

Overhauling FOI for Today: a Response to the Queensland *Enhancing Open and Accountable Government* Discussion Paper

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This paper represents a response to the recent discussion paper produced on Freedom of Information legislation (FOI) in Queensland, *Enhancing Open and Accountable Government*, chaired by Dr David Solomon. The reply comes from the perspective that FOI is not meeting the challenges of today. The Act is experiencing a shortfall in reaching its objects of enhancing participatory and accountable government, for a number of reasons. The main problem, however, is arguably that FOI is treated too casually within the public sector. We need to overhaul the Act so that it may meet the needs of a modern community endowed with popular sovereignty.

Chapter 6 - Purpose and Principles of FOI

6.1 Preamble – why FOI?

Is there a public “right” to information held by the government, information about the personal affairs of people and about the way government is conducted?

It is now beyond question that citizens have a right to information in the possession of government departments and agencies, be it personal, policy or administrative in nature. A quick examination of the explosion of information access legislation worldwide would confirm this. To what extent the right does apply, or should, is questionable, however. This question, I believe, involves addressing fundamental assumptions relating to citizenship and the State in modern

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times. What is the equation of power between citizen and State? To what extent do representatives, having been duly appointed in free elections sustain the ability to conduct public affairs in secrecy? How involved should the public be in public affairs post-election time?

Should disclosure of information be guided by the same (or a similar) test the High Court proposed in 1980, that is “by reference to the public interest. Unless disclosure is likely to injure the public interest, it will not be protected”?

Disclosure of information should be guided by the public interest. But again, this question comes back to the matter of how extensive the right supplied by FOI is and, in turn, how the public interest is best served. Is it in the public interest for individuals and organisations to have a strong democratic right to information in the possession of departments and agencies? Or, conversely, is it in the public interest that representatives are given a degree of opacity, so as to govern without the fear of embarrassment? If the public does have a strong right and representatives have an obligation to explain their action in detail, then the public interest is best served through generous disclosure. If the public does not have a strong right, however, and representatives are allocated a generous leeway of secrecy, based on parliamentary sovereignty, then the public interest is best served by tempering the amount of information available.

It's a matter of popular or parliamentary sovereignty. Parliamentary sovereignty relates to the classical Westminster model and:

...a view that cedes sovereignty – supreme power – to the elected parliament. This view is particularly associated with A. V. Dicey, but its genesis is in the political thought of Thomas Hobbes, who argued that citizens demanding protection from war, crime, and violent death must offer their complete submission to the Crown and pursue their private ends within the belly of the Leviathan.²

On the other hand, there is popular sovereignty or ‘soccer-stadium democracy’.³ The basis of authority in this model lies with the constituent power of the people. Government operates according to the consent of the governed, who are, consequently, granted inviolable rights against the State.⁴ Snell and Upcher argue:

Popular sovereignty shifts the focus of the Westminster system from the core values of responsible government and collective accountability to the need for openness, transparency, and sluices between parliament and public, and is much more amenable to the goals and values to FOI.

² Snell, R. and Upcher, J., ‘Freedom of Information and parliament: A limited accountability tool for a key constituency?’, *Freedom of Information Review*, 100 (August 2002), 35-41 (p. 39)

³ Holmes, S., *The Anatomy of Antiliberalism* (Cambridge: Harvard University Press, 1996), p. 4

⁴ Snell and Upcher, ‘Freedom of Information and parliament’, p.40

Popular sovereignty appears to be the preference in Australia. The Courts have certainly championed civic rights.⁵ In 1992 Mason J argued in the judgement of *Australian Capital Television Pty Ltd v Commonwealth*:

*...elected representatives have a responsibility not only to ascertain the views of the electorate but also to explain and account for their decisions and action in government and to inform the people so that they make informed judgment on relevant matters.*⁶

In accordance with the philosophy of popular sovereignty the disclosure of information under FOI should be judged by a public interest test that recognises the right of the populace to demand and receive continual commentary and answers from government.

Does FOI contribute to a healthier democracy and enhance its practice?

FOI does contribute to a healthier, more robust democracy by supplying citizens with a right to demand information in the possession of government departments and agencies. Nevertheless, the extent to which FOI contributes to the democratic scene depends on how we view the political system and mechanisms within it, like FOI. The view these days appears to favour substantive democracy and strong FOI in accordance with the doctrine of popular sovereignty. In this situation FOI can contribute significantly.

Should the FOI Act contain a Preamble placing the Act in this context of its function of supporting the system of representative, democratic government?

Indeed, the FOI Act should contain a preamble stating the extent to which the right to information applies to the general public. Hopefully the preamble would stipulate how Australian citizens have a universal right to view documents, with minimal exemptions, in the possession of government officials who serve the community. And this right is based on the fact that power ultimately resides in the people, who have the democratic entitlement of knowing what their government has done and is planning to do.

6.2 Objects of the *Freedom of Information Act 1992*

6.2.1 Better governance

⁵ Wright, H., 'Sovereignty of the People – The New Constitutional Grundnorm?', *Federal Law Review*, 26(1) (1998), 165-194

⁶ (1992) 177 CLR 106, p. 139

Should the Objects section of the Act be expanded to include better public administration and other benefits such as improved quality of government decision making?

Yes, the Objects section of the Act should be expanded to include better public administration and other benefits such as improved quality of government decision making. But what does this really mean? I think there are two sides as to how FOI actually contributes to ‘better’ governance. First, it means better governance in the sense of increasing democratic participation and accountability. Second, the enhanced transparency facilitates more informed, clear and concise public authority. Essentially, the second point springs from the first: as the policy process is opened up, participants become more aware of the need to be up to date and articulate. Marie Shroff, a former Cabinet Secretary in New Zealand, has indicated (as the discussion paper highlights) that healthy FOI in NZ has improved participation and accountability in the policy formation process and, in turn, that manner in which information is shared between politicians and public servants. Officials are more accurate in their dealings if they know documents are likely to come under scrutiny.⁷ It is important this process is recognised in Australia because it runs counter to the tradition argument that release of too much information would prevent public servants from speaking freely or giving frank and fearless advice.

6.2.2 Openness

Should the Objects section acknowledge “openness” specifically as an aim of the Act and as a contribution towards more accountable government?

Yes, the Object section should acknowledge openness and accountability, which are the essence of FOI. How are those interpreting the Act meant to fully understand this otherwise? There should be no assumptions when it comes to such democratically important legislation.

O’Brien, although referring to the Commonwealth FOI Act, has emphasised what shape the object provision must take. He argues that the object provision:

*...needs to be reformulated to explain that the purpose of the Act is to provide a right of access which will enable people to participate in the policy and decision making processes of government, open the executive government’s activities to scrutiny and increase its accountability to the people.*⁸

⁷ As noted in the discussion paper: Shroff, M., “The *Official Information Act* and Privacy: New Zealand’s Story”, Presented to the FOI Live 2005 Conference, London, 15 June 2005

⁸ O’Brien, D., “Freedom of Information Law in Need of Overhaul”, *Democratic Audit of Australia* (March 2005), p. 5

6.2.3 Open and Shut

The “default” setting when any document is created by agencies is that it be regarded as “confidential”. Is this still appropriate?

I believe the answer to this question is no. FOI was arguably introduced to help reverse the ‘default’ mindset of ‘confidential’. Indeed, as the discussion paper indicates, at the time of his Second Reading Speech, Queensland Attorney-General Dean Wells, declared, ‘The Bill replaces this presumption of secrecy with a presumption of openness...’ The legislation represents a minimum, not a maximum. Public information should be considered free, unless stipulated otherwise.

Nevertheless, the trouble experienced by Australian FOI suggests that the traditional assumption of confidentiality in government will be difficult to reverse. It involves a change of mindset and a battle of rights in what Canadian philosophy John Ralston Saul calls the Age of Reason; an era in Western history when information is closely guarded as part of an expert culture that bases itself on a strong faith in instrumental rationality.⁹ All information is considered secret unless specifically categorised otherwise according to the experts. The shift in culture or mindset regarding the nature of information disclosure involves reversing a governing perspective that sees participation and accountability as an inefficient liability.

FOI has a role to play in repealing this mindset, but the effort should be more widespread. Access law cannot be thrown into a system that is resistant to openness and be expected to work wonders. Citizenship must be given more legitimacy in general, particularly in relation to a growth of popular sovereignty. This involves wider participation and accountability in government that runs contrary to the culture of experts and representatives. The ‘default’ mindset of ‘confidentiality’ has been reversed on paper, but the fact is we need to do more in order to make this a reality.

6.2.4 The 30-year rule

Does the existence of the 30-year rule militate against the culture of openness that the freedom of information law is meant to encourage within government and other relevant agencies?

⁹ Saul, J. R., *Voltaire’s Bastards: the Dictatorship of Reason in the West* (Ontario: Penguin Canada, 1992)

The 30 year rule involves a judgement that certain information is confidential by ‘default’, it therefore runs counter to a culture of openness.

Should the period be reviewed in relation to Cabinet decisions and documents, and more generally for other public records?

Yes, the period should be review for such documents. Criteria for the release of documents should rest on consequence, not category. That is, documents should be released or withheld on the basis of the potential consequences of either action, not the type of information in question.

If so, to what extent should it be reduced?

