3.1 Current and proposed exclusions[767]

While EARC's recommended FOI legislation essentially eschewed the exclusion of persons or bodies on an agency-basis or a function-basis, EARC recognised that some persons or bodies (or their specified functions) should not be subject to FOI legislation. EARC felt that restrictions on access to documents of these persons or bodies was necessary in order for them to properly perform their functions: *'To expose those persons or bodies to scrutiny through FOI legislation may seriously prejudice the attainment of their objectives, and would not, therefore, be in the public interest.'*[768]

The persons and bodies currently excluded under s 11(1) are:[769]

> *(a) the Governor; or*
>
> *(b) the Legislative Assembly, a member of the Legislative Assembly, a committee of the Legislative Assembly, a member of a committee of the Legislative Assembly, a parliamentary commission of inquiry or a member of a parliamentary commission of inquiry; or*
>
> *(c) the Parliamentary Judges Commission of Inquiry appointed under the Parliamentary (Judges) Commission of Inquiry Act 1988; or*
>
> *(d) the Parliamentary Service established by the Parliamentary Service Act 1988; or*
>
> *(e) the judicial functions of—*
>
> *(i) a court; or*
>
> *(ii) the holder of a judicial office or other office connected with a court; or*
>
> *(f) a registry or other office of a court, or the staff of a registry or other office of a court in their official capacity, so far as its or their functions relate to the court's judicial functions; or*
>
> *(g) the judicial committee established under the Magistrates Act 1991, section 10A; or*
>
> *(h) the Fitzgerald commission of inquiry, that is, the commission of inquiry that is "the Commission" within the meaning of the Commission of Inquiry Continuation Act 1989; or*
>
> *(i) another commission of inquiry issued by the Governor in Council; or*
>
> *(j) an agency in relation to a document that has originated with, or has been received from, the Australian Secret Intelligence Service, the Australian Security Intelligence Organisation, the Inspector-General of Intelligence and Security or the Office of National Assessments, or the Defence Signals Directorate or the Defence Intelligence Organisation of the Commonwealth Department of Defence; or*
>
> *(m) Queensland Treasury Corporation in relation to its borrowing, liability and asset management related functions; or*

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766 Submissions relevant to one or more of the issues discussed in this section: 3, 4, 7, 8, 16, 21, 26, 27, 29, 30, 40, 42, 44, 45, 46, 47, 49, 50, 51, 53, 54, 59, 60, 61, 62, 63, 66, 68, 69, 72, 73, 77, 78, 80, 83, 86, 92, 100A, 103, 107, 118, 131, 135, 139, 140, 141, 144, 146, 149, 150, 151, 155, 161 and 167.

767 QIC, first submission no 56 at paras B64-B68.

768 EARC FOI report, n 19 at para 8.11. As to persons or bodies which EARC recommended should be excluded from FOI legislation see EARC FOI report, n 19 at chapter 8 and, in particular, paras 8.149-8.152.

769 Exclusion by s 11(1) does not mean that the documents created by or concerning the excluded entities can never be subject to the FOI Act. Copies of any such documents in the possession or control of an agency which is subject to the Act are accessible under the Act subject to the application of relevant exemptions. The same situation applies with respect to documents created by or concerning any private sector corporation or private citizen which are in the possession or control of an agency subject to the Act.

(n) Queensland Treasury Holdings Pty Ltd, its wholly owned subsidiaries (within the meaning of the Corporations Law), and the entities in which the subsidiaries have a controlling interest (within the meaning of the Corporations Law), in relation to their commercially competitive activities; or

(o) the adult guardian in relation to an investigation or audit; or

(p) the Health Rights Commissioner, or a person appointed as a conciliator under Health Rights Commission Act 1991, section 75, in relation to the conciliation of health service complaints under part 6 of that Act; or

(q) an agency, part of an agency or function of an agency prescribed by regulation for the purposes of this paragraph.

Additional agencies can be, and have been, excluded by regulation pursuant to s 11(1)(q).[770] The exclusions effected by s 5(1) of the FOI Regulation are:

(a) the Australian Financial Institutions Commission established under the Australian Financial Institutions Commission Act 199*2;*

(b) a parents and citizens association formed under the Education (General Provisions) Act 1989*;*

(c) a public grammar school to which the Grammar Schools Act 1975 *applies;*

(d) Queensland Events Corporation Pty Ltd, its wholly owned subsidiaries, and the entities in which the subsidiaries have a controlling interest, in relation to their competitive commercial activities;

(e) Gold Coast Events Co Pty Ltd, its wholly owned subsidiaries, and the entities in which the subsidiaries have a controlling interest, in relation to their competitive commercial activities;

(f) Gold Coast Motor Events Co in relation to its competitive commercial activities;

(g) each of the following agencies, in relation to individual and aggregate student data about core skills tests, junior and senior certificates and tertiary entrance statements (including an equivalent substituted test, certificate or statement)—

(i) the department within which the Education (General Provisions) Act 1989 *is administered;*

(ii) the Board of Senior Secondary School Studies;

(iii) the Tertiary Entrance Procedures Authority;

(h) the department within which the Education (General Provisions) Act 1989 *is administered in relation to each of the following student assessment programs conducted by or for it—*

(i) year 1–2 assessment;

(ii) year 6 assessment;

(iii) student performance standards assessment;

(i) the Queensland School Curriculum Council (P-10) in relation to an assessment program mentioned in paragraph (h)(i) or (ii);

(j) each of the following agencies in relation to individual and aggregate student data about approved tests within the meaning of the Education (School Curriculum P–10) Act 1996*—*

(i) the department within which the Education (General Provisions) Act 1989 *is administered;*

[770] The committee discusses whether agencies should be excluded from the Act by regulation in section 12.5.1.

(ii) the Queensland School Curriculum Council (P-10).

Section 5A of the FOI Regulation excludes the functions of a mayor and chief executive officer of a local government to keep a register of interests under the *Local Government Act 1993* (Qld).

In accordance with a recommendation of EARC, the QIC is also excluded from the operation of the Act (save in respect of the publication requirements): s12. EARC reasoned that other accountability mechanisms were more appropriate for ensuring the openness and accountability of the QIC, and that the absence of such an exclusion would interfere with the independence and efficiency of the review process.[771] The committee agrees with EARC's reasoning in this regard.

Some submitters to the committee's inquiry argued for deletions and/or additions to the current list of exclusions.

Additional suggested exclusions include:

- the Bureau of Criminal Intelligence;
- Crime Stoppers;
- the Queensland Crime Commission in relation to its investigative and intelligence functions [although the functions of the QCC will be performed by the Crime and Misconduct Commission on commencement of *Crime and Misconduct Act 2001* (Qld)];
- the Queensland Law Society in relation to its private functions;
- the Solicitors Complaints Tribunal in relation to its judicial functions;
- local government councillors;
- the Queensland Audit Office in relation to its investigation working papers and related files;
- public universities;
- quality assurance documents relating to health care;
- the Nominal defendant;
- the witness protection and intelligence divisions of the Crime and Misconduct Commission;
- local government business units; and
- employee assistance programs.

In its FOI report, EARC considered but rejected a number of claims for exclusions, including some of those listed above.[772]

12.3.2 A consistent policy approach to exclusions

The committee agrees with EARC that, in exceptional cases, it will be necessary to prescribe that certain persons or bodies (or certain of their functions) are not subject to the FOI Act. However, careful consideration must be given to those entities which are to be excluded. Too many exclusions has the potential to undermine the essence of the Act, namely, open and accountable government.

A number of submitters, particularly non-agency submitters, submitted that the ambit of the Act is too narrow. The QIC likewise submitted that the ambit of the Act requires extension, not narrowing, and that the basis on which exclusion from the application of the Act is conferred and effected requires thorough scrutiny and remedial measures.[773]

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771 EARC FOI report, n 19 at paras 8.27-8.32.

772 EARC FOI report, n 19 at chapter 8, in particular, paras 8.149-8.152.

773 The QIC expressed concern that the FOI Act is '*in danger of dying a death of a thousand cuts unless the recent trend towards more and more exclusions of particular bodies, or particular functions or classes of documents in*

There appears to be no consistent policy approach to the exclusions which have been effected.[774] The QIC observed that '*exclusions and partial exclusions appear to have been granted on an ad hoc basis, reflecting no (or at least no discernible) consistent policy approach*'.[775]

There should be a consistent policy approach to exclusions which focuses on an analysis of the type of information held by the relevant entity and the harm which would result from its disclosure. In this context, exclusions should only be made where it can be clearly established in accordance with FOI purposes and principles that:

- the fulfilment of the functions of the person or entity would be significantly compromised if the person or entity was subject to the Act; and
- the exemption provisions under the Act do not provide sufficient protection for the person or entity to properly perform their functions.

Where this approach justifies an exclusion, it should be effected in a proper, balanced and fair manner excluding no more than is necessary to protect the functions of the person or entity.

The committee has not considered each of the current and proposed exclusions as the committee:

- has been unable to establish the rationale behind many of the current exclusions and therefore is lacking essential background information;
- is not in a position to analyse exactly the type of information held by the excluded entities and the harm which would result from the disclosure of such information; and
- in chapter 11 has recommended amendments to the exemption provisions which are relevant to consideration of whether a particular exclusion should be retained or granted.

Rather, the committee proposes that the Attorney-General, after considering the committee's recommended amendments to the exemption provisions, review the current and proposed exclusions in light of the test outlined above. In conducting this review, the Attorney-General should consider the observations listed below.

Consistency: A consistent approach should be taken to documents regarding similar processes and functions performed by different entities. For example, a consistent approach should be taken to conciliation and mediation processes which are an alternative to parties undergoing judicial processes.

Likewise, a consistent approach should be taken to the intelligence gathering and witness protection functions performed by Queensland law enforcement agencies. (Although see the committee's comments in section 11.11.4 in this regard.)

Separation of powers: The FOI Act was intended to apply to the Executive not the legislature (that is, the Legislative Assembly, its members and committees, and the Parliamentary Service) or the judiciary.[776]

It is also relevant to note in this regard that the concept of parliamentary privilege does not apply at local government level. Accordingly there is no justification for the exclusion of local governments on this ground.

(The committee did seek the advice of the Members' Ethics and Parliamentary Privileges Committee of the Queensland Legislative Assembly (the MEPPC) regarding a submission advocating that

respect of particular bodies, is arrested and, preferably, reversed': QIC, *1994/95 Annual Report*, n 160 at para 3.63.

774 Although it is evident from the exclusion in s 11(1)(n) and some of those in s 5 of the FOI Regulation (as well as ss 11A and 11B) that the underlying government policy is that the Act should not apply to government commercial enterprises.

775 See QIC, first submission no 56 at para B65.

776 EARC FOI report, n 19 at paras 8.18-8.20 and 8.150. This is consistent with the approach in all other Australian FOI legislation.

documents concerning the workings and administration of Parliament be subject to the Act. The MEPPC recommended that, if it were proposed that action be taken in this regard, the issue should be addressed further with the Speaker and/or the Clerk of the Parliament.[777] The committee believes that the Attorney-General should consider this issue as part of the recommended review of current and proposed exclusions, in consultation with the MEPPC, the Speaker and the Clerk.)

Private v public functions: Generally, private, as opposed to public, functions of an entity should be excluded from the Act as private organisations are not subject to the Act.

Time limits to exclusions: In some cases, it might be appropriate for operations of entities which are excluded from the Act to become open to public scrutiny after a reasonable period of time has elapsed. Some exclusions might be amenable to a sunset clause or to a time limited exclusion.

Specific matters: The following specific matters are also relevant.

- The Gold Coast Motor Events Co Pty Ltd—currently excluded by s 5(1)(f) of the FOI Regulation in relation to its 'competitive commercial activities'—is not an agency as defined by the Act and therefore is not subject to the Act.[778]
- In his 1994/95 annual report, the QIC recommended that the regulations excluding aggregate or school-based student data—contained in s 5(1)(g), (h) and (i) of the FOI Regulation—should be repealed forthwith as a matter of principle.
- Section 50(b) exempts certain material relating to commissions of inquiry, and bodies with powers of commissions of inquiry: see section 11.20. This exemption overlaps to some degree with s 11(1)(h) and (i).
- Section 11(1)(j) is somewhat of an anomaly in s 11(1) as it applies to every agency subject to the Act in respect of a defined class of *documents*, that is, documents received from Commonwealth agencies whose functions concern national security. In his 1994/95 annual report, the QIC queried whether this exclusion should more appropriately have been dealt with as an exemption provision, perhaps in an additional subsection of s 38 (Matter affecting relations with other governments).[779]

COMMITTEE FINDING 207—RECOMMENDATION

The Attorney-General, after considering the committee's recommended amendments to the exemption provisions, should review the list of persons and bodies or their specified functions or activities that are currently excluded from the Act by the Act or the FOI Regulation. The Information Commissioner should remain excluded from the Act.

This review should ensure that a consistent policy approach is taken to exclusions by applying the principle that exclusions should only be made where it can be clearly established in accordance with FOI purposes and principles that:

- the fulfilment of the functions of the person or entity would be significantly compromised if the person or entity was subject to the Act; and
- the exemptions under the Act do not provide sufficient protection for the person or entity to properly perform their functions.

The Attorney-General should consider the committee's observations in section 12.3.2 *A consistent policy approach to exclusions* in conducting this review.

777 Letter from the MEPPC to this committee dated 14 November 2001.
778 *Re McPhillimy and Gold Coast Motor Events Co* (1996) 3 QAR 376.
779 QIC, *1994/95 Annual Report*, n 160 at para 3.57.

12.3.3 Technical amendments to the exclusions[780]

A number of aspects of the exclusions as currently drafted require amendment at the earliest opportunity, regardless of when the Attorney-General might complete a review of the current and proposed exclusions recommended above.

