The Honourable Rod Welford MP
Attorney-General and Minister for Justice

Response to

The Legal, Constitutional and Administrative Review Committee Report no. 32, December 2001

Freedom of Information in Queensland

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 held by the Queensland Government:

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

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

(c) to increase the accountability of the Executive Government of the State and public officials.

(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;

(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of documents containing information relating to the personal affairs of an applicant that is inaccurate, incomplete, out-of-date or misleading; and

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

(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;

(b) recognises that information held by the Queensland Government is held on behalf of the people of Queensland; 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.

(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.*

Noted. While the existing sections 4 and 5 of the FOI Act set out the objects of the Act and the reasons for enactment the need to amend these clauses will be reviewed when considering the amendments to the Act required as a result of this Response.

Committee findings 5 to 10 – FOI Monitor

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.

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.*

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.

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.

Response to Committee Findings 5 to 10

The Government agrees in principle that there are a range of functions in relation to FOI requiring better co-ordination. The Government notes that many of the functions referred to by LCARC are currently undertaken by a range of agencies including JAG and the Information Commissioner. For instance, JAG produces an annual FOI report, which is tabled in Parliament, has conducted training for practitioners on FOI and publishes information about FOI for both practitioners and the public on its website. In addition, applicants who are aggrieved by the conduct of agencies in dealing with their FOI application may complain to the Ombudsman.

The Government is not convinced, however that it is appropriate or effective to establish a separate body or for the Information Commissioner to perform these functions given the potential for conflicts of interest. The Government will further consider how co-ordination can be improved.

Committee findings 11 and 12 – whole of government strategy for disclosure of information outside the FOI Act

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.

Response to committee findings 11 and 12

Many of the processes suggested by LCARC have already been effected. Government held information is made available to the public in a number of ways outside the FOI Act.

The Government notes that many agencies have developed administrative or statutory access schemes to enable frequently requested information to be accessed outside the FOI Act wherever possible. Documents relating to decisions about policies are also available on websites. There has been an increasing use of technology including the internet in recent years. Information available electronically includes statistical data, community and regional profiles and the results of consultation activities.

A number of factors impact on agency's decision to make documents available electronically. These include the sensitivity of the information and ensuring that information is given in context, is useable and understandable.

In addition, the recent launch of the Community Engagement Division (CED) by the Premier in 2001 will focus on enabling more Queenslanders to participate in policy development. The CED directions statement specifies that one of its roles is to build new ways of engagement for the public and includes the goal of improving access to public information. It will establish new and better ways to inform the community about and encourage participation in government policy.

Section 18 of the FOI Act requires agencies to identify and describe a range of documents available for inspection and purchase by the community in the agencies annual statement of affairs as well as the types of documents held by the agency. These include policy documents.

The Premier will write to all Ministers asking them to reinforce each Chief Executive Officer's obligation to ensure that a statement of affairs is updated and published. The Premier will also provide Ministers with a statement of agencies' disclosure obligations, which will make it clear that statements of affairs should be published on agency websites.

If a central co-ordinating agency is established the Government will consider if the development of a strategy is a role for that agency having regard to the processes for disclosure of information outlined above.

Committee finding 13—Recommendation

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

Not adopted. This section is located in a part of the FOI Act that deals with the interaction of the FOI Act with other laws. This section is appropriately located.

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.

The development of guidelines is supported in principle. If a central co-ordinating agency is established the Government will consider whether this is a function that should be undertaken by that agency.

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.*

Not adopted. The indemnities and protection extended by sections 102 to 104 of the FOI Act apply to the release of documents, which is permitted under the Act. These

indemnities and protection extend to officers and Ministers who release documents under the Act pursuant to a bona fide exercise of a discretion not to claim an exemption.

The proposal to extend the indemnities to cover release of documents where no FOI application has been lodged are very broad and the legal protection afforded may not strike a fair balance. For example the suggested extension would protect any officer that releases documents and not just those authorised under s33 to make decisions under the FOI Act. Administrative release may not be appropriate for some documents that are particularly sensitive or involve a number of competing interests. It may also be appropriate for applications to be brought under the FOI Act to ensure that all parties have access to internal and external review of decisions that they are dissatisfied with.

Agencies routinely release documents under administrative and statutory access schemes outside the operation of the FOI Act. When developing those schemes agencies should consider how officers should be indemnified and protected from prosecution.

In any event, officers who release documents in the course of their employment will be indemnified under the whole of government indemnity policy provided the release was done diligently and conscientiously.

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).*

Not adopted. A directive is unnecessary as the FOI Act contemplates disclosure of documents outside the operation of the Act. Section 14 contains a clear statement to this effect. In addition, s28 of the Act does not require agencies to claim an exemption where one is available. In addition, such a directive may be at odds with the independence of decision-makers who decide access applications.

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.

Adopted in principle. The Government will take these issues into account when drafting Chief Executive Officers' performance agreements.

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.

Adopted in part. The Government recognises the importance of the s108 Annual Report as it enables the Parliament and the public to know how well the FOI Act is being administered. It is acknowledged however, that the s108 reporting requirements are onerous and require considerable information, which may not be used for any purpose other than completing the report.

JAG will review the reporting requirements of s108 in consultation with the Information Commissioner and other relevant stakeholders to determine appropriate categories of information for inclusion in the s108 Annual Report. Any new categories created will be compatible with the FOIonLine system.

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 s 108 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.

Adopted in principle. In March 2002, the Department of Justice and Attorney-General (JAG) finalised the development of a new software program called FOIonLine, which replaces FOIDERS. This new web based system is user friendly and will remedy the problems associated with FOIDERS that cause delay in finalising the s108 report.

The Business Projects Unit of JAG, which provides technical assistance regarding the availability and problem rectification for the system, supports FOIonLine. The Business Projects Unit will provide support to agencies that adopt FOIonLine via the JAG Help Desk. The Help Desk will liaise directly with information technology staff from the agency concerned.

JAG has already adopted FOIonLine and all agencies have now been invited to use this software.

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.*

Noted. A specific review clause however is unnecessary as the Department of Justice and Attorney-General monitors the implementation of the FOI Act to ensure it continues to meet community expectations. In addition, under s86 of the *Parliament of Queensland Act 2001*, LCARC has the ability to deal with issues within its area of responsibility, which includes the FOI Act. The suggested provision would duplicate this role.

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).

Adopted. The Government will clarify the meaning of agency in s8 and ensure that similar definitions to that contained in the *Ombudsman Act 2001* are used.

Committee finding 25—Recommendation

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

Adopted. The Government will clarify the intent of s9(1)(a)(ii) which defines a 'public authority' as a body established for a public purpose by or under an Act. The Government notes that the Information Commissioner recently considered the meaning of s9(1)(a)(ii) in decision number 08/2001. In that decision the Information Commissioner decided that the correct interpretation of this section was that a public authority must be established by government under an enactment but that the public purpose did not need be set out in the enactment.

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).

Adopted. It appears that the qualifying words at the end of section 9(1)(e) were intended to apply to the whole of section 9(1). The provision will be clarified.

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).

Adopted for further consideration in proposed amendments to the FOI Act.

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.

Partially adopted. Section 7 of the FOI Act will be amended to include a footnote which refers to the definition of 'document' in s36 of the *Acts Interpretation Act 1954*. As the aim of the *Acts Interpretation Act 1954* is to assist in the interpretation of Acts and to shorten Acts by placing definitions for commonly used terms in legislation in one place, it would not be appropriate to repeat the definition of 'document' in the FOI Act.

As noted by LCARC in its report and the Information Commissioner, the definition of document includes data stored in a computer. Amendment in relation to 'data' therefore appears to be unnecessary.

The Government acknowledges that computerised back up systems exist to resurrect whole systems if a disaster occurs are not like an ordinary filing system. Significant resources may be involved in retrieving items from back up systems. The Attorney-General will consider the exclusion of back up systems from the 'documents' that an agency must search in response to an FOI access application.

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.

Adopted. The FOI Act will be amended to make it clear that the term 'official documents of a minister' does not include documents held by an agency.

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.