The eight years suggested by Former Premier Peter Beattie is enticing. It’s less than a third of the current waiting period! Yet, if the criterion for release is not category, but consequence, time should not be a factor. The convention of collective responsibility is one thing; an excessively secretive state is another. An impenetrable ‘cabinet oyster’ does nothing to further the democratic tradition, except perpetuate convention. Cabinet documents, like others, should be assessed for release based on the likely impact of disclosure to public debate.

Given that any change would have financial and administrative implications for Queensland Archives, should any change be phased in over a number of years?

No comment.

6.2.5 Administrative access

Should agencies be encouraged to consider providing more information to people under administrative access schemes or otherwise than through FOI?

Agencies should be encouraged to consider providing more information to people under administrative access schemes or otherwise than through FOI. The Act is one avenue of information access that represents a minimum, not a maximum. Section 14 and 15 of the QLD FOI Act clearly indicate that FOI should work in conjunction with other access systems. Access to information via FOI can often be time consuming and costly, for agencies and requestors, these problems may (to some extent) be avoided if time is taken to develop alternate access regimes for information that is often requested.

Should FOI officers be given more delegated power and discretion to release information requested under FOI other than through the FOI process?

FOI officers might be given more delegated power and discretion to release information under FOI other than through the official process. The informal release of information requested through FOI could be more efficient, at times, than following typical protocol. However, the release of information in this way does nothing for FOI. The application process should be straightforward enough so that informal release is unnecessary. Documents should be made available through FOI in a timely and cost effective manner.

A middle ground of informal FOI release has the potential to confuse emphases on maximum disclosure and effective FOI. That is, a maximum amount of information should be made available to the public, outside the domain of FOI. Documents that are not release or posted in this fashion should be easily accessible via FOI, provided they are not exempt for legitimate reasons. There should be little middle ground, otherwise the importance of maximum disclosure and effective FOI could become confused and potentially lost.

Is further legal protection required for information provided other than through FOI?

No comment.

6.2.6 Publication Schemes

Should agencies be required to include more information in their statements of affairs if so what?

Departments and agencies should be required to routinely publish information as a requirement of FOI. The information that must be published under s. 18 of the Queensland FOI Act is, I think, sufficient. A statement of affairs can provide a member of the public with a good reference sheet relating to the organisational structure and type of documents held within a particular agency. What is more, other data available on official websites contributes to the overall amount of information on, for example, an agency's structure and function. It is important, however, that statements and other information are readily available and up-to-date. Publication requirements must be monitored in order to accesses compliance.

Evidence within a number of other states indicates a complacent attitude towards publication requirements can often develop within agencies. For example, the New South Wales Ombudsman consistently found between 2001 and 2005 that a large number of bodies failed to comply with their legal obligation to publish specific information.¹⁰ Similarly, a 2001 review by the Australian Capital Territory Auditor-General of agency compliance with FOI revealed a situation where some agencies complied with their publication requirements sufficiently, while others did not. It is interesting to note the agencies that performed well in their publishing function were those most likely to receive requests for personal information. Agencies such as the Treasury, likely to receive non-personal requests, were notable underperformers.¹¹

Should they be required to keep these genuinely up-to-date (revised, if necessary every week/month)?

Departments and agencies should perhaps be required to update their statement of affairs monthly; unless significant changes in the organisation occur, which would require the statement be immediately revised. It's important the statement of affairs reflect current practices and circumstances otherwise their utility to concerned citizens may be substantially decreased.

Is the statement of affairs the best format for publication of this information?

Provided they are completed with honesty and integrity—that is, properly—statement of affairs are a good format for the publication of information required under s. 18 of the Act.

Should ministers exercise, or should the Information Commissioner be given the power to require the publication by agencies of additional information?

As an FOI advocate and lynch between government and citizen, the Information Commissioner should be given the power to require the publication of additional information by agencies.

Would there be an advantage in the creation of an Information Standard to provide more specific guidance to agencies about what information they should publish? Or should this be done by regulation?

¹⁰ New South Wales Ombudsman, *Audit of FOI Annual Reporting 2001-2002* (October 2003); New South Wales Ombudsman, *Audit of Annual Reporting 2004-2005* (October 2006). These reports – and those in between – are available online at <http://www.ombo.nsw.gov.au/publication/annualreports.asp>

¹¹ Australian Capital Territory Auditor General, *The Freedom of Information Act* (December 2001), p. 126

There would be an advantage in the creation of an Information Standard to guide agencies in the publication of information. The Information Standard may stipulate the format of what information should be published so that there is a standard on which to judge performance and detail across the board. Citizens will also be able to better assess a particular agency's information, because they will be familiar with format. The Information Commissioner, or another independent body, would be best suited to formulate, implement and monitor such a standard.

6.2.7 Negating access

Should the Objects clause include reference to factors that are used to balance against a right to access information?

No, I do not think the Objects clause should include prominent reference to factors that are used against the right to access information. The primary object of any freedom of information or official information act must be to provide citizens with access to government held documents. The fact that this object is, at times, hindered by the slim requirements of confidentiality government should no dilute this.

Would this be better achieved with a formula such as that adopted in the New Zealand *Official Information Act*, s. 4 (c)?

Section 4 of the *Official Information Act 1982* in New Zealand makes it clear that the objects of information access are to increase accountability and participation in government; and, when appropriate, 'protect official information to the extent consistent with the public interest and preservation of personal privacy.' The manner in which the purposes are framed under the *Official Information Act* is exemplarily, because it subtly frames the need for some documents to be deemed exempted in a positive way that does not distract from the chief objects—facilitating democratic government through information disclosure. The Queensland *Freedom of Information Act 1992* would benefit, in terms of clearer purposes, by adopting similar sections.

6.2.8 Interpretation

Should this section be redrafted to emphasise the object in subsection (1)?

Yes, the section should be drafted emphasise the object in subsection (1).

6.3 Ambit of the *Freedom of Information Act 1992*

6.3.1 Document

Would there be any advantage in changing the Act to provide that a person may seek access to public records, rather than documents, or even to official information? Should the Act specifically exclude “ephemeral” material?

The FOI Act currently applies to documents in the possession of government departments and agencies. There would be an advantage in changing the Queensland Act so as to provide for access to information, rather than public records or documents. The advantage comes from the fact that requests would be provided with a wider scoop; the fishing net would be increased. This would enable members of the public to greater access when it comes to information possessed by government, because departments and agencies would be required to disclose a larger variety of information that reveals their thinking and action (or inaction).

‘Ephemeral’ material, such as drafts and emails that are often considered to fall outside the scope of official documentation, should to considered to be government information and therefore subject to FOI. The need for confidentiality in the public service is routinely overstated. For the public to draw an accurate picture of an agencies or officers thinking in a particular decision the maximum amount of material needs to be released, especially information that is likely to reveal internal debates.

Should it move towards the Swedish approach?

The Swedish approach to access target is certainly better than that of Queensland. Nevertheless, I think we should be moving in the direction of New Zealand on this matter. The line drawn by the Swedish on the issue of ‘official’ and ‘unofficial’ documents is open to interpretation; whereas the New Zealand target of information is much more concrete and straightforward. Honest officials should have nothing to fear when it comes to the release of information. FOI should only improve their drive towards recording and disseminating well researched and argued methods.

6.3.2 Bodies to which the Act applies

- (i) The private sector
- (ii) Contracting out
- (iii) Government Owned Corporations

Should the private sector remain outside the reach of the FOI Act?

The private sector should remain outside the reach of the FOI Act, which was created for the purpose of allowing access to information held by public authorities. I do not think FOI would benefit by an attempt at redrafting to include the private sector generally. The purposes of FOI are already confused enough. The private sector is an issue in itself.

The private sector is the sacred elephant in the room when it comes to discussions about transparency, particularly in relation to power. Some of the most economically and politically powerful entities in the world are private organisations, which often dwarf nation-states. The global markets, in which these bodies operate, function with terribly high levels of opacity and monopoly. Many of the influential companies demanding secrecy for commercial advantage, while at the same time apparently supporting free markets. Yet free markets work on the premise that each participant within the market has equal access to information.

The commercial value of particular secrets is often over exaggerated by private companies at the expense of healthy competition. Stevenson argues:

In a free market economy that is by definition dependent on the liberal flow of information, the question is not whether the disclosure of 'commercial secrets' will be disadvantageous to a particular firm but what effect a change in law governing the protection of those secrets will have, over the long run, on the economic incentives of a corporation to engage in socially productive activity.¹²

A regime that facilitates a liberal flow of information in the global markets is certainly needed. As to how this will occur is uncertain.

Should there be special provisions in the Act (and, if necessary, in other legislation) to ensure that when government services are contracted out to corporations, partnerships or individuals, that the contractor should be required to provide information that would have been required under FOI if the services were being provided by an agency?

¹² Stevenson, R., *Corporations and Information: Secrecy, Access and Disclosure* (John Hopkins University Press, 1980), p. 9

A large number of bodies, mainly private contractors, now undertake similar tasks to those performed by traditional public entities in the past, yet they remain outside the scope of FOI, which means that documents relating to their activities are subject to the Act only to the extent that they are in the possession of contracting or associated agencies. This has caused much debate. Indeed, the QLD LCARC Committee commented in a discussion paper that the issue of contracting out and information access has:

*...become increasingly topical given that, in many instances, government and private bodies are now providing identical services, some of which (such as telecommunications and energy supply) might be said to be inherently public.*¹³

In this context it is sobering to note that Victoria held a larger proportion of convicts in privately run prisons than any other jurisdiction in the world during the late 1990s.¹⁴

A number of inquiries have examined the issues surrounding contracting out and FOI.