First, s 11(1)(e) (relating to the judicial functions of courts and the holder of judicial and other offices) could be better drafted. The QIC pointed out: (a) other similar paragraphs of s 11(1) operate by first identifying the body, specific functions of which are to be excluded from the Act; and (b) it must have been the legislature's intention that a court, or the holder of a judicial office etc., would not be obliged to comply with the obligations imposed on agencies by Parts 2, 3 or 4 of the Act, in respect of documents which relate to their judicial functions.

The committee supports amending this provision to make it consistent with other exclusions and hence clarify its meaning.

Secondly, the QIC submitted that it seems the words 'commercially competitive activities' which appear in s 11(1)(n) were intended to be 'competitive commercial activities', the latter being a term which is defined in s 7 of the Act, and which is used consistently in s 5 of the FOI Regulation.[781]

The committee agrees that the terminology used should be consistent and that the phrase 'competitive commercial activities' is more appropriate.

COMMITTEE FINDING 208—RECOMMENDATION

Irrespective of when the Attorney-General completes the review of exclusions (as recommended in section 12.3.2), the Attorney-General should:

- amend s 11(1)(e) to provide that the Act does not apply to a court, or the holder of a judicial office or other office connected with a court, in respect of documents relating to their judicial functions; and
- amend the words 'commercially competitive activities' in s 11(1)(n) to 'competitive commercial activities'.

12.3.4 Section 11(2)[782]

Section 11(2) provides: '*In subsection (1), a reference to documents in relation to a particular function or activity is a reference to documents received or brought into existence in performing the function or carrying on the activity'*.

However, s 11(1) contains no references to documents in relation to a particular function or activity of a named body. The only reference to the word 'document' that occurs in s 11(1) is in paragraph (j), where it is not used in conjunction with a reference to a particular function or activity.[783] This anomaly should be rectified.[784]

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780 QIC, first submission no 56 at paras C35-C40.

781 'Competitive commercial activity' is defined in s 7 to mean an activity carried out on a commercial basis in competition with persons other than government.

782 QIC, first submission no 56 at paras C41-C46.

783 The QIC states that this clear drafting error in s 11(2) appears to have been brought about by adaptation of the equivalent provision in the Commonwealth FOI Act.

784 The committee's recommendation in this regard adopts the second of two proposals put forward by the QIC to cure the drafting error.

COMMITTEE FINDING 209—RECOMMENDATION

Section 11(2) should be amended to remove the reference to documents and clarify the application of the subsection.

12.4 GOCs AND LGOCs[785]

GOCs are government entities which, pursuant to the *Government Owned Corporations Act 1993* (Qld) (the 'GOC Act'), have undergone structural reform so as to operate, as far as practicable, as a corporate body on a commercial basis in a competitive environment while maintaining public ownership and control.[786] 'Corporatisation' is increasingly being seen by governments as a means to improve efficiency, and accords with national competition policy aims of ensuring that private and public bodies compete for business on a 'level playing field'.[787]

'Corporatised corporations' or LGOCs are essentially local government equivalents.[788]

12.4.1 Exclusion of GOCs and LGOCs[789]

Since its commencement, the FOI Act has not applied to certain prescribed bodies in relation to their 'competitive commercial activities' (or like phrase), such exclusion being effected by s 11(1).

In 1994, s 11A was inserted into the Act.[790] The effect of s 11A, when read in conjunction with schedule 2 and the application provisions in that schedule, is that the Act does not apply to documents received or brought into existence by the GOCs specified in schedule 2 while carrying out:

- 'commercial activities', a phrase which appears to be wider than 'competitive commercial activities';[791] or
- any community service obligation (CSO) prescribed by regulation. (This second limb is discussed further in section 12.4.3.)

The GOCs specified in schedule 2 include the Queensland Investment Corporation, rail and port GOCs and state electricity entities. Additional exclusions of activities of individual GOCs have been made by other legislation.[792]

Section 11A thus enables the specified GOCs to argue that the majority of their documents are exempt from disclosure under the Act since conducting activities on a commercial basis is a key part of corporatisation.[793]

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785 Submissions generally relevant to one or more of the issues discussed in this section: 3, 8, 16, 18, 27, 43, 44, 61, 62, 63, 69, 77 and 81.

786 *Government Owned Corporations Act 1993* (Qld), s 16.

787 In this regard see the GOC Act, s 17.

788 See the *Local Government Act 1993* (Qld), s 1205.

789 Relevant submissions: 90, 92, 101, 101K, 101M, 101N, 103, 104, 107, 109, 113, 115, 119, 120, 121, 127, 133, 134, 135, 138, 142, 145, 146, 149, 154, 156, 157, 160, 161 and 167. QIC, first submission no 56 at paras B68-B76.

790 Section 11A was inserted by the *Queensland Investment Corporation Amendment Act 1994* (Qld).

791 Dixon N, 'Government Owned Corporations and the Freedom of Information Act 1992: An exemption from compliance', (1996) *Queensland Law Society Journal*, February 1996, 67 at 69.

792 See, for example, the *WorkCover Queensland Act 1996* (Qld), s 423 regarding certain commercial activities of WorkCover.

793 Although, the QIC has held that an exclusion of an entity in respect of its 'commercial activities' does not necessarily mean that all activities conducted by the entity must be characterised as commercial activities and therefore excluded: *Re Hansen and Queensland Industry Development Corporation* (1996) 3 QAR 265 at paras 17-29. In that case the QIC held that documents relating to termination of an employee were not excluded from the application of the Act by s 11A.

Further, the relevant 'application provisions' in schedule 2 state that a regulation may declare the activities of a GOC that are taken to be, or are taken not to be, activities conducted on a commercial basis. Thus, for example, the *Transport Infrastructure (Rail) Regulation 1996*, s 5(1) further widens the scope of the Queensland Rail exclusion by providing that any activity of Queensland Rail, other than an activity performed under its CSOs, is an activity conducted on a commercial basis, that is, a 'commercial activity'.

Section 11B, inserted in 1997, provides a similar exclusion to s 11A for LGOCs.

The QIC has argued that the Act should apply to GOCs and LGOCs pointing out that, where necessary, such bodies can rely on relevant exemptions to protect their commercial interests.[794] For example, s 45 exempts from disclosure matter relating to trade secrets, information of a commercial value and business affairs.

Similarly, in the ALRC/ARC review, the Commonwealth Ombudsman[795] felt that the Commonwealth FOI Act should apply to Commonwealth GOC equivalents—government business enterprises (GBEs)—due to their 'connection with' government and, consequently, the need for some degree of accountability to the public. The Ombudsman also felt that the question was '*beyond a test of the operation of the marketplace*'.[796]

A large number of submitters agreed that GOCs should be subject to the Act. Reasons cited essentially endorsed those noted in the committee's discussion paper, namely:

- GOCs are publicly funded and therefore should be publicly accountable for those funds (particularly when they perform CSOs);
- GOCs are accountable to ministers and the public has a democratic interest in their workings; and
- FOI and other administrative laws provide cheap and accessible benefits in public accountability and administrative justice which private sector mechanisms cannot match, and citizens should not lose these benefits merely because of the government's choice as to the structure of the service deliverer.[797]

The majority of submitters who felt that the exclusion of GOCs from the Act was appropriate were GOCs or departments. Arguments raised against the application of the Act to GOCs included:

- the argument that GOCs are publicly funded is simply wrong—by providing commercial returns GOCs fund the public;
- GOCs are accountable through other private sector regulatory mechanisms including annual reports which are widely available to the public unlike the reports of propriety companies; and
- for GOCs to be commercially successful in the conduct of their activities (as required by the GOC Act, s 20) and to operate on a level playing field with their private sector competitors, it is imperative that the existing exclusions remain.

The committee is not prepared at this stage to recommend that the Act should apply to GOCs, subject only to the relevant exemptions to protect their commercial interests. The committee agrees with the

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794 See also the QIC *1994/95 Annual Report*, n 160 at paras 3.50-3.73; *1995/96 Annual Report*, n 160 at paras 3.30-3.41; *1996/97 Annual Report*, n 160 at paras 3.14-3.15. See also EARC's comments regarding statutory authorities engaged in commercially competitive activity: EARC FOI report, n 19 at paras 8.60-8.63.

795 As a dissenting member of the ARC in the ALRC/ARC review: ALRC/ARC review report, n 13 at para 16.14.

796 See also the Tasmanian Legislative Council Select Committee, *Freedom of Information*, n 29 at 89-90 and NZLC, *Review of the Official Information Act 1982*, n 39 at paras 411. In New Zealand, State Owned Enterprises (SOEs) are subject to FOI legislation. This position was endorsed by the NZLC for reasons including: the nature and functions of SOEs; their role in the community; their public ownership; and the fact that the *Ombudsmen Act* and the *Official Information Act* provide a public accountability measure which the other SOE accountability processes do not address.

797 These arguments are, in turn, drawn from the ALRC/ARC discussion paper, n 468 at para 10.9.

majority view of the ALRC/ARC review. The majority, while confirming that generally GBEs should be subject to FOI legislation, concluded that the justification for applying the Commonwealth FOI Act decreased as a GBE's commercial activities in a competitive market increased. Hence, the majority recommended that GBEs that are engaged predominantly in commercial activities in a competitive market should not be subject to FOI legislation.[798] They considered that to subject those GBEs to the Act might put at risk the benefits of competitiveness and efficiency.

Below, the committee discusses how these exclusions should be effected: see section 12.4.2 and section 12.4.3.

COMMITTEE FINDING 210—CONCLUSION

It is appropriate for certain activities of particular Government Owned Corporations and particular Local Government Owned Corporations that are engaged predominantly in commercial activities in a competitive market to be excluded from the Act.

(Section 12.4.2 concerns the appropriate manner and scope of GOC and LGOC exclusions and section 12.4.3 concerns exclusion of GOC and LGOC community service obligations.)

12.4.2 The manner and scope of GOC and LGOC exclusions[799]

Currently, ss 11A and 11B operate as a *documents-based* exclusion. As such, the prescribed GOCs and LGOCs receive more favourable treatment than their private sector competitors. This is because FOI immunity 'travels' with these entities' documents wherever they go. In contrast, documents created by, or concerning, any private corporation or citizen which are in the possession or control of an agency subject to the Act are capable of being accessed under the Act subject to the application of the exemption provisions.[800]

The current document-based exclusion (which appears to be unique in Australia) is inappropriate given that it affords GOCs more favourable treatment than their private sector competitors—and indeed government-owned commercial entities mentioned in s 11(1) and the FOI Regulation.

The QIC argues that if, as a matter of policy, GOCs and LGOCs are to be equated with private sector organisations, ss 11A and 11B and schedule 2 should be repealed and those bodies should (like pre-1994) be separately named in s 11(1). The QIC goes on to note that, if necessary, this exclusion could be expressed with a qualification such as '*in respect of documents regarding its competitive commercial activities*'.[801]

The committee believes that a more appropriate manner of dealing with GOCs and LGOCs would be to repeal s 11A, s 11B and schedule 2 and to separately list the relevant bodies in s 11(1) in respect of documents regarding their 'competitive commercial activities', a term already defined in s 7. (The phrase 'its commercial activities' is inappropriate as, to the extent that the GOC has no competitor, there is no justification for separate treatment.)

The FOI monitor should issue guidelines about what constitutes 'competitive commercial activities'.

If this approach is adopted, consideration should also be given to subsidiary issues such as whether employees of a body with an exclusion for documents regarding its competitive commercial activities

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798 ALRC/ARC review report, n 13 at paras 16.13-16.14. The majority also recommended that GBEs not predominantly engaged in competitive commercial activities should be subject to the Commonwealth FOI Act at para 16.15.

799 Relevant submissions: 113, 119, 127, 135, 142, 145, 154 and 160. QIC, first submission no 56 at paras B77-78.

800 The QIC illustrated difficulties with the current provisions by referring to a review application he received in 1999. QIC, supplementary submission no 173 at 9-10.

801 QIC, first submission no 56 at para B78.

are intended to have the right to seek access under the Act to documents relating to their employment affairs.

COMMITTEE FINDING 211—RECOMMENDATION

Sections 11A and 11B and schedule 2 should be repealed and necessary consequential amendments made to complementary legislation. Particular Government Owned Corporations and particular Local Government Owned Corporations that are engaged predominantly in commercial activities in a competitive market should be separately listed in s 11(1) in respect of documents regarding their 'competitive commercial activities'.

The FOI monitor should issue guidelines about what constitutes 'competitive commercial activities'.

12.4.3 Exclusion of GOC and LGOC community service obligations[802]

Sections 11A and 11B additionally operate so that the Act does not apply to documents received or brought into existence by the prescribed GOCs or LGOCs while carrying out any community service obligation (CSO) prescribed by regulation: see the various 'application provisions' mentioned in schedule 2.

CSOs are defined in the GOC Act, s 121(1) as obligations to perform activities that are: (a) not in the commercial interest of the GOC to perform; (b) arise because of a direction, notification or duty to which s 121 applies; and (c) do not arise because of the application of the key principles of corporatisation relating to strict accountability for performance and competitive neutrality.

In a general sense CSOs: fulfil government social or community objectives; are unprofitable and so are government funded; and would not be performed by the private sector. Examples include nationwide telecommunication access, uniform rates of postage and subsidised transport.[803]

The QIC stated the following regarding the appropriateness of this exclusion:

> *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.*[804]

The committee agrees with the QIC and does not consider that documents relating to GOCs' and LGOCs' community service obligations should be excluded. (In section 12.5.1 the committee discusses the manner in which this exclusion is effected, namely, by regulation.)