Adopted in part. Section 22(a) should enable access to be refused if the documents, sought under an FOI application are available to the applicant, as opposed to the community at large, under a statutory or administrative access scheme (whether or not a fee is charged).

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.

Substantially adopted. The Department of Families is currently reviewing the *Adoption of Children Act* 1964. That review may impact on any amendments to the FOI Act in relation to adoptions. The Attorney-General will consult with the Department of Families to determine whether the existing provision about access to adoption information is adequate. If the existing provisions are found insufficient the Department of Justice and Attorney-General will liaise with the Department of Families to develop appropriate provisions.

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.

Not adopted. The Government considers that s96 of the FOI Act provides an adequate response for the Information Commissioner where access to a document has been obstructed. Section 96 enables the Information Commissioner to bring evidence of breach of duty by an officer or misconduct by an officer in the administration of the Act to the attention of the relevant Minister or Chief Executive Officer who would then take appropriate action.

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.

Adopted. The Government acknowledges that it is important that personal information held on government files is accurate, particularly as government may use

that information as a basis for decision making. Section 53 of the FOI Act makes it clear that a person may apply to have information about their personal affairs or their deceased next of kin's personal affairs corrected if the information is inaccurate, incomplete out of date or misleading. It is noted that LCARC is concerned that the current wording of s53 presupposes that a determination has been made that the information in question is inaccurate, misleading, incomplete or out of date. To avoid this s53 of the FOI Act will be amended to provide that applications to amend documents that are claimed to be inaccurate, incomplete, out of date or misleading may be made.

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).

Adopted. The FOI Act will be amended to enable the transfer of applications to amend information where the document in question is in the possession of another agency or Minister or the subject matter of that document is more closely connected with the functions of the another agency or Minister.

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.

Adopted. Section 54 will be amended to require applicants to provide details of why the information held is out of date, misleading, incorrect or incomplete, the reasons for the claim and any information required to rectify the problem.

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).

Not adopted. The suggested amendment is a practice issue and is more appropriately dealt with by guidelines and training. Including a provision of this nature in the Act would make it unduly prescriptive. The Department of Justice and Attorney-General will consider developing a guideline about this.

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.*

Adopted. While the current provision is clear the Government will consider redrafting s55 into two new sections when developing the amendments to the FOI Act required as a result of this Response.

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.

Adopted. The intention of section 59(2) is that it applies to a decision by an agency not to amend personal affairs information of the applicant or personal affairs information of the applicant's next of kin. Section 59 will be amended to make this clear.

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.

Not adopted. The Government considers that notification is an administrative matter, which should be left to agencies' discretion. A document that is amended may have been created many years prior to the amendment and may have been sent to many different agencies. Forwarding notification to all other previous recipients of the document in these circumstances is likely to be impractical and costly. There may however, be situations where notification is appropriate. Agencies should be able to decide this on a case by case basis. The Department of Justice and Attorney-General will consider whether guidelines should be developed to assist agencies to identify when notification of previous recipients of a document would be appropriate.

Committee findings 44 and 45

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.

Adopted. The FOI Act currently requires details of agency reading rooms and facilities and publications available in those rooms or facilities to be included in the

s108 Annual Report. As an agency's statement of affairs is intended to provide information to the public about the agency's operations, the types of documents available for purchase and how to access certain types of documents, it is appropriate that reading room information be included in agency's statement of affairs. Section 18 of the FOI Act will be amended to reflect this.

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.

Adopted in part. As indicated in response to committee finding 11 above, the Premier will reinforce each Chief Executive Officer's obligation to ensure that Statements of Affairs are completed and published in accordance with the Act. The Government will also advise Departments that Statements of Affairs should, wherever possible, be published on their websites as well as in agencies' annual reports where this is appropriate.

The Government notes that in its Report, LCARC indicates that a limited number of requests for Statements of Affairs appear to be received by agencies. Any auditing of those Statements is likely to be resource intensive. The FOI Act however, provides a mechanism, which enables a person to complain about an agency's non-compliance with the Statement of Affairs requirement in the FOI Act. Section 20 enables a person to serve an agency's principal officer with a notice about the agency's non-compliance with the Statement of Affairs requirements. The principal officer is then required to make a decision about the statement of affairs. That decision is reviewable by the Information Commissioner.

The Department of Justice and Attorney-General will consider developing guidelines for agencies about the type of information that should be included in Statements of Affairs.

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.

Adopted in principle. The Queensland Government has recognised the need to improve recordkeeping and management practices. There is now a new legislative and policy framework in place in Queensland to improve the management of public records. Under the new *Public Records Act 2002*, the State Archivist is responsible for developing and promoting effective and efficient methods, procedures and systems for making, managing, keeping, storing, disposing of and preserving public records.

In January 2002 the State Archivist released *Information Standard 40 Recordkeeping* (IS40) which is to be implemented by Queensland public authorities by 31 December 2006. IS40 recognises that it is critical that each public authority establishes recordkeeping as a systematic part of its business operations so that records are identified, captured and retained in an accessible and useable format that preserves the integrity of those records for as long as they have value. The purpose of IS40 is to provide a policy framework for achieving this outcome. State Government departments and local governments are required to submit to the State Archivist a Strategic Recordkeeping Implementation Plan by 30 June 2002 for assessment and endorsement, and then develop an Operational Recordkeeping Plan by 31 December 2002. Statutory authorities, the courts and Ministerial offices have an additional 12 months to submit these two plans to the State Archivist. Queensland State Archives (QSA) has embarked on a two-year training, education and awareness program for government employees to promote IS40. By 2005 QSA intends to have introduced a more formal compliance framework in partnership with the Queensland Audit Office.

In addition, *Information Standard 41 (IS41) Managing Technology Dependent Records* identifies key principles for managing electronic records (including micrographic and audio-visual records), generated or received in the course of government business. IS41 requires that these types of public records must be created, maintained and accessible for as long as they are required to meet legislative, accountability, business and cultural obligations.

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.

Adopted in principle. The *Public Records Act 2002* commenced on 1 July 2002. The interrelation of the FOI Act and public records legislation was addressed during development of the *Public Records Act 2002*. Section 3 of the *Public Records Act 2002* states that one of the main purposes of the Act is to ensure public access to

records under the Act is consistent with the principles of the *Freedom of Information Act 1992*. The Attorney-General will consult with the State Archivist prior to implementing any of LCARC's recommendations concerning agencies' management of information.

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.

Not adopted as the Act works best where both applicants and agencies have certainty as to agencies' responsibilities under the Act. Providing a mechanism for generally varying the terms of responsibilities of agencies and applicants under the FOI Act will only add confusion and time in processing applications. It may disadvantage applicants particularly given the unequal bargaining positions of most applicants in relation to agencies.

There is currently some scope to negotiate in relation to applications. This is available in limited circumstances. For instance, s28A(2) enables negotiation about timeframes where an application would otherwise be refused because it would result in a substantial and unreasonable diversion of an agency's resources or it would interfere unreasonably with the performance of the agency's or Minister's functions.

Committee finding 51—Recommendation

Section 25(2) should enable agencies and ministers to waive the requirement for a written application in appropriate circumstances.

Noted. The Attorney-General will consult with the Adult Guardian and Public Advocate about this issue to ensure that the FOI Act operates effectively for people with disability when consulting in relation to committee finding 88.

Written applications however, provide independent evidence of the documents that an applicant wishes to access. It is particularly important that the scope of an application be clearly defined for both the applicant and agency particularly if an agency's decision about an application is to be subject to internal or external review. This minimises the time spent in responding to the application and fees and charges (if any) imposed. Permitting oral applications may result in confusion or disputes about the scope of an individual's application.

The FOI Act accommodates those individuals who may have difficulty in completing applications or who apply to the wrong agency. Section 25(3) requires agencies to assist applicants to make applications in a way that complies with the provisions of section 25. In addition, agencies are required to consult with applicants under s25(4) before refusing access to a document because the application does not comply with the provisions of the Act.

The *Electronic Transactions Act 2001* will enable applications to be lodged electronically if the agency consents to this.

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.

Adopted. The FOI Act will be amended to include a requirement that access applications must include an address at which the applicant may be contacted and to which notices under the Act can be sent.