There was general agreement amongst these investigations that:

*...the contracting out of government services should not result in a loss or diminution of government accountability or the ability of members of the public to seek redress where they have been affected by the actions of a contractor delivering a government service.*¹⁵

After considering the matter in 1995 the ALRC/ARC Committee recommended that FOI should apply to private service providers in respect of documents that relate to the performance of contractual obligations.¹⁶ A year later the ARC conducted an investigation into contracting out and concluded that the most appropriate way to remedy the situation is to deem documents in a contractors possession that relate directly to the performance of their contractual obligations to be in the possession of the government agency concerned (and therefore subject to FOI).¹⁷ This recommendation was endorsed by a Federal Senate Committee and the Queensland LCARC investigation.¹⁸

I would also agree with these recommendations and the reasoning behind them. There should be special provisions in the Act (and, if necessary, in other legislation) to ensure that when government services are contracted out to corporations, partnerships or individuals, that the

¹³ LCARC, *Freedom of Information in Queensland*, Discussion Paper No. 1 (Feb 2000), p. 23

¹⁴ Harding, R., *Private Prisons in Australia: The Second Phase* (Canberra: Australian Institute of Criminology, 1997) p. 1

¹⁵ ARC, *Contracting Out of Government Services*, Report No. 42 (August 1998), p. vii

¹⁶ ALRC/ARC Committee, *Open Government: A Review of the Federal Freedom of Information Act 1982* (Canberra: AGPS, 1995), p.202

¹⁷ ARC, *Contracting Out of Government Services*, p. 63

¹⁸ Senate Finance and Public Administration References Committee, *Contracting out of government services*, 2nd Report (May 1998), p. 39 and LCARC, *Freedom of Information in Queensland* (Brisbane: December 2001), p. 255

contractor should be required to provide information that would have been required under FOI if the services were being provided by an agency.

Should Government Owned Corporations (however constituted) be exempt from provisions of the Act covering agencies and, if so, to what extent?

GOCs have an obligation to the public and must, therefore, come under the scope of FOI. The arguments presented on page 65 of the discussion paper that favour extending the FOI to include GOCs catalogues the fragments of this obligation. There is some relevance to the arguments about competitive markets and other mechanisms of government accountability that affect GOCs, however, I would agree with Snell and Langston that the ‘...accountability being offered by market mechanisms, and a regime of government controls over GBEs, is not interchangeable with that produced by devices like FOI.’¹⁹ Information access provides an avenue for citizens, not just governments, to monitor GOCs. And GOCs need not worry about the need for commercial confidentiality; there are ample exemption provisions within the current legislation that will prevent disclosure of valuable information.

If world’s best practice in FOI law is that FOI should extend to “any body that is exercising government functions” should any attempt be made to define what are “government functions” at a time when the responsibility for many such functions is being devolved to the private sector of GOCs?

Any attempt to define ‘government functions’ would be a waste of time. FOI should apply to clear public sector bodies and those entities that undertake services on behalf of government, including contractors and GOCs. On the other hand, the private sector should be subject to its own, unique form of information flow. A debate on the term “government functions” is really a continuation of the historic question about “what is government” and “what should government do.”

Should people be able to access their personal information held by organisations like GOCs that are ultimately controlled by government and, if so, to what extent?

GOCs should be subject to FOI legislation, just like any other public entity. People should therefore be able to access their personal information held by organisations like GOCs that are

¹⁹ Snell, R. and Langston E., ‘Who needs FOI when market mechanisms will deliver accountability of demand?’, *Flinders Journal of Law Reform*, 3(2) (December 1999) (p. 216)

ultimately controlled by government, to the same extent provided by departments and agencies. Why should the extent of access to personal information differ between any agency and GOC? Is there a commercial advantage in the hoarding of information that relates to the personal details of a person?

(iv) Other Bodies

What principles should apply in determining whether bodies are covered by the *Freedom of Information Act*?

In accordance with the report, *Strengthening the Access to Information Act*, by the Canadian Department of Justice, I think the principles that should determine whether a body is covered by the FOI Act must relate to the development and application of public policy.²⁰ This is because FOI aims to facilitate accountability and public participation in the activities of governance or public policy. In this way, FOI should cover the public sector and those bodies, like contractors or GOCs, which help develop or apply government decisions.

What principles should apply when consideration is given to excluding a body from coverage by the Act?

The principles that should apply when consideration is given to excluding a body from the coverage of the Act, should reflect those principles used to determine what bodies are covered by the Act. If bodies are deemed subject to FOI because they participate in ‘governance’ or public policy, then organisations should be deemed exempt from FOI on the basis that they are at some considerable distance from the policy process and public authority. There is no clear line here but perhaps two, maybe extreme examples, will suffice. First, GOCs like Telstra or Qantas, which provide a service once monopolised by government and generally used by the public, should be covered within FOI legislation. Private schools, on the other hand, do not hold public authority—they are a small part of the public good—and should consequently be exempt from FOI.

²⁰ Department of Justice (Canada), *Strengthening the Access to Information Act* (11 April 2006), p. 3

Chapter 7 - Exemption Provisions

If no harm would follow from the release of material that would fall within an exemption provision, should it be released?

Information should not be withheld under FOI exemptions simply because of its type or class. Information should be disclosed if no harm would follow from release, no matter what category the document falls into. Withholding information without substantive reasons, simply because the document falls within an exemption provision, reaffirms the culture of secrecy, in which the default judgement is non-disclosure not disclosure. An official should ask themselves when considering a document that may fall within an exemption provision, ‘Are there any case specific and substantive reasons as to why this document should be withheld?’ not, ‘Are there any decent arguments for the release of this document which is otherwise exempt?’

Should exemption provisions be rewritten to ensure that FOI officers apply such public interest tests as they contain?

Exemption provisions should include notification of the competing concerns that make up the public interest. At the moment the Queensland FOI Act does not do this, as the discussion paper demonstrates. Exemption provisions within the QLD Act should include a note something like that found among New Zealand exceptions: ‘good reason for withholding official information exists... unless in the circumstances of the particular case, the withholding of that information is outweighed by other considerations which render it desirable, in the public interest, to make that information available.’ Although the emphasis might even want to be reversed: the comment might be more effective in facilitating transparency if it highlights considerations for release first and restriction second. In any case, officers need to be constantly reminded of the competing facets that make up the public interest, which in turn, determine whether or not a document is released.

Should there be an over-riding public interest test covering all exemptions?

An over-riding public interest test covering all exemption should be introduced into the *Freedom of Information Act 1992*. The public interest test applied to exemptions should be universal and no exemption should escape its application. There is no room for broad categorical exemptions in legislation that purports to facilitate open government. All arguments to withhold information

or documents should be case specific and consequential; an over-riding public interest test that covers all exemptions will help guarantee this.

New Zealand, which appears to have an overriding public interest test, has been consistently shown to have superior FOI compared to Australia. Liddell argues:

*The enduring strengths of the Official Information Act is in its insistence on case-by-case consideration, its refusal to allow judgements based on category, its use of a public interest balancing test, and the overarching framework of purposes and principles directed towards better government.*²¹

Is there a need to write additional legal protections to cover the release of material under FOI?

No comment.

How can FOI officers be made more aware of the fact that they can release information that falls within an exempt category? What test should they apply if they consider exercising this discretion?

Officials must understand it is not good enough to restrict information because there is perhaps one decent reason to withhold a document under particular exemption provisions, as there may be five good reasons to release the documents which undermine the single reason for restriction. There are a number of ways this knowledge may be facilitated. The Information Commissioner, or indeed Ministers, might remind officials that information can be released even though, strictly speaking, it may fall within an exemption provision (provided such action would be in the public interest) through the circulation of a statement. Moreover, the wording of exemption provisions should state clearly that there are competing interests involved in judging whether information should be released or not.

The a pro-disclosure public interest test must direct officers in judging if otherwise exempt material should be released. This test starts from the presumption that disclosure of information is generally in the public interest, and then works backwards to determine if any case specific reasons exist to undermine this presumption and justify any withholding of documentation. The argument that such public interest test should apply to documents that may fall within exemption provisions draws solace, among other things, from a right to political free speech recognised

²¹ As quoted in Snell, R., 'The Kiwi Paradox – A Comparison of Freedom of Information in Australia and New Zealand', *Federal Law Review*, 26 (2000), 575-616 (p. 603) from Liddell, G., "The Interests of Effective Government: New Zealand's Official Information Act in an MMP Era", paper presented at INFO 2, Second National Conference on Freedom of Information, Gold Coast, Australia, March 1995, p. 23

within the Commonwealth Constitution by the High Court. The Court argued representatives govern on behalf of the public and are therefore accountable to it and:

Indispensable to that accountability and that responsibility is freedom of communication, at least in relation to public affairs and political discussion. Only by exercising that freedom can the citizen communicate his or her views... [and] criticize government decisions and actions, seek to bring about change, call for action where none has been taken and in this way influence elected representatives... Communication in the exercise of the freedom is by no means a one-way traffic, for the elected representatives have a responsibility to only to ascertain the views of the electorate but also to explain and account for their decisions and actions in government and inform the people so that they may make informed judgements on relevant matters.²²

7.1 Public interest tests

What role should the “public interest” play in the determination of whether access should be granted to documents that would otherwise be exempt?