The Government's ability to prescribe by regulation CSOs regarding which information is not to be disclosed appears to go further than exclusion provisions concerning GOC information in other Australian jurisdictions.[805]

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802 Relevant submissions: 92, 101N, 113, 119, 127, 134, 142, 145, 146 and 154. QIC, supplementary submission no 173 at 10-11.

803 Dixon, n 791 at 68.

804 QIC, supplementary submission no 173 at 10.

805 Dixon, n 791 at 69.

COMMITTEE FINDING 212—RECOMMENDATION

Documents relating to Government Owned Corporations' and Local Government Owned Corporations' community service obligations, should not be excluded from the Act.

12.4.4 The need for additional controls regarding LGOCs[806]

In his 1996/97 annual report, the QIC expressed greater concern with respect to the exclusion of LGOCs than GOCs because LGOCs are not created by legislation but rather a series of local government resolutions, thereby avoiding parliamentary scrutiny of moves which result in further exclusions from the Act.[807]

In his supplementary submission, the QIC confirmed that he favoured an approach of repealing s 11B and naming the bodies covered by s 11B in separate paragraphs of s 11(1) over the imposition of additional controls in respect of documents of LGOCs being excluded from the Act. The QIC stated: '*This approach would better promote the accountability of such bodies to their ultimate owners, the electors and ratepayers of the particular local government authority*'.[808]

The committee endorses this position. If, however, the committee's recommendation in section 12.4.2 *The manner and scope of GOC and LGOC exclusions* is not implemented, then s 11B should only apply to LGOCs prescribed in a schedule to the Act (as is currently the case with GOCs.)

COMMITTEE FINDING 213—RECOMMENDATION

If the committee's recommendation in section 12.4.2 *The manner and scope of GOC and LGOC exclusions* is not implemented, then s 11B should only apply to Local Government Owned Corporations prescribed in a schedule to the Act.

12.5 EXCLUSION BY REGULATION AND OTHER LEGISLATION[809]

12.5.1 Exclusion by regulation

The power to exclude agencies by regulation—s 11(1)(q)—was inserted despite EARC's recommendation that the only way additional 'agency-based exclusions' should be created is by direct amendment to the Act so as to attract full parliamentary scrutiny.[810]

The committee agrees with EARC's position. The significance of excluding persons or bodies (or their specified functions) from the Act is such that it is not appropriate to delegate the legislative power to do so to the Executive. Further, such a delegation provides power to effectively amend the application of the Act by regulation and, accordingly, is not consistent with fundamental legislative principles.[811]

While Parliament can disallow regulations, they are not subject to the same level of parliamentary scrutiny as amendments to Acts. If the government has a compelling argument to exclude an agency

806 Relevant submissions: 113, 119, 127, 142, 146 and 154. QIC, supplementary submission no 173 at 10-11.
807 QIC, *1996/97 Annual Report*, n 160 at para 3.14.
808 QIC, supplementary submission no 173 at 11.
809 Submissions relevant to one or more of the issues discussed in this section: 4, 18, 29, 40, 44, 49, 69, 77, 92, 113, 119, 127, 133, 138, 142, 150, 153, 154, 157, 160 and 161. QIC, supplementary submission no 173 at 10-11.
810 EARC FOI report, n 19 at paras 8.137-8.148 and its recommendation at para 8.152.
811 See *Legislative Standards Act*, s 4(4)(a) and (c), and (in relation to the regulations made under this authority) s 4(5)(d).

from the Act, the government should have to amend the Act and justify the exclusion to Parliament. To do otherwise would be contrary to FOI principles of openness and accountability.

In the case of GOCs, the relevant application provisions referred to in schedule 2 enable the exclusions to be extended by regulation. These provisions generally state that 'excluded activities' mean:

- 'commercial activities' and a *regulation* may declare the activities of a GOC that are taken to be, or are taken not to be, activities conducted on a commercial basis, that is 'commercial activities'; and
- CSOs prescribed under a *regulation*.

Again, the committee believes that it is inappropriate for such important matters to be dealt with by regulation rather than by amendment to the Act itself. Dealing with such matters by regulation fails to direct Parliament's attention to the issue in the way that direct amendment to the Act would. Further, citizens 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.

Implementation of the committee's recommendations in section 12.4.2 and section 12.4.3 would make this issue redundant. If those recommendations are not implemented, the relevant 'application provisions' should be amended to preclude the ability to prescribe such matters by regulation. Similarly, it should not be possible to prescribe excluded CSOs by regulation.

COMMITTEE FINDING 214—RECOMMENDATION

Section 11(1)(q) should be repealed so that exclusions from the application of the Act can only be effected by primary legislation.

COMMITTEE FINDING 215—RECOMMENDATION

If the committee's recommendations in section 12.4.2 *The manner and scope of the GOC and LGOC exclusions* and section 12.4.3 *Exclusion of GOC and LGOC community service obligations* are not implemented, the relevant 'application provisions' referred in schedule 2 should be amended to preclude the ability to prescribe by regulation:

- the activities of a Government Owned Corporation that are taken to be, or are taken not to be, activities conducted on a commercial basis; and
- excluded community service obligations.

12.5.2 Exclusion by other legislation

Provisions contained in legislation other than the FOI Act or the FOI Regulation have effected exclusions to the Act.[812] This is undesirable as it makes it more difficult for citizens to accurately ascertain the application of the Act, and fails to specifically direct Parliament's attention to the exclusion.[813]

It is highly desirable that the entire statutory law on a particular matter be accessible from one statute. If particular bodies are excluded from the FOI Act other than by the Act itself, the effectiveness, cohesiveness and integrity of the Act is threatened and there will be administrative difficulties for decision-makers and applicants alike.[814] Accordingly, the committee believes that any exclusions from

812 See, for example, *WorkCover Queensland Act 1996* (Qld), s 423(2) which excludes from the FOI Act documents of WorkCover Queensland relating to certain of its commercial activities. See also various provisions of the *Police Powers and Responsibilities Act 2000* (Qld) and the *Crime and Misconduct Act 2001* (Qld).

813 QIC, *1996/97 Annual Report*, n 160 at para 3.15.

814 Townsville Community Legal Service Inc., submission no 119. See also DJAG, submission no 150.

the FOI Act should appear in the FOI Act. However, where an exclusion under the FOI Act is relevant to another Act, that other Act should include a reference to the exclusion of the application of the FOI Act.

COMMITTEE FINDING 216—RECOMMENDATION

The Attorney-General should take necessary steps to ensure that all current and future exclusions to the Act are contained in the Act and not in other legislation.

The recommendations in this chapter, adapted as appropriate, apply equally to exclusions which are currently effected by legislation other than the Act.

12.6 THE PRIVATE SECTOR[815]

FOI regimes, because of their nature, traditionally apply to government-held information. Therefore, citizens have no general right of access to documents held by private citizens or private entities. Although:

- the *Privacy Act (Cth) 1988*—following the commencement of the *Privacy Amendment (Private Sector) Act 2000 (Cth)*—will impose requirements relating to personal information on certain private sector entities;
- private citizen or entity documents might, subject to any applicable exemptions, be accessible under FOI regimes when in the hands of an 'agency'; and
- private sector bodies might voluntarily provide information to citizens in certain circumstances.

It was suggested to the committee that the FOI Act be extended (either fully or partially) to private sector bodies primarily on the basis that, increasingly, private entities are performing important functions which are inherently 'public'.[816] The need for consistency between access rights regarding services which are provided by both public and private entities—for example, health services—was also seen as important.

The ALRC/ARC review concluded against a general extension of the Commonwealth FOI Act to the private sector on the basis that *'the democratic accountability and openness required of the public sector* (under the Commonwealth FOI Act) *should not be required of the private sector'*.[817] The review further concluded that, if it is thought that in a particular area of the private sector any additional disclosure of information is required, then it can be addressed through specific legislation.[818]

In his supplementary submission, the QIC submitted that the extension of the FOI Act to the private sector 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*

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815 Relevant submissions: 24, 66, 81, 90, 91, 92, 103, 113, 118, 119, 133, 134, 138, 142, 149, 150, 154, 156, 163 and 172. QIC, supplementary submission no 173 at 11.

816 See the arguments for and against extending FOI to the private sector in the ALRC/ARC's issues paper, n 24 at chapter 14.

817 ALRC/ARC review report, n 13 at para 15.5. A number of submitters to this committee agreed with that statement.

818 ALRC/ARC review report, n 13 at recommendation 98.

> *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.*[819]

The relevant considerations are broader than accountability and the use of public resources. Indeed, the issue extends beyond the scope of this inquiry and requires more detailed consideration and consultation than this committee has been able to undertake. Accordingly, the committee is not prepared at this stage to make any recommendations regarding extension of the FOI Act to the private sector either generally or in relation to particular areas of private sector service provision. The Attorney-General might wish to include this issue as part of the broader inquiry recommended in section 12.2 *Scope for further inquiry*.

However, the committee believes that consideration should at least be given to information access rights in areas where services are provided by both public and private entities, such as health and education.

COMMITTEE FINDING 217—RECOMMENDATION

The issue of whether the Act should be extended to private sector entities is outside the scope of the committee's inquiry. The Attorney-General might wish to include this issue as part of the broader inquiry recommended in section 12.2 *Scope for further inquiry*.

If such a broad inquiry is not commissioned, the Attorney-General might consider commissioning a specific inquiry into information access rights in those areas where services are provided by both public and private entities, such as health and education.

12.7 CONTRACTING OUT GOVERNMENT SERVICE PROVISION[820]

12.7.1 Extending the FOI Act to contractors[821]

The Queensland Government, like many other governments, contracts with private sector bodies to deliver services to government or to provide government services to the community (called 'contracting out' or 'outsourcing'). While the FOI Act right of access applies in respect of documents in an *agency's* possession regarding a contracted service, a question arises as to whether the s 7 definition of 'document of an agency' is, in all cases, broad enough to incorporate information held by *contractors*. ('Document of an agency' is defined 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.) The QIC submitted that an express provision in this regard is preferable.[822]

Not addressing the issue of contractors poses a potential threat to the FOI objectives of accountable and open government, and has the potential to result in the loss of administrative law benefits to

819 QIC, supplementary submission no 173 at 11. The QIC also noted there his personal view that the whole topic raises issues so complex and controversial that it deserves to be the subject of a separate inquiry.

820 Submissions relevant to one or more of the issues discussed in this section: 54, 58, 59, 63, 67 and 68.

821 Relevant submissions: 54, 59, 68, 70, 90, 91, 93, 98, 103, 104, 113, 115, 119, 120, 122, 128, 134, 135, 136, 137, 138, 142, 150, 154, 156, 157, 160, 161, 162 and 163. QIC, first submission no 56 at paras B79-B83. QIC, supplementary submission no 173 at 11.

822 The QIC notes that entitlement to access a document must derive from a statutory or contractual right and that in many cases a determination of whether a document is one that the agency is entitled to access may depend on interpretation of contractual terms and sometimes the operation of difficult principles of common law. QIC, first submission no 56 at para B83.

citizens.[823] Without information, it is more difficult for citizens to evaluate the performance of both contractors and government agencies.[824] Further, there is an expectation that publicly-funded providers of public services will be publicly accountable.[825]

By the same token, community interests in accessing information in a contracting out situation need to be balanced against contractors' and the government's genuine business interests.

In a 1998 inquiry into contracting out, the Administrative Review Council (ARC) stated that accountability, through rights of access to information relating to performance of government services, should not be lost or diminished because of contracting out.[826]

The ARC identified five options which could protect contractors' interests and simultaneously ensure democratic accountability through access to information, namely:[827]

1. extend the Commonwealth FOI Act to contractors;
2. deem specific documents in a contractor's possession to be in the possession of the government agency;[828]
3. deem documents in a contractor's possession *that relate directly to the performance of their contractual obligations* to be in the possession of the government agency;[829]
4. incorporate information access rights into individual contracts;
5. establish a separate information access regime.

The ARC's conclusion that the third option was most preferable was subsequently endorsed by the Senate Committee.[830]

The rights of access created by this option would not only enhance accountability of the government agency and the contractor for the quality of the service provided but also protect documents not directly related to the performance of the contract from disclosure (for example, records of suppliers and similar commercially sensitive material).

The committee believes that the same approach should be adopted in Queensland's FOI Act, namely, that the Act should be amended to include an express provision deeming documents in the possession of a contractor, that relate directly to the performance of their contractual obligations, to be in the possession of the relevant agency. Information of that type would then be accessible, subject to relevant exemption provisions. In particular, exemption provisions which might apply are s45 (Matter relating to trade secrets, business affairs and research) and s 46 (Matter communicated in confidence).

As the QIC noted, this approach sits comfortably with the s7 definition of 'document of an agency'. Further, this approach does not impose onerous administrative or processing obligations (and the

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823 That contracting out should not result in these two things were the central principles of ARC's contracting out inquiry: ARC, *The contracting out of government services*, (the 'contracting out report'), report no 42, Canberra, 1998 at para 5.20.

824 ARC, contracting out report, n 823 at para 5.17.

825 Mulgan R, 'Contracting out and accountability', (1997) *Australian Journal of Public Administration* 106 at 106.

826 ARC, contracting out report, n 823 at para 5.20. See also Senate Finance and Public Administration References Committee (Commonwealth Parliament), *Contracting out government services*, second report, Canberra, May 1998.

827 ARC, contracting out report, n 823 at para 5.21.

828 This option is similar to the approach in New Zealand where the *Official Information Act 1982* (NZ) provides that any information held by an independent contractor performing services for a minister or agency is deemed to be held by the minister or agency: s 2(5). A similar provision applies in relation to local authorities: *Local Government Official Information and Meetings Act 1987* (NZ), s 2(6).

829 Similarly, Ireland's FOI Act, s 6(9) applies to records in the possession of independent contractors to *public bodies* where the records relate to the services being carried out by the contractor for the public body.