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.*

Adopted in part. The Government agrees that prescribed application forms are unnecessary and not within the spirit of the FOI Act.

Conferring a specific function on an FOI Monitor to assist applicants to make applications would duplicate functions already being carried out by the Department of Justice and Attorney-General and other agencies. Section 25(3) of the FOI Act requires agencies to assist applicants to frame applications. This includes identifying the correct agency to apply to.

The Department of Justice and Attorney-General has developed information which is available on its website about how to make a Freedom of Information application. This information is available to other agencies by accessing the website should they wish to provide written information to potential applicants. In addition, many agencies now have information about making FOI applications available on their websites.

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.

Not adopted. The suggested amendments are unnecessary. Section 27 of the Act requires agencies and Ministers to notify an applicant that the application has been received within 14 days of its receipt by the agency. While it is desirable that

applicants be notified as soon as possible if the application does not comply with the FOI Act it may not always be possible to do this within 14 days of receipt of the application.

In any event s25 of the FOI Act adequately addresses this issue by requiring agencies and Ministers to consult with and assist applicants to make compliant applications. Under s25(4) an agency or minister cannot refuse access to a document on the basis that the application does not comply with section 25 unless the applicant has first been consulted and given a reasonable opportunity to make the application in a form that complies with the Act.

What agencies should do to consult and assist applicants to frame compliant applications including the timeframe for these activities are practice issues and are more appropriately dealt with by departmental guidelines than legislative amendment. The Department of Justice and Attorney-General will consider developing guidelines about these matters.

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 if it becomes apparent that the fee was not required to be paid.

Adopted in part. The FOI Act will be amended to require the relevant $31 fee to accompany applications for access. Where the fee does not accompany the application, it will not be a valid application for the purposes of the Act and the time periods for making decisions will not run until the fee is paid.

The period of time within which applicants must be notified of the requirement to pay a fee is an administrative matter and is more appropriately dealt with in guidelines than a legislative provision. This allows more flexibility as agencies may not ascertain that a fee is payable until some work has been done on the application.

Section 25 of the FOI Act imposes an obligation on agencies to help a person make a valid application. This would include notifying applicants of the need to pay the fee as well as the fact that no work will be undertaken on the application until the fee has been paid. It will be in agencies' interests to notify applicants about the need to pay a fee as soon as this becomes apparent to reduce the risk of review applications.

The Government considers that refunding fees paid is best dealt with administratively rather than legislatively. Many scenarios may arise where an application fee was not payable and should be refunded. The Department of Justice will consider developing guidelines about refunds and notifying applicants of any application fee payable.

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*
- *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.*

Adopted. Section 26 will be amended to ensure transfers of applications may be treated as fresh applications by the transferee agency. This will enable the transferee agency to charge an application fee which may help to prevent misuse of the provision by applicants making one application, which effectively seeks documents held by many different agencies. In addition, as is currently the case, any transfer will be subject to the consent of the transferee agency.

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.

Adopted. It is clearly the intention of the Act that agencies and Ministers assist applicants whether the whole of their applications or only part of their application should have been directed to another agency.

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).

Adopted in principle. The Government acknowledges the importance of applicants being aware of their review rights and that agencies should be informing them of this

at an early stage. There are practical difficulties with this however, as the time limits applicable will vary depending on the application and consultation requirements, which may not be ascertained until the application is processed. Legislative amendment is not considered appropriate however, the Department of Justice and Attorney-General will develop a guideline addressing this issue under which agencies will be required to forward information to applicants which outlines applicable time limits.

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.

Substantially adopted. The Government is concerned however, that enabling applicants to seek review of decisions about parts of their applications when the entire application has not been finalised and matters are still outstanding is likely to be confusing and expensive. The issue will be further considered in proposed amendments to the FOI Act.

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.

Noted. As the FOI Act clearly specifies the time frames within which agencies are required to carry out 'relevant activities' amendment to the Act is not necessary. The Department of Justice and Attorney-General will however, consider developing guidelines about this issue.

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.

Not adopted due to the concerns raised at committee finding 50 above. The Government acknowledges that s28A permits agencies and applicants to agree on an appropriate period for processing an application which would otherwise be refused on the basis that it would unreasonably divert the resources of the agency. This type of provision should only be available in the limited circumstances currently prescribed by the Act and any general provision would be contrary to the interests of applicants.

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.

Not adopted. Section 79(2) currently enables agencies and Ministers to apply to the Information Commissioner for an extension of time to deal with an application where the time specified in the Act has elapsed and the agency or Minister has not made a decision. Agencies should use this provision where they have been unable to make a decision within the statutory timeframe. It is inappropriate that applicants should apply for an extension of time to enable an agency or Minister to make a decision about their application.

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.

Supported in principle. The priority for processing applications, including urgent applications, is a matter for agencies to consider having regard to the requirements of the FOI Act and work within the agency. The Department of Justice and Attorney-General will consider, however whether guidelines would be of assistance to agencies.

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.*

Adopted in part. The Government agrees that the FOI Act should continue to contain a deemed refusal provision.

As the Government is not adopting the recommendation contained in committee finding 50 or 63 it is not necessary to ensure that a deemed refusal does not occur as outlined in dot point two above.

The Government considers that inclusion of a provision as suggested at dot point three above may be unduly prescriptive. The Government acknowledges however, the intent of LCARC's recommendation and will consider whether the FOI Act can be amended to give effect to this intent or whether guidelines about this issue would be sufficient. The Department of Justice and Attorney-General will consider whether agencies should be required to report on the frequency with which they meet the time frames in the FOI Act.

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.*

Adopted.

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'.

Not adopted. The intention of section 28(1) is clear and the amendment suggested would not add to the interpretation of the provision. Section 28(1) gives agencies and Ministers the discretion to refuse to grant access to exempt matter or exempt documents rather than a discretion to release. It is contained in a section of the Act that deals with refusal of access on a variety of grounds.

Committee finding 74—Recommendation

Section 28(2) (sic) 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.

Adopted in principle. The Government agrees that s28(3) of the FOI should continue to refer to a non-exhaustive list of matters to be considered by agencies and Ministers before refusing to dealt with an application. The Department of Justice and Attorney-General however will consider developing a guideline about this matter.

Committee finding 75—Recommendation

The FOI monitor should provide agencies with advice and assistance regarding the exercise of the s 28(2) power.

Supported in principle. Section 28 was amended in 2001 to provide examples of the circumstances which would justify an agency refusing to deal with an application on the basis that it would substantially divert the agency's resources. It is anticipated that any guidelines developed by the Department of Justice and Attorney-General, referred to in response to committee finding 74 above, will assist agencies regarding the exercise of the s28(2) power. If a central co-ordinating agency is established, the Government will consider if this is a role that should be undertaken by that agency.

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.

Adopted subject to the development of appropriate safeguards. The Government acknowledges that multiple FOI applications by one applicant may, when considered as a whole, have a substantial effect on a Minister's or an agency's ability to perform its functions. Multiple applications may also unreasonably divert resources when considered as one application. This is an issue however, that requires careful consideration to ensure that applicants are not disadvantaged.

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.*

Partially adopted. This provision saves time and resources by enabling agencies in appropriate circumstances to refuse access without having to identify all of the documents in its possession that are relevant to the application or state reasons for the exemption. For instance, an agency may use this provision where an applicant seeks all Cabinet documents about a particular matter. The Government considers

that applicants should be informed of the exemption provision relied on. The section will be amended so that agencies must identify the exemption provision relied on. Agencies will not be required to specifically identify individual documents.

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.

Adopted. Sections 28(2) and (5) will be amended to enable an agency or minister to refuse to 'deal with' an application. It is not intended however, to include these provisions in stand alone or separate sections.

Committee finding 79—Recommendation

Agencies and ministers should be required to comply with the requirements of s 28A [What an agency or minister must do before refusing access under s 28(2)], before relying on s 28(5) to refuse to deal with an application.