The “public interest” should have the task of confronting public servants with the realities of open government. The “public interest” should challenge officials to think outside their box, to concern themselves with the interests of the democratic community as a whole. A politician or civil servant can only legitimately claim a document exempt once she/he has confronted the public interest and determined there is sound case specific evidence as to why the information simply cannot be released to the public (at this time anyways).

Should there be a public interest override covering all exemptions? Or, all but a few specific exemptions?

There should be a public interest override covering all exemptions. A document should be judged as restricted or released based on the consequences of release, not the categorical type of information.

How should the public interest test be expressed?

To some degree the public interest test should be expressed. Patterson, as quoted in the report, is spot on in arguing the ill defined test, as it currently stands, has the potential to work to the disadvantage of applicants. There is a need to frame, officially, what the public interest involves

²² As quoted in Bayne, P. and Rubenstein, K., ‘Freedom of Information and Democracy: A Return to the Basics?’, *Australian Journal of Administrative Law*, 1(2) (1994), 107-112 (p. 109)

in terms of information policy, if only to prevent distorted perceptions of the test. This task would be best completed by the Information Commissioner, whom has already stated:

*The FOI Act must be applied in a manner that pays appropriate regard to the objects which the framers of the legislation sought to achieve...Unless the exemption provisions... are applied in a manner which accords appropriate weight to the public interest objects sought to be achieved by the FOI Act, the traditions of government secrecy are likely to continue unchanged...*²³

Nevertheless, the public interest is not a static, quantitative or scientific matter. It cannot be defined as a simple rule that, when applied, computes a clear answer. It may be sufficient to simply emphasize the angle at which the public interest is drawn—towards release.

To what extent should the notion of detriment or harm be involved in determining the balance of public interest?

Concerns relating to detriment or harm are perhaps at the core of any public interest test that may apply within FOI. In this regard, it is possible to harm the public interest, or common good, in a number of ways. But not all manners of harm hold the same weight: the aim of FOI is open government and, as a result, the disclosure of information is generally in the public interest. Concerns about possible detriment and harm to the common good in relation to secrecy and exclusion in government should be paramount in judging the public interest. Concerns about detriment or harm in relation to privacy should be considered heavy in judging how the public interest is best served in a particular case. While, conversely, concerns about detriment or harm to in relation to changing traditions of government or confusion in the community should be given little weight in judging the public interest or common good.

Should the timelines of release of the document be a factor in determining public interest?

No.

Should there be guidelines on the matters that need to be considered in determining the public interest?

²³ Quoted in Douglas, R. and Jones, M., *Administrative Law: Commentary and Materials*, 3rd edn (Sydney: The Federation Press, 1999), pp. 108-109 from *Re Eccleston & Department of Family and Community Services and Aboriginal and Islander Affairs* (1993) 1 QAR 60

Yes there should be guidelines on the public interest. This will help officials move their thinking outside their limited departmental box of concerns. These guidelines should emphasis a pro-disclosure public interest.

Should these be provided by the Information Commissioner? Or should they be included in the Act as factors (some of which are not specified) that should be taken into account in determining what the public interest is in the particular case?

It is probably more suitable that guidelines to the public interest be written into the Act. That way they are strictly part of the law. The Information Commissioner can still play a role by monitoring official interpretation of these guidelines.

7.2 Cabinet and Executive Council matters

Cabinet matter:

Should the exemption be reworded to ensure that those considering applications for access remain conscious of the fact that even if matter falls within the exemption, there remains a discretion for it to be released?

The restriction of information based on class or type runs counter to the philosophy of open government. Considerations about the public interest, and case specific consequences of release or restriction, should be central to judging of any potential exemption. The Cabinet exemption should be reworded so as to make this clear. In New Zealand Snell notes:

...the Cabinet exemption is not treated as a class or category exemption but agencies are forced to demonstrate what the consequences would be of releasing the particular Cabinet information in question, as opposed to the consequences of releasing Cabinet information per se.²⁴

Should a class exemption for Cabinet matter be maintained?

No.

Should a public interest test be introduced?

²⁴ Snell, 'The Kiwi Paradox', p. 596

Yes.

Should the exemption include a purposive element?

Documents should be considered under the Cabinet exemption based on potential consequences of release or restriction in individual situations. The exemption should also provide a purposive element that highlights the purpose of the exemption is to prevent the disclosure of sensitive information put together for the consideration of Cabinet. Such a provision could help prevent the regrettable behaviour of stamping documents as Cabinet matter, and consequently bringing them under the relevant exemption, simply because they entered the appropriate room.

Should there be a factual/statistical material exception?

No, I do not think there should be a factual/statistical exception. If the information was put together for the purposes of Cabinet, it should fall under the category of a Cabinet exemption that is based on a consequential public interest test, not a class exception.

Should a Minister/Cabinet/Governor in Council be able to issue a conclusive certificate?

Conclusive certificates are a hangover from past traditions in Australian government. They are reminiscent of a time when secrecy was the rule and officials held the discretion of releasing information—or not. They were introduced into FOI in order to give politician and officials an override mechanism against the principles of FOI and open government. Ultimate authority on whether or not information should be released or restricted should not lie in the hands of officials who have such a strong interest in the matter. Conclusive certificates should not exist at all.

Should there be a time limit on how long Cabinet matter can be exempt from FOI?

No.

Should the exemption be based on a consequential approach, as in New Zealand?

Yes.

Executive Council matter:

Should a class exemption for Executive Council matter be maintained?

No.

Should there be a time limit on how long Executive Council matter can be exempt from FOI?

No.

Should there be provision for a conclusive certificate?

No.

7.3 Deliberative processes

Should the exemption be narrowed, for example, by limiting it to deliberative material associated with policy formulation?

A multitude of authors have highlighted the fact that the success of FOI should be judged on that degree to which it facilitated access to deliberative-type documents. Madeline Campbell has create two simple tests for FOI in Australia, that derive from a series of sources, including quotes of government ministers introducing FOI regimes, expressions of underlying commitment by parliamentary opposition parties to those access schemes, press accounts heralding the advent of those schemes and general pro-democratic sentiments which have frequently appeared in discussions about open government. The tests were:

1. To what extent did the relevant information access regime allow an ordinary citizen access to pre-decisional deliberative policy documents proper to the finalisation of the policy concerned?

2. To what extent did the relevant information access regime allow an ordinary citizen access, after the event, to pre-decisional deliberative policy documents which were used to finalise the policy concerned?²⁵

The deliberative process exemption should be limited as much as possible. Arguments for a broad exemption when it comes to deliberative material centre on the need for a cloak of secrecy over government processes as the experts make their decision. Those in the service of government might not speak freely if they know what they say might become public sometime soon, some might suggest. But, in challenging such perspectives, it comes back to the question of open or closed government. Do representatives and officials have the right to conduct affairs behind closed doors? Have they been elected to simply do their job, free of the pressures that come with open government? Or, on the other hand, does the public have a right to participate effectively in transparent and inclusive government?

Within the arena of open government citizens need access to as much material as possible that sheds light on the government's method and thinking in the decision making process. How are citizens supposed to participate effectively in the process of policy conception and formulation if they are restricted from knowing essentially what the government knows? Catch-all restrictions on deliberative related document inhibit accountability and participating by circumventing the public's right to know. The deliberative process exemption needs to be narrowed, for example, to material associated with policy formulation. But even then, a pro-disclosure public interest test must apply to policy associated documentation that is requested by the public.

Should there be a time limit on the exemption for pre-decisional documents, linked to the implementation of any decision?

In accordance with the idea that FOI is a mechanism for open government, official accountability and public participation, think there should be a strict time limit on exempt deliberative process documents. If it is found that pre-decisional documents should not be released in the public interest, which should not be a common occurrence, this restriction should have a time limit. After which, the decision to restrict the documents in question can be challenged by the public.

²⁵ As quoted in Snell, 'The Kiwi Paradox', p. 599 from Campbell, M. and Arduca, H., "Public Interest, FOI and Democratic Principle—A Litmus Test", paper presented at INFO 2, 2nd Australian National Conference on Freedom of Information, Gold Coast, March 1996.

7.4 Personal affairs

Should the term “personal affairs” in s.44 of the Act be replaced by “personal information”?

The term ‘personal affairs’ in s.44 of the Act should be replaced by ‘personal information’. I agree with the reasoning of the ALRC/ARC on this one.

Should the exemption reflect the provisions of Information Standard 42: Information Privacy, whether or not that becomes part of a new Privacy Act?

Yes.

To what extent should workplace information about government employees be protected by s. 44?

To the extent that release of information is in the public interest and does not endanger the life or public safety of any person.

Does acceptance of government funded equipment affect a claim of privacy by the user of the equipment?

I think records relating to the use by individuals of government funded equipment should be covered by FOI. Tax payers are funding the use of such equipment and should, if they like, be able to inquire as to how it is being used. Public vehicles and telephones, for instance, are certainly open to misuse.