830 Note 826 at 49.

associated costs) on contractors, which might result if a contractor was deemed to be an agency for the purposes of the Act.

The success of such an approach would depend on all contracts imposing obligations on contractors 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.[831]

Consequential amendments to that effect should also be made to the government purchasing policy and standard tender documentation. This would inform potential contractors about FOI Act obligations.

In accordance with the Queensland Government policy on the contracting-out of government services,[832] services contracted to community service providers through grant programs or as recurrently funded programs should not be regarded as being contracted-out.

COMMITTEE FINDING 218—RECOMMENDATION

The Act should include an express provision deeming documents in the possession of an entity which has contracted with an agency to perform one or more of that agency's functions, that relate directly to the performance of the contractor's contractual obligations, to be in the possession of the relevant agency.

12.7.2 'Commercial-in-confidence' claims and the 'commercial exemptions'[833]

Government use of the so-called 'commercial-in-confidence' argument as a basis to restrict the disclosure of information regarding contractual arrangements is an issue of increasing concern in the context of private sector entities contracting with government.

A number of recent reviews have considered the wider issue of commercial-in-confidence.[834] Central to these reviews is the concern that the routine inclusion of confidentiality clauses in contracts between public sector entities and the private sector has the potential to suppress from disclosure information which should be open to public and parliamentary scrutiny, and hence undermine the accountability of, and the public's confidence in, government.

One accountability measure introduced in some Australian jurisdictions is a requirement that governments routinely disclose contract documentation with mechanisms for governments to justify non-disclosure of genuinely confidential material. Such measures have been introduced in Victoria, Western Australia and the ACT.[835]

At the Commonwealth level, the Senate has ordered agencies to publish on the Internet lists of their contracts to the value of $100,000 or more, with details of the contracts and a statement of reasons for any provisions which require the parties to maintain confidentiality or which are regarded by the

831 QIC, *1997/98 Annual Report*, n 462 at 21.

832 Queensland Government policy on the contracting-out of government services available at <www.premiers.qld.gov.au/policies/wm/pubs/contracting.htm>.

833 Relevant submissions: 16, 29, 44, 54, 77, 81, 113, 115, 119, 120, 127, 133, 134, 135, 138, 142, 149, 150, 152, 154, 156, 160, 161, 162, 163 and 167. QIC, supplementary submission no 173 at 12-13.

834 See: Queensland Auditor-General, *Report no 2 2000-2001 on Results of Audits performed for 1999-2000 as at 28 February 2001 (incorporating the Audit of the management of official travel and hospitality*), Brisbane, May 2001; the Public Accounts and Estimates Committee (Victorian Parliament), report no 35, *Inquiry into commercial in confidence material and the public interest*, March 2000; Australian National Audit Office, *The use of confidentiality provisions in Commonwealth contracts*, audit report no 38, May 2001.

835 Senate Finance and Public Administration References Committee (Commonwealth Parliament), *Commonwealth contracts: A new framework for accountability*, September 2001 at 7-8.

parties as confidential. The order requests the Auditor-General to examine a selection of contracts to determine whether there is any inappropriate use of confidentiality provisions.[836]

Such measures accord with the approach advocated by the committee in section 4.3 *Greater disclosure outside the Act.*

A further accountability measure which has been suggested is guidelines regarding the use of commercial-in-confidence clauses in contracts and use of the commercial-in-confidence classification generally.[837]

The terms of reference for this committee's review do not extend to a broad inquiry regarding commercial-in-confidence, albeit this is a matter which the committee believes warrants further review.

However, the committee has considered the appropriateness of the 'commercial exemptions' in the FOI Act—contained in s 45(1) and s 46(1)—in light of suggestions that FOI access applications are being inappropriately refused by agencies on the basis that the information requested falls within one of these exemptions.

The FOI Act must strike a careful balance between the public interest in transparency and accountability of government, and the need to protect the legitimate business interests of the government, its agencies and of third parties.[838]

Confidentiality of certain commercially sensitive information is necessary to protect the incentive to invest, produce and profit, and to promote and enhance interpersonal trust, organisational creativity and economic value. By the same token, a complete exemption for all business, commercial and financial information held by government would be far too wide with adverse consequences for parliamentary and public accountability. In addition, it may be appropriate that commercial information is disclosed despite its competitive sensitivity where there are pressing public interests in issue, for example, the exposure of official corruption or the revelation of environmental hazard. [839]

The committee has not received any compelling evidence suggesting that s45(1) and s46(1) need to be amended to ensure that the public interest in disclosure of information is more properly balanced with the protection of legitimate business interests. Therefore, the committee does not consider that any substantial amendments to s 45(1) and s 46(1) in this regard are necessary.[840] In reaching this view, the committee is particularly persuaded by:

- the finding of the majority in the ARC's contracting out inquiry that the commercial exemptions in the Commonwealth FOI Act (which are similar to ss 45 and 46 of Queensland's FOI Act), if applied appropriately by agencies, would not prevent the disclosure of information that should be available about contracted services;[841] and
- the QIC's comment that, based on his experience of cases that have proceeded to external review, he does not consider that amendments to s45(1) or s46(1) are necessary to more appropriately

836 See Senator G Campbell, Return to order, government agency contracts, *Commonwealth Senate Parliamentary Debates (Hansard)*, 27 September 2001 at 28109-28110. See also the numerous reports of the Senate Finance and Public Administration References Committee regarding its inquiry into the mechanism for providing accountability to the Senate in relation to government contracts: *Contracting out of Government services*, n 826; *Inquiry into the mechanism for providing accountability to the Senate in relation to government contracts*, Canberra, June 2000; and *Commonwealth contracts: A new framework for accountability*, Canberra, September 2001.

837 See comments by the Queensland Auditor-General, n 834 at 81-83.

838 See EARC FOI report, n 19 at paras 7.201-7.213.

839 Paper by Associate Professor Spencer Zifcak, La Trobe University at the 2001 Administrative Law Forum, Canberra, July 2001 at 8-9.

840 The committee has however recommended specific amendments to ss 45 and 46 in sections 11.14 and 11.15.

841 ARC, contracting out report, n 823 at paras 5.89-5.95. Although, the ARC minority believed that legislative changes to the commercial exemptions were necessary to ensure that contracting out does not, in practice, lead to loss or diminution of rights of access to information: at para 5.122.

balance the competing interests of disclosure of information in the public interest, and the protection of legitimate business interests.

However, more should be done to ensure that agencies only claim the commercial exemptions in appropriate circumstances. There have been cases where agencies, in applying the exemptions, have not given sufficient consideration to how disclosure could reasonably be expected to have an adverse effect, or which parts of documents legitimately qualify for an exemption.

To ensure the commercial exemptions are used appropriately, the FOI monitor should:[842]

- provide training to agencies regarding the interpretation and application of the commercial exemptions;
- issue guidelines on how the commercial exemptions should be interpreted and applied. These guidelines might:
  - include a non-exhaustive list of the kinds of factors relevant to the public interest in this context such as any significant ethical, scientific, cultural, environmental considerations; and
  - address the fact that trade secrets and commercial information might only be sensitive for a limited period of time, and that the exemptions should not be used when the information has ceased to be sensitive.

The QIC has recently posted on his website four information sheets concerning the commercial exemptions. These information sheets provide a basis for more detailed guidelines for agency use.

As part of its audit function, the FOI monitor should monitor agencies' application of the commercial exemptions to ensure that agencies are not inappropriately claiming them.

COMMITTEE FINDING 219—RECOMMENDATION

The FOI monitor should:

- issue guidelines and conduct agency training regarding the interpretation and application of the commercial exemptions, namely, s 45(1) and s 46(1); and
- monitor agencies' application of the commercial exemptions to ensure that agencies are not inappropriately claiming them.

COMMITTEE FINDING 220—RECOMMENDATION

The broader issue of 'commercial-in-confidence' claims by government warrants further, comprehensive review. This issue is more appropriately within the jurisdiction of the Public Accounts Committee rather than the Legal, Constitutional and Administrative Review Committee.

[842] The ARC made similar recommendations. See ARC, contracting out report, n 823 at recommendations 17-19. The ARC saw both a monitoring and educative role for the FOI Commissioner: para 5.101. The QIC and other submitters in response to discussion point 32 supported this.

13. CONCLUSION

The conclusions and recommendations in this report are designed to make Queensland's FOI regime more effective and efficient from the perspective of both applicants and agencies.

In some cases, the committee has not discussed its proposals in detail. The committee invites the Attorney-General to further consult the committee regarding any of the committee's recommendations which require further clarification.

The committee has also recommended that its proposed FOI monitor undertake a number of tasks. Should that office not be established, the committee encourages the Attorney-General to ensure that the recommended tasks are nevertheless undertaken by another appropriate entity.

Given the number and nature of many of the committee's recommendations, there would appear to be much value in the Attorney-General preparing a consultation draft FOI bill (to replace the existing Act) for further and final consultation purposes. A three-month consultation period would allow for further comment from agencies, members of the public and interested organisations without unduly delaying introduction of amending legislation.

Drafting this bill will require consideration of the need for transitional provisions.

The preparation of such a bill also provides the opportunity for the Act to be reviewed by Parliamentary Counsel to ensure that it is drafted in accordance with modern drafting practice, and that any minor drafting errors are corrected. As a general comment, the committee believes that there is scope for the Act to be made more user friendly, primarily by the use of more headings (that is, shorter sections), footnotes and the inclusion of examples where appropriate.

COMMITTEE FINDING 221—RECOMMENDATION

The Attorney-General should prepare and release for further and final community consultation purposes, a consultation draft FOI bill (to repeal and replace the existing Act) which incorporates those recommendations made by the committee in this report and accepted by Government.

STATEMENT OF RESERVATION

The committee's report contains many suggestions for constructive reform to Queensland's FOI regime. These reforms have emanated from an extensive review by this committee which was conducted in a bipartisan and constructive manner. We acknowledge the very dedicated work of the secretariat to both the former and current committee. Their work has been excellent.

We wholeheartedly endorse the thrust of the committee's findings which is to make government in Queensland more open, accountable and participatory. However, there are two key issues which we feel warrant our further, specific comment.

First, we must express our disappointment that the Government saw fit to introduce a bill to make substantial amendments to the FOI regime—including the introduction of charges for processing FOI applications and supervising access to documents—prior to this committee finalising its review of the Act.

The bill, which has now passed and commenced, will make it more costly for applicants to utilise the FOI process to gain access to information. Rather than improving openness and accountability, the new fees and charges regime will, by the imposition of financial barriers, reduce public participation by Queensland citizens in government.

The introduction of the bill during the final stages of the committee's inquiry was contemptuous of the parliamentary process. Moreover, the lack of consultation with the Queensland Information Commissioner, this committee and other key stakeholders prior to the tabling of the bill has undermined the credibility of the new legislation. Prior consultation with these entities might have addressed many of the concerns with the new provisions which have been identified and noted in chapter 9 of the committee's report.

While we support review of the fees and charges regime by this committee in the near future to assess its operation in practice, we remain of the view that the pre-23 November 2001 fees and charges regime is more appropriate and support its immediate restoration. The cost of access by the community to information relevant to them is a reasonable cost of Government and one which can be shared by the community.

The second area in which we wish to make comment concerns the Cabinet exemption. The version of the Cabinet exemption recommended by the committee will achieve a more appropriate balance between FOI principles of openness and the need to protect the confidentiality of Cabinet deliberations than the current provision. However, our preferred option remains the restoration of the Cabinet exemption to the form in which it was originally enacted in 1992.

The Cabinet exemption is at the core of the effectiveness of FOI legislation because Cabinet is so integral to government processes. The 1992 provision was introduced by a relatively new government in an environment where government accountability was high on the public agenda. Against this background, it sets a more appropriate benchmark to underpin open and accountable government.