Not adopted. Section 28(5) enables an agency to refuse access where it is clear from the terms of the application that all documents sought are exempt. The obligation to consult in s28A relates to an application where access is to be refused because dealing with the application would substantially and unreasonably divert the resources of the agency or interfere substantially with the performance by the Minister of the Minister's functions. Consultation where all documents sought are exempt is not likely to be beneficial as the applicant would be unable to refine the scope of their application to enable access to occur.

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.

Substantially adopted. The Government acknowledges that some agencies expend significant time and resources in responding to serial or repeat applications lodged by a limited number of applicants. Any amendment however will need to be subject to appropriate limits to safeguard legitimate use of the FOI Act by applicants. These limits may include restricting the grounds of refusal to repeat applications where the documents sought by the applicant are the subject of a prior access application which is still being processed, or which is subject to review or which are subject to a decision by the Information Commissioner that the documents do not exist, are exempt or incapable of being located.

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.*

Not adopted. Section 30 already provides adequate discretion to agencies and the suggested amendments are largely addressed by s30. Section 30 enables an applicant to request access in a particular form. Applicants may ask for copies of documents if they do not wish to inspect them. If an applicant has requested access in a particular form, agencies and Ministers must provide the applicant with access in that form unless it would unreasonably interfere with the operation of an agency or the performance of a Minister's functions. The section also contemplates that if access is not given in the applicant's preferred form then the applicant must not be required to pay a charge that is greater than the charge would have been had access been granted in the applicant's preferred form. The section strikes a balance between providing access to an applicant in the form requested and the need to ensure the efficient and effective operation of agencies and performance of ministerial functions.

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.

Adopted in principle. The Department of Justice and Attorney-General will consider developing a guideline about appropriate forms of access.

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.

Adopted. The lack of a time limit for inspection causes operational difficulties for agencies, as they have to retain files in FOI areas rather than in operational areas.

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.*

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.

Not adopted. Section 30 adequately addresses forms of access to documents. The Government is not convinced that the amendments recommended by LCARC are necessary. The Government notes that s14 of the *Public Records Act 2002* requires public authorities to ensure that information that can only be made available using particular equipment or technology remains available to be produced and is accessible.

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.

Not adopted. The suggested amendment is unnecessary. Section 30 of the FOI Act does not contain an exhaustive list of the forms in which access to documents may be given. Agencies may provide access electronically where appropriate and subject to safeguards. Section 30(7) specifically contemplates an agency or Minister giving access to documents in a form agreed to by the applicant. This would include

electronic access to documents. The Department of Justice and Attorney-General's annual FOI report for 2000-2001 notes that the Department of Primary Industries utilises its email network to process FOI applications and that other agencies are moving towards a paperless FOI process.

In addition, s16 of the *Electronic Transactions Act 2001* allows an agency to produce documents electronically where the applicant consents to this form of access.

Given the variety of documents that applicants may be entitled to access and the potential for alteration or deletion of documents it is appropriate for agencies to decide when access should be given electronically. The Department of Justice and Attorney-General will consider developing guidelines about electronic access to documents in consultation with relevant departmental stakeholders.

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.

Adopted. While the FOI Act does not contain an explicit provision that applicants can only access documents created or received by an agency as at the date of application it is noted that this is the view currently adopted by the Information Commissioner and agencies.

It is acknowledged however, that there may be some uncertainty about whether an access application applies to documents of an agency which come into existence after the application is made but before a decision is made. The Act will be amended to clarify that access applications apply only to documents created at the date of application.

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.*

Adopted in part. The use of 'close relative' and 'next of kin' will be standardised and a definition of close relative provided. The definition will include spouses and de facto spouses. It is often difficult for agencies to determine who is the most appropriate person to consult with particularly when there are a number of close relatives at the same level. If all close relatives had the option to make an

amendment application agencies could be faced with numerous and conflicting applications.

It is therefore appropriate that only the person identified as a 'senior closest relative' to the deceased person is able to apply to amend information.

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.*

This recommendation will be referred to the Adult Guardian, the Public Advocate and the President of the Guardianship and Administration Tribunal for their views. Further consideration will be given to this matter when that consultation is complete.

Committee finding 90—Recommendation

The term 'matter' should be defined in s 7 as 'part of a document'.

Not adopted. It is clear from the terms of s32 of the FOI Act that its intention is to allow access to documents with exempt matter excised from them. The suggested definition of 'matter' will not add to the meaning of s 32 of the FOI Act and may cause confusion. Under part 3, division 2 of the FOI Act, part of a document or the whole of a document may be exempt matter. The suggested amendment would therefore be inappropriate.

Committee finding 91—Recommendation

The Act should provide for cross-agency delegation of decision-making within the same portfolio.

Adopted. This would allow small agencies that receive few FOI applications to rely on the FOI expertise of staff in larger agencies within the same portfolio. This would lead to cost savings, contribute towards achieving consistent decision-making and maximise the use of FOI expertise in Departments.

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.

Not adopted. A number of provisions of the FOI Act provide that matter is exempt unless its disclosure is in the public interest. As notification under s34 of the Act is an official record of an agency or Minister's decision, it is appropriate that the notification details all public interest considerations. This ensures that the applicant and any third party who has been consulted is aware of all matters considered and allows the agency or Minister to show that a balanced decision has been made.

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.*

Not adopted. Section 25(3) makes it clear that agencies have a duty to assist applicants and no amendment is required on this matter. The information that an agency should provide to an applicant where documents cannot be found or have been destroyed or are located with another agency is more appropriately dealt with by way of guidelines than legislative amendment. The Department of Justice and Attorney-General will consider developing guidelines about this.

Committee finding 94—Recommendation

Section s 34(3) should be repealed.

Not adopted. This provision ensures that agencies do not have to disclose exempt matter in the notification of decisions and reasons provided to an applicant. It ensures that the notification is not required to disclose the very information, which forms the basis for the decision to refuse access. In some cases this may require the notification to be silent about the existence and characteristics of a document. The Government acknowledges that this should be avoided wherever possible. Where a notification is silent the applicant may apply for review of the decision and the document may be required to be produced to the Information Commissioner. The Department of Justice and Attorney-General will consider developing a guideline about the use of s34(3).

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.

Adopted in part. The Government supports the preparation of schedules in appropriate circumstances however, given the variation of applications and decisions, this is a matter that should be left to agencies' discretion. If schedules were required for all decisions this would be resource intensive and add to the time taken to process applications.

The Department of Justice and Attorney-General will consider developing guidelines about the appropriate use of schedules.

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).*

Adopted in part. The Government will consider including a specific provision enabling agencies to refuse access to documents on the basis that the documents do not exist or have been lost. It is arguable whether such a clause is necessary, as clearly it is implicit that agencies cannot grant access to documents that do not exist or have been lost.

It is unnecessary for the Act to specify the information that must be included in a statement of reasons. This is unduly prescriptive. This is an issue to be addressed through training and guidelines.

The Government will consider whether a mechanism for review is necessary when including a specific provision about access to documents. It is noted that the Information Commissioner has previously decided that he has this jurisdiction.

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.

Adopted in part. The Government endorses retention of s51 in its current form. The Government supports agencies consulting appropriately with third parties where matter may be exempt under the exemption provisions in the FOI Act. The development of guidelines outlined in the response to committee finding 99 will assist agencies to identify when to consult and the extent of any consultation that is necessary. If a central co-ordinating agency is established, the Government will consider whether this is a function that should be undertaken by that agency.

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.

Adopted. If a third party or agency who has objected to an agency's decision to release a document subsequently changes their mind and agrees to the release, the agency should not have to wait until the possible review period expires before releasing the document.

Committee finding 99—Recommendation

The FOI monitor should issue guidelines about, and monitor the adequacy of, consultation by agencies and ministers with third parties.

Adopted in principle. The Department of Justice and Attorney-General, will consider developing guidelines about consultation by agencies and Ministers with third parties pursuant to s51 of the Act.

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.

Adopted in part. Amendment to the Act to stress that the internal review process should be conducted entirely separately from the original decision making process is unnecessary. Sections 52(5) and 60(5) of the Act make it clear that applications for internal review must be dealt with separately from the original decision making process. Sections 52(4) and 60(5) make it clear that internal reviews are to be treated as if they were fresh applications.