7.5 Commercial-in-Confidence

Should the exemptions in s.45 (1) (a) and (b) also be made subject to a public interest test?

Class or categorical exemptions facilitate a continuation of secrecy in government and run counter to a culture of openness. They cannot be justified for this reason. The release or restriction of information must be judged on a case by case situation, using a public interest test that recognises information disclosure is generally in the public interest and the need to narrow the circumstances in which government can legitimately claim information exempt from FOI.

Exemptions in s. 45 (1) (a) and (b) should therefore be subject to a pro-disclosure public interest test.

Should confidentiality be available only if it can be shown disclosure would cause demonstrable harm to the competition process?

Secrecy runs counter to free markets. A fundamental tenet of free markets is the liberal flow of information. Excessive amounts of confidentiality can be said to hinder the competition process by allowing artificial monopolies of information. For this reason, confidentiality should be limited to when it can be shown that disclosure would cause significant harm to the competition process.

Should the exemption contain a specific reference to a time limitation on how long an exemption may continue?

The value of commercial information can be said to decrease over time and considering the 'value' of such information is the reason for its potential restriction under FOI, the exemption should contain a specific reference to a time limitation on how long an exemption may continue before potential challenges may begin.

7.6 Other exemption provisions

Is each of these exemptions necessary?

No comment.

Is the public interest test appropriate?

No comment.

Would a "harm" test be more appropriate?

No comment.

7.6 Conclusive certificates

Should some or all conclusive certificates in the *Freedom of Information Act 1992* be abolished?

All conclusive certificates should be abolished. These instruments allow ministers to conclusively determine information to be exempt from FOI, to a point largely beyond administrative review. This practice runs counter to the philosophy of FOI and acceptable practice within open government. Representatives should not be given such powers as they do not have exclusive rights over public information, which is the possession of the populace. Ministers can often confuse the line between their interests and that of the public and should not, therefore, be given the prerogative to conclusively determine information is restricted. There are other bodies within the democratic political system that are more suitable for such practices, namely judiciaries or commissioners. All conclusive certificates should be abolished.

If any are retained, should a time limit be applied to any certificate that is issued?

No comment.

Should the use of conclusive certificates be monitored by the Information Commissioner?

If the decision is made to keep conclusive certificates as part of legislation that is aimed at freedom of information, then the Information Commissioner should monitor their use.

Should any use of a conclusive certificate be reported to Parliament, and if so, when?

No comment.

Chapter 8 - Administration of FOI in Queensland

8.1 Public Sector culture

To what extent does FOI in Queensland recalibrate the basic informational settings between open/closed, secrecy/openness, privacy/disclosure, and spin/deliberative dialogue?

Governing is the task of representatives and the masses are designed the role of principally disengaged citizens who vote once every few years, according to the liberal ethos inherited by Australians. The conventional liberal Westminster model therefore provides that, outside elections, governments are *horizontally* and *upwardly* accountable through a structural framework consisting of constitutional provisions, legal requirements or conventional understandings.²⁶ Australian governments were under no obligation to release information and stringently reserved the right to disclose information or not. Official Secrets Acts and a general ethos of guarding information characterised Westminster public administration.

This model was challenged between the 1960s and 1980s. Change was propelled during this time by a series of official inquiries, including the Federal Coombs and Victorian Bland Inquiries for example, that found the public service to be cloaked in secrecy and isolated from the community.²⁷ ‘New Administrative Law’ (NAL) was widely introduced as a response to such findings. The initiatives were set to change the way democracy is conceptualised and practices in Australia. They represented a form of citizen-based or *downward* mechanisms of accountability and participation through which democratic practices could be enhanced.

FOI was implemented in the mix of reforms in order to regulate the disclosure of information within the context of open government. The key to the potency of FOI is in the objectives of the legislation. In theory, FOI removes the power of the state, which typically existed under traditional monarchical and Westminster systems, to determine what the community views of government affairs. Access laws really mean the state no longer gets to decide what information sees the light of day: convenient and damaging information are essentially one and the same. The public has a right to know, under FOI, what the government is doing so as to keep it accountable and participate effectively. In this way, FOI substantially recalibrates standards of information handling within the public sphere—they are now set on open, disclosure and deliberative dialogue

FOI might even be thought of as a microcosm within the wider developments of democratic theory over the past 100 years. In the post-WW II years and certainly after the Cold War, liberal democracy was seen as the ultimate achievement in political structure. The model was even said to represent the ‘end of history’.²⁸ However, this does not seem to be the case. There has been a substantial drive to further the democratic tradition that goes beyond the liberal

²⁶ O’Faircheallaigh, C., Wanna, J. and Weller, P., *Public Sector Management in Australia: New Challenges, New Directions*, 2nd edn (Hong Kong: Macmillan Publishers, 1999), p. 208

²⁷ Caiden, G., ‘Australia’s Changing Administrative Ethos: an exploration.’ In *Dynamics in Australian Public Sector Management*, ed. A. Kouzmin and N. Scott (Melbourne: Palgrave Macmillan, 1990), p. 39-41

²⁸ Fukuyama, F., *The End of History and the Last Man* (New York: Free Press, 1992)

representative paradigm in the West over the past two or three decades. Deliberative politics have been widely discussed amongst scholars and some countries have implemented ways to bring citizens closer to the forefront of decision making, through the use of citizen juries or consensus conferences for instance.²⁹ FOI is a part of this trend towards greater popular sovereignty, in that it gives citizens an intricate link with representatives and allows them a chance to better participate in the policy process than they might have been able to under the traditional liberal model.

How can a State, characterised by a strong executive, honour the original intent of FOI and address its anxiety about the capacity to govern effectively in a hungry and geared information age?

If governments are genuine and avoid rhetoric they need not entertain such anxiety. ‘Honesty is the best policy’, as the saying goes.

In accepting that the administration of FOI operates beyond an application of primary legal obligations, how can bureaucratic and political interests be kept in balance?

There are many of ways to help reform entrenched cultures within the public service. I think the suggestions presented on pages 100-102 of the discussion paper would be helpful, in an internal sense. But we may need to look a little further. Bureaucratic and political cultures are not isolated phenomena. They are not a part of an autonomous state that reserves independence from the community it governs. A strong civil society would also put pressure on officials to conduct FOI according to its aims. Greater demand on the existing legislation would force a heavier flow of information.

There is a certain individualism involved in FOI that needs to be addressed in order to place more pressure on officials. As it stands, FOI leaves unconnected individuals against departments and agencies that maintain the advantages of institutional memory, specialised expertise and a long term interest in influencing the evolution of case law.³⁰ Terrill notes:

FoI is built on faith in the individual, as it appropriate in a democracy. But it does not thereby follow that the realisation of rights to know must be left solely to the sum of atomised actions by unconnected individuals. Collective arrangements also have a role. Any system for the management of secrecy that relies solely on means for individual access along neglects

²⁹ See for example Bohman, J., ‘Survey Article: The Coming Age of Deliberative Democracy’ *The Journal of Political Philosophy*, 6(4) (1998), 400-425

³⁰ Terrill, G., ‘Individualism and freedom of information legislation’, *Freedom of Information Review*, 87 (2000), 30-32 (p. 30)

*the realities of how secrecy is promoted and perpetuated. This realisation is the key to improving the effectiveness of FoI.*³¹

Terrill suggested a number of reforms to help address the individualism of FOI and transform the current regime into something more communal, these include encouraging repeat players; providing collective knowledge to individual applications; promoting long-term advocates for progressive change within the system and making the results of one application available for all.³²

Politicians and bureaucrats typically need to be pressured into change, particularly when it concerns giving away rights to secrecy. That is how FOI came to be in Australia: through consistent and vocal pressure from within the community. We need to rethink the individualism of FOI and attempt something more solid; something that will allow collective pressure to build around FOI, which will then force change in the way officials conduct FOI. The reforms suggested by Terrill should be seriously considered in this regard.

Which of the administrative compliance behaviours described in Table 8.1 are practised in Queensland? – typically? Infrequently?

As suggested by Snell and indicated in the discussion paper, administrative compliance is generally subject to a number of variables, such as the type of applicant and the nature of information requested. Evidence suggests administrative practices towards requests for personal information in Queensland, and Australia wide, can be characterised as ‘compliant’ or ‘pro-active compliance’. The administrative access regime adopted in Queensland could, for example, be considered an instance of ‘pro-active compliance’.

However, FOI in Queensland, and perhaps Australia wide, is typically adversarial in relation to requests policy and administrative information. The foreign legislation adopted into a backward looking bureaucracy has produced less than exemplary results. The statutes are such that departments and agencies are able to test the limits of the law without technically breaching its provisions. Anecdotal reports of officials wheeling different documents into Cabinet meetings so as to bring them under the strict corresponding exemption spring to mind as evidence of government ‘adversarial’.