Miss Fiona Simpson MP Member for Maroochydore Shadow Minister for Health; Shadow Minister for Tourism; and Shadow Minister for Women's Policy	**Ms Liz Cunningham MP** Member for Gladstone	**Ms Dorothy Pratt MP** Member for Nanango

APPENDIX A ~ LIST OF SUBMISSIONS MADE TO THE INQUIRY

SUBMISSION NO	SUBMISSION FROM:
1	Mr J S Page
2	Mareeba Shire Council
3	Mackay City Council
4	Mr A J H Morris QC
5	Miss L Stewart
6	Pine Rivers Shire Council
7	Speaker, Queensland Parliament (Hon R Hollis MP)
8	QUT (K E Baumber, Registrar)
9	Dr G Copland
9A	Mr P Burke
10	Mr R Althaus
11	Ms M McDonagh, Lecturer in Law, University College Cork, Ireland
12	Mr D Minty
13	Queensland Corrections (Central Region Community Corrections: Mr G R M Palk, Regional Manager)
14	Griffith University [Mr C McAndrew, Pro-Vice-Chancellor (Administration)]
15	Mr G Terrill
16	Australian Law Reform Commission
17	Dr D Meyers
18	Ports Corporation of Queensland
19	Office of the Director of Public Prosecutions
20	CONFIDENTIAL
21	Townsville City Council
22	Ms S Adams
23	Dr T Prenzler, School of Criminology, Griffith University
24	Mr W Tait
25	Council of the Shire of Esk
26	Nominal Defendant
27	CONFIDENTIAL
28	State Ombudsman of South Australia (Mr E Biganovsky, Ombudsman)
29	Social Action Office, Conference of Leaders of Religious Institutes, Queensland
30	Mr J S P O'Keeffe, Chairperson, The Solicitors Complaints Tribunal
31	Toowoomba City Council
32	Queensland Police Union of Employees
33	Beaudesert Shire Council
34	Ms M Campbell

SUBMISSION NO	SUBMISSION FROM:
35	Office of the Intellectually Disabled Citizens' Council of Queensland and the Legal Friend
36	CONFIDENTIAL
37	Balonne Shire Council
38	Gold Coast City Council
39	Mrs H M Gundry
40	Toowoomba Grammar School
41	Rivermouth Action Group Inc.
42	CONFIDENTIAL
43	CONFIDENTIAL
44	*The Courier-Mail*
45	Queensland Police Service
46	Department of Primary Industries
47	Department of Tourism, Sport and Racing
48	Mr S A Trappett
49	The Rockhampton Grammar School
50	Brisbane City Council
51	Mr R Price (Not tabled)
52	Whistleblowers' Action Group (Qld) Inc.
53	Queensland Treasury Corporation
54	Queensland Nurses' Union
55	Department of Justice and Attorney-General (Ms J Macdonnell, Director-General)
56	Information Commissioner (Qld)
57	Mr R Gilliver, Registrar, James Cook University
58	Wildlife Preservation Society of Queensland
59	Legal Aid Queensland
60	CONFIDENTIAL
61	Department of Emergency Services
62	Mr C Burgess, Lecturer in Journalism, University of Southern Queensland
63	Townsville Community Legal Service Inc.
64	Mr A Randle
65	International Commission of Jurists Australian Section (Queensland Branch)
66	Environmental Protection Agency and the Department of Natural Resources
67	Department of Families, Youth and Community Care
68	Queensland Audit Office
69	Queensland Treasury (attaching comments from Golden Casket Lottery Corporation Limited)
70	Western Australian Information Commissioner (Ms B Keighley-Gerardy)
71	Australian Press Council
72	Queensland Crime Commission

SUBMISSION NO	SUBMISSION FROM:
73	Education Queensland
74	CONFIDENTIAL
75	Douglas Shire Council
76	Office of the Public Service
77	♦ Department of Equity and Fair Trading and the Department of Aboriginal and Torres Strait Islander Policy and Development (77A); and ♦ Building Services Authority (77B).
78	CONFIDENTIAL
79	Mrs M V Dekker
80	Queensland Law Society Inc.
81	Australian Society of Archivists (Queensland Branch)
82	Mr N Waters
83	Australian Medical Association (Queensland Branch)
84	Department of Public Works
85	Gatton Shire Council
86	Criminal Justice Commission
87	Department of Employment, Training and Industrial Relations
88	Mr K Lindeberg (Not tabled)
89	Australian Democrats (Queensland Division)
90	Queensland Council for Civil Liberties
91	Queensland Advocacy Incorporated
92	Environmental Defenders Office (Qld) Inc.
93	Mr R Snell and Ms P Walker
94	CONFIDENTIAL
95	Department of Housing
96	University of Queensland (Mr D Porter, Secretary and Registrar)
97	National Tertiary Education Union (Queensland Division)
98	Mr G McMahon (Not tabled)
99	Rockhampton City Council
100	♦ Queensland Health (100A); ♦ Health Rights Commission (100B); and ♦ Office of the Health Professional Registration Boards (100C).
101	Queensland Transport and Department of Main Roads (101) attaching comments from: ♦ Manager, Human Resources Policy and Systems – Department of Main Roads (101B); ♦ A/District Director, Peninsula District - Department of Main Roads (101C); ♦ District Director, North Coast Hinterland District – Department of Main Roads (101D); ♦ Senior Systems Security Officer, Driver and Vehicle Management Branch – Queensland Transport (101E); ♦ Manager (Policy and Research), Driver and Vehicle Management Branch – Queensland Transport (101F);

SUBMISSION NO	SUBMISSION FROM:
	♦ Relieving Regional Harbour Master, Mackay, Marine Operations – Queensland Transport (101G); ♦ Director, Internal Audit – Queensland Transport (101H); ♦ Principal Advisor (Regional Transport Planning) – Queensland Transport (101I); ♦ A/Director (Property Services) – Department of Main Roads (101J); ♦ Manager, Corporate Services – Mackay Port Authority (101K); ♦ Regional Director, Northern Region – Queensland Transport (101L); ♦ Chief Executive Officer – Ports Corporation Queensland (101M); and ♦ Executive Director, Rail and Ports & Aviation – Queensland Transport (101N).
102	Burnett Shire Council
103	Mr J Orr
104	Department of Communication and Information, Local Government and Planning
105	Local Government Association of Queensland Inc.
106	WorkCover Queensland
107	Department of Corrective Services
108	Queensland Chamber of Commerce and Industry Limited
109	Queensland Rail
110	Office of the Health Professional Registrations Boards (Addendum to submission no 100C)
111	Mareeba Shire Council
112	Institute of Municipal Management Queensland Inc
113	Mr K Hasandedic
114	Gatton Shire Council
115	Queensland Health (Tablelands District Health Service)
116	Mrs M V Dekker
117	Ms S Adams
118	Queensland Law Society Inc
119	Townsville Community Legal Service Inc.
120	Social Action Office (Conference of Leaders of Religious Institutes, Queensland)
121	Ports Corporation Queensland
122	Department of Families, Youth and Community Care, Queensland and Disability Services, Queensland
123	Anti-Discrimination Commission, Queensland
124	Queensland Police Service
125	Department of Emergency Services, Queensland
126	Queensland Board of Senior Secondary School Studies
127	Department of Equity and Fair Trading and Department of Aboriginal and Torres Strait Islander Policy and Development
128	Office of Health Practitioner Registration Boards
129	Dalrymple Shire Council

SUBMISSION NO	SUBMISSION FROM:
130	Records Management Association of Australia
131	Queensland Crime Commission
132	Dr A Higgins
133	Australian Society of Archivists (Queensland Branch)
134	Mr W Tait
135	Queensland Audit Office
136	Beaudesert Shire Council
137	Queensland University of Technology (Mr K Baumber, Registrar)
138	Environmental Defenders Office (Qld) Inc.
139	Whistleblowers Action Group (Qld) Inc.
140	Queensland Police Union of Employees
141	Mr M O'Neill
142	Ms C Hoey
143	Department of Housing, Queensland
144	Queensland Teachers' Union of Employees
145	Queensland Rail
146	Environmental Protection Agency and the Department of Natural Resources
147	Mr W B Lane (Faculty of Law, QUT)
148	Department of Public Works, Queensland
149	Australian Medical Association (Queensland Branch)
150	Department of Justice and Attorney-General, Queensland (Ms J Macdonnell, Director-General)
151	CONFIDENTIAL
152	Deputy Leader of the Opposition (Mr L Springborg MP)
153	Queensland Transport
154	Queensland Nurses' Union
155	Queensland Health
156	Queensland Chamber of Commerce and Industry Limited
157	Hon P Foss QC MLC, Attorney-General and Minister for Justice, Western Australia
158	Queensland Treasury
159	CONFIDENTIAL
160	Queensland Council for Civil Liberties
161	Bar Association of Queensland
162	Department of Employment, Training and Industrial Relations
163	Education Queensland
164	Associate Professor Richard Fotheringham
165	Scrutiny of Legislation Committee
166	CONFIDENTIAL
167	Dr W De Maria
168	Department of Mines and Energy

SUBMISSION NO	SUBMISSION FROM:
169	Mr R G West
170	CONFIDENTIAL
171	Mr I Timmins (not tabled)
172	CONFIDENTIAL
173	Information Commissioner (Supplementary submission)

APPENDIX B ~ LIST OF WITNESSES APPEARING AT THE PUBLIC HEARING

WITNESSES ON THURSDAY, 11 MAY 2000

Mr Rick Snell (University of Tasmania)

Mr Paul Whittaker (*The Courier-Mail*)

Mr Richard Fotheringham (Freedom of information applicant)

Mr Rob Stevenson (Environmental Defenders Office (Qld) Inc.)

Ms Lone Keast (Department of Education)

Mr Philip Clarke (Department of Education)

Ms Kathryn Mahoney (Department of Education)

Ms Therese Storey (Department of Education)

Ms Alison Algate (Department of Education)

Ms Julie McCusker (Department of Transport)

Mr Bill Rodiger (Department of Transport)

Mr Alan Davidson (T.C. Beirne School of Law, University of Queensland)

WITNESSES ON FRIDAY, 12 MAY 2000

Dr William De Maria (Centre for Public Administration, University of Queensland)

Mr Alan Randle (Freedom of information applicant)

Mr Steve Austin (ABC Radio)

Ms Karen Fletcher (Prisoners' Legal Service)

Ms Susan Harris (Queensland Health)

Ms Susan Heal (Queensland Health)

Mr Michael Cope (Queensland Council for Civil Liberties)

Ms Elizabeth Mohle (Queensland Nurses' Union)

Mr Steve Ross (Queensland Nurses' Union)

Dr Geoff Copland (Freedom of information applicant)

Mr Gregory Sorensen (Deputy Information Commissioner)

Mr Peter Shoyer (Assistant Information Commissioner)

APPENDIX C ~ SECTIONS OF THE REPORT WHICH RELATE TO PARTICULAR TERMS OF REFERENCE

TERM OF REFERENCE		RELEVANT DISCUSSION POINT[843]		RELEVANT REPORT SECTION	
A.	Whether the basic purposes and principles of the FOI Act have been satisfied, and whether they now require modification	1	While the committee welcomes further comment on FOI purposes and principles, their satisfaction and whether (and, if so, how) they require modification, the committee would particularly like to receive comments about the compatibility of FOI purposes and principles with our Westminster-style system of government	3.3	FOI purposes and principles and Westminster governance
B(I)	Whether the FOI Act's objects clauses should be amended	2	Should the objects clauses of the FOI Act be revised as the QIC suggests?	3.6	The objects clauses
		3	In particular, should the FOI Act include: (a) a provision stating that the Act is to be interpreted in a manner that furthers the Act's stated objects [like the FOIC, s 3(2)]?; and/or (b) a guiding principle or presumption of access?	3.6.1	Possible broad amendments to the objects clauses
		4	Should the relationship between the exemption provisions and the objects clauses of the FOI Act be made more clear? For example, should the FOI Act provide that the exemption provisions 'operate subject to' or 'are to be interpreted in furtherance of" the objects of the Act? Alternatively, should the objects clause avoid direct reference to the exemptions?	3.6.1	Possible broad amendments to the objects clauses
		5	Alternatively, if the FOI Act is to promote disclosure (in the interests of open government) should the reference to the exceptions and exemptions be removed from the objects clause?	3.6.1	Possible broad amendments to the objects clauses
		6	Should any additional matters be stipulated in the objects clauses, eg, a statement that Parliament's intention in providing a right of access to government-held information is to underpin Australia's constitutionally guaranteed representative democracy; an acknowledgment that information collected and created by government officials is a public resource?	3.6.1	Possible broad amendments to the objects clauses
		7	Is there a 'culture of secrecy' in Queensland? If so, how is this evident? What can be done to overcome any such culture?	3.4.2	Factors influencing the success of Queensland's FOI regime

[843] In the committee's February 2000 discussion paper *Freedom of Information in Queensland*.

TERM OF REFERENCE	RELEVANT DISCUSSION POINT[843]	RELEVANT REPORT SECTION
	8 Should the entire approach to FOI in Queensland be 'reversed' so that the onus is on agencies to routinely make certain information public (with the public still having the right to apply for information not already so released)? If so: (a) How should this be achieved, eg, by statutory or administrative instruction? (b) What sort of (additional) information should agencies be required to routinely publish? (c) What (other) considerations are relevant?	4.3 Greater disclosure outside the Act
	9 Is the existence of the FOI Act adequately publicised? If not, how could it be better publicised? [For example, through public libraries, on-line, by assigning promotion of the FOI Act to somebody—see T/Ref C(i).]	4.2 Independent monitoring of Queensland's FOI regime
	10 In addition to any suggestions made in response to the above discussion points, are there any other ways in which the FOI Act, part 2 provisions concerning the publication of statements of affairs and other documents might be improved?	5.5 Availability of information: ss 18 and 19
	11 Is there scope for performance agreements of senior public officers to impose a responsibility to ensure efficient and effective practices and performance in respect of access to government-held information including FOI requests?	4.7 Performance agreements
	12 Should the title of the FOI Act be changed to the *Access to Information Act*?	4.5 A change in name of the Act
	13 Should sufficient regard to 'the right to access government-held information' be included as an example of a 'fundamental legislative principle' in the *Legislative Standards Act 199*2 (Qld), s 4?	4.6 A right to government-held information as an example of an FLP
B(II) Whether, and to what extent, the exemption provisions in the FOI Act, Part 3, Division 2, should be amended	14 Should any of the current exemptions be removed from the FOI Act? Should any new exemptions be inserted?	Chapter 11 – The specific exemption provisions
	15 What, if any, are deficiencies in particular exemption provisions—eg, are any expressed too broadly, thereby unnecessarily limiting access—and how might their drafting be improved?	Chapter 11 – The specific exemption provisions
	16 Should the different harm tests that are (or should be) contained in the FOI Act exemption provisions be rationalised and/or simplified? If so, what form(s) should they take?	10.3 Rationalisation of the public interest and harm tests
	17 Should the harm tests be made more stringent, eg, by requiring decision makers to show that disclosure would result in *substantial* harm?	10.3 Rationalisation of the public interest and harm tests
	18 Should there be a general harm test imposed on all exemptions? If not, what exemptions are not suited to the application of such a test and why?	10.2 Alternative approaches to the exemption provisions