The Government agrees that s60 of the FOI Act should be amended to ensure that applicants who apply to Ministers for amendment of documents have the same right to internal review of decisions made by Ministerial staff as applicants who apply to agencies for amendment.

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.

Adopted.

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.*

Not adopted.

It is the responsibility of agencies to monitor and review their internal processes to ensure that appropriate decisions are being made. An external body is unnecessary as applicants, who are dissatisfied with decisions made by agencies, may apply for review to the Information Commissioner, an external arbiter. In addition, applicants aggrieved by the conduct of agencies may be able to complain to the Ombudsman. Decisions made by the Information Commissioner which highlight agency deficiencies provide an effective review mechanism for agency processes.

Committee finding 104—Recommendation

Section 52 (Internal review) and s 71 (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.*

Adopted. The Information Commissioner has made decisions on a number of occasions indicating that he has jurisdiction to review these decisions. LCARC has identified however, that some agencies are not notifying applicants of their rights of review where the decision to refuse access to documents is based on an assertion by the agency that they are not subject to the FOI Act. The Government will amend the Act to make it clear that applicants may seek internal and external review of these decisions.

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.

Adopted. It appears that in practice departments and agencies have exercised their rights of internal and external review where that agency or department is consulted on an application as a third party and a document is released contrary to their views. The Government acknowledges that it would be of assistance to make this right clear.

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.

Adopted. The FOI Act will be amended to ensure that the requirements for applicants to provide an address are consistent throughout the Act.

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.

Adopted. The Government agrees that agencies and ministers should consider including information about how applicants can assist internal review applications in the original decision letters. The Department of Justice will consider developing guidelines about original decision letters.

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.

Adopted in part. The Government agrees that the Act should be amended to provide the time in which an application for internal review can be lodged should not commence to run until the applicant is given **written** notice of a decision. In practice applicants would be given written notice, as the FOI Act requires agencies and Ministers to provide written reasons for their decisions. It is unnecessary for decisions by agencies to refuse to extend the 28 day period to be subject to external review as applicants may relodge their original application.

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.

Adopted in part. The Government acknowledges the difficulty agencies experience in conducting internal reviews of decisions within the current 14 day time limit. The Act requires such reviews be conducted as though a fresh application had been received. The Act will be amended to provide 28 days for internal review. The Government notes LCARC's comment this extension should reduce the number of deemed refusals and have a positive flow on effect for the Information Commissioner's workload. The Government does not however, consider it appropriate that agencies or ministers are able to negotiate to extend the time during which a review should be completed. See response to committee finding 50 and 63.

Recommendations 112 and 113 - not adopted.

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.*

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).*

Response to Committee findings 112 and 113

Not adopted. Separation of the roles of the Ombudsman and Information Commissioner is not necessary as the current system is operating well. While LCARC has identified a perceived conflict of interest no actual conflict was identified. Current practices to ensure that there is no conflict of interest are working effectively. These practices ensure that the Information Commissioner has no involvement in external review of decisions of the Ombudsman's office as this has been delegated

to the Deputy Information Commissioner. Primary decisions and internal review decisions are not made by the Ombudsman but by another officer authorised to perform this function.

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.*

This is a matter for the internal management of the Office of the Information Commissioner. The FOI Act includes a requirement for strategic reviews of the Office of the Information Commissioner to be conducted by an appropriately qualified person every five years.

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.

The Government supports the intention of this committee finding. The Attorney-General will consult with the Information Commissioner about the feasibility of publishing all decisions.

Committee finding 116—Recommendation

The Information Commissioner should explore the advantages of the office having its own Internet website and domain name.

This is an issue for the internal management of the Office of the Queensland Information Commissioner. The Attorney-General will ensure that this matter is brought to the Information Commissioner's attention.

Committee finding 117—Recommendation

Section 77 (Commissioner may decide not to review) should:

- *make it clear that the Information Commissioner is entitled to invoke s 77(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.*

Adopted. The FOI Act will be amended to enable the Information Commissioner to decide not to review part of an application on the basis that it is frivolous, vexatious, misconceived or lacking in substance. The Act will also be amended to enable the Information Commissioner to refuse to review an application for external review on the basis of 'want of prosecution' by the applicant.

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.

Adopted in part. LCARC has noted that section 35 is rarely used. In the limited circumstances where its use is appropriate, it enables an agency to avoid identifying that any documents are held by the agency where those documents are Cabinet matter, Executive Council matter or documents relating to law enforcement or public safety. Its use in these limited circumstances is justified.

The Government acknowledges that the Information Commissioner should be able to identify documents that he has decided are not exempt in his decision. The FOI Act will be amended to enable this to occur. Those amendments will be subject to safeguards to ensure that no such information is released to an applicant unless the relevant period in which an agency or Minister may apply for judicial review has expired.

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.

Adopted in part. While ss 71 and 88 of the FOI Act confer broad powers of review on the Information Commissioner, the Government will consider whether explicit jurisdiction over forms of access is required in the amendments to the FOI Act.

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.

Adopted. The Information Commissioner has wide powers of review and has made a number of decisions in which he has confirmed that he has the power to review a decision on the basis that an agency or Minister has not located and dealt with all documents in its possession or control. The Government will however, clarify this in the FOI Act.

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.*

Adopted. The FOI Act will be amended to remove any doubt that the Information Commissioner has jurisdiction to conduct a review on the basis of a fresh deemed refusal.

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.

Adopted.

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.*

Adopted. The Government will review s74 to address the issues raised by LCARC.

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';*
- *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).

Adopted. The Information Commissioner has power to inspect an exempt document under s76. The Information Commissioner also has power to require production of documents under s85, if the Information Commissioner has reason to believe that a person has information or a document relevant to a review. These sections give the Information Commissioner the powers LCARC has suggested. However, the Government will amend the FOI Act to make this clear and to give the Information Commissioner explicit jurisdiction to require production of a document to determine whether a fee or charge is properly payable.

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.

Adopted in part. The Government will amend the FOI Act to enable the Information Commissioner to disclose a document to a party to a review in limited circumstances for example: where the party concerned has provided the document to the Information Commissioner; or the person concerned has created the document.

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.

Adopted. A third party who objects to the release of a document by an agency should have to establish why the document is exempt from release.

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.

Adopted in part. The Government adopts recommendations (a) and (b), however does not adopt recommendation (c). Deletion of s87(3) is unnecessary.

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.)

Not adopted as the Government does not propose to implement the Committee's findings with respect to conclusive certificates for sections 36 and 37. In addition, s84 makes it clear that the Information Commissioner's grounds for review of conclusive certificates are limited to whether there are reasonable grounds for the issue of the certificate.

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).

Not adopted. The Government is not convinced that there is sufficient evidence to justify this approach and is concerned that such a power would result in the adoption of an adversarial attitude to external review applications when co-operation between agencies and the Office of the Information Commissioner should be fostered. The Government is also concerned that conferring a power of entry and search on the Information Commissioner is excessive, particularly as the Information Commissioner

has power to require production of documents, and to obtain information and compel attendance of relevant persons before him.

The Information Commissioner is able to highlight an agency's lack of response in his annual report and by referring inappropriate conduct to the Chief Executive of the agency concerned.

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.

Not adopted. There is no demonstrated need for contempt provisions in the Act. It is not appropriate that the Information Commissioner is able to certify matters of 'contempt' to the Supreme Court. The Information Commissioner has existing powers, which may be used to address deliberate non-compliance with the FOI Act or inappropriate behaviour of officers in relation to the Information Commissioner. These include:

- reporting breaches of duty or misconduct of an officer of an agency to the principal officer of the agency or Minister;
- reporting inappropriate conduct in his annual report;
- making a report to the Speaker on matters relating to a particular review; and
- in appropriate cases reporting official misconduct by officers to the Crime and Misconduct Commission.

The Government notes that the Ombudsman, while unable to review the Information Commissioner or decisions that could be subject to review by the Information Commissioner, has jurisdiction to review conduct of agencies and officers with respect to administrative decisions and actions.

In addition the unauthorised or inappropriate disposure of public records is an offence under the *Public Records Act 2002*.

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).

Adopted.