A quick review of headlines regarding FOI in Queensland reveals continual concern about administrative practices that could be described as adversarial:

³¹ *Ibid.*

³² Terrill, ‘Individualism and freedom of information legislation’, p. 31

- Thomas, H., 'Secrecy watchdog redefines freedom', *Courier Mail*, 12-13/11/05
- Watt, A. and Chalmers, E., 'premiers united in cover-ups', *Courier Mail*, 29/9/05
- McKinnon, M., et al, 'Beattie to revise FOI over Clark', *A*, 17/5/05
- Gregory, J., 'FOI law changes increase secrecy', *Courier Mail*, 14/5/05
- Thomas, H., 'Stat's global FOI reputation at stake', *Courier Mail*, 18/3/05
- De Maria, W., 'Deliberately kept in the dark', *Courier Mail*, 8/3/05
- Wardill, S., 'Fresh row erupts on secrecy', *Courier Mail*, 13/10/04
- Snell, R., 'Information law needs a light hand', *Courier Mail*, 15/7/04
- Franklin, M., 'Secrecy bid demolishes confidence', *Courier Mail*, 7/7/04
- Lloyd, G., 'FOI rules need logic', *Courier Mail*, 12/5/04
- McKinnon, K., 'News dries up as government becomes a covert operation', *A*, 25-31/12/03
- Solomon, D., 'Burden of secrecy tips scales of justice', *Courier Mail*, 18/12/03
- DeMarie, B., 'Open-door myth shut in our faces', *Courier Mail*, 12/12/03
- 'Cancer fund hits waiting list secrecy', *Courier Mail*, 28/6/03
- Parnell, S., 'Accountability starts with FOI', *Courier Mail*, 28/6/03
- Chamberlin, G., 'Choose democracy', *Courier Mail*, 25/11/02
- Strutt, S., 'State companies have the edge', *FR*, 7/11/02
- Franklin, M. and Odger, R., 'Warfare blocks FOI overhaul', *Courier Mail*, 14/8/02
- McKinnon, M. and Franklin, M., 'Beattie defends massive FOI bills', *Courier Mail*, 5/2/02
- Franklin, M., 'Blast at failure of FOI system', *Courier Mail*, 31/10/01
- Greber, J. and Franklin, M., 'Lang Park papers kept secret', *Courier Mail*, 22/8/01
- Franklin, M. and McKinnon, M., 'Beattie secrecy moves blasted', *Courier Mail*, 20/8/01
- 'Refusal is the latest in succession of blocking tactics', *Courier Mail*, 11/8/01
- Franklin, M., 'Time to fix hide and seek laws', *Courier Mail*, 7/7/01
- Koch, T., 'Living in a state of secrecy', *Courier Mail*, 28/4/01³³

But to be fair it is probably more likely that administrative compliance towards applications for policy/administrative documents should typically be characterized as 'non-compliance'; although requests for potentially embarrassing or critical information (infrequent in number)

³³ List compiled by the Centre for Policy and Development Systems. Available at http://cpds.apana.org.au/Documents/Crisis_in_GQ/Archive/freedom_of_information.htm

often receive hostile receptions. A general misunderstanding in the public service as to what is required so that FOI may function in accordance with the principles that underpin it has supported things like inadequate resourcing, poor records management and hopes of cost recovery. This general misunderstanding is perhaps more detrimental to FOI as a whole, than the infrequent cases in which ‘adversarialism’ shows its ugly head.

In considering the steps towards addressing administrative compliance shortfalls suggested by Snell and others (pp. 100 – 102) plus incentives and sanctions and any other general measures, how might Queensland drive a cultural change necessary to give effect to the legislative objects of the *Freedom of Information Act 1992*?

See comments regarding the strengthening of civil society and addressing individualist nature of FOI.

8.2 Information policy

Planning for information lifecycles

Can the outcomes desired for FOI, and those of information policy, benefit from the inclusion of FOI considerations (with advancing ICT impact and corporate governance notions in records management), in development of a whole of government information policy framework that sets strategic directions and a new model of ICT governance?

FOI would benefit greatly from considerations in the development of a whole of government information policy framework that sets strategic directions and a new model for ICT governance. Proper records management and the maximum utilisation of new technologies are essential for strong FOI.

Should parliamentary oversight of FOI be elevated to a “dedicated focus on information as a dimension of all government activity”?

Information is power. Queenslanders, like the rest of the affluent world, are said to live within the information age. Modern technologies, such as ICT, allow information to travel great distances at high speeds. In this environment information becomes a strengthened commodity. It influences an ever greater number of events in the social, political, cultural and economic realms.

The abundance of information and knowledge has the potential to work in an undemocratic or democratic fashion. That is, this information may be hoarded so as to create informational

‘haves’ and ‘have nots’; or it may be widely distributed to inform public debate and facilitate social equality. I think parliament definitely has a role to play in ensuring that information is used in a democratic manner. Parliamentary oversight of FOI should be elevated to a ‘dedicated focus on information as a dimension of all government activity’.

Recordkeeping meets FOI and ICT

Are records management protocols and standards accessible, widely know and understood, consistent and reflective of the practical realities of government activity – particularly on questions of retention, storage and release of electronic (non-paper) information? What is done well? What can be done better?

No comment.

To what extent can ex ante decision-making assist in the administration of FOI?

No comment.

How can the volume and status of drafts and emails be better managed with the advent of ICT, in both better meeting expectations and achieving reasonable outcomes for all under FOI?

No comment.

Are access rights “stuck in a time warp” in terms of ICT? What improvements can be made?

No Comment.

Thinking about metadata

How can requirements in handling raw data and metadata under FOI be improved in balancing the public interest? Should applicants be able to obtain raw data in the possession of an agency? Should there be any obligation on an agency to process data to provide the particular information that an applicant is seeking?

The community has a substantial interest in knowing the pattern(s) of conversation within an agency that constitutes part of its representative government. Raw data and metadata record such

trends, according to Roberts. Therefore it would be beneficial to the public interest if such information were subject to FOI legislation. Moreover, departments and agencies should be obligated to process data to provide particular information that an applicant may be seeking.

Disseminating information, plus FOI

What can Queensland learn and do in response to international models such as the UK's information asset registers and single internet entry point – when seeking in this Review to “improve access to government documents and reduce the time and costs involved in accessing government documents”?

The international models for better combinations in ICT and FOI, like those in the UK and US, present Queensland with an opportunity. They provide solid examples of how ICT can be used to enhance the effectiveness of FOI. In response to this situation the Queensland FOI regime should review the possibility of implementing such models so as to improve its own FOI and ICT situation. Initially, these programs may take time to setup and disseminate, but that is a given. The initial costs represent a switch from, as Paterson calls it, a ‘pull model’ to a ‘push model’.³⁴ The savings on the time and cost in retrieving documents in the future will cover the initial burden. The ‘push model’ will pay for itself with more effective and efficient FOI and, in turn, improved democratic practices.

What can be done sector-wide to achieve e-FOI where ICT enables electronic lodgement, payment and access methods yielding time and cost savings?

Australians have borrowed a great many ideas and traditions from the British, we should now re-model our FOI regimes to emulate their e-FOI systems. Queensland should adopt a central registration system for government-held documents that have not yet been, or will not be formally published. Like in the UK, and as the discussion paper suggests, this Register should cover vast quantities of information held by all government departments and agencies, including databases, old sets of files, recent electronic files, collections of statistics, and research. Individual departments should have primary responsibility for putting in place their own registers (according agreed indexing practices) which they will maintain on their own websites with links and search facilities. Citizens should be able to request and purchase documents through these

³⁴ Paterson, M., *Freedom of Information and Privacy in Australia* (Sydney: LexisNexis Butterworths, 2005), p. 498

individual web portals. Changes like these will ultimately yield time and cost savings, through ease of access, for both parties: government and citizen.

Should FOI move towards a “push model” of proactive disclosure before individual FOI requests? If so, how and to what extent, can ICT open up “routine disclosure” and “active dissemination” pre-FOI?

There should be a “push model” for information dissemination within the public sector, rather than the existing “pull model”. The philosophy of open government necessitates that as much information as possible is made readily available to the public so members of the community may better participate in governance. Citizens should not have to go through the hassle of FOI every time they want a snippet of information; such situations should be saved for when contentious information is needed.

A ‘push system’ should largely function outside the scope of FOI. Departments and agencies could be required to electronically catalogue most documents that have not yet been, or will not be, formally published. Citizens could then request these documents through some formal on-line process that may attract a small fee. FOI, in this case, would be saved for more critical information held by the Executive branch of government. But obviously in this example, the line between unpublished documents in routine agencies and those in Executive branches would have to be made explicit.

Re-using government information

What role can FOI play in the Smart State in today’s and tomorrow’s information economy?

The Smart State should be one that has an information economy relatively comparable with that of any other jurisdiction in the world; an abundance of natural resources should simply be another advantage, not the be all and end all of the economy. FOI can play a role in the Smart State’s information economy, today and tomorrow, by increasing the nature and amount of information available to the public. In theory, this will increase the level and distribution of knowledge within the community. An increase and expansion of knowledge will then help facilitate the birth of new enterprises and increase competition.

In order for FOI to contribute to the information economy, however, the legislation must be taken more seriously. Documents need to be made accessible in real time, without excessive

costs and delays. ICT needs to be sufficiently incorporated into records management and FOI to help facilitate this. But most of all, FOI needs to be taken more seriously by the civil service and, indeed, the public. The opportunities in FOI for democratic government and economic activity need to be widely discussed and debate. But action is ultimately needed.

How can re-use rights for information contained in “documents” released under FOI be clarified, and where appropriate, extended?

No comment.

Is there still (if there ever was) a need for documents released under FOI to be watermarked “FOI Release” and non-editable formats preferred by government?