TERM OF REFERENCE	RELEVANT DISCUSSION POINT[843]	RELEVANT REPORT SECTION
	19 Should there be a general public interest test imposed on all exemptions? [For example, the FOI Act could instead express the exemptions as a list of interests and documents to be protected, all of which are subject to the one public interest test (perhaps in addition to being subject to a single harm test: see above).] Are any exemptions ill-suited to the application of a public interest test and why?	10.2 Alternative approaches to the exemption provisions
	20 Should the 'public interest' as it relates to exemptions be defined in the FOI Act? Alternatively, should the FOI Act deem any specified factors as relevant, or irrelevant (eg, embarrassment to government), for the purpose of determining what is required by the public interest?	10.4 Defining the 'public interest'
	21 If the 'public interest' is to remain undefined in the FOI Act, should more guidance be provided on how to apply the public interest test by other means? [For example, through guidelines issued by the QIC.]	10.4 Defining the 'public interest'
	22 Should the ability of ministers to sign conclusive certificates be revisited?	10.7 Conclusive certificates
B(III) Whether the ambit of the application of the FOI Act, both generally and by operation of s 11 and s 11A, should be narrowed or extended	23 Should—and, if so, what—action be taken to prevent the exclusion of agencies, or part thereof, from the application of the FOI Act by: (a) regulation; and (b) legislation other than the FOI Act?	12.5 Exclusion by regulation and other legislation
	24 Should a mechanism be introduced whereby specific bodies to which government provides funding or over which government may exercise control (and which are not otherwise 'agencies' within the meaning of the FOI Act) are made subject to the FOI Act? If so, what form should that mechanism take?	5.2.3 Entities declared by regulation to be public authorities
	25 Should GOCs and LGOCs, as a matter of policy, be excluded from the application of the FOI Act in relation to their (competitive) commercial activities? Why/why not?	12.4.1 Exclusion of GOCs and LGOCs
	26 If GOCs and LGOCs are to be so excluded, is the manner of exclusion effected by ss 11A and 11B appropriate? If not, how should they be excluded?	12.4.2 The manner and scope of GOC and LGOC exclusions
	27 Should the government be able to, by regulation, prescribe GOC community service obligations in relation to which documents are not accessible under the FOI Act?	12.4.3 Exclusion of GOC and LGOC community service obligations 12.5.1 Exclusion by regulation
	28 Should there be additional controls in respect of documents of LGOCs being excluded from the FOI Act given the QIC's concern about LGOCs' method of creation?	12.4.4. The need for additional controls regarding LGOCs
	29 What arguments, if any, are there for extending the FOI Act to the private sector generally?	12.6 The private sector
	30 Should the FOI Act be extended to cover contractors performing functions 'outsourced' by government? If so, why and how should this be effected?	12.7.1 Extending the FOI Act to contractors

TERM OF REFERENCE	RELEVANT DISCUSSION POINT[843]	RELEVANT REPORT SECTION
	31 Do the current commercial exemptions in the FOI Act—principally, ss 45 and 46—require amendment to ensure that an appropriate balance is struck between disclosure of information in the public interest and the protection of legitimate business interests? If so, what amendments need to be made?	12.7.2 'Commercial-in-confidence' claims and the 'commercial exemptions'
	32 What more can or should be done to try to ensure that agencies do not inappropriately claim that documents fall within the ss 45 and 46 exemptions? (For example, should the QIC or some other body issue guidelines or otherwise have a monitoring role in relation to agencies invoking the exemptions?)	12.7.2 'Commercial-in-confidence' claims and the 'commercial exemptions'
B(IV) Whether the FOI Act allows appropriate access to information in electronic and non-paper formats	33 Should the FOI Act confer a general right of access to *information* instead of a right to documents? If so, what should 'information' encompass?	5.3.1 The focus on documents
	34 If the FOI Act is to continue to provide for access to documents, can the definition of *document* be improved? (For example, by clarifying that it includes data?)	5.3.2 The definition of 'document'
	35 What more can be done by agencies to assist FOI applicants in accessing *all* relevant documents (ie, including electronic and other non-paper form documents)?	5.6 The importance of good records management 6.13 Forms of access: s 30
	36 How can agencies improve the efficiency and thoroughness of their procedures to create, manage and retrieve electronic documents, and, in particular, electronically provide access to documents to FOI applicants?	5.6 The importance of good records management 6.13 Forms of access: s 30
	37 Which documents should be considered in the possession of an agency for the purposes of the FOI Act? Need the Act's definitions of 'documents of an agency' and 'official documents of a Minister' be amended in this regard? Alternatively, how might the FOI Act charging regime account for agencies' identification and retrieval of documents potentially relevant to an FOI request that are 'documents of an agency' but not in the agency's physical possession?	5.3.3 'Documents of an agency' 5.3.4 'Official documents of a minister'
B(V) Whether the mechanisms set out in the FOI Act for internal review are effective	38 Should internal review necessarily be a prerequisite to external review? If not, should there be conditions attached as to when and how an applicant can proceed directly to external review? [For example: agreement of both the applicant and agency; by leave of the QIC?]	7.3.1 Internal review as a prerequisite to external review
B(V) Whether the mechanisms set out in the FOI Act for external review are effective and, in particular, whether the method of review and decision by the Information Commissioner is excessively legalistic and time-consuming	39 Is there a case for any other model or a variation of the existing model of external review under the FOI Act?	8.2.1 Alternative models

TERM OF REFERENCE	RELEVANT DISCUSSION POINT[843]	RELEVANT REPORT SECTION
	40 Should the same person hold the offices of Queensland Ombudsman and Queensland Information Commissioner?	8.2.2 The Ombudsman as Information Commissioner
	41 If, as T/Ref B(v) queries, the method of 'review and decision' by the QIC is 'excessively legalistic and time-consuming', how in light of the above discussion can the QIC adopt less legalistic and quicker processes? For example, is there more scope for the QIC to use informal dispute resolution mechanisms?	8.2.4 The Information Commissioner's approach
	42 Given the importance of providing FOI administrators guidance on the proper interpretation and application of the FOI Act: (a) Should the QIC [or some other body responsible for overseeing the administration of the FOI Act: see T/Ref C(i)] be responsible for preparing guidelines to assist agencies and applicants to understand, interpret and administer the Act? (b) Should there be a statutory provision requiring the QIC to publish <u>all</u> decisions in either full or summary form (as in Western Australia)?	8.2.4 The Information Commissioner's approach 4.2.2 The FOI monitor's specific functions
	43 Should there be a statutory time limit imposed on the QIC in which to deal with external review applications?	8.2.6 A time limit on the Information Commissioner
	44 If such a time limit is imposed, what should that time limit be and should it allow for extensions (and, if so, on what grounds)?	8.2.6 A time limit on the Information Commissioner
	45 Should the QIC have the power to: (a) enter premises and inspect documents; and/or (b) punish for contempt?	8.5.2 Power to enter premises and inspect documents 8.5.4 Power to punish for contempt
	46 Should the QIC be empowered to order disclosure of otherwise exempt matter in the public interest?	8.5.3 Powers of the Information Commissioner on review: s 88(2)
	47 Should the scope of the QIC's decision-making powers in relation to conclusive certificates signed by a minister under ss 36, 37 or 42 be expanded? (In this regard, refer to discussion point 22 regarding the need for conclusive certificates.)	8.5.1 Review of conclusive certificates: s 84
B(VI) The appropriateness of, and the need for, the existing regime of fees and charges in respect of both access to documents and internal and external review	48 Should the non-personal information application fee be abolished, remain at $30 or be increased (to what level)?	9.5.2 Application fees
	49 Should a uniform application fee be introduced (ie, should an application fee be introduced for *personal* information requests)?	9.5.2 Application fees

TERM OF REFERENCE	RELEVANT DISCUSSION POINT[843]	RELEVANT REPORT SECTION
	50 Should charges be introduced for: (a) processing (for retrieval of documents, decision making and/or consultation); and/or (b) supervised access; and if so, at what levels and in what form? (For example, per hour spent, per page disclosed or dealt with, a sliding scale, with caps on fees?)	9.5.3 Processing charges 9.5.4 Access charges
	51 What other components of the charging regime need to be addressed (eg, photocopying)?	Chapter 9 Fees and charges
	52 Especially if there are to be any fee increases, should the FOI Act be amended to enable agencies and ministers to waive or reduce fees? On what grounds?	9.6.3 Waiver of charges
	53 Are any of the arguments for the introduction of application fees for internal and/or external review valid? If so, which ones and why?	9.7 Fees and charges for internal and external review
	54 If application fees are introduced for internal and/or external review: (a) at what level should those fees be set; and (b) should they apply to reviews of decisions concerning both personal and non-personal information? Should provision be made for: (c) waiver of those fees and, if so, in what circumstances; (d) refunds of those fees where proceedings are decided (wholly or partly) in favour of the applicant; and/or (e) the fees extending to applications relating to a deemed refusal?	9.7 Fees and charges for internal and external review
B(VII) Whether the FOI Act should be amended to minimise the resource implications for agencies subject to the Act in order to protect the public interest in proper and efficient government administration, and in particular:- - whether s 28 provides an appropriate balance between the interests of applicants and agencies …	55 In relation to s 28(2) concerning voluminous applications, should: (a) the word 'only' be deleted from the last paragraph of s 28(2) to widen the factors that agencies may have regard to when deciding whether to refuse to deal with an application because it would substantially and unreasonably divert agency resources; (b) agencies be required to consult with the QIC before refusing an application under the provision; and/or (c) the provision be redrafted to emphasise the importance of agencies consulting with applicants about their applications?	6.8 An unreasonable and substantial diversion of agency resources: s 28(2) 6.10 Refuse to 'deal with' an application
	56 Should s 28(3) of the FOI Act be repealed? If s 28(3) is to be retained, should it be amended to require the agency to: (a) identify the exemption provision(s) purported to be applicable; and (b) explain why all the sought documents are exempt thereunder?	6.9 Applications for entire classes of 'exempt' documents: s 28(5)

TERM OF REFERENCE	RELEVANT DISCUSSION POINT[843]	RELEVANT REPORT SECTION
	57 Should the FOI Act contain a general provision enabling an agency to refuse to deal with frivolous and vexatious applications? If so, how should this provision be drafted and what provisos should it contain?	6.12 'Vexatious' and 'serial' applications
	58 Alternatively (or additionally), should the FOI Act contain a provision enabling an agency to refuse to deal with serial/repeat applications? If so, should it be in the form suggested by the QIC in the above text?	6.12 'Vexatious' and 'serial' applications
B(VII) Whether the FOI Act should be amended to minimise the resource implications for agencies subject to the Act in order to protect the public interest in proper and efficient government administration, and in particular:- … - whether data collection and reporting requirements, which inform the parliamentary and public understanding of how well the FOI Act is operating in Queensland, exceed what is necessary to achieve their legislative purposes;	59 In addition to having (relevant and not unduly onerous) data collection and reporting requirements, is there a need for an entity (other than the relevant minister) to be responsible for: (a) ensuring the timely, accurate and consistent reporting of that data; (b) undertaking a meaningful analysis of that data once collected; and (c) ensuring that, as a result of that analysis, any appropriate remedial action is taken?	4.2 Independent monitoring of Queensland's FOI regime
B(VII) Whether the FOI Act should be amended to minimise the resource implications for agencies subject to the Act in order to protect the public interest in proper and efficient government administration, and in particular:- … - whether time limits are appropriate	60 Should the basic 45 day time limit for processing access applications—in s 27(7)(b) of the FOI Act—be reduced to 30 days?	6.5.4 Time limits for processing FOI access applications
	61 Should the 15 day extension for third party consultation when required under s 51—in s 27(4)(b) of the FOI Act—be extended to 30 days?	6.5.4 Time limits for processing FOI access applications
	62 Should provision be made for agencies (or ministers) and applicants to agree to extend response times rather than incur an automatic deemed refusal? Should any such amendment be subject to the requirement that a partial or interim decision be made within the prescribed time limits on as many documents as possible?	6.5.5 Extension by agreement between the parties

TERM OF REFERENCE	RELEVANT DISCUSSION POINT[843]	RELEVANT REPORT SECTION
	63 Should an agency's (or minister's) failure to decide an access application and notify the applicant within the relevant time period be taken to be deemed access instead of deemed refusal?	6.5.11 Deemed refusal: s 27(4)
	64 Should s 27 be redrafted to provide that an agency or minister must decide an application and notify the applicant '*as soon as is reasonably practicable*' but, in any case, no later than the relevant time limit?	6.5.3 A requirement to process as soon as practicable
	65 Should there be provision for the processing of applications to be expedited in circumstances where a compelling need exists? If so, in what circumstances? (For example, imminent threat to public safety, public health or the environment.)	6.5.7 Provision for expedited processing of access applications
	66 Should a statutory time limit be applied for applicants viewing or seeking copies of documents to which access has been granted (say, 60 days)?	6.13 Forms of access: s 30
	67 Should the 14 day limit for dealing with internal review applications for access and amendment decisions—as set out in ss 52(6) and 60(6)—be extended? If so, what should the period be?	7.4.5 The 14 day time limit for determining internal review applications
	68 Should the 60 day period for lodging an application for external review—as set out in s 73(1)(d)(i) of the FOI Act—be reduced? If so, what should the relevant time period be?	8.4.1 Time limits for lodging external review applications
B(VIII) Whether amendments should be made to either s 42(1) or s 44(1) of the FOI Act to exempt from disclosure information concerning the identity or other personal details of a person (other than the applicant) unless its disclosure would be in the public interest having regard to the use(s) likely to be made of the information	69 Is there a need to implement further measures to ensure that, where appropriate, public servants can claim exemptions in respect of their names and other identifying material? For example: (a) Should the QIC (or some other body) issue guidelines setting out general principles regarding the release of public servants' personal information and the circumstances in which exemption from disclosure may be justified? (b) Alternatively, should the FOI Act specify categories of personal affairs information of public servants that is not exempt under s 44?	11.22 Exemptions relating to the identity or other personal details of a person
	70 Is the balancing of the public interests required by s 44(1) of the FOI Act sufficient to protect the evidence of children/adult victims of serious offences from use outside court processes? Does it provide sufficient certainty?	11.23 Evidence given by child witnesses in court proceedings
	71 If not, should "personal affairs" be defined in the FOI Act to include recordings of evidence of children/ people generally?	11.23 Evidence given by child witnesses in court proceedings
B(IX) Whether amendments should be made to the FOI Act to allow disclosure of material on conditions in the public interest (eg to a legal representative who is prohibited from disclosing it to the applicant)	72 What particular deficiencies in the FOI Act might the proposal in T/Ref B(ix) seek to overcome? Does the proposal adequately overcome these deficiencies? Are there any alternative ways by which these deficiencies might be addressed?	6.23 Conditional disclosure