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.

Not adopted. The Government is concerned that implementing this recommendation would undermine the operation of the Office of the Information Commissioner. It is important that the Information Commissioner is an independent decision-maker. If the Information Commissioner provides an opinion on a matter the Information Commissioner may be considered to be prejudging the matter. It will often be difficult to determine when a matter may ultimately be subject to external review. It is likely that there will be situations where an opinion has been provided in a matter that is subject to external review.

Committee findings 136 and 137

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).

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.

Response to Committee Findings 136 and 137

The Attorney-General notes that Acts establishing other review bodies such as the Guardianship and Administration Tribunal and the Children Services Tribunal contain offence provisions about making false and misleading statements or providing false and misleading documents to the Tribunal. The Attorney-General will review these offence provisions to ensure that the FOI Act contains appropriate offence provisions that are comparable to other Tribunals. This review will also consider the appropriate maximum penalties that should be imposed. It is noted however, that it is an offence for a person to fail to comply with a notice given by the Information Commissioner to attend before the commissioner, give information or produce a document so an offence provisions as suggested in committee finding 137 may be unnecessary.

Committee finding 138—Recommendation

The words 'the State' in s 98 (Costs in proceedings) should be replaced with 'an agency or a minister'.

Not adopted. It is clear that the section was intended to apply to proceedings instituted by the State so that the State would be responsible for costs in those circumstances. A number of agencies captured by the FOI Act do not represent the

State (eg port authorities, local governments) and it would be unreasonable to include those agencies within the definition. In any event, the court has a wide discretion with respect to costs under the *Judicial Review Act 1991* and will make appropriate orders where an agency, other than the State, is an unsuccessful applicant.

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.*

Not adopted. The Supreme Court has recognised that s99 enables the Information Commissioner, in appropriate cases, to make submissions on the proper construction of the FOI Act and the manner in which the powers conferred by the Act are to be exercised. It is a matter for the court on a judicial review application, to determine the appropriate conduct of the proceedings before it and if it considers necessary, to obtain assistance from the Information Commissioner.

As the Information Commissioner is a quasi-judicial decision-maker, it is important that the Information Commissioner is and is seen to be impartial. The expansion of the Information Commissioner's ability to appear and be heard in judicial review applications may give rise to a perception of bias particularly where the matter is referred back to the Information Commissioner to be decided in accordance with the directions of the court.

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.

Not adopted. The Government acknowledges the Information Commissioner's concern that his office has been subject to applications to produce documents supplied to him by agencies in the course of an external review application. The suggested amendment however is too wide and may have unintended consequences. For example, the Information Commissioner and staff are protected under s91 of the FOI Act from civil liability for an act done or omitted, which is done honestly and without negligence. If an officer acts negligently and a plaintiff wishes to bring an action against the Office of the Information Commissioner, the suggested provision would prevent the officer from being called to give evidence and would prejudice the plaintiff's case. The plaintiff would not be able to able to obtain

documents on discovery or require their production if the suggested provision was included in the FOI Act.

The Attorney-General will however, consider whether there are alternative means to address the Information Commissioner's concerns.

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.

Not adopted. As one person is appointed as the Ombudsman and Information Commissioner, the Attorney-General does not consider that it is appropriate for the Ombudsman to have jurisdiction in relation to the Information Commissioner.

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.

Not adopted. The Act recognises that individuals should not have to pay a fee to access documents about their 'personal affairs'. This has been interpreted to mean documents relating to their affairs in their personal capacity. It excludes documents relating to a person's business or commercial capacity. It is appropriate that people seeking to access documents about their business or commercial affairs or other matters that concern them should pay a fee. The suggested amendment would significantly change the application of the FOI Act. It would broaden its application potentially allowing an applicant to access any information, which they had an interest in. It is likely to result in uncertainty. It is also desirable that there be consistency with the use of the term in s44 of the FOI Act, which deals with exemptions for matters affecting personal affairs. The use of 'personal affairs' in the Act is also in line with most other Australian jurisdictions.

The Information Commissioner has interpreted the meaning of 'personal affairs' at length in a number of decisions. In addition, the Information Commissioner (IC) has released fact sheets and deals with 'personal affairs information' at length in the IC's practitioner guidelines on application fees. The Department of Justice and Attorney-General will consider developing guidelines about the meaning of 'personal affairs'.

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.

Adopted for inclusion in a departmental guideline.

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;*
- *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.*

Not adopted. It is a matter for LCARC whether it wishes to review the fees and charges regime in the FOI Act as part of its area of responsibility under the *Parliament of Queensland Act 2001*. The Government does not at this stage propose to refer the fees and charges regime under the FOI Act to LCARC.

The Government gave careful consideration to the charging regime introduced by the 2001 amendments to the FOI Act. The Department of Justice and Attorney-General will monitor the operation of the FOI Act charging regime to ensure that it meets community expectations. The Information Commissioner has recently released practice guidelines in relation to the new charges regime and the Department of Justice and Attorney-General will consider developing further guidelines for agency use.

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.

Not adopted. The suggested amendments are unnecessary. The Government considered the operation of the charging regime when the amendments were introduced in 2001. The Government accommodated individuals who would suffer financial hardship by the imposition of fees by enabling charges to be waived. In addition, the FOI Act includes a provision that enables agencies to waive charges where the time spent on an application is likely to be less than two hours. Applicants are also able to consult with an agency and negotiate making an application in a form that would reduce the charges payable.

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.*

Not adopted. It is appropriate that the detail in relation to the percentage amount of any deposit be contained in the regulations to the Act. The issue of refunds of deposits and the time within they must be paid will be considered by the Department of Justice and Attorney-General for inclusion in departmental guidelines. In considering whether guidelines are necessary the Department of Justice and Attorney-General will have regard to the Information Commissioner's recent practitioner guidelines on the fees and charges regime.

Committee finding 149—Recommendation

The Attorney-General should consider expanding the circumstances in which charges can be waived.

Not adopted. The Government carefully considered the grounds for waiver of charges when the charging regime for the FOI Act was introduced and passed in 2001. The Government does not propose extending the grounds for waiver of charges currently outlined in the FOI Act at this time. The Department of Justice and Attorney-General will keep this issue under review.

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.

Not adopted. The Act recognises that applicants seeking documents which contain information about their personal affairs should be treated differently to applicants seeking documents about other matters. This is achieved by providing that applicants for personal affairs information do not have to pay fees and charges. Applicants seeking information about their deceased close relatives however, are not seeking information about their own personal affairs. The FOI Act recognises this distinction. It is not appropriate to exempt a personal representative from fees when accessing information about the deceased person as they are operating in a legal capacity that is distinct from their personal capacity. Some personal representatives may in fact be professional personal representatives such as solicitors or trustee companies.

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.

Not adopted. The suggested amendment is unnecessary. The considerations for applying the 'public interest' and 'harm' tests have been established over a number of years and are clear. It is irrelevant to those considerations that disclosure would embarrass the government. This is the view adopted by the Information Commissioner. The Department of Justice and Attorney-General will consider developing guidelines to address this issue.

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.

Supported in principle. The Department of Justice and Attorney-General will consider developing guidelines about the application of the public interest and harm tests.

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.

Not adopted. Section 6 provides that the fact that a document contains matter relating to the 'personal affairs' of a person is an element to be taken into account in deciding whether it is in the public interest to grant access. 'Personal affairs' is considered the appropriate term particularly, as 'affairs' is potentially very broad. This amendment is likely to create uncertainty and is unnecessary.

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).

Not adopted. The Government is not convinced that the restriction of applicants' rights that would result from including s44 within the scope of s35 is justified.

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.

Not adopted. The suggested amendment does not add to the operation of the Act. Decisions by agencies to neither confirm nor deny the existence of documents are subject to external review. It is the nature of these documents rather than the 'harm' that might be caused by release which justifies the exempt status. In some circumstances, such as ongoing police investigations, it may be difficult to see the harm until some time in the future eg after an investigation is concluded.

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.

Noted. The Department of Justice and Attorney-General will consider whether information about the use of this provision should be specifically included in a revised s108 Report.