There was never a need to ‘watermark’ documents released under FOI in non-editable formats preferred by government. Government holds public information. Once this information is released to the community via an FOI request the ‘public’ label holds and the information can, and should, be used in a multitude of ways, depending on the needs of the community. It is even possible that a database of documents obtained through FOI should be created to enable various members of the public to re-access this information and use it for their own purposes. This reform would help tackle the individualism inherent in FOI (discussed earlier).

What principles could guide the balance between the rights of the public to access information as a “public resource” and the revenue raising initiatives of government from “corporate resources”?

The information society is not necessarily democratic. It is entirely possible that information, although extensive, will become hoarded and guarded so as to maintain a system of information ‘haves’ and ‘have nots’. Roberts’ concerns about the information commons, in this sense, are entirely correct. Excessive commercialisation of government-held information may, to the detriment of the wider public, facilitate the drawing of lines between those who have rights and access to information and those who do not.

A set of principles should guide the balance between the rights of the public to access information as a ‘public resource’ and the revenue raising initiative of government for ‘corporate resources’. What are these principles? I’m unsure; suffice to say that commodification of public information runs counter to its nature as a commons. The parliamentary committee dedicated to co-ordinating a whole of government information policy, suggested earlier in the discussion

paper, would be best suited to define and implement these principles (possibly with the help of the Information Commissioner).

8.3 Protection of privacy matters

Should the differences that exist between “personal information” and information that relates to definitional “personal affairs” be reconciled?

No comment.

Should Queensland consider adopting a scheme like that operating in New Zealand in which people seek personal information about themselves may do so mainly under a new Privacy Act, rather than through FOI? If there were to be a Queensland Privacy Act covering access to personal information and the correction of errors, should the Act extend beyond those official and other agencies covered by FOI to the private sector, and if so how?

Yes, I think Queensland should consider adopting a scheme like that operating in New Zealand in which people seeking personal information about themselves may do so mainly under a new Privacy Act, rather than through FOI. The principle reason for the introduction of FOI was to enhance accountability and participation in government, which relates to public access to documents relating to policy and administrative issues. The WA Information Commissioner has noted that information held by public entities can be ‘viewed as a continuum with personal information at one end of that continuum and critical “policy” type information at the other. The key to assessing the accountability of government agencies and, hence, the success of the legislation, is in the type and quantity of “policy” information that is released or withheld from the public.’³⁵

The inclusion of access to personal information distracts from the need for FOI to meet the test suggested by the Commissioner. The success rate of requests for personal information is much higher than that of policy and administrative documents. It therefore warps the apparent success of FOI, by giving the impression that a large number of publicly informative requests are successful, whereas a large portion of the requests were simply for personal information. The successfulness or otherwise of FOI would be more easily identified if access to personal

³⁵ As quoted in Snell, ‘The Kiwi Paradox’, p. 599 from WA Information Commissioner, *First Annual Report of the Office of the Information Commissioner WA 1993-1994*, p. 26

information were removed from the legislation and placed under the oversight of new Privacy Act.

It may be appropriate that the new Privacy Act concern the handling of personal information within the private and public sectors. The diffusion of lines between the public and private sectors with the implementation of managerial and economic rationalist policies supports this move. Moreover, the economic and political power of private organisations at the dawn of the 21st century does the same. Citizens should know what information is held about them in both the private and public sectors today.

In the event that new privacy legislation was enacted, what mechanisms should be developed to ensure consistency of administration and decision-making as between privacy and FOI legislation?

No comment.

8.4 Other mechanisms for accessing information held by Government

Is there any need for FOI legislation to take account of other mechanisms for accessing information held by government, other than through s. 22 of the *Freedom of Information Act 1992*?

No.

Should there be any changes to government secrecy laws or codes of conduct to take account of the operation of FOI?

FOI can not function properly with secrecy laws and codes of conduct that run counter to its aim of increasing open government. Secrecy laws and codes of conduct should be aligned with FOI so as to help facilitate a democratic environment where there is a free flow of information between government and citizen.

8.5 FOI applications for access

How can the application process be streamlined, made more efficient and user friendly?

There are plenty of ways in which the application process may be streamlined, made more efficient and user friendly. At the core of all these possibilities lies the need to convert the currently dated ad hoc 'pull system', into something resembling a state of the art 'push system' that incorporates all the latest technology. Such a system would better allow citizens to determine exactly which documents they'd like to access and minimise the amount of time required by agencies searching for the appropriate paperwork. Any minimal fees and charges could then be paid over the internet. Communication between the agency and requestor would be improved broadly.

Should agencies adopt guidelines giving effect to the advice given to federal agencies by the Commonwealth Ombudsman in his 2006 Report?

Certainly, it must be clear to agencies as to what practices are acceptable and unacceptable. The Queensland Information Commissioner would be well suited to draw up, distribute and monitor such guidelines.

8.6 FOI applications for amendment

Should applications be able to use the FOI Act to request amendment of personal information irrespective of how they became aware of the document containing the information?

I see little reason as to why applicants shouldn't be able to use the FOI Act to request amendment of personal information in almost any circumstance, irrespective of how they became aware of the document containing the information. If agency staff locate the document according to the request and can see the possibility for amendment the question as to how the applicant knew about the document is irrelevant.

Should the requirements of the FOI Act and any privacy legislation be harmonised to ensure the same conditions apply in relation to the amendment of personal information in official documents under both schemes?

The Acts should be harmonised.

8.7 FOI Review process

8.7.1 Internal Review

Should internal review remain mandatory?

The internal review should not remain mandatory, contrary to the LCARC findings. I agree with the ALRC/ARC Committee's findings on this question. Agencies will ultimately have to consider how and why a particular decision was made during the appropriate external review process.

Should applicants have the option of going directly to external review?

Applicants should have the option of bypassing the internal review process in order to go directly to external review. A requestor may know, for whatever reason, that the chances of successful or just internal review are limited, in which case they may prefer to go straight to the external review. Time may also be a factor in the decision to bypass internal review.

Should formal internal review be abolished?

No, I do not think the possibility of internal review should be abolished. I can understand the argument put forth by Snell on this matter concerning possible pressure put on the public service by such action, but the internal review process has arguably been shown to have some worth. The LCARC listed a number of advantages, as the discussion paper indicates. Additionally, citizens should have as many options for redress open to them as possible. They should be the ultimate decider of how they would like the application to proceed in a given situation.

Should the charging regime be adjusted to favour any particular outcome?

I understand this question to imply that the charging regime may be adjusted so that, perhaps, a successful outcome requires charges, while an unsuccessful outcome would nullify the possibility of fees and charges. If this interpretation is correct, I'd argue that, yes, the charging regime should be adjusted so that successful applicants may be charged, while unsuccessful applicants are not. This will not only put pressure on agencies to release information, or risk the waste of resources, it would also apply pressure on agencies to adjust record management

systems to become more efficient and up-to-date with ICT so as to minimise the burden of each request.

8.7.2 External Review

Should external review be conducted by the Ombudsman, the Information Commissioner or by an Administrative Tribunal? What are the advantage/disadvantages of each method of providing external review?

No comment.

Should there be an external body to perform the kind of supervisory/ advisory functions identified by the ALRC/ARC, the S.A. Legislative Review Council and LCARC that might be performed by an FOI monitor?

FOI needs all the help it can get. Above all, evidence from around Australia has shown the legislation needs its own champion. FOI needs a fulltime nanny, someone to watch over and disrupt any unnecessary conflict that may come its way. An external review body, such as an FOI monitor, should be created to undertake the kind of supervisory/ advisory functions identified by the ALRC/ARC, the S.A. Legislative Review Council and the LCARC.

If external review is to be the function of the Ombudsman or the Information Commissioner, could or should that office also perform the role of FOI monitor?

I would argue that the FOI Monitor is a role upon itself, and such a position should be created in Queensland. The Ombudsman and Information Commissioner obviously have a role to play in the functioning of FOI, yet there needs to be a dedicated watchdog for FOI. The political and bureaucratic nature of the law necessitates it. This would also allow the Information Commissioner or the Ombudsman to play the role of external reviewer, if they are to be preferred over a more judicial body.

Are appointment and other procedures appropriate for maintaining independence of the Information Commissioner?

No comment.

8.8 Other considerations

Should, and if so how can, there be scope for cross-agency resourcing support and delegation of decision-making authorities under the *Freedom of Information Act 1992*?

No comment.

Should there be a power to receive and investigate complaints about the administration of FOI in Queensland? Should that power include “own motion” investigation, and be given to the Ombudsman or a FOI monitor-styled body?

The Commonwealth Ombudsman has played an important role in monitoring FOI in the Federal sphere. The role regularly receives and investigates complaints about FOI handling from the public. What is more, the Ombudsman has used the power of ‘own motion’ investigations to produce two informative reviews of Commonwealth FOI law: ‘Needs to Know’ in 1999 and ‘Scrutinising Government’ in 2006. These powers should be replicated within Queensland, probably in the hands of a new FOI monitor, as they would deal with the primary supervision and review of information access law.

Are there any improvements possible to streamline notice requirements under the *Freedom of Information Act 1992*?

No comment.

Chapter 9 - Costs and Time

9.1 Fees and charges

Is the existing fees and charges regime in the *Freedom of Information Act 1992* reasonable and balanced?

In comparison to FOI regimes within other Australian jurisdictions and that of New Zealand, the existing fees and charges structure under the *Freedom of Information Act 1992* is reasonable. The application fee is similar to others. The search and production fees, comparatively speaking, are exemplary, while the deposit requirement is standard. Unlike some of the other statutes that require considerable charges, there are no review costs in Queensland. The law also allows for

the considerable circumstances on which to waive fees and charges. In all, current fees and charges regime is reasonable under the current paradigm.

But how balanced is it? Does it provide a fair weighing of concerns relating to government transparency and organisational efficiency? This is debatable. As I read through the Appendix of fees and charges regimes provided within the discussion paper, it is striking how expensive a simple application for non-personal information may become. A non-controversial request for innocuous information is likely to put the applicant back about \$50. Some may say, 'that's not much at all'; but for a lot of people that is a substantial amount of money to be taken out of the weekly budget to pay for a document or two. Naturally, the charges may be revoked under different circumstances, but the applicant can not always know this at the time of application. What about requests for critical information? In such circumstances the costs are likely to be considerably more; and there is still no certainty in the possible waiver of fees.

Journalists, who provide a service as the 'fourth estate' in monitoring the actions of government, are likely to make critical FOI requests. Journalistic applicants have frequently complained about the existing fees and charges regime. *Sydney Morning Herald* journalist, Stephanie Peatling, requested documents from the Federal Department of Employment and Workplace Relations concerning a welfare-to-work scheme introduced in 2005. The Department told Peatling it would cost \$13,000 just to make a decision on whether or not to release the information and this charge could not be waived in the public interest. Peatling asked the department for a 50% discount, as the law indicates discounts are allowed when 'the giving of access is in the general public interest'. The government refused to give a discount on the grounds it did not know how the material would come to the attention of the public if released. The paper explained that it would publish it, but officials refused to budge. The paper challenged the decision in the AAT, but the court ultimately decided in favour of the government. In fact, the Department spent an estimated \$200,000 in the external review process ensuring that no discount was realised.³⁶

For freedom of information to become a pro-disclosure 'push system' it's likely that the current way of thinking in terms of fees and charges needs to be scrapped. As I see it, the existing charges system works like many of the exemption provisions provided throughout the legislation, it provides part of a barricade that helps government protect itself from unwanted requests. The current fees and charges are fine for personal information, but once the request is non-personal and even critical, the costing can be used to prevent the disclosure of information.

³⁶ Moore, M., 'Public interest runs second again', *Sydney Morning Herald*, 31 January 2007

And the justification for this reality is ‘efficient government’—well dictatorships are often some of the most efficient regimes in the world.

What about reversing the fees and charges? What about penalising government for not acting on the behalf of citizens in a timely and honest manner? What if departments and agencies for fined for not genuinely providing information in an efficient manner to the public? I am sure record management systems and general government culture would then appreciate effective openness more.

What are the comparative merits of a flat fee scaled by volume and the current time-based charging model?

The flat line fee would make the costing more standardised. Under the current time-based system costing is largely at the discretion of government. Officials report the amount of time taken to recover the document, leaving the question as to how long they actually looked and in what manner the search was conducted open questioning. A flat line fee would resolve these questions by removing the factor of time and introducing the element of volume, while costs would still reflect the magnitude of the request. Despite the fact that a volume-based fee system is still perhaps open to abuse by government through the inappropriate introduction of documents into a request, it is to be preferred over a time-based charging system, which is much more open to abuse.

What alternatives exist to ensure consistency in the application of any fees and charges?

No comment.

8.9 Time limits

Are the existing time limits reasonable and consistent with the objectives of the *Freedom of Information Act 1992*?

The existing time limits are not consistent with the objectives of the Act. The time limits are, as the discussion paper indicates, confusing and have the potential to frustrate the objects of the Act, particularly in relation to requests from journalists. The suggestions on how to ‘free up’ the current time limits on page 149 of the discussion paper are pertinent as possible solutions to this problem. They should be carefully considered as ways to better the current situation.

Beyond amendments to existing time limits, what initiatives exist which could improve early disclosure under the Act?

Early disclosure would be facilitated under the Act through the development of a pro-disclosure 'push system', which is distinguished from the current ad-hoc 'pull system' by the maximum disclosure of information outside information access law, better records management and incorporation of ICT with FOI, abolishment of conclusive certificates, a collectivisation FOI to challenge the weaknesses of individualism, balanced fees and charges, as well as minimal time delays.

8.10 Voluminous and/or vexatious requests

Should the Act contain a power to declare an applicant for information vexatious?

The Act should contain a right to declare an applicant for information vexatious. There is a need to prevent abuse of the Act by persons that make excessively repeated or ridiculous requests. However, this power should be well defined and monitored to prevent abuse by departments and agencies that simply do not wish to comply with comprehensive requests.

Should that power be exercisable at first instance by an agency or by the Information Commissioner?

In the first instance the power should be exercisable by an agency. They are original receivers of requests and probably know the circumstances of a particular case best. But the Information Commissioners, or perhaps FOI monitor, should have the discretion to readily review such decisions.

On what grounds should an applicant be declared vexatious?

The criteria applied to applicants that are potentially vexatious should be well defined and relate to the conduct and content of an application. Motives are too subjective. It must be clear that either the conduct of the applicant or the content their request is unwarranted, in spite of the objects that guide FOI.

Alternatively, should there be a provision entitling an agency to declare a request to be vexatious?

The provision relating to vexatious matters should be applicable to both particular requestors and particular requests. Some individuals may have a track record of vexatious requests and should therefore be bared from the privilege of FOI, other persons may make vexatious applications under particular circumstances and these applications should be dealt with independently.

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Should it be possible to declare an application vexatious because it is voluminous?

It should not be possible for an agency to declare an application vexatious on the sole basis that it is voluminous. An application should only be considered vexatious where there is clear evidence that the request is not just large, but the conduct and content of the application is unwarranted. Otherwise agencies may feel they have the prerogative to reject applications simply because they involve some considerable time and energy. Activity of this nature runs counter to the spirit of FOI and provides no incentive for public bodies to improve records management practices or consultation methods.

Should voluminous applications be able to be refused under a provision such as section 29 of the Queensland Act?

No, the provision is too broad and the criteria concerning request refusal must relate to more than simply the volume of the application.

Should a more definitive test be applied when determining whether a voluminous application might be refused, such as the number of pages it would produce, the number of days it would require to process or the cost of processing it?

Any the test for voluminous requests should be definitive and relate to concrete concerns, such as the number of pages it would produce or the cost of processing it. But, again, I don't think the amount of paper or cost should be the sole factor in rejecting such a request. If the application is legitimate in its nature then the number of documents should be minimised or something. Consultation should be used in these circumstances to help fulfil the request with the least amount of troubles.

Should journalists and/or MPs be exempt from provisions concerning vexatious requests?

I do not think journalists and/or MPs should be exempt from provisions concerning vexatious requests. It is possible that such individuals may participate in bad practices in relation to FOI. However, their role in a healthy functioning democracy should be taken into consideration. In order to fulfil their different functions journalists and MPs may need to make frequent and often large requests for government-held information.

Chapter 10 - Effectiveness and Adequacy of Data Collection and Reporting

What data should be collected for the annual s. 108 reports?

No comment.

How can the collection of this data be improved?

No comment.

How can the integrity of the data be improved?

No comment.

Should the Information Commissioner (or some other agency) be given responsibility for analysing the data and publishing information about the way FOI operates in Queensland, based on analysis of that data?

An independent agency, like the proposed FOI monitor, should play a role in analysing then publishing any data collected from agencies. As the discussion paper suggests, the current reporting regime is dry and devoid of proper analysis. An independent observer should be given data on FOI usage then place this alongside other empirical evidence to form an overall interpretation of how well the democratic objectives of FOI are or, are not, being achieved.

Should the Information Commissioner (or some other agency) be made responsible for ensuring that the data required to be provided under s. 108 is appropriate?

An independent advocate for FOI should have a role in ensuring that the data collected in accordance with s. 108 is appropriate. This will help ensure data is of the upmost integrity.

Should the data be used to benchmark the performance of individual agencies? If so, who should perform this role?

The performance of individual agencies should be benchmarking, using the data collected. Agencies that are acting in accordance with the spirit of FOI should be praised and encouraged to do more of the same, whereas agencies that act contrary to FOI should be named and shamed. Agencies that flout FOI should have the highest level of pressure put on them internally and publicly to change their ways in a manner that facilitates open government.

Chapter 11 – Conclusion: A New Beginning?

Should a new Act be called something other than the Freedom of Information Act?

Yes, I believe a new Act should be called something other than the *Freedom of Information Act*. This title is too Orwellian! It is comparable with the recent Federal Work Choices legislation, which is something in name and another in nature. Freedom of Information, as it currently stands, is the same. It purports to represent a portal for open government, but instead works as a barricade as to what the public can and cannot see. As the discussion paper indicates, some people have come to call the legislation, more accurately perhaps, Freedom from Information.

If so, what would be the best title?

The title I think is most suited for the legislation is *Access to Information*. This is primarily because the name asserts the central rationale for the legislation. It does not declare cuddly things like 'freedom', but clearly states that the aim is ACCESS, pure and simple.