TERM OF REFERENCE	RELEVANT DISCUSSION POINT[843]	RELEVANT REPORT SECTION
	73 Should the personal affairs exemption (s 44) be amended to provide that, in weighing the public interest in disclosure, an agency may have regard to any special relationship between the applicant and a third party? If so, on what basis should such a provision operate?	11.13.4 Special relationship between the applicant and a third party
C. Any related Matter C(I) The need for independent coordination and monitoring of Queensland's FOI regime	74 Should a person/entity be (statutorily) responsible for generally: (a) monitoring compliance with, and the administration of, the FOI Act; and (b) providing advice about, and ensuring a high level of agency and community awareness of, the FOI Act?	4.2. Independent monitoring of Queensland's FOI regime
	75 If so, who should perform this role: (a) the QIC; (b) a unit within the Department of Justice and Attorney-General; (c) a new independent (statutory) entity; or (d) some other existing person/entity? Why?	4.2.3 The entity to perform the role of FOI monitor

APPENDIX D ~ FOI USAGE AND OUTCOMES

Table D.1: Personal and non-personal FOI applications made to state and local government agencies[844]

YEAR	STATE GOVERNMENT AGENCIES			LOCAL GOVERNMENT AGENCIES			TOTAL
	Personal	*Non-personal*	*Total*	*Personal*	*Non-personal*	*Total*	
1992/93	3,297	1,076	4,373	74	89	163	4,536
1993/94	5,161	1,698	6,859	212	392	604	7,463
1994/95	4,311	2,532	6,843	118	510	628	7,471
1995/96	4,848	2,989	7,837	99	572	671	8,508
1996/97	4,004	3,094	7,098	100	613	713	7,811
1997/98	N/A	N/A	6,884	N/A	N/A	626	7,510
1998/99	3,006	3,514	6,520	153	820	973	7,493
1999/00	4,623	4,663	9,286	178	980	1,158	10,444

Table D.2: Documents released under the FOI Act[845]

YEAR	TOTAL DOCUMENTS CONSIDERED		ACCESS REFUSED				PARTIAL RELEASE				FULL RELEASE			
	State	*Local*	*State*	%	*Local*	%	*State*	%	*Local*	%	*State*	%	*Local*	%
1992/93	443,421	N/A	20,853	5	N/A		23,832	5	N/A		398,736	90	N/A	
1993/94	871,493	155,583	79,391	9	37,638	24	36,845	4	2,012	1	755,257	87	115,933	75
1994/95	1,048,226	234,136	81,951	8	13,820	6	31,838	3	5,513	2	934,437	89	214,803	92
1995/96	842,802	128,752	49,911	6	6,412	5	35,120	4	3,640	3	757,771	90	118,700	92
1996/97	808,932	262,371	79,733	10	117,181	45	38,229	5	2,720	1	690,970	85	142,470	54
1997/98	852,656	145,183	140,353	17	13,730	9	45,829	5	1,422	1	666,474	78	130,031	90
1998/99	727,090	415,365	73,572	10	120,788	29	46,877	7	4,642	1	606,641	83	289,935	70
1999/00	950,157	224,369	122,722	13	9,587	4	59,835	6	4,131	2	767,600	81	210,651	94

844 Department of Justice and Attorney-General, *FOI Annual Reports*: 1992/93 at appendices C & M; 1993/94 at appendices C & M; 1994/95 at appendices E-F; 1995/96 at appendices E-F; 1996/97 at appendices D-E; 1997/98 at appendices 5.1-5.2; 1998/99 at appendices 1.5-1.6; 1999/2000 at appendices 1.5-1.6.

845 Department of Justice and Attorney-General, *FOI Annual Reports*: 1992/93 at appendix E; 1993/94 at appendices E and O; 1994/95 at appendices G-H; 1995/96 at appendices G-H; 1996/97 at appendices F-G; 1997/98 at sections 5.4-5.5; 1998/99 at appendices 1.7-1.8; 1999/2000 at appendices 1.7-1.8.

Table D.3: Timeliness in processing access applications[846]

YEAR	STATE GOVERNMENT AGENCIES				LOCAL GOVERNMENT AGENCIES			
	% within 45 days	% within 60 days	% within 75 days	% over 75 days	% within 45 days	% within 60 days	% within 75 days	% over 75 days
1992/93	73	12	5.6	94	100	0	0	0
1993/94	71.6	11.4	5.7	11.3	68.4	19.6	6	6
1994/95	69.1	12.1	5.2	13.5	76.8	13.9	5.6	3.7
1995/96	68.2	11.8	5.5	14.5	81.1	12.6	2.7	3.6
1996/97	66.4	10.6	5.8	17.2	79.7	13.8	3	3.5
1997/98	-	-	-	-	-	-	-	-
1998/99	72	11	5	12	78	13	4	5
1999/00	73	9	5	13	76	15	5	4

Table D.4: Applications for amendment[847]

YEAR	STATE GOVERNMENT AGENCIES				LOCAL GOVERNMENT AGENCIES			
	Applications		Outcome		Applications		Outcome	
	Received	*Finalised*	*Documents Altered/ notated* #	*Documents Amend/t Refused*	*Received*	*Finalised*	*Documents Altered/ notated* #	*Documents Amend/t Refused*
1992/93	36	32	138	14	1	1	0	0
1993/94	47	52	237	230	3	3	1	5
1994/95	36	38	286	49	2	1	5	0
1995/96	31	23	42	48	1	2	11	0
1996/97	27	30	71	23	-	-	-	-
1997/98	19	17	11	19	-	-	-	-
1998/99	12	10	8	24	2	2	1	1
1999/00	17	12	4	16	0	0	0	0

Note: # This includes documents altered, documents notated, and documents 'alt/noted'. One application might relate to multiple documents.

846 Department of Justice and Attorney-General, *FOI Annual Reports*: 1992/93 at appendices I and N; 1993/94 at appendices I and S; 1994/95 at 14; 1995/96 at 14; 1996/97 at 13; 1998/99 at 13; 1999/2000 at 10.

847 Department of Justice and Attorney-General, *FOI Annual Reports*: 1992/93 at appendices B and L; 1993/94 at appendices B and L; 1994/95 at appendices C-D; 1995/96 at appendices C-D; 1996/97 at appendix C; 1997/98 at section 5.3; 1998/99 at appendices 1.3-1.4; 1999/2000 at appendices 1.3-1.4.

Table D.5: Outcome of external reviews[848]

	1992/93	1993/94	1994/95	1995/96	1996/97	1997/98	1998/99	1999/00	2000/01
No jurisdiction	2	7	6	21	24	31	39	40	50
Decision not to review/review further under s 77 of the FOI Act	1	0	1	1	2	1	3	3	1
Agency granted further time to deal with application	2	1	3	0	1	0	8	2	0
Resolved/withdrawn following mediation	20	98	130	138	171	148	193	223	292
Decision issued – affirming decision under review	1	13	25	19	22	37	26	41	27
Decision issued – varying decision under review	1	3	10	12	17	34	21	30	20
Decision issued – setting aside decision under review; making decision in substitution	0	3	4	12	9	19	11	13	6
TOTAL	27	125	179	203	246	270	301	352	396

[848] QIC, *Annual Reports*: 1992/93 at 2; 1993/94 at 3; 1994/95 at 2; 1995/96 at 2; 1996/97 at 2; 1997/98 at 3; 1998/99 at 2; 1999/00 at 3; 2000/2001 at ii.

APPENDIX E ~ FREEDOM OF INFORMATION AMENDMENT (OPEN GOVERNMENT) BILL 2000 (CTH), CLAUSE 3 (OBJECT)

Senator Murray's Freedom of Information Amendment (Open Government) Bill 2000 (Cth) would replace the objects clause of the Commonwealth FOI Act with the following objects clause:

(1) The object of this Act is to extend as far as possible the right of the Australian community to access to information in the possession of the Government of the Commonwealth:

(a) to enable people to participate in the policy, accountability and decision-making processes of government; and

(b) to open the Governments activities to scrutiny, discussion, comment and review; and

(c) to increase the accountability of the executive branch of government;

by:

(d) creating a right of access to personal information in documentary form about an applicant in the possession of Ministers, departments and public authorities; and

(e) creating a general right of access to the national resource of information in documentary form in the possession of Ministers, departments and public authorities; and

(f) creating a right to bring about the amendment of records containing personal information that is incomplete, incorrect, out of date or misleading.

(2) It is the intention of the Parliament that the provisions of this Act shall be interpreted so as to further the object set out in subsection (1) and give effect to the principles of representative democracy, and that any discretions conferred by this Act shall be exercised as far as possible so as to facilitate and promote, promptly and at the lowest reasonable cost, the disclosure of information.

APPENDIX F ~ THE INFORMATION COMMISSIONER'S PROPOSED OBJECTS CLAUSES[849]

Sections 4 and 5 of the FOI Act should be amended to read:

4.(1) *The purpose of this Act is to confer rights on persons, and impose obligations on agencies and Ministers, with the object of furthering the principles that, in a free and democratic society, with a system of government based on representative democracy and sovereign power residing in the people—*

(a) the public interest is served by—

(i) opening the activities of government to scrutiny, discussion, comment and review;

(ii) promoting informed public participation in the processes of government;

(iii) enhancing the accountability of government and government officials; and

(b) the community should be kept informed of government's operations, including, in particular, the rules and practices followed by government in its dealings with members of the community; and

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

(2) *Parliament also recognises that there are competing interests in that the disclosure of particular information could be contrary to the public interest because its disclosure in some instances would have a prejudicial effect on—*

(a) essential public interests; or

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

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

5.(1) *The objects of this Act are to be achieved by—*

(a) creating a general right of access to documents of an agency and official documents of a Minister;

(b) providing means to ensure that information held by government which relates to the personal affairs of members of the community is accurate, complete, up-to-date and not misleading; and

(c) requiring that certain information and documents concerning the operations of government be made available to the public.

[849] QIC first submission no 56 at para B4.

(2) *It is the intention of the Parliament that the provisions of this Act be interpreted so as to further the objects set out in s.4, and that any discretions conferred by this Act be exercised as far as possible so as to facilitate and promote, promptly and at the lowest reasonable cost, the disclosure of information.*

(3) *Agencies and Ministers are to give effect to this Act in a way that assists the public to—*

(a) obtain access to the particular documents they seek, promptly and at the lowest reasonable cost; and

(b) ensure that information relating to an individual's personal affairs is accurate, complete, up-to-date, and not misleading.

APPENDIX G ~ QIC'S CASELOAD, STAFFING, TIMELINESS AND BACKLOG

Table G.1: Timeliness[850]

	MATTERS RESOLVED								
	1992/93	**1993/94**	**1994/95**	**1995/96**	**1996/97**	**1997/98**	**1998/99**	**1999/00**	**2000/01**
Number of external reviews resolved	27	125	179	203	246	270	301	352	396
Average elapsed time for finalisation for cases completed in the reporting period		162 days	286 days	292 days	352 days	478 days	309 days	370 days	185 days
Proportion of cases resolved in under 1 month	4	13	10	22	25	35	73	72	120
Proportion of cases resolved in 1 – 3 months	14	31	30	39	49	35	64	79	96
Proportion of cases resolved in 3 – 6 months	9	34	32	39	45	47	60	56	67
Proportion of cases resolved in 6 – 12 months	0	37	46	40	39	48	33	58	56
Proportion of cases resolved in 12 – 24 months	NA	10	57	43	45	36	30	34	38
Proportion of cases resolved in 24 – 36 months	NA	NA	4	20	43	25	10	18	9
Proportion of cases resolved in over 36 months	NA	NA	NA	NA	NA	44	31	35	10
Proportion of cases in which informal dispute resolution methods were undertaken		92%	91%	93%	91%	94%	90%	92%	95%
Proportion of cases resolved informally	74%	84%	76%	78%	79%	66%	77%	74%	86%
Number /proportion of cases resolved by formal decision	7 (26%)	20 (16%)	43 (24%)	44 (22%)	51 (21%)	91 (34%)	70 (23%)	93 (26%)	- (14%)

[850] QIC, *Annual Reports*: 1992/93 at 2 and 19; 1993/94 at 1-3 and 23; 1994/95 at 1-3 and 161995/96 at 1-3 and 16; 1996/97 at 1-3 and 16-17; 1997/98 at 1-2, 12 and 15-16; 1998/99 at 1-2, 10 and 13; 1999/00 at 1-3, 10, 12-13; 2000/2001 at i-ii, 10 and fax dated 26 November 2001 from the QIC.