Committee finding 163—Recommendation

The FOI monitor should educate agencies about the correct use of s 35 (Information as to existence of certain documents).

Supported in principle. The training conducted by JAG in 2001-2002 specifically addressed the use of section 35. The Department of Justice and Attorney-General will consider developing guidelines about the use of s35 of the FOI Act.

Committee finding 164—Recommendation

Provision for conclusive certificates should be removed from s 36 (Cabinet matter) and s 37 (Executive Council matter).

Not adopted. The Government considers the conclusive certificate provisions are justified. The removal of these provisions is unnecessary particularly given the Information Commissioner's comments to LCARC that it does not appear as though these provisions are being misused or invoked inappropriately. The Attorney-

General will consider whether the issue of conclusive certificates is an item that agencies should be required to report against in the s108 report.

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.

Supported in principle. If a central co-ordinating agency is established, the Government will consider if this is a function that should be undertaken by that agency.

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'.

Adopted. Section 42(3) will be amended to refer to 'specified matter' rather than 'a specified matter'.

Section 42(3) will also be amended to clarify that the ability to issue a conclusive certificate applies regardless of whether the agency has confirmed the existence of the document.

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.*

Noted. The Information Commissioner however, has issued a number of fact sheets in relation to many of the exemption provisions in the FOI Act. These fact sheets are available free of charge on the Information Commissioner's website. The Office of the Information Commissioner has also indicated that it intends to prepare practitioner guidelines on the exemption provisions. The Department of Justice and Attorney-General will consider whether departmental guidelines will add to the Information Commissioner's published fact sheets and his proposed practitioner guidelines.

The Department of Justice and Attorney-General recently conducted state wide training on the FOI Act, which included training on the use of the exemption provisions in the Act. Further training will be provided on an as needed basis and it is anticipated that training will be available in 2003.

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;

(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).

Not adopted. The Cabinet exemption strikes a balance between the public interest in promoting open discussion of public affairs and the detrimental effect that the disclosure of information about Cabinet deliberations may have. The exemption recognises that it is essential that discussions and deliberations are candid and unrestricted and that Cabinet papers should therefore be confidential and exempt from disclosure under the FOI Act. This principle is prejudiced if documents, which are submitted to Cabinet or proposed to be submitted to Cabinet, are accessible because they were not initially created for the purpose of submission to Cabinet. The proposed amendments would undermine the mechanisms currently in place, which remove any doubt regarding the Cabinet exemption, so that all documents submitted to Cabinet are exempt and all considerations of Cabinet are exempt.

Committee finding 170—Recommendation

The exemption contained in s 37 (Executive Council matter) should be amended in the same way that the Cabinet exemption (contained in s 36) is amended.

Not adopted. See reasons for the response to committee finding 168 above.

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'.

Not adopted. Section 39(2) provides that matter is exempt if its disclosure is prohibited by s92 of the *Financial Administration and Audit Act 1977* (FAA Act) unless disclosure is required because of a compelling public interest. Section 92 of

the FAA Act recognises the importance of maintaining the confidentiality of information provided to the Office of the Auditor-General. The 'compelling public interest' test recognises that Parliament has already considered that access to documents under the FAA Act should not be available. The 'compelling public interest' test should be retained to ensure that the functions of the Office of the Auditor-General are not compromised. A relationship of trust and co-operation is central to the effective discharge of the functions of the Auditor-General. Audit processes result in information, documents and explanations being freely given. In addition, the Auditor-General has reporting requirements in relation to audits conducted. It is noted that most other jurisdictions exempt the functions of the audit office from the operation of the Act.

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.

Supported in principle. If a central co-ordinating agency is established the Government will consider if this is a function that should be undertaken by that agency.

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.

Adopted. The Attorney-General will consult with the Queensland Police Service and other relevant stakeholders to determine whether the law enforcement exemptions in the Act are adequate and appropriate.

Committee finding 177—Recommendation

In relation to the exemptions contained in s 42 (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.

Adopted.

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.*

Noted however, the suggested process appears to be cumbersome and complex. The Attorney-General will consult with the Queensland Police Service and the Crime and Misconduct Commission about this issue when consulting about the issues raised in committee finding 176.

Committee finding 180—Recommendation

Section 42(4) should expand on what is encompassed by the phrase 'contravention or possible contravention of the law'.'

Not adopted. The Government considers that the meaning of the phrase is clear and that a further interpretive provision in the Act about it is unnecessary. However, the Government recognises that guidance on the meaning of the phrase may be useful and the Department of Justice and Attorney-General will consider developing guidelines about this issue.

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.

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.

Adopted. The Attorney-General will consult with the Minister for Corrective Services and other relevant stakeholders to identify whether the provisions of the Act are

sufficient in relation to the release of reports about prisoners. The preparation of guidelines will be considered following that consultation.

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.

Noted. The Information Commissioner has prepared a fact sheet on the application of s44. The Department of Justice and Attorney-General however, will consider developing departmental guidelines having regard to the Information Commissioner's already published information.

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.

Noted. The Department of Families (Families) recognises the importance of former State wards having access to information about their time in care. In response to recommendations made in the Report by the Commission of Inquiry into Abuse of Children in Queensland Institutions, Families established an administrative access scheme to deal with requests for information by former residents of institutions. An administrative approach was considered appropriate as it provides requested information in a timely and more informal way than FOI processes.

Applicants who are unhappy with the outcome of their requests to the administrative access scheme may still apply for access to documents under the FOI Act. From July 1999 to January 2002, 728 applications for administrative release of documents have been received. A negligible number of applicants have requested that their applications be reviewed under FOI. This appears to reflect general satisfaction within the target group with the service being provided.

While administrative release is a discretionary process the framework for release is based on the same philosophy underpinning the FOI Act. The right of access to information must be balanced with the right of other people (including family members) to maintain their privacy. Generally people are given access to information about themselves and their family except where legislation impacts on release (eg Adoptions legislation) or the information concerns the affairs of another person and its release could cause substantial concern to that person.

Families have indicated that many people have misconceptions about the amount and type of information held by the Department. When information is deleted from documents, applicants sometimes assume that the information relates to them personally. It is rare for all information contained on a file to be solely about the applicant. Prior to the introduction of the FOI Act, workers were not aware of the

wider implications of recording information. Some files also hold very little information and a large number of records were lost as a result of the 1974 floods. This has led some people to believe that Families is withholding information about them.

The current administrative access scheme is providing former residents with sufficient and appropriate access to information and this is borne out by the personal contact experiences of departmental staff with former residents and by the low rates of request for review of decisions and repeat request for information.

As there are two avenues through which information can be obtained by former residents the establishment of a third access scheme would replicate the functions and divert resources from the two schemes which appear to be operating satisfactorily.

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.

Adopted.

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.

Adopted. The Government will amend the FOI Act to make it clear that where direct access to information provided by a qualified professional will be detrimental to the applicant, the agency may disclose the information under s44(3) to a similar qualified professional as the one who initially provided the information.

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.

Adopted.

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.*

Not adopted. Section 45(3) appears to be intended to apply to research that has been completed as well as uncompleted research. Section 45 will be amended to clarify this. A public interest test is inappropriate and would significantly change the scope of the exemption provision. Given the nature of research it may be difficult to tell where public interest lies until the research is completed therefore the 'adverse effect test' is considered appropriate. Inappropriate disclosure of completed or uncompleted research may prejudice or adversely affect intellectual property rights in that research or research outcomes.

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.

Adopted. The Government acknowledges that the current s46(2) is confusing and will amend the FOI Act to clarify its meaning.

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.

Adopted. The Attorney-General will consult with appropriate departments and agencies to determine whether it is possible or appropriate to amend the FOI Act to recognise the confidentiality of specific culturally sensitive Aboriginal or Torres Strait Islander 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.*

Not adopted. When this provision was implemented, Parliament considered that releasing documents about 'contemplated movement in government taxes, fee or charges and the imposition of credit controls' may have a substantial adverse effect on the ability of government to manage the State even where those decisions have been made.

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.*

Substantially adopted. The provisions in schedule 1 of the FOI Act recognise that certain information should be treated confidentially. It is inappropriate for the FOI Act to attempt to regulate access to documents when access to those documents has been considered in other legislation and determined to be inappropriate for release except in limited circumstances. The Attorney-General will consult with relevant stakeholders to determine whether the provisions listed in schedule 1 to the FOI Act require amendment.

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'.

Not adopted. The 'compelling reason in the public interest' test in s48(1) recognises that Parliament has already identified the inherent public interest in protecting the confidentiality of certain information. The Acts specified in the first schedule to the FOI Act identify that information. It includes information relating to adoptions and

child protection. Parliament has already considered the circumstances where it would not be in the public interest to release the specified information. It is appropriate therefore, that any release of the information contrary to the provisions in those Acts should require a 'compelling public interest'.

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).

Not adopted. The Government does not consider that these amendments are appropriate. They would allow the Information Commissioner to review orders and directions made by tribunals and commissions of inquiry relating to the confidentiality of matters before them. Those bodies are in the best position to determine whether material/evidence should be subject to a non-disclosure order. They have the benefit of hearing all evidence before them, are able to assess the potential harm and public interest in publication and have appropriate expertise in the particular area. The suggested amendments may compromise the independence of those bodies. A person aggrieved by a suppression order would usually be able to apply to the relevant body that made the order or the Supreme Court to have that order reviewed.

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.

Not adopted. The exemption in s50 recognises that the Legislative Assembly, its committees and members have immunity from some aspects of the general law in

relation to proceedings in Parliament. In addition, the exemption recognises Parliament's exclusive power to interpret, control and protect the integrity of its processes. The exemption ensures that the FOI Act does not override, infringe or interfere with these privileges. It recognises the independence of Parliament from the Executive and the importance of Parliament being able to carry out its work without hindrance or fear of prosecution. The FOI Act is concerned with the production of documents. Where the production of documents would infringe the privileges of Parliament they are exempt from the Act.

The suggested amendment would expand on this exemption and is not appropriate.

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.

Not adopted. Refer to recommendation 199. The Attorney-General will consider however, whether examples of matter which would be exempt as a document which would infringe the privileges of parliament would be appropriate for inclusion in departmental guidelines.

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.

The Members' Ethics and Parliamentary Privileges Committee is conducting an inquiry into the status of information provided to members by constituents and members' communications to ministers, departments and other agencies. The Attorney-General will consider whether a broad exemption is required following the conclusion of that inquiry.

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.

Not adopted. The Government is concerned that any expansion of the current provisions enabling the issue of conclusive certificates has the potential to undermine the objects of the FOI Act.

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.

Adopted in principle. The Attorney-General agrees in principle with the intention of recommendations 21.1 to 21.5 of the Queensland Law Reform Commission's Report, which are aimed at preventing inappropriate use of evidence by or about children. The Attorney-General also agrees in principle with the extension of the QLRC's recommendations to evidence obtained in the investigation of specified offences involving adults such as rape or sexual assault. The Attorney-General will consider the most appropriate way in which these recommendations can be implemented.

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.

Noted. The Attorney-General acknowledges the changing corporate environment within which Government operates. The Attorney-General will consider whether this matter should be referred to the Queensland Law Reform Commission.

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.

Adopted. The Attorney-General will review the lists of bodies and persons or their activities or specified functions that are specifically excluded from the operation of the Act to ensure that those exclusions continue to be appropriate. In addition, the Attorney-General will consider developing a consistent policy approach to exclusions.

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'.*

Adopted in part. The Attorney-General agrees that it is appropriate that the issues identified by LCARC in relation to the exemption for Judicial officers and courts be addressed by amendment to the FOI Act.

The Government notes LCARC's comments in relation to s11(1)(n) and the use of 'commercially competitive activities'. The suggested alteration to 'competitive commercial activities' may have unintended consequences as that phrase is defined in the Act and may have a narrower meaning than the phrase currently used. The Attorney-General has indicated in this Response that he will review the exclusions from the FOI Act and this issue will be considered in that context and in consultation with Queensland Treasury.

Committee finding 209—Recommendation
Section 11(2) should be amended to remove the reference to documents and clarify the application of the subsection.

Adopted. The Government notes that section 11 (2) of the FOI refers to references to 'documents in relation to a particular function or activity in subsection (1)' yet subsection (1) contains no such reference. The Government will clarify the intention of s11(2).

Committee Findings 211 to 213

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'.

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.

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.

Response to Committee Findings 211 to 213

Not adopted. Government owned corporations (GOCs) that are predominantly engaged in commercial activities in a competitive market should not be subject to the operation of the FOI Act. It is important that those bodies are able to operate on a level playing field. GOCs operate in increasingly competitive environments and many are subject to particularly strong competition such as the energy GOCs. The current exclusions for GOCs effectively recognise the environment within which their commercial activities are performed, their performance agreements negotiated and performance monitored.

Under s122 of the *Government Owned Corporations Act 1993* the community service obligations that a GOC is to perform are specified in its statement of corporate intent (SCI). The SCI must contain the costing of, funding for, or other arrangements to make adjustments relating to the GOCs community service obligations. The SCI must be tabled in Parliament subject to the deletion of commercially sensitive information and is therefore publicly available.

As indicated previously the Attorney-General will consider the exclusions currently operating and will consider the exclusions in relation to LGOCs and GOCs in that context in consultation with relevant departmental stakeholders.

Committee Findings 214 to 215

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.*

Response to Committee Findings 214 and 215

Adopted in part. The Attorney-General acknowledges that it is good practice that exclusions from the operation of an Act are effected by amendment to the Act rather than by regulation. This ensures that the full scrutiny of Parliament is attracted to the proposed exclusions. The interaction of GOC and LGOC legislation and the FOI Act however, is complex and removal of the ability to prescribe exclusions by regulation may reduce the flexibility and responsiveness of agencies to deal with matters affecting these bodies. Flexibility and responsiveness is particularly important when dealing with bodies that undertake a wide range of commercial activities. As indicated in response to committee finding 207 the Attorney-General will consider the current exclusions from the FOI Act and the issues raised by findings 214 and 215 will be considered at that time in consultation with relevant stakeholders.

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.

Adopted. The Attorney-General agrees that it is good practice for current and future exclusions to be contained in the Act wherever possible and not in separate legislation. The Attorney-General will review the current exclusion provisions to identify those exclusions that can be moved to the FOI Act.

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.

Not adopted. The aim of the FOI Act is to ensure that Government is open and accountable to the public. Generally private sector agencies do not have a duty to act in the interests of the community as a whole and a disclosure requirement would be inappropriate. Many private sector bodies are subject to specific regulation by industry bodies or legislation for example health and safety legislation, environmental practices, trade practices and consumer protection. In addition, companies have to comply with relevant provisions of the *Corporations Act 2001*. Specific legislation has been developed where a need for accountability has arisen. Any extension of the Act to cover private sector agencies would require strong grounds to justify such an intrusion into the operation of those organisations. Such justification is not apparent from LCARC's Report.

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.

Not adopted. One of the objects of the FOI Act is to ensure open and accountable government by providing access to government records and documents. Extending the operation of the Act to private sector agencies falls outside those objects and is likely to be difficult to enforce and monitor. Arrangements made with contractors are diverse and a uniform provision would not be appropriate.

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.*

Not adopted. The Public Accounts Committee is currently conducting an inquiry into the issue of 'commercial in confidence' claims by government. Once that inquiry has concluded the Government will consider the issue of these claims in the context of the FOI Act regime including the development of specific guidelines by government if these are considered necessary. The Government notes that the Information Commissioner has released fact sheets on the applicability of exemptions for information of commercial value.

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.

Noted. The Public Accounts Committee is conducting an inquiry into 'commercial in confidence claims' by government.

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.

Adopted in part. While it is not proposed to repeal and replace the FOI Act it is anticipated that a number of amendments to the FOI Act will be made to implement those recommendations that have been adopted. It is anticipated that those amendments will be made in 2002 or early 2003. As significant consultation on the Act has already occurred through LCARC's processes it is not anticipated that there will be widespread community consultation. It is likely however that the Attorney-General will consult with appropriate government stakeholders about these amendments.