Table G.2: Caseload, backlogs and staffing[851]

Reporting Period	Applications received	Applications completed	Applications pending	Equivalent full-time professional staff
18/1/93 – 30/6/93	120	27	93	2
1/7/93 – 30/6/94	274	125	242	4
1/7/94 – 30/6/95	223	179	286	6
1/7/95 – 30/6/96	209	203	292	6.3
1/7/96 – 30/6/97	231	246	277	8
1/7/97 – 30/6/98	210	270	217	8.5
1/7/98 – 30/6/99	291	301	207	8.8
1/7/99 – 30/6/00	327	352	182	10.6
1/7/00 – 30/6/01	376	396	162	10
Total	2261	2099		

851 QIC, *2000/2001 Annual Report* at 6.

APPENDIX H ~ HARM TESTS, PUBLIC INTEREST TESTS AND CLASS EXEMPTIONS

		Public Interest Test				Basis of exemption (harm test or class exemption)	
Exemption		None	1*	2#	3Ø	Harm test@	Class
36	Cabinet matter	4					4
37	Executive Council matter	4					4
38(a)	Matter affecting relations with other agencies			4		cause damage to relations	
38(b)	Matter affecting relations with other agencies			4			4
39(1)	Matter relating to investigations by Ombudsman or audits by Auditor-General etc.			4		prejudice …	
39(2)	Matter relating to investigations by Ombudsman or audits by Auditor-General etc.				4		4
40(a)	Matter concerning certain operations of agencies			4		prejudice ..	
40(b)	Matter concerning certain operations of agencies			4		prejudice …	
40(c)	Matter concerning certain operations of agencies			4		have substantial adverse effect …	
40(d)	Matter concerning certain operations of agencies			4		have substantial adverse effect …	
41	Matter relating to deliberative processes		4				4
42	Matter relating to law enforcement or public safety			4[852]		(a)-(j) various harm tests eg 'prejudice ..' 'endanger …'.	
43	Matter affecting legal proceedings	4					4
44	Matter affecting personal affairs			4			4
45(1)(a)	Matter relating to trade secrets, business affairs and research	4					4
45(1)(b)	Matter relating to trade secrets, business affairs and research	4				destroy or diminish commercial value	
45(1)(c)	Matter relating to trade secrets, business affairs and research			4		have adverse effect	
45(3)	Matter relating to trade secrets, business affairs and research	4				have adverse effect	
46(1)(a)	Matter communicated in confidence	4				found action for breach of confidence	
46(1)(b)	Matter communicated in confidence			4		prejudice … substantial adverse effect …	
47	Matter affecting the economy of State			4		expose person to unfair advantage	
48	Matter to which secrecy provisions of enactments apply				4		4
49	Matter affecting financial or property interests			4		have substantial adverse effect	
50	Matter disclosure of which would be contempt of Parliament or contempt of court	4					4

Harm Tests

@ **All harm tests except s46(1)(a), use the term 'could reasonably be expected to'. The QIC has interpreted this phrase as follows "...** ***The words call for the decision-maker ... to discriminate between unreasonable expectations and reasonable expectations, between what is merely possible (eg. merely speculative/conjectural 'expectations') and expectations which are reasonably based, ie expectations for the occurrence of which real and substantial grounds exist." Re B and Brisbane North Regional Health Authority (1994) 1QAR 279.***

Public Interest Test Key

* Public interest test 1: The public interest test is an additional element of the exemption. An agency or minister must show that the matter is of the kind specified in the exemption provision, and that its disclosure would, on balance be contrary to the public interest.

Public interest test 2: If the disclosure of the matter would have the effect specified in the exemption then it is exempt unless disclosure would, on balance, be in the public interest.

Ø Public interest test 3: Information is exempt unless its disclosure is required by a compelling reason in the public interest.

(For further discussion of tests 1 and 2 see EARC FOI report at paras 7.45-7.49 and *Paul Whittaker v Queensland Audit Office* QIC Decision number 05/2001 at 7.)

852 But other criteria must also be met.

APPENDIX I ~ USAGE OF EXEMPTION PROVISIONS

Table I.1: Agencies' reliance on the exemption provisions by exemption provision

Sections	Section title	Frequency of use
35	Information as to existence of certain documents	Infrequent use
36(1)(a)	Cabinet matter	Very frequent use
36(1)(b)	Cabinet matter	Moderate use
36(1)(c)	Cabinet matter	Moderate use
36(1)(d)	Cabinet matter	Moderate use
36(1)(e)	Cabinet matter	Frequent use
36(1)(f)	Cabinet matter	Moderate use
36(1)(g)	Cabinet matter	Moderate use
37(1)(a)	Executive Council matter	Infrequent use
37(1)(b)	Executive Council matter	Very infrequent use
37(1)(c)	Executive Council matter	Infrequent use
37(1)(d)	Executive Council matter	Very infrequent use
37(1)(e)	Executive Council matter	Infrequent use
37(1)(f)	Executive Council matter	Infrequent use
37(1)(g)	Executive Council matter	Infrequent use
38	Matter affecting relations with other agencies	Infrequent use
39(a)	Matter relating to investigations by Ombudsman	Moderate use
39(b)	Matter relating to audits by Auditor-General etc.	Very infrequent use
39(2)	Matter relating to audits by Auditor-General etc.	Very infrequent use
40(a)	Matter concerning certain operations of agencies	Moderate use
40(b)	Matter concerning certain operations of agencies	Infrequent use
40(c)	Matter concerning certain operations of agencies	Frequent use
40(d)	Matter concerning certain operations of agencies	Infrequent use
41	Matter relating to deliberative processes	Frequent use
42(1)(a)	Matter relating to law enforcement or public safety	Frequent use
42(1)(b)	Matter relating to law enforcement or public safety	Very frequent use
42(1)(c)	Matter relating to law enforcement or public safety	Very frequent use
42(1)(d)	Matter relating to law enforcement or public safety	Moderate use
42(1)(e)	Matter relating to law enforcement or public safety	Frequent use
42(1)(f)	Matter relating to law enforcement or public safety	Very infrequent use
42(1)(g)	Matter relating to law enforcement or public safety	Infrequent use
42(1)(h)	Matter relating to law enforcement or public safety	Moderate use
42(1)(i)	Matter relating to law enforcement or public safety	Infrequent use
42(1)(j)	Matter relating to law enforcement or public safety	Very infrequent use
43	Matter affecting legal proceedings	Very frequent use
44	Matter affecting personal affairs	Very frequent use
44(3)	Matter affecting personal affairs (access to nominated medical practitioner	Frequent use
45(1)(a)	Matter relating to trade secrets, business affairs and research	Moderate use
45(1)(b)	Matter relating to trade secrets, business affairs and research	Frequent use

Sections	Section title	Frequency of use
45(1)(c)	Matter relating to trade secrets, business affairs and research	Frequent use
45(3)	Matter relating to trade secrets, business affairs and research	Infrequent use
46(1)(a)	Matter communicated in confidence	Frequent use
46(1)(b)	Matter communicated in confidence	Frequent use
47(1)(a)	Matter affecting the economy of State	Very infrequent use
47(1)(b)	Matter affecting the economy of State	Very infrequent use
48	Matter to which secrecy provisions of enactments apply	Infrequent use
49	Matter affecting financial or property interests	Infrequent use
50(1)(a)	Matter disclosure of which would be contempt of contempt of court	Infrequent use
50(1)(b)	Matter disclosure of which would be contempt of a commission of inquiry	Infrequent use
50(1)(c)	Matter disclosure of which would be contempt of Parliament	Very infrequent use to frequent use[853]

Table I.2: Agencies' reliance on the exemption provisions by category of use

Usage	Sections
Very infrequent use	37(1)(b), 37(1)(d), 39(b), 39(2), 42(1)(f), 42(1)(j), 47(1)(a), 47(1)(b)
Infrequent use	35, 37(1)(a), 37(1)(c), 37(1)(e), 37(1)(f), 37(1)(g), 38, 40(b), 40(d), 42(1)(g), 42(1)(i), 45(3), 48, 49, 50(1)(a), 50(1)(b),
Moderate use	36(1)(b), 36(1)(c), 36(1)(d), 36(1)(f), 36(1)(g), 39(a), 40(a), 42(1)(d), 42(1)(h), 45(1)(a)
Frequent use	36(1)(e), 40(c), 41, 42(1)(a), 42(1)(e), 44(3), 45(1)(b), 45(1)(c), 46(1)(a), 46(1)(b), 50(1)(c)
Very frequent use	36(1)(a), 42(1)(b), 42(1)(c), 43, 44

These tables were collated on the basis of statistics contained in the FOI annual reports (published pursuant to s108 of the Act) for 1997/98, 1998/99 and 1999/00. The tables provide general indicators of the level of usage of exemptions. In some cases, classification was difficult due to the high variation between years. Further, it is apparent from a close analysis of the annual reports that the reliability of the information contained in those reports is limited because:

- some agencies did not indicate the exemptions invoked;
- some agencies referred to the exemption provision generally, and others referred to specific subsections; and
- in calculating the number of time particular exemptions were invoked, it appears that agencies have not applied consistent criteria.

[853] Reliance on this exemption was substantially higher in 1999/2000 than previous years.

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PARLIAMENTARY DEBATES

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The Hon P Beattie MP, Premier, Witness Protection Bill 2000 (Qld), *Queensland Parliamentary Debates (Hansard)*, 10 November 2000 at 4302.

Senator G Campbell, Return to order, Government agency contracts, *Commonwealth Senate Parliamentary Debates (Hansard)*, 27 September 2001 at 28109-28110.

LEGISLATION

Australia

Queensland

Acts Interpretation Act 1954 (Qld)

Adoption of Children Act 1964 (Qld)

Anti-Discrimination Act 1991 (Qld)

Appropriation Act 1998 (Qld)

Commissions of Inquiry Act 1950 (Qld)

Constitution Act 1867 (Qld)

Crime and Misconduct Act 2001 (Qld)

Electronic Transactions (Queensland) Act 2001 (Qld)

Financial Administration and Audit Act 1977 (Qld)

Freedom of Information Act 1992 (Qld)

Freedom of Information Regulation 1992 (Qld)

Freedom of Information Amendment Act 1993 (Qld)

Freedom of Information Amendment Act 1995 (Qld)

Freedom of Information Amendment Act 2001 (Qld)

Government Owned Corporations Act 1993 (Qld)

Guardianship and Administration Act 2000 (Qld)

Judicial Review Act 1991 (Qld)

Legislative Standards Act 1992 (Qld)

Libraries and Archives Act 1988 (Qld)

Libraries and Archives Regulations 1990 (Qld)

Local Government Act 1993 (Qld)

Ombudsman Act 2001 (Qld)

Parliamentary Committees Act 1995 (Qld)

Parliamentary Papers Act 1992 (Qld)

Penalties and Sentences Act 1992 (Qld)

Public Records Bill 1999 (Qld) (lapsed)

Police Powers and Responsibilities Act 2000 (Qld)

Police Service Administration Act 1990 (Qld)

Queensland Investment Corporation Amendment Act 1994 (Qld)

Vexatious Litigants Act 1981 (Qld)

WorkCover Queensland Act 1996 (Qld)

Commonwealth	*Administrative Appeals Tribunal Act 1975* (Cth)
	Privacy Act 1988 (Cth)
	Freedom of Information 1982 (Cth)
	Freedom of Information (Fees and Charges) Regulations 1982 (Cth)
	Freedom of Information Amendment (Open Government) Bill 2000 (Cth)
Imperial	*Bill of Rights 1688* (Imp)
Australian Capital Territory	*Freedom of Information Act 1989* (ACT)
New South Wales	*Administrative Decisions Tribunal Act 1997* (NSW)
	Freedom of Information Act 1989 (NSW)
South Australia	*Freedom of Information Act 1991* (SA)
Tasmania	*Freedom of Information Act 1992* (Tas)
	Freedom of Information Amendment Act (Cabinet Exemptions) Act 1999 (Tas)
Victoria	*Freedom of Information Act 1982* (Vic)
	Victorian Civil and Administrative Tribunal Act 1998 (Vic)
	Freedom of Information (Miscellaneous Amendments) Bill 1999 (Vic)
Western Australia	*Freedom of Information Act 1992* (WA)
	Freedom of Information Regulation 1993 (WA)

New Zealand

Official Information Act 1982 (New Zealand)

Local Government Official Information and Meetings Act 1987 (New Zealand)

Ombudsmen Act 1975 (New Zealand)

Canada

Freedom of Information and Privacy Act 1987 (Ontario).

Freedom of Information and Protection of Privacy Amendment Act, R.S.B.C 1996 (British Columbia).

Freedom of Information and Protection of Privacy Amendment Act 1999 (Alberta).

United Kingdom

Freedom of Information Act 2000 (UK)

Ireland

Freedom of Information Act 1997 (Ireland)

South Africa

Constitution of the Republic of South Africa 1996 (RSA)

Open Democracy Bill (South Africa)

CASES

The committee has relied heavily on numerous (reported and unreported) decisions of the Queensland Information Commissioner. These decisions are available:

- via the Information Commissioner's website at <http://www.slq.qld.gov.au/infocomm/>
- via the AUSTLII website at www.austlii.edu.au
- in the Queensland Administrative Report series (reported decisions).

Other cases:

Australian Capital Television Pty Ltd v Cth (1992) 177 CLR 106

Brisbane City Council v *Albietz* (2001) QSC 160

Cairns Port Authority v Albietz (1995) 2 Qd R 470

Commissioner of Police v Ombudsman [1988] 1 NZLR 385

Esso Australia Resources Ltd v The Commissioner of Taxation [1999] HCA 67

Grant v Downs (1976) 135 CLR 674

Johnson Tiles Pty Ltd v Esso Australia Ltd [2000] FCA 212

Local Government Association of Queensland Inc v Information Commissioner and Price [2001] QSC 52

Nationwide News Pty Ltd v Wills (1992) 177 CLR 1

R v The Australian Broadcasting Tribunal and Others ex parte Hardiman (1980) 144 CLR 13

Sobh v Police Force of Victoria (1933) 65 A Crim R 466

Sobh v Police Force of Victoria (1994) 1 VR 41.

Theophanous v Herald & Weekly Times Ltd (1994) 182 CLR